

## THE U3C—IT MAY LOOK PRETTY, BUT IS IT ENFORCEABLE?

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It is axiomatic that no regulatory legislation can be stronger than its enforcement provisions. A statute may include many excellent provisions regulating conduct, but these provisions will be meaningless if the statute does not also provide for their effective enforcement. The National Conference of Commissioners on Uniform State Laws is currently drafting a Uniform Consumer Credit Code (hereafter called the U3C)<sup>1</sup> to regulate the practices of those who lend to consumers. This Code is supposed to replace all present legislation regulating such lenders—small loan acts, retail installment sales acts, truth-in-lending statutes, etc. There will undoubtedly be many articles written comparing the regulatory provisions of the present statutes with those of the U3C. However, all of these comparisons of regulatory provisions are dependent not only upon the relative merits of the provisions themselves, but also upon the relative powers available for their enforcement. This article will examine the enforcement provisions available under the U3C and their effectiveness.

A regulatory statute may be enforced through many different devices. For example, different people can act against violators—either public agencies or private individuals. The enforcer may seek different types of remedies. He may seek only to prevent presently-occurring violations from recurring, or to redress the effects of past violations, or to punish past violations and therefore attempt to deter future violations; or he may seek some combination of these three powers. This article will examine the utility of these alternatives, the devices and powers needed to effectuate them,<sup>2</sup> and how effectively the U3C does or does not provide for them. Suggestions for change will follow.

The primary policy question presented by the U3C is whether

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<sup>1</sup> UNIFORM CONSUMER CREDIT CODE (Working Draft No. 6, 1967) [hereafter cited as the U3C to distinguish it clearly from the Uniform Commercial Code, the UCC. There is no standard citation form, but a number of journals have adopted this form].

<sup>2</sup> Thus this article will avoid discussion of the regulatory provisions of the U3C whenever possible, as being outside its scope. Two classic enforcement devices will also not be covered in detail: (1) licensing and (2) criminal penalties. *But see* notes 43, 104, and 157 *infra*. It will also avoid discussion of internal agency structure, and procedures for agency proceedings.

both public and private enforcement should be available in a consumer protection statute. The draftsmen seem to have decided that only public enforcement powers are needed, and have accordingly reduced the enforcement powers available to individual aggrieved consumers. Thus the present draft will be effective only in those states having a well-financed, aggressive, consumer-oriented Administrator. It seems unlikely that *all* Administrators in 50 states for the next 40 years will meet these criteria. Even those who do possess all the necessary attributes will find that their own powers are limited, and that the range of tools available to enforce the U3C through agency action is limited.

#### I. WHAT ENFORCEMENT POWERS ARE EITHER NECESSARY OR USEFUL?

Since a regulatory statute may be enforced either publicly or privately, or both, the first question to consider is what persons should be allowed to act against violators of the statute. In addition, four functions should be performed by the enforcement provisions of a regulatory statute: (1) It must provide a method of informing the persons regulated concerning proposed courses of conduct and whether they violate the statute. (2) It must provide a method of stopping violations once they occur, and assuring that they will not reoccur. If possible, it should also provide a method of restraining violations before they occur. (3) It should provide a method of deterring violations before they occur by penalizing violators. (4) It must provide a method of redressing the effects of violations, and of compensating the aggrieved party. The second question is what statutory provisions are necessary to accomplish each function. Since the method of accomplishing these functions will be different for public and for private enforcement, the statutory provisions needed for each type of enforcement will be discussed separately.

##### A. *Who Should Enforce?*

Is a public agency needed to enforce a consumer credit code? There is general agreement that the majority of consumers do not know their present rights against creditors, and even when they know of a violation are often unable or unwilling to confront the creditor.<sup>3</sup> In a field where the creditor is a professional, consumers are amateurs

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<sup>3</sup> That this is particularly true of the low-income buyer is evidenced by the finding in one study that, although forty percent of poor consumers reported exploitation in their credit purchases, over half took no retaliatory steps and only nine percent sought any form of professional help. D. CAPLOVITZ, *THE POOR PAY MORE* 137-140, 171 (1963).

at protecting themselves and unable to provide such protection consistently. Thus a professional is needed to protect the public interest consistently—an agency whose job it is to enforce the consumer's rights under the statute. The agency should be fully staffed with full-time personnel. It has been objected that merchants should not be subject to such regulation,<sup>4</sup> presumably because they too are amateurs at the lending business and do so only because of customer demand. Unfortunately, this objection ignores the present scope of installment selling,<sup>5</sup> the number of consumer abuses it has produced,<sup>6</sup> and the number of consumers adversely affected by the abuses.<sup>7</sup> In short, the problem has grown too large for amateur solutions randomly raised in an *ad hoc* manner.<sup>8</sup>

If enforcement by a public agency is provided, is private enforcement needed also? There are significant dangers in any system using only public enforcement which require that it be supplemented by provisions for effective potential private enforcement. Industry domination of its administrative agency is a well-known phenomenon.<sup>9</sup> Sometimes this is accomplished through the appointment of a "captive" commissioner.<sup>10</sup> However, more often it is accomplished through less reprehensible means. The commissioner of a consumer credit code is likely to be the banking commissioner or his sub-

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<sup>4</sup> NATIONAL CONFERENCE OF COMMISSIONER ON UNIFORM STATE LAWS, PROCEEDINGS: PUBLIC HEARING ON SECOND TENTATIVE DRAFT OF THE UNIFORM CONSUMER CREDIT CODE Part 6, at 347B, 349, 353, 353A (June 16-17, 1967).

<sup>5</sup> Installment credit extended as of December 1967 totaled 77.946 billion dollars. This figure does not include the rapidly expanding total of credit extended by means of charge accounts. 54 FED. RES. BULL. No. 2, at A-52 (1968).

<sup>6</sup> See Art. 2 of the U3C and retail installment acts generally by means of which thirty-five states regulate automobile finance charges and twenty-six regulate other installment credit charges. Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81, 87 (1967).

<sup>7</sup> E.g., the Michigan Consumer Protection Division of the Office of the Attorney General processed 1,054 complaints in 1965 while in Washington over 6,000 complaints have been incorporated into the files of the Consumer Protection Division since its creation in 1961. LEGISLATIVE COUNCIL, REPORT TO THE COLORADO GENERAL ASSEMBLY, CONSUMER PROBLEMS IN COLORADO, RESEARCH PUBLICATION No. 112 at 150, 159 (Nov. 1966).

<sup>8</sup> See, e.g., 16 FLA. STAT. ANN. § 520.332 (Supp. 1968); IND. STAT. ANN. § 58-925 (1962); MASS. LAWS ANN. ch. 255D § 6 (1968).

<sup>9</sup> See, e.g., Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952).

<sup>10</sup> See W. CARY, POLITICS AND THE REGULATORY AGENCIES 67-68 (1967); Reich, *The New Property*, 73 YALE L.J. 733, 768 (1964); Boston Herald, Dec. 19, 1966, at 1.

ordinate, or to be selected in approximately the same manner.<sup>11</sup> In many states, such a commissioner must have had long experience in the credit industry, usually working for a creditor.<sup>12</sup> With such a background, the commissioner could have an orientation toward creditors' problems and be more "understanding" of creditor violations than the consumer.

In either case, it is unlikely that such a commissioner would be an aggressive "ombudsman" representing the consumer, thus reducing the consumer's protection to a minimal or an illusory level. The consumer needs more than enforcement of those provisions of the statute which are clear against violations which are equally clear. He also needs protection against questionable conduct by creditors, which requires test cases where the statute is unclear, or even silent, and the creditor's conduct is ambiguous. It also requires the development of new theories supporting action, and this may be accomplished only by those who view the transactions as consumers.

Even where the industry does not dominate the agency, there are necessary benefits from effective private enforcement. First, it allows the consumer to act on his own initiative, either to deter or to seek cessation of violations and redress. He does not have to obtain the prior approval or cooperation of the agency, rely upon the quality of its staff, or overcome its inertia, red tape and conservatism.<sup>13</sup> Secondly, it manifoldly increases the potential enforcement powers. Few agencies have sufficient funds or manpower to maintain adequate surveillance or to bring action against most violations discovered.<sup>14</sup> Effective private enforcement would create thousands of additional investigators and the local bar would provide many additional prosecutors. Thirdly, it is more certain to provide appropriate re-

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<sup>11</sup> This, at least, has been the experience under the Small Loan Acts, and there is no provision in the U3C which attempts to change the trend. ME. REV. STAT. ANN. tit. 9 §§ 222(2), 3121-22 (1964). See also DEL. CODE ANN. tit. 5 § 2107 (1953); N.Y. BANK. LAW § 360 (McKinney 1950).

<sup>12</sup> ME. REV. STAT. tit. 9 § 1 (Supp. 1967). See also GA. CODE ANN. 13-304 (1966); IOWA CODE ANN. § 524.2 (1949).

<sup>13</sup> This may be the meaning of the language in the Prefatory Note to *Working Draft No. 6*, U3C at 3, [hereafter cited as Prefatory Note, U3C] suggesting a necessity for ample "self-executing judicial remedies."

<sup>14</sup> The utility, and even necessity, of this aspect of private policing is best exemplified in the area of antitrust regulation. The Antitrust Division staff would have to be quadrupled to provide enforcement solely through public agency action. Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 183 n.10 (1961); Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

dress to the individual, especially if the agency does not have sufficient authority to seek redress easily,<sup>15</sup> or redress involves an election by the consumer.<sup>16</sup>

Further, the arguments advanced against effective private enforcement do not show any adverse effect upon legitimate creditor interests. A common argument for limiting private actions is that they have not been used sufficiently in the past to be worth the political and psychological strain of trying, over creditor opposition, to provide them. This ignores any influence consumers or consumer groups may have,<sup>17</sup> but, more important, it ignores the needs of the consuming public. Is past use, or lack of use, relevant if private actions can assist the agency when used? Even as to the fact of non-use, new procedures and programs, such as class actions,<sup>18</sup> legal aid offices and OEO neighborhood law offices, may soon render past experience irrelevant by making opportunities to seek redress more readily available.<sup>19</sup>

Another argument often raised for limiting private enforcement provisions is that forfeiture of both principal and interest for any violation is the usual remedy given for successful private actions, and this is too harsh a penalty.<sup>20</sup> However, this argument assumes that effective private enforcement requires such a remedy in all circumstances—an unwarranted assumption, as will be shown below.<sup>21</sup> Instead, it is quite possible to provide a set of graduated sanctions to the consumer, to provide different deterrent effects in different circumstances.

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<sup>15</sup> See text at notes 92-97 *infra*.

<sup>16</sup> See text following note 144 *infra*.

<sup>17</sup> NAT'L LEGAL AID AND DEFENDER ASS'N, JOINT STATEMENT OF NLDA AND OEO LEGAL SERVICES PROGRAM RE WORKING DRAFT No. 6 OF UCCC (January 10, 1968).

<sup>18</sup> That the class action device is intended for and adapted to the protection of small claimants is discussed in *Dolgow v. Anderson*, 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968) (a class action on behalf of allegedly defrauded securities purchasers authorized by FED. R. CIV. P. 23).

<sup>19</sup> The conclusion that there has in fact been a lack of use in the past is also open to question. It is primarily based on the absence of reported appellate cases, but this does not indicate its utility at the trial court level, especially in small claims courts. Further, it ignores any non-judicial use of such opportunities to influence out-of-court settlements. Finally, it cannot measure the *in terrorem* influence of potential actions to inhibit violations. Thus the case of past non-use is at best unproved.

<sup>20</sup> Most Small Loan Acts so provided. F. HUBACHEK, ANNOTATIONS ON SMALL LOAN LAWS (Based on Sixth Draft of the Uniform Small Loan Law) 119-25 (1938). It is believed that this inhibited public enforcement.

<sup>21</sup> See text at notes 52-59, *infra*.

Thus a combination of both public and private enforcement powers should be provided so that each can supplement the other. Each can perform different functions, and each must be examined separately to determine its capability of informing creditors and halting, deterring and redressing violations of the statute.

### B. *Public Enforcement Provisions*

As to the informational function, the vast bulk of creditors will adhere to any regulations if they both know and understand their effect.<sup>22</sup> Thus, the first requisite to any workable enforcement scheme is to provide this information to creditors, and only a public agency can furnish a consistent interpretation. The information can be either general, relating to classes of problems, or specific, providing answers to individual inquiries concerning particular proposed courses of conduct. The agency must be able to provide both. General regulations, however detailed, cannot answer specific questions, because the methods of merchandising and lending to the consumer are too diverse to fit any set of standard patterns. The agency must therefore be empowered to issue advice in response to queries, and also to issue formal declaratory orders. The creditors should be furnished a clear procedure for raising such questions.<sup>23</sup>

Information must be available both on an informal and on a formal basis, so that the creditor can obtain not only advice but also a declaratory order. A declaratory order may be appealed from, but advice or an advisory opinion typically may not.<sup>24</sup> Without declaratory orders which are appealable under the applicable statute, there is no method of testing the agency beliefs in courts without first violating the statute. If the informational function is to be properly served, it should be available before the creditor violates the statute, especially if other methods can be easily provided. In the consumer field this may be especially important, because many merchants and other creditors are conscious of consumer good will and would prefer not to risk it by deliberately violating a statute if such conduct can be avoided. A second, and less important, reason for declaratory

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<sup>22</sup> Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535 (1967).

<sup>23</sup> Although many states have administrative procedure acts which would provide procedures for declaratory orders, a uniform act must provide such procedures for states which do not have them. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW*, app. II, at 1231 (1960).

<sup>24</sup> 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 4.09, 4.10 (1958) [hereinafter cited as DAVIS].

orders is that, if they are favorable, the creditor should be able to rely on them and be protected from agency action against conduct based on them. The orders should be subject to rescission after notice and hearing, to provide flexibility in a field of rapidly changing social values, but they should protect from agency action as long as they are effective. The declaratory orders cannot preclude consumer test cases in court, and may be invalidated by the courts.<sup>25</sup>

It would probably be unwise, however, to require the agency to issue such orders in all cases. Where the facts are predeterminable and not easily modified, such as proposed creditor's forms or interest rate structures, there seems no problem in requiring an order. On the other hand, where the facts are fluid, such as proposed sales techniques or debt collection tactics, the agency probably should not give an unqualified assurance, since statutory compliance can only be judged on the basis of actual conduct. Thus declaratory orders should be mandatory only for a limited class of inquiries.<sup>26</sup>

If a creditor violates the statute or threatens to do so, the agency's first concern should be to prevent the violations, or halt them and prevent their recurrence. A wide range of devices must be provided the agency because it will face a wide variety of situations involving violations. Some will involve misinterpretations of the statute; others deliberate abuses of consumers. Both informal and formal procedures will be needed, involving both internal agency proceedings and direct access to the courts, and permitting effective voluntary settlements as well as enforcement through litigation. Above all, in the many circumstances where mass public harm is threatened, for example false advertising, the agency must be able to act very quickly to protect the public interest effectively.

One informal method of halting violations is to accept an assurance of discontinuance from the creditor. In effect, the agency accepts the creditor's promise to behave as a substitute for an order

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<sup>25</sup> Neither the principles of *res judicata* nor those of collateral estoppel would apply to bar the consumer's private suit since he was not a party nor privy to the original declaratory proceeding. See, RESTATEMENT OF JUDGMENTS § 93 and comments at 460-67 (1942). As to the *res judicata* effect of a declaratory proceeding between the Administrator and a party to the order see L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 410 (2d ed. 1961).

<sup>26</sup> REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 8 (1961). If mandatory for a limited class, the class could be determined by designating those sections of the U3C which relate to the form of contracts, and omitting those sections which relate to other creditor conduct. *But cf.*, Note, *The Availability and Reviewability of Rulings of the Internal Revenue Service*, 113 U. PA. L. REV. 81 (1964).

resulting from more formal proceedings, but without the expense of those formal proceedings. Since this device will be accepted in a negotiating context, rather than in litigation, the agency must be able to resolve fairly all issues relating to injuries to the public interest while it is negotiating and deciding whether to accept the assurance. Thus it should be able to condition its acceptance upon obtaining admissions of the prior violations,<sup>27</sup> redress to all consumers aggrieved by prior violations,<sup>28</sup> and reimbursement to the agency for money spent investigating the prior violations.<sup>29</sup> In addition, some consideration should be given to the losses which can be caused by future violations. Thus, in appropriate situations, another possible condition should be the establishment of an escrow fund to provide redress and cover investigation expenses of proven future violations.<sup>30</sup>

A more formal method of halting violations is the cease and desist order, issued after notice and a hearing. Use of an agency proceeding, rather than a court proceeding, allows fact-finding by a tribunal which specializes in such problems, and may therefore be more aware of the business setting of the problem and the ramifications of its rulings.<sup>31</sup> The agency must be able to act on its own initiative, without a complaint from an aggrieved consumer.<sup>32</sup> The orders need not be self-executing and will in any event be subject to judicial review.<sup>33</sup> The review of findings of fact should be on the record made in the agency, and the agency's expertise should be

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<sup>27</sup> The use of an admission as a *prima facie* case in subsequent proceedings is granted to the New York attorney general in his public enforcement role. N.Y. EXEC. LAW § 63(15) (McKinney Supp. 1967).

<sup>28</sup> The State's interest in private redress is a function of its concern with public welfare, a recognized area for exercise of the police power. MASS. LAWS ANN. ch. 93A § 5 (Supp. 1967); VT. STAT. ANN. tit. 9 § 2459 (Supp. 1968).

<sup>29</sup> Authorities cited *supra* note 28. The New York attorney general may make the payment of such costs a condition to his acceptance of an assurance of discontinuance in lieu of prosecution for a violation of state law. N.Y. EXEC. LAW § 63(15) (McKinney Supp. 1967).

<sup>30</sup> Such a procedure was suggested and adopted for use by the New York Consumer Frauds Bureau. Memorandum of N.Y. Dept. of Law, 1965 McKinney's Session Laws of New York 2070; N.Y. STATE FINANCE LAW § 121(2)o (McKinney Supp. 1966). Such a provision should not be considered a penalty, since the UCC provides that an analogous "guaranty" may be required as part of an assurance of performance in a commercial transaction. UNIFORM COMMERCIAL CODE § 2-609, Comment 4.

<sup>31</sup> 1 DAVIS, *supra* note 24, § 1.05 at 37-40.

<sup>32</sup> Not all Administrators are authorized to act on their own initiative. *See, e.g.*, MD. CODE ANN. art. 83 § 162(a) and (d) (1965).

<sup>33</sup> 3 DAVIS, *supra* note 24, § 29.11.



recognized by adoption of the customary rule of upholding the agency action if supported by credible evidence in the record.<sup>84</sup>

If the cease and desist orders are not self-executing, it will be necessary to seek a court order for enforcement. This would require two hearings and two notice periods before the violation is halted. In many situations, such a lengthy reaction time will be unsatisfactory; something quicker is needed to protect the public from future mass violations. Thus the agency should be able to approach a court directly, and on its own initiative, to seek to halt violations. It should be able to seek temporary relief pending a hearing, under the normal limitations traditionally provided by an equity court.<sup>85</sup> As an additional violation-prevention device, the agency should be able to seize and condemn any forms or advertising matter not in compliance with the statute.<sup>86</sup> All such relief should be available to the agency on its own initiative, without any prior complaints from aggrieved consumers, because the purpose of agency enforcement is to obviate the necessity of reliance on consumer initiatives. Thus it should be able to provide continuous and consistent surveillance and enforcement, regardless of the ability or willingness of the consuming public to protect itself.

A second problem concerns the scope of the order. An order merely to discontinue the exact form of present violation will often be illusory, because a creditor may then change his practices slightly and escape any effect of the order while still violating the statute. Thus, the agency should be able to issue orders which cover practices similar to the illegal acts which have actually occurred.<sup>87</sup>

In addition to halting the violations, the agency should be able to redress past violations. This requires that it have power to strike

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<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g.*, FED. R. CIV. P. 65(b); authorities cited *infra* note 89. One example of the required "immediate and irreparable injury" is a mass fraudulent advertising campaign.

<sup>86</sup> *See, e.g.*, the Federal provisions for seizure and forfeiture of "containers, vehicles and vessels" involved in violations of liquor transportation laws. 18 U.S.C. § 3615 (1964).

<sup>87</sup> The cease and desist orders of some Federal agencies have been challenged on the ground of overbreadth, but despite the fact that violation of the order would subject the party to the summary penalty of a contempt decree broad language has been upheld. For a general discussion of this issue see *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392-95 (1965). On the State level a similarly broadly worded injunction, which traditionally must be specific, was upheld prohibiting demanding, receiving or attempting to collect usurious interest, or charging or contracting for any usurious interest. *Wilson Finance Co. v. State*, 342 S.W.2d 117 (Tex. Civ. App. 1960).

prohibited clauses from contracts already in existence or seek injunctions against their enforcement, to require refunds of overcharges, and to obtain rescission or cancellation of prohibited types of contracts in appropriate cases. Where appropriate redress requires an election by the consumer, such as to rescind a contract or not,<sup>38</sup> the agency must also be able to contact the consumer and obtain his decision. Its ability to provide such redress can relieve the consumer of the burden of initiating action to seek relief from either the creditor or the courts, thereby raising the probability that the individual consumer's rights will be protected. The agency should also be able to obtain redress for itself.<sup>39</sup> The investigation and prosecution of the creditor has required expenditures, and it should be reimbursed if the creditor has violated the statute. Such expenses should be borne by the creditor who caused them, rather than the public at large. Reimbursement increases the agency's resources and discourages any attempt to defeat enforcement through exhaustion of the agency's resources, as through numerous appeals.

Where the agency seeks both to halt violations and to redress past violations, this should not require separate actions. Thus, at the informal level of enforcement, acceptance of an assurance of discontinuance could be conditioned on providing redress to all individual aggrieved consumers. In agency proceedings, the agency should be able to issue an order for redress as well as a cease and desist order. In court, if the agency can represent the aggrieved consumers as a class, it can obtain redress for them while obtaining an injunction against creditor conduct. If separate actions are required in any of these cases, the extra drain on agency resources will limit the number of cases it can attempt to resolve.

Providing the agency with a deterrent capability is also a necessity because simply stopping the present violations or preventing their recurrence, or even providing redress for past violations, is sometimes inappropriate. Lack of a deterrent allows the creditor to violate the statute literally without risk. If he is later ordered to stop, or even ordered to redress violations, he has lost nothing more than his ill-gotten gains. Where he has nothing to lose by violating the statute, he is less likely to be careful in observing the consumer's rights. Any system which depends upon stopping a course of prohibited conduct after it occurs is not effective at halting the first violations. Agency inertia or lack of manpower may allow these prior

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<sup>38</sup> See text following note 144 *infra*.

<sup>39</sup> Md. CODE ANN. art. 83 § 25 (Supp. 1967).

violations to continue for an extended time. Thus, the agency must be given the ability to penalize past violations, thereby deterring future violations.

Once the creditor has an opportunity to seek a declaratory order on the propriety of any particular course of dealing, liability should attach to any conduct which violates the statute. It may be objected that most creditors are honest and should not be penalized for honest mistakes, and that penalties should not be available unless some form of *mens rea* can be proved.<sup>40</sup> Such a limitation is not relevant where declaratory orders are available. The limitation is based on a belief that it is unjust to penalize for the first violation, because the violator could not be certain that his conduct was illegal until a court had so ruled. However, if declaratory orders are provided, the creditor has a method of obtaining a ruling on the validity of his proposed conduct before acting. If he chooses either not to seek such a ruling or to ignore a ruling before engaging in conduct so questionable that it is later found illegal, a sanction should be available.<sup>41</sup> The purpose of a regulatory statute is to inhibit creditors from carelessly engaging in questionable conduct, so that lack of prior agency approval should be the only condition to liability for some penalty. With regard to public enforcement, the agency is unlikely to penalize a single clerical error arising under circumstances unlikely to recur, as long as it is given discretion in such matters. Thus, the agency should be able to seek sanctions against all violating conduct not protected by a ruling, regardless of "willfulness" but at its discretion.<sup>42</sup>

What sanctions should be available? Obviously, the penalty should be designed to fit the type of violation. But there are an almost infinite number of relevant independent variables—the seriousness of the type of violation, the number of occurrences, the prior history of violations by the same creditor, the deliberateness of his conduct, his willingness to halt violations and offer redress to consumers, the necessity of litigation, and others. It must be recognized that the like-

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<sup>40</sup> Cf. U3C § 6.113(3), (4).

<sup>41</sup> A different analysis may apply when the creditor has sought a declaratory order, but has been unable to obtain one because the agency feels it cannot give a sufficiently concrete and unqualified opinion to serve any purpose. See note 25 *supra*. In this limited class of circumstances, imposing a penalty without a *mens rea* requirement would depend solely upon whether the legislature desired to use absolute liability concepts in this area. See text at note 64 *infra*.

<sup>42</sup> Such discretion would obviate the problems encountered under most Small Loan Acts. See note 20 *supra*.

likelihood of discovery of violations is relevant, and will vary from state to state. No agency can afford to undertake complete surveillance or to litigate all violations discovered. In states where investigations and enforcement are more extensive, an effective deterrent can be provided by use of smaller sanctions than in states where money and manpower, and therefore the chances of discovery and enforcement, are limited. Thus the extent of the penalty given through public enforcement cannot be set by statute but must be discretionary. The maximum penalties should be sufficiently great to deter prohibited conduct,<sup>43</sup> but the agency should be allowed to seek lesser penalties where it sees fit.

### C. *Private Enforcement Provisions*

The powers necessary to create effective private enforcement are different and must be analyzed differently. One difference is that the consumer cannot perform the informational function. Moreover, he cannot be bound by the agency's declaratory orders, because he had no opportunity to be heard before their issuance.<sup>44</sup> If private enforcement is the antidote to possible industry domination or agency inertia, red tape or conservatism, the declaratory order cannot bar private actions.<sup>45</sup> Further, if private actions are to serve an effective

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<sup>43</sup> The possible sanctions include: (1) a civil penalty, (2) a criminal penalty and (3) revocation of a license. Each presents problems concerning effective use. The civil penalty, if imposed, may easily be written off as just another cost of doing business, especially if the maximum is low and the chance of enforcement small. This device is effective only if a penalty may be levied for each individual violation. As a minimum, in all cases, the Administrator should be able to recover all the costs of investigating and prosecuting the violating creditor. Although this merely provides redress for the Administrator, it is a penalty to the creditor.

Criminal sanctions and revocation of license cannot be dismissed in the same way. They are, however, often dismissed on the ground that they are little used in practice. Felsenfeld, *supra* note 22. Such reactions may not, however, portray the complete picture. For example, an attorney's advice to a client regarding a proposed course of questionable conduct may be far less cautious when only money is being risked than if criminal sanctions, and the attendant publicity, could be involved, even though a criminal action has never been brought in the state.

<sup>44</sup> See note 25 *supra*.

<sup>45</sup> Declaratory orders are generally treated as the same as other agency adjudications, e.g., Federal Administrative Procedure Act, 5 U.S.C. § 554(e) (1966). It does not necessarily follow, however, that it is the product of a genuine adversary proceeding. And while the agency is bound to protect the interests of consumers generally, it cannot be presumed to have asserted and protected the interests of any particular consumer. Compare the problem of inadequate representation in spurious class actions, FED. R. Civ. P. 23(a).

purpose, the declaratory order cannot defeat those parts of the individual's recovery which seek to compensate him for the expenses of such action or induce him to undertake the risks thereof.<sup>46</sup>

Once violations occur or are threatened, however, consumers have an interest in halting or preventing them to at least the same extent as the regulatory agency. The typical device available to groups of individuals to prevent harm to the group is the class action, but this is not available for prospective enforcement in its normal state.<sup>47</sup> Some of the problems are technical and relate only to use of the normal class action device as such,<sup>48</sup> and can be obviated by expressly granting a right to enjoin the violation to an aggrieved consumer.<sup>49</sup> Would a grant of such a right be wise? It would permit consumers to halt violations, and would also allow them to show the entire pattern of operations of a violating creditor, which might be necessary to overcome limitations on obtaining redress or imposing sanctions under the statute.<sup>50</sup> On the other hand, prospective enforcement through private ombudsmen is not generally permitted. If "all the world" are potential victims, assuring adequate representation is difficult. Preclusion of subsequent actions by those claiming non-representation is also difficult, and could provide opportunity for collusion. If multiple injunction actions are allowed, the burden on the creditor and the opportunity for harassment of the non-violating creditor are also great. However, limiting the right of action to consumers already aggrieved by the violations and requiring the posting of a bond to cover a successful creditor's costs could greatly reduce such problems.<sup>51</sup>

The consumer's primary interest is in obtaining redress for the

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<sup>46</sup> See text at notes 52-60 *infra*.

<sup>47</sup> The primary problem is one of standing. See discussion in text at note 110 *infra*.

<sup>48</sup> *E.g.*, in addition to the standing problem, can anyone assure adequate representation of an unborn potential victim, within FED. R. CIV. P. 23?

<sup>49</sup> See N. MEX. STAT. 49-15-8 (Supp. 1968) which allows an individual to enjoin "deceptive trade practices" of another if he is "likely" to be damaged thereby. See also Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 495-501 (1967).

<sup>50</sup> Although such limitations ought not to be placed on the consumer's right to recover, see text at notes 63, 64 *infra*, the present draft of the U3C does so limit them. U3C § 5.201.

<sup>51</sup> For a far deeper and more illuminating discussion of these problems than is practicable for this article, generally affirming the consumer's right to enjoin, if properly limited, see Starrs, *The Consumer Class Action: Considerations of Equity and Procedure*, NAT'L INST. OF EDUC. IN LAW AND POVERTY, HANDBOOK ON CONSUMER LAW § 74.2, at 23 (1968).

violations of his rights. But this involves more than refunding an overcharge or striking a prohibited clause from a contract. The consumer whose statutory rights have been violated must be not only made aware of the violation, but also willing and able to confront the creditor and seek redress. Even after deciding to seek redress, he can still lose all if he does not choose a response permitted by the statute. If not aided by counsel, the violation might never be discovered or the creditor confronted; and even if he seeks redress, the unadvised consumer's instinctive reaction is to stop paying the debt, which creates a default and all the creditor's remedies which arise therefrom. Thus, any consumer protection statute must recognize the necessity for the aggrieved consumer to consult an attorney, even in the case which is settled out of court, and must actively seek to promote such conduct.<sup>52</sup>

Attorneys, however, charge fees, and the fee for redressing the creditor's violation will come out of the aggrieved consumer's pocket. Thus, the consumer must invest money to obtain a redress of the violation, even when litigation is not involved. He must also invest time and risk his reputation and good will with the local credit industry. If he receives only a refund of an overcharge or the striking of a void clause from his contract, he has not been made whole. He has still lost the amount of his attorney's fee, his time, reputation and good will. Something more is needed even in the settlement situation, if the statute is to promote solution of these problems through legal channels.<sup>53</sup> This "something more" should compensate him for both attorney's fees and time and risk to reputation. Three methods of providing such an additional award seem possible: (1) an additional award related to attorney's fees, either "a reasonable attorney's fee" or a stated dollar amount related to a typical fee for handling such a problem; (2) cancellation of the interest charge; (3) an option for the consumer to rescind the contract.<sup>54</sup>

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<sup>52</sup> Of course, some consumers are sufficiently sophisticated to recognize violations and confront the creditor to seek adjustment. This adjustment may then be negotiated without regard to the remedy provisions of any statute and to the mutual satisfaction of the parties. Where they can deal on equal terms, this resolution may be more appropriate than any statutory rule; but it is an atypical fact situation.

<sup>53</sup> This is not the same measure of damages which would be given by the standard contract formulation. However, damages established by a statute's regulatory scheme can be different, and the U3C draftsmen have already recognized the necessity of differing from the standard formulation by providing recovery of attorney's fees in some circumstances. U3C § 5.201(7).

<sup>54</sup> The term "rescind," rather than the UCC term "cancel" is used deliberately as reflecting more accurately the relief envisaged. Rescission would include return of both goods and payments, with or without an allowance for use. Since the consumer

The first method is causally related to part of the necessary compensation, but compensates him only for the monetary part of his investment. Setting a standard fee will be difficult, since the typical fee will be different in urban and rural locations. If a standard is not set, the creditor and consumer's attorney may not be able to agree on a "reasonable" fee without the mediating influence of a court. Out-of-court settlements can be promoted only if the recovery amounts are explicit and very certain. The second method is not causally related to any part of the consumer's investment, but might compensate him for all facets of his investment in many cases, and also is certain and easily ascertainable. However, any award relating to cancellation of an interest charge must provide for a minimum recovery. Without such a minimum, it is too easy for the seller to raise his supposed cash price and eliminate interest charges, thus avoiding the statutory penalty.<sup>55</sup> If the minimum is set sufficiently high to cover a typical attorney's fee, this would seem to combine the best attributes of the first two methods.

In some circumstances, however, enforcement of the contract, even with an allowance, is completely inappropriate. Where the violation relates to inducing the consumer to contract, such as a false statement of a contract term or a prohibited referral sale, there is no relationship between the consumer's loss of expectations and any monetary award. In many instances it can be presumed that the consumer would not have purchased but for the violation, so that a far more appropriate remedy would be an option to rescind.<sup>56</sup> Even where a monetary award could be appropriate, many aggrieved consumers will not consult an attorney, but will stop making payments—an inartistic attempted rescission. If the consumer thereby loses all protection, the statute has not aided him, regardless of the quality of its regulatory provisions. Thus it is at least arguable that such conduct should be recognized, and optional rescission allowed for all violations.<sup>57</sup>

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has had to invest time and money to obtain redress, such an allowance seems inappropriate. A separate problem is created by destruction or damage of the goods sold, which could prohibit appropriate use of the rescission device.

<sup>55</sup> The federal Truth in Lending Act provides an example of how this may be done. 82 Stat. 146, § 130(a)(1), 1968 *United States Code, Cong. and Admin. News* 1232, 1245.

<sup>56</sup> See note 54 *supra*.

<sup>57</sup> A possible limit on such recognition arises from the fact that some technical violations, such as a small overcharge, probably will not be discovered by the consumer without aid of counsel. Rescission in such cases might therefore be inappropriate.

If the foregoing remedies are necessary to compensate the consumer fully in the out-of-court settlement situation, they are obviously insufficient when litigation is required. The investments of time and money are greater, but more important a new element is added—risk. To the layman the risks of litigation are frighteningly uncertain and create an immense psychological barrier. He must invest his time and money knowing that his chances of success are low<sup>58</sup> and that he cannot estimate them with any accuracy. He must be prepared to fight appeals and contend with the best legal counsel. Mere compensation for expenditures, such as an award of attorney's fees, cannot therefore realistically compensate, because it ignores the risk factor. Instead an incentive is needed to induce the consumer to undertake the risks involved, and an incentive great enough to induce him to undertake test cases to clarify the statute.<sup>59</sup> Such awards to the successful litigant must be very substantial to create this kind of incentive, and also to compensate him for both the large expenses and the risks he must undertake.<sup>60</sup>

Such additional awards will also act as a deterrent. Consumers, as a group, need such a deterrent capability more than a public agency, because they have no means of consistently halting or redressing violations. Thus, if they are to supplement the powers of an under-financed, or perhaps industry dominated, agency, they must have the power to deter violations. Providing such a deterrent capability does not necessitate a harsh penalty, such as voiding both principal and interest, in all cases. Sanctions can be differentiated depending upon the conduct one seeks to induce or deter.

In particular, the consumer has two identifiable interests which must be separately recognized. First, he has an interest in inducing the creditor not to violate the statute. Secondly, after violation, he has an interest in inducing the creditor to settle, rather than litigate. Thus, two different levels of deterrents are needed, just as two levels of redress awards are needed—one applicable to out-of-court settlements, the other to instances in which a violating creditor has compelled the consumer to litigate. Even if large deterrents are available

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<sup>58</sup> In the area of private antitrust litigation, for example, less than 17 per cent of plaintiffs are successful. See Alioto, *The Economics of A Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87, 92 (1966).

<sup>59</sup> Such test cases will be highly speculative, but necessary if private enforcement is to supplement the administrative agency. The agency may be conservative or jealous of its litigation record and therefore unwilling to attempt test cases.

<sup>60</sup> In antitrust regulation, the successful litigant can obtain treble damages. 15 U.S.C. § 15 (1964). The analogy does not seem apposite in the area of consumer protection, however, because of the lack of provable commercial damages.



in the litigation context, if they are only available then, there is no deterrent applicable to the act of violating the statute. The violating creditor could settle the few claims raised by consumers without liability, which in effect permits violation without risk.<sup>61</sup> This ignores one purpose of such sanctions, and fails to protect an identifiable consumer interest.

On the other hand, failure to differentiate between the awards available with and without litigation will induce the creditor to threaten to litigate all complaints. Threats of such conduct, including endless appeals, will intimidate many consumers to abandon their efforts to achieve redress. Thus, serious efforts at settlement will be implemented by differentiating awards according to the method of resolution.<sup>62</sup> The difference between the settlement award and the litigation award is an inducement not to litigate, or a deterrent to litigation. If a court finds that the creditor has violated the statute, it must be presumed that the creditor had the power to propose an out-of-court settlement which offered full redress, as long as the aggrieved consumer made an attempt to contact the creditor and settle the grievance before initiating action. Therefore, the only condition to recovery of the larger award, other than successfully proving the violation, should be a demand by the consumer for redress and lapse of sufficient reaction time without an offer of full settlement by the creditor.

It is often proposed that such awards be conditioned on proof of "willful" violations by the creditor,<sup>63</sup> but the suggestion fails to perceive the multiple purposes of the awards. For example, large awards to the successful private litigant are given both to induce him to undertake the risks and expenses involved and to deter the violating creditor from requiring him to litigate. The willfulness of the original violation is therefore irrelevant to granting the award. Where the creditor settles out of court, it is arguable that willfulness should be relevant, to penalize only the culpable violator. But it is also arguable that violations of a consumer protection statute should provide absolute liability to induce the creditor to establish and maintain such business practices as may be necessary to prevent inadvertent violations, especially where the penalty is mild.<sup>64</sup> However, if the amount of the award is set to compensate the aggrieved con-

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<sup>61</sup> See text between notes 39 and 40 *supra*.

<sup>62</sup> On this point, the U3C draftsmen agree *in theory*. See Comment to § 5.201.

<sup>63</sup> See U3C § 5.201(6).

<sup>64</sup> R. PERKINS, CRIMINAL LAW 692-710 (1957).

sumer for his investment of time, money and reputation in seeking redress, the award also serves a redress purpose, and willfulness is again irrelevant to granting an award for such a purpose.

Thus, a dual system of enforcement is proposed. Public enforcement is likely to provide more consistent application of control, but may not be aggressive, for it may be underfinanced or subject to bureaucratic conservatism, red tape and inertia or to industry domination. It therefore should be supplemented by effective private enforcement which, although applying only randomly, is not subject to bureaucratic control or lethargy. The public agency should first be provided a means of informing the creditor as to the validity of specific courses of proposed conduct, then provided ample means of preventing or halting violations and redressing and penalizing those which have occurred. It should have the power to handle each of these functions informally or formally through agency proceedings or in court. Several functions should be accomplished in one proceeding—for example, allowing the agency to condition its acceptance of an assurance of discontinuance on redress to aggrieved individuals, seizure of forms with prohibited clauses and establishment of an escrow fund to redress future violations.

Private individuals should be empowered to bring class actions to halt violations, within some limitations, and also to seek full redress. Any award which grants full redress must include compensation for the consumer's investment of time, money and reputation, even in achieving an out-of-court settlement, and such an award would also act as a mild deterrent. If a larger additional deterrent is desired in more specialized circumstances, it should be provided. Thus, if a violating creditor refuses to settle, a very substantial award is needed to induce the consumer to risk litigation. However, the addition of such larger awards in special circumstances should not create conditions on the recovery of the basic redress-oriented award.

## II. THE STATUTE

The enforcement provisions of the U3C are divided between two articles, Article 6 on public enforcement and Article 5 on private enforcement. Each will be discussed in turn. A stated basic assumption of the U3C draftsmen is that the statute should provide "ample administrative powers and self-executing judicial remedies" to assure compliance with the statute.<sup>65</sup> The intended meaning of the reference to administrative powers is clear, and the draftsmen have

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<sup>65</sup> Prefatory Note, U3C at 3.

concentrated on this aspect of enforcement. However, the intended meaning of the reference to "self-executing judicial remedies" is less clear. It seems to refer to remedies available to the consumer without agency intervention, but does it refer only to remedies available without resort to courts? If the latter is intended, it is an illusory exercise, because judicial recognition of the individual's rights will usually be needed to protect them fully.

#### A. *Public Enforcement Under the U3C*

The U3C grants broad powers to an "Administrator," but does not seem to grant him the power to issue declaratory orders. He may promulgate substantive rules "in cases specifically authorized by this Act,"<sup>66</sup> but these are intended to be only general regulations, not responses to specific inquiries. He may also "counsel persons and groups on their rights and duties under this Act,"<sup>67</sup> but such counsel does not seem appealable if adverse, so the creditor must violate the advice to test it. If favorable, the informal "counsel" cannot be relied upon because it provides no protection from subsequent action by the Administrator. Thus, there is no method provided under the U3C to inform creditors whether a proposed course of specific conduct violates the statute.

General regulations may be issued, and do provide protection for all conduct conforming to a then-existing rule or guideline.<sup>68</sup> Such regulations may be amended, rescinded or invalidated by the Administrator or a court,<sup>69</sup> so that the creditor has no vested right in retaining a regulation once he has set his business practices,<sup>70</sup> but a subsequent change has no effect on prior creditor conduct. While the rule or guideline is in force, the creditor is protected from all liability for conforming conduct. Although this seems sound for liability through public enforcement, it improperly limits actions by individual consumers and subverts private enforcement. The "no liability" rule precludes any award to the successful consumer litigant, even to reimburse him for attorney's fees actually expended, and thereby destroys all incentive to bring private actions against

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<sup>66</sup> U3C § 6.104(1)(f). Such power is specifically provided in only three instances: adjustment of dollar amounts, additional charges, and advertising. U3C §§ 1.106, 2.202, 2.303.

<sup>67</sup> U3C § 6.104(1)(b).

<sup>68</sup> U3C § 6.104(2).

<sup>69</sup> U3C §§ 6.104(1)(f), 6.108(2).

<sup>70</sup> There seems to be no requirement of notice before change of regulations so the creditor does not even have this interest.

creditors to test agency regulations.<sup>71</sup> Nor does the U3C provide any method for consumers to test such regulations before the agency itself. Thus, if industry domination exists, the "no liability" rule will help sustain it.

Instead of providing such information to creditors, the U3C draftsmen have concentrated on halting prohibited conduct only after a course of dealing which violates the statute has started, and then preventing such conduct from recurring. Article 6 provides for informal handling through assurances of discontinuance, for agency proceedings leading to a judicially reviewable cease and desist order, and for direct application to the courts for injunctions. Thus the necessary types of enforcement devices have been provided, but there are problems in the scope and structure of the devices set forth in the U3C.

The Administrator is allowed to deal with violators informally and accept an assurance of discontinuance from them.<sup>72</sup> This might have provided the Administrator a very useful enforcement tool, except that it seems to be usable only in very limited situations. The present draft allows its use only to process "conduct subject to an order by the Administrator (Section 6.108) or a court (Sections 6.110 through 6.112)."<sup>73</sup> This language might be interpreted to include all violations against which either might act; however, since the language is not conditional, it literally seems applicable only to those prior violations which have been the subject of actual orders directed to the particular creditor. If the latter interpretation prevails, assurances may not be used to handle claimed violations of the statute, but only claimed violations of an Administrator's order or a court order. Thus it may not be used to process the initial violations of the statute by a particular creditor, where an informal procedure would be the most useful tool to inform him of the violation and impose a mild sanction. Instead, it could only be used to process later violations, occurring after a formal proceeding, and when the creditor should be aware of the questionable nature of his conduct. This limitation requires the Administrator to handle all first violations through formal proceedings—a needless escalation of the conflict in many cases—or take no official action.

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<sup>71</sup> The analytical problems presented seem quite similar to those concerning the requirement of "willfulness" for a supposedly-deterrent penalty award, which is also needed to afford complete redress to the consumer.

<sup>72</sup> U3C § 6.109.

<sup>73</sup> *Id.*

If an assurance is given and the creditor continues his violations, the prior assurance "is evidence" that violations occurred before the assurance.<sup>74</sup> This seems to be the only effect under the U3C of breaching an assurance. There is no express authority to condition acceptance on redress to aggrieved consumers, reimbursement to the agency for investigation costs or establishment of an escrow fund to redress future violations.<sup>75</sup> Since the assurance evidences prior violations, it probably cannot be worded to cover more than those violations which the Administrator is willing to attempt to prove have actually occurred in the past.<sup>76</sup> Thus the violator can change his prohibited practices slightly and escape the scope of the assurance. In order to use the assurance as "evidence" of prior violations, the Administrator seemingly must first prove that the assurance itself has been breached, which requires that he first prove the occurrence of the subsequent violations. Of what value, then, is the assurance? The multiple conditions on its use in court make the U3C's assurance of discontinuance an illusory regulatory tool.

Formal agency proceedings are also available, on the Administrator's initiative,<sup>77</sup> except against unconscionable contracts or collection tactics.<sup>78</sup> The reason for this exclusion is obscure, for the agency expertise would seem most useful in defining or analyzing these abstract concepts.<sup>79</sup> For other violations, the Administrator may, after a hearing, issue a cease and desist order, which is subject to judicial review upon appeal by the creditor.<sup>80</sup> The Administrator's orders are not self-executing, so he must seek a court order for enforcement. His findings of fact may be reversed only if clearly erroneous, and creditors' objections not urged at the administrative hearing are deemed waived unless excused for good cause.<sup>81</sup> If the

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<sup>74</sup> *Id.*, second sentence.

<sup>75</sup> See text at notes 27-30 *supra*.

<sup>76</sup> Compare the problems created by the scope of a cease and desist order. See note 37 *supra*. The problem is even more easily solved in the assurance of discontinuance context, because the admissions may be stated separately from the assurance. See text at note 27 *supra*. By providing for admissions, some of the problems discussed in text following this footnote may be obviated.

<sup>77</sup> U3C § 6.108.

<sup>78</sup> U3C § 6.108(6). See note 91 *infra*.

<sup>79</sup> If it is felt that the defining of "unconscionability" should be controlled by the courts, all agency decisions are reviewable. U3C § 6.108(1). Thus the exclusion can be supported only by asserting that the courts must have the *exclusive* opportunity to develop a definition. However, such an assertion ignores the primary rationale for providing expert administrative bodies.

<sup>80</sup> U3C § 6.108(1).

<sup>81</sup> U3C § 6.108(2), (3).

creditor does not appeal within thirty days, the Administrator may procure a court order for enforcement by petitioning the court and showing service of the agency order on the creditor and that he is subject to the jurisdiction of the court.<sup>82</sup> The statute does not state whether the court must issue such an enforcement order, nor whether defenses may be interposed at this point by the creditor. At least, however, the agency order is now "final," and the Administrator need not "support its findings with substantial evidence."<sup>83</sup>

The primary problem created by these agency hearings is the scope of the orders provided. The cease and desist order concerns only the halting of presently-occurring violations.<sup>84</sup> It cannot redress aggrieved individuals, reimburse the agency, or prevent future or penalize past violations. The same is also true for the resulting court enforcement orders, for according to the statute the court may grant only a restraining order through the Administrator's petition.<sup>85</sup>

The Administrator also has direct access to the courts, on his own initiative, to seek a temporary or permanent injunction (but not a temporary restraining order) to halt violations of the Act.<sup>86</sup> Temporary relief is available only after notice and a hearing, no matter how clear the violation, nor how convincing the evidence, nor how heinous the violation, nor how numerous the potential victims.<sup>87</sup> The matter does not even seem to be within the discretion of the court.<sup>88</sup> Thus, speedy relief may not be available when needed. This seems an unwarranted interference with the normal discretionary powers of an equity court.<sup>89</sup> On the other hand, in most cases, relief may be granted to prevent violations before they occur, because it need not be shown that violations have actually occurred to obtain such

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<sup>82</sup> U3C § 6.108(5).

<sup>83</sup> U3C § 6.108, comment.

<sup>84</sup> U3C § 6.108(1).

<sup>85</sup> U3C § 6.108(2).

<sup>86</sup> U3C §§ 6.110-.112.

<sup>87</sup> U3C § 6.112.

<sup>88</sup> The section states that "the Administrator may apply to the court for appropriate temporary relief," which would normally include temporary restraining orders. However, it then states the limitation "but only after a hearing." Since this language limits the Administrator's authority to apply to the court, it deprives him of standing to seek an order. *Id.*

<sup>89</sup> Ordinarily a temporary restraining order is available when in the court's discretion special circumstances of need make that very special relief proper. See 7 J. MOORE, FEDERAL PRACTICE ¶¶ 65.05-.07 (2d ed. 1955); *Inhabitants of Town of Lincolnville v. Perry*, 150 Me. 113, 116-17, 104 A.2d 884, 887 (1954).

an order.<sup>90</sup> Thus, if the Administrator can obtain warning of potential violations and can prove "reasonable cause to believe" that they are planned, he may be able to forestall them. As usual, there is an exception to this rule concerning unconscionable agreements, for which proof of past violations is a requisite to any relief.<sup>91</sup>

If the Administrator has powers to stop violations through several devices, his ability to obtain redress is much more limited. He may not be able to obtain such redress at all, except for usury violations. The only provision which expressly allows him to seek such redress for aggrieved individuals enables him to demand "refunds" of "overcharges" (what once was called usury), and to penalize refusals to accede to such demands.<sup>92</sup> For all other violations, he has no express power to seek redress. However, if he brings a formal court action seeking to enjoin a creditor's conduct, he may also seek "other appropriate relief."<sup>93</sup> He faces two hurdles in seeking to use this phrase to obtain redress for individual consumers: First, what is "appropriate relief?" And second, has he standing to represent aggrieved consumers as a class? Redress under this phrase seems more plausible where the violation concerns the inclusion of void clauses, and the court is asked to enjoin the creditor from enforcing them. Thus the relief sought is still injunctive, but of broader scope; and the state is sometimes allowed to seek injunctive relief when representing private rights of action.<sup>94</sup>

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<sup>90</sup> U3C §§ 6.110-.112. Under U3C § 6.110, he may seek to restrain a creditor "from violating" the Act, and is not limited to enjoining them from continuing to violate. Under U3C § 6.111, he may likewise seek to restrain creditors "from engaging" in prohibited courses of conduct.

<sup>91</sup> U3C § 6.111(2)(a). However, the court may restrain "unconscionable conduct" if it finds that the creditor "is likely to engage" in a course of such conduct.

An explanation for the many exceptions to the normal rules regarding unconscionable agreements and collection techniques is that the U3C draftsmen seem undecided about whether to call them violations of the Act or not. They do not appear in those parts of the U3C which create all other violations, but sanctions are provided against them. Further, the aggrieved consumer may not obtain relief, but the Administrator may. See text at notes 105-09 *infra*. These are strange results, and differences which do not seem to be based on any analytical distinctions. Until the draftsmen decide whether such conduct actually is to be prohibited, such anomalies will continue.

<sup>92</sup> U3C § 6.113(1).

<sup>93</sup> U3C § 6.110.

<sup>94</sup> The issue of agency protection of the defrauded public by means of the injunctive process is not free from problems. It has been held that the state could not be granted a decree enjoining violations of the usury laws where it was not proved that victims of the practice were indigent or for other reasons unable to protect themselves, *Nash v. State*, 271 Ala. 173, 123 So. 2d 24 (1960), and that the state solicitor

However, where the violation requires a more sophisticated remedy, such as an election to rescind, the utility of this provision would depend upon local procedural rules concerning public representation of private rights of action in non-injunctive proceedings.<sup>95</sup> As long as the Administrator cannot bring a class action representing consumers, and the U3C gives him no such powers, he probably cannot obtain such rescission or reformation of contracts to which he is not a party. Thus, in many jurisdictions he may be unable to help the consumers aggrieved through the use of balloon notes, referral sales, or unauthorized home solicitation sale techniques.<sup>96</sup> Further, he has no ability to obtain any redress for unconscionable contracts or collection techniques, because injunctions against such practices are provided in a separate section which does not allow the court to grant "other appropriate relief."<sup>97</sup> Thus the Administrator literally cannot help the individual consumer who has been harassed by all-night telephone calls. As to reimbursement for his own costs

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general was not the proper party to seek such an injunction where the duty to seek that state laws are enforced was expressly vested in the governor. *State ex rel. Boykin v. Ball Investment Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940). *See generally*, Annot. 83 A.L.R.2d 848 (1962).

This analytical problem is compounded by the conflicting principles in the administrative law area that a delegation of power carries with it the implied powers necessary to perform the designated duty and that any delegation of authority to an administrator must be strictly construed to prevent overreaching. *Compare* discussion in *United States v. Jones*, 204 F.2d 745, 750-54 (7th Cir. 1953) with statement in *United States v. Foster*, 131 F.2d 3, 7 (8th Cir. 1942) that "while officers are presumed to have acted within their authority, statutes delegating powers to public officers must be strictly construed. . . ."

<sup>95</sup> The problem here is that statutes providing for private redress through public prosecution are read narrowly. *See, e.g.*, *Railroad Commissioners v. Atlantic Coast Line R. Co.*, 56 Fla. 525, 47 So. 870 (1908). (The Railroad Commissioner was authorized to bring a restitutional suit at request and on behalf of a private party, but his authority was read to be limited to bringing suit only in those situations peculiarly related to the duty of a common carrier). *See* note 94 *supra*.

<sup>96</sup> These problems may represent one difficulty with what the draftsmen term "self-executing remedies." U3C § 2.405 gives the balloon note victim a right to re-finance. Even if this were an appropriate remedy (*see* text following note 144 *infra*) a court order may be needed to obtain the refinancing from a creditor who would violate the clear provisions of the statutory section. If the Administrator may not seek such an order, and the consumer can obtain no award from the creditor for the violation, there is no risk in a violation. A court order is even more necessary where the violation involves an unauthorized home solicitation sale, because of the evidentiary problems involved, and the fact that an ineffectual cancellation is a default. As to referral sales, *see* Part II, C, *infra*.

<sup>97</sup> U3C § 6.111. *See* note 91 *supra*.



of investigation and prosecution of the violating creditor, the U3C gives the Administrator no powers of redress. Thus, such costs must be borne by the public at large, rather than by the creditor who caused the expenditures by his own illegal acts.

If halting violations after they begin may be delayed, and redress for past violations may be unavailable, can the Administrator deter potential violations before they begin? Since the U3C does not provide for declaratory orders, so that creditors cannot determine in advance whether a proposed course of conduct will be considered a violation, the deterrent function is not emphasized. The Administrator is given two types of civil actions to recover a penalty: one for usury violations, the other for almost all types of violations. A usurer is subject to a penalty only if he refuses to refund upon demand,<sup>98</sup> or has deliberately violated the act.<sup>99</sup> The first action is designed only to deter litigation, since the violating creditor can escape the penalty by settling. The second action would seem practically unavailable because of the impossibility of proving the requisite intent, except for the self-confessed loan shark. Thus there is no penalty attaching to the simple act of charging usurious rates from time to time, not even a slight one.<sup>100</sup> The creditor literally risks nothing by such conduct.

A separate cause of action is given the Administrator to recover a civil penalty of up to five thousand dollars for any "repeated and willful" violation of the Act,<sup>101</sup> except the making of unconscionable contracts or use of unconscionable debt collection tactics.<sup>102</sup> Since the violations must be both repeated *and* willful, proof of a number of violations is probably insufficient. Instead, the Administrator seemingly must prove that the creditor has engaged in a "practice" of "knowingly" violating the statute.<sup>103</sup> In all cases, the intent requirement creates fact issues, and thereby reduces the effectiveness of the

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<sup>98</sup> U3C § 6.113(1).

<sup>99</sup> U3C § 6.113(2). The penalty may be assessed if the excess charge was "in deliberate violation or in reckless disregard of" the Act. However, no penalty may be levied if the violation was "unintentional." U3C § 6.113(4). This seems to create a conflict as to reckless, but unintentional, conduct.

<sup>100</sup> The only sanction attaching to "getting caught" at such a violation is that the overcharge must be refunded. U3C § 6.113(1). But the money refunded is all illegal profit anyway, so the creditor has at this time risked none of the funds to which he had a rightful claim.

<sup>101</sup> U3C § 6.113(3), (4). Presumably, this sanction is available against usurers too. U3C § 6.113, comment.

<sup>102</sup> See note 91 *supra*.

<sup>103</sup> U3C § 6.113, comment.

deterrent because of the uncertainty of the result of the litigation. It also allows the creditor to be extremely careless in his observation of the regulatory provisions without risk. Whenever the statutory meaning is unclear or subject to several interpretations, the creditor may automatically opt for the most favorable meaning without risk.<sup>104</sup>

Even the dedicated, well-financed, "ombudsman-type" Administrator will have problems with this set of enforcement tools. Every action is excessively formalized. If he seeks to halt violations after they have occurred, at least formal agency proceedings are necessitated. If he seeks to prevent or deter their occurrence, or to redress the effect of past violations, he must proceed in court. As to providing redress to aggrieved consumers, this requirement virtually eliminates the effectiveness of the Administrator in providing consistent and comprehensive relief. On the other hand, the unaggressive or under-financed civil servant can easily go through the motions without accomplishing anything. He can issue cease and desist orders whenever he happens upon a violation and accept assurances of discontinuance for later violations; believing in good faith that some day, before the statute of limitations runs, an assistant attorney general will appear and bring all the appropriate actions for all the violations in his files. The latter type of Administrator creates an immediate need for effective private enforcement, and in particular for effective provisions for redress to the aggrieved individual. Does Article 5 of the U3C so provide?

#### B. *Private Enforcement Under the U3C*

In one of the most crucial areas, the U3C gives the consumer no powers to do anything—to halt, deter or seek redress for violations. Unconscionable debt collection practices are supposedly regulated by the U3C, but they are not expressly prohibited or declared

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<sup>104</sup> The provision, and the problems it creates, illustrate another reason for authorizing the issuance of declaratory orders.

Criminal penalty provisions are provided, but only for violations concerning mis-disclosure, usury, the unlicensed making of regulated loans, and non-notification to the administrator of engaging in consumer financing. U3C §§ 5.301-02. No criminal penalties are provided which apply to any other violations of the act, no matter how heinous. The draftsmen may have underrated the effect of such sanctions, even if prosecutions are not brought. See note 43 *supra*. License revocations are also possible if the violating creditor is authorized to make "regulated loans." U3C § 3.504. The criterion for revocation is the same as that for imposing a civil penalty. Compare U3C § 3.504(1)(a) with U3C § 6.113(3). Thus it possesses the same faults.

a violation.<sup>105</sup> Thus, the consumer has no right of action under the statute against the creditor who uses such tactics. Even though a remedy for such unconscionable conduct is developing in tort,<sup>106</sup> the U3C provides that the creditor's rights on the contract may not be impaired by such conduct.<sup>107</sup> The broad language of the U3C may even jeopardize the development of the tort action, because the U3C expressly undertakes to regulate such conduct and refuses the debtor a remedy.<sup>108</sup> Has it preempted the field?<sup>109</sup> There is no reason either to deny the consumer a remedy through private action, or to create doubts concerning the validity of the developing tort remedy. The aggrieved consumer is being directly affected by the conduct, and he should therefore be able to act on his own initiative, without regard to the Administrator's finances or philosophy. The draftsmen of a modern consumer protection statute should recognize the modern tort developments and incorporate them into the U3C.

As to the halting of violations, the consumer has no express power to seek injunctions under the U3C, so that he will have difficulties attempting to halt them, even through a class action. The difficulties arise because the relief is too limited if the class comprises only past victims, but potential victims as a class may not yet have standing to sue.<sup>110</sup> Thus the statute would have to expressly grant

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<sup>105</sup> U3C § 6.111. Unconscionable agreements and clauses also are not labelled as violations, but courts are permitted to refuse to enforce them, regardless of the parties to the action. U3C § 5.106. Presumably, such language will create a right of action in equity for reformation in most states. See text at note 133 *infra*.

<sup>106</sup> Three principles currently being used in the abusive debt collection technique area are: the right of privacy, *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961); the intentional infliction of emotional distress, *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); and unreasonable collection practices, *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484 (Tex. Civ. App. 1965). See Note, *Mental Distress From Collection Activities*, 17 HASTINGS L.J. 369 (1965); Comment, *Effectively Regulating Extra-Judicial Collection of Debts*, 20 ME. L. REV. 261 (1968); Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572 (1957).

<sup>107</sup> U3C § 5.201(1).

<sup>108</sup> The counter argument is that the U3C seeks only to regulate contract remedies, not those for breach of common law duties. However, the U3C ignores standard contract measures of damage throughout.

<sup>109</sup> Cf., e.g., *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 240-52, 218 N.E.2d 185, 194-201 (1966) (dissenting opinion).

<sup>110</sup> While a victim should be allowed to seek an injunction against a prohibited course of conduct, an as yet uninjured member of the consuming public would not be permitted to sue for failure to show the requisite special injury different from that suffered by the general public. See, e.g., *G. T. McGovern Trucking Co. v. Moses*, 92 N.Y.S.2d 550 (Sup. Ct. 1949).

It is even questionable whether a private consumer could, under the U3C, obtain

standing to seek an injunction, and it does not. If the consumer is to have any ability to prevent violations, it must therefore come through the technique of deterring future violations by penalizing such conduct after it has occurred.

For most violations of the act, the U3C provides no potential deterrent through private actions, because the aggrieved consumer may not recover any penalty award. Penalties are available only where the violation concerns usury, misdisclosure, referral sales, regulated loan payments schedules, or the making of regulated loans without a license.<sup>111</sup> There are no penalties, as such, attached to such other violations as use of negotiable promissory notes, balloon notes and clauses assigning earnings, confessing judgment, waiving defenses, providing unreasonable attorneys fees and default charges, and unconscionable debt collection techniques.<sup>112</sup> Thus neither an individual consumer, nor any conscientious group of consumers, can even attempt to deter such conduct through private enforcement. Even if void, their *in terrorem* use is a major abuse, and consumers should be able to deter it on their own initiative.

Even in cases of usury, the deterrent effect available through private action is nonexistent. No penalty is available if the creditor refunds the usurious charge upon demand.<sup>113</sup> The creditor must not only violate the statute, but also refuse redress in order to be penalized. Therefore, the penalty does not seek to deter the violation itself, but only the refusal to furnish redress after violation.<sup>114</sup> This is the only section which seeks to deter litigation; all other sections provide no additional award if the creditor compels the consumer to undertake its hazards.

Most of the penalties which are provided are related to a cancellation of "loan finance charge" or the "credit service charge"

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injunctive relief since that function is expressly vested in the Administrator (U3C § 6.110) and where the legislature has designated certain parties to perform a certain function, parties not included may be deemed excluded. *Cf.* *New York Post Corp. v. Moses*, 10 N.Y.2d 199, 176 N.E.2d 709 (1961). *See* notes 49 *supra*, and 133 *infra*.

<sup>111</sup> U3C §§ 5.201(2)-(5), 5.202(1).

<sup>112</sup> U3C §§ 2.403-415, 3.402-407, 3.512, 3.604, 6.111. The U3C does in some cases provide some relief for such violations, but the creditor never is required to give up more than his ill-gotten gains in such circumstances. *See* text at notes 52ff. *supra* and at notes 127ff. *infra*.

<sup>113</sup> U3C § 5.201(3). There is a penalty available if the violation was "deliberate," even if the overcharge is refunded upon demand. However, the burden of proof of the *mens rea* would seem to be on the consumer, which effectively eliminates the utility of the exception in practice. *Compare* § 5.201(6).

<sup>114</sup> *See* text following note 57 *supra*.

(both of which are hereafter called "interest").<sup>115</sup> The penalties available for violations of referral sales and regulated loan schedules are so highly conditioned that they are probably not effective either. The penalty available is the cancellation of the interest charge.<sup>116</sup> This penalty is available whether the matter is settled out of court or litigated. Thus there is no inducement to the creditor to settle out of court rather than to threaten litigation and hope the consumer will not accept the risks it entails. However, the award, in all cases, is conditioned upon a finding that the creditor's violation was intentional.<sup>117</sup> It therefore does not provide absolute liability, and does not seek to deter careless violations.<sup>118</sup> Even the deterrent to the culpable violator is probably ineffective. The award is conditioned on intent and the presence of an interest charge which is clearly identifiable as such.<sup>119</sup> With these conditions upon its availability, it is very unlikely that the penalty will be available in any practical sense without litigation.<sup>120</sup> But the award provided is probably too small to induce a consumer to undertake the risks and expenses of litigation, especially if appeals are possible.

The remedies provided for misdisclosure are the same as in the

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<sup>115</sup> The linguistic distinctions between "loan finance charge" and "credit service charge" in current use are due to the time-price doctrine and are conceptually difficult to rationalize. An attack upon so ancient a concept as the time-price doctrine is outside the scope of this article. The distinction between the credit sale and cash loan will probably continue to be made, but only because of policy reasons based on the modern economics of consumer credit, and the requirements of usury statutes adopted without such economics in mind. Therefore, because this article is concerned with the enforceability of any type of provision limiting rates of return on loans, the circumlocutions of the doctrine will be ignored, as will distinctions based *solely* on the status of the creditor as a lender or a merchant. See *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952); Littlefield, *Parties and Transactions Covered by Consumer-Credit Legislation*, 8 B.C. IND. & COMM. L. REV. 463 (1967).

<sup>116</sup> U3C § 5.201(4).

<sup>117</sup> U3C § 5.201(6). Although the statute is much more circumloquacious, through assigning the burden of proof on the issue to the creditor, the result is the same. The statute requires the court to decide whether the violation was intentional or not, and only if this question is decided in the debtor's favor is the added sanction available.

<sup>118</sup> See text at note 64 *supra*.

<sup>119</sup> The effect of this condition on the award in referral sale violation is remarkable. See text at notes 143-44 *infra*.

<sup>120</sup> It would be extremely unwise for the consumer even merely to stop payment of interest without the protection of a court order or a written release by the creditor. No matter how obvious the violation, it could always be claimed to be unintentional, freeing the creditor from liability for the penalty and automatically placing the unprotected consumer in default on his obligation. This will be very tricky for the layman unless guided by counsel at every step.

federal Truth in Lending Act.<sup>121</sup> They provide a slightly greater penalty award, twice the interest charges, up to one thousand dollars. Further, there is a minimum liability of one hundred dollars, regardless of the amount of interest. The award is more certain than others provided by the U3C. It is mandatory for all misdisclosure violations, if made "knowingly." There is a presumption that any violation was made knowingly, and the creditor must prove not only that the misdisclosure was the result of a bona fide error but also that he maintained procedures which were reasonably adapted to avoid such an error.<sup>122</sup>

The only violation for which both principal and interest may be cancelled is the making of "regulated loans" without a license.<sup>123</sup> However, this penalty also seems illusory. The distinction between regulated loans and others is the greater interest rate allowed the regulated lender—he may charge more than 10 per cent per year.<sup>124</sup> Therefore, the creditor who charges more than that may claim that he is merely a usurer, not an unlicensed regulated lender, and that he is liable for no more than the lesser usury penalties.

Thus the consumer probably has no effective deterrent powers against any violations of his statutory rights. For most violations he simply is given no deterrent power by the statute. Against two violations, usury and unlicensed regulated lending, the express deterrent provided seems illusory. While the deterrent available against referral sales and unauthorized schedules in regulated loans is not entirely illusory, it is so small, and so highly qualified, that it is unlikely to be available in practice. The deterrent available against misdisclosure is also subject to the same objections, but to a lesser extent. However, in the last case, the remedial provisions in the U3C have been literally forced upon the draftsmen by Congress.<sup>125</sup>

If the consumer cannot stop the recurrence of violations, and cannot deter their occurrence, can he at least obtain redress when he discovers that his rights have been violated? This question is of crucial importance, since the Administrator himself probably cannot obtain such redress in many instances. The answer to this

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<sup>121</sup> Compare 82 Stat. 146, § 130(a)(1), 1968 *United States Code, Cong. and Admin. News* 1232, 1245 with U3C § 5.202(1). The amount of the award is the same whether litigation is required or not, so that there is no deterrent to the creditor refusing to negotiate.

<sup>122</sup> U3C § 5.202(2).

<sup>123</sup> U3C § 5.201(5).

<sup>124</sup> U3C §§ 3.201, 3.501.

<sup>125</sup> See note 121 *supra*.

question depends upon what one considers to be "redress" when the consumer's rights have been violated. If redress is considered to be the refunding of a usurious charge or the striking of a prohibited clause from the contract, it is sometimes available. However, if redress is considered also to include compensation for the consumer's investment of his time, money and reputation, this is not available under the U3C. Attorney's fees may be awarded, at the court's discretion,<sup>126</sup> but this does not compensate for other investments. Nor does reimbursement for actual expenditures, if successful, provide an incentive to undertake the risks of litigation. Further, the attorney's fees are reimbursed only when litigation is required.<sup>127</sup> Thus there is no inducement to the consumer to seek counsel when attempting to settle out of court, so that he will probably exercise unauthorized self-help and create all the problems caused thereby. Article 5 therefore ignores a prominent known problem.<sup>128</sup>

If the consumer is not afforded redress in the sense of full compensation, he should at least be given relief from the injurious effects of the creditor's violation. Under the U3C, however, such relief is not always available. It sometimes allows only the Administrator to act against wrongful conduct, and then fails to provide him the power to obtain any compensation for the aggrieved consumer.<sup>129</sup> In other circumstances, the relief which is provided is completely irrelevant to the injury caused by the creditor's violation. The relief provided by the U3C may conveniently be divided into four categories: (1) refund of a usurious charge,<sup>130</sup> which seems appropriate if full redress is not to be provided; (2) a right to cancel the contract,<sup>131</sup> which also seems appropriate; (3) a statutory prohibition against certain devices, sometimes with a declaration that

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<sup>126</sup> U3C § 5.201(7). Attorney's fees "may" be granted by the court, not "shall" be granted, but no standards are set to guide the court's discretion.

<sup>127</sup> *Id.* The consumer has a right to such fees only if they are awarded by a court, presupposing a litigation context.

<sup>128</sup> It has been suggested to the draftsmen that the entire statutory scheme will not provide protection to poor consumers unless a default after a creditor violation is recognized at least to the extent of not depriving the defaulting consumer of all rights under the contract. NAT'L LEGAL AID AND DEFENDER ASS'N, JOINT STATEMENT OF NLDA AND OEO LEGAL SERVICES PROGRAM RE WORKING DRAFT No. 6 OF UCCC, at 4 (January 10, 1968). This author cannot, however, find any attempt in the U3C to deal with this problem.

<sup>129</sup> For such wrongs, the consumer must rely upon a non-statutory tort cause of action. See text at notes 98 and 107-110 *supra*.

<sup>130</sup> U3C § 5.201(2).

<sup>131</sup> U3C § 2.502.

the device is void if used, which is rarely appropriate; and (4) cancellation of the interest charge, which is rarely appropriate where used.

The statute's major reliance is on the third method of relief listed; prohibition and voiding of devices which have been abused by creditors in the past. This relief is provided for wage assignments, confession of judgment clauses, clauses providing for unreasonable attorney's fees and default charges, encumbrance of all the consumer's property, waivers of defenses (one alternative only), and promissory notes (no voiding, however).<sup>132</sup> The limitations on the value of such relief where third parties are involved should be obvious. For example: (1) The holder of the promissory note must still be paid, greatly reducing the consumer's negotiating position with a defaulting seller. (2) The consumer must still explain to his employer that the wage assignment is unenforceable, or more likely procure a court order protecting the employer so as not to jeopardize his job.

Even where only two parties are involved, the value of the relief is questionable. Although many of the devices are termed void, this will not defeat their *in terrorem* use. What is appropriate relief to the consumer when a creditor asserts a right to collateral under a void contract clause? Some form of court action is required, probably a declaratory judgment and a restraining order against enforcing the clause. Thus the statute should provide, not only for such an action, but also for reimbursement to him for his litigation risks and expenses. The U3C does not expressly provide for such an action, although courts will probably create one through normal equity powers.<sup>133</sup> The statute does provide for discretionary recovery of reasonable attorney's fees, in litigation only, "in any case in which it is found that a creditor is liable for a violation of this act."<sup>134</sup> However, since no express right of action is conferred on the consumer aggrieved by a prohibited contract clause, and therefore no express creditor liability is created, he may have no right to reimbursement for such fees, even if he must litigate to achieve redress. His right to reimbursement depends upon the construction of "*liable* for a viola-

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<sup>132</sup> U3C §§ 2.403-415, 3.402-407, 3.512, 3.604.

<sup>133</sup> Drafting history could be dangerous here. Working Draft No. 4 provided an express right of action against all violations, U3C (Working Draft No. 4, 1967) § 5.201(3). This has since been eliminated. Does this elimination create an argument that these violations are only matters of defense, and not proper subjects of declaratory judgment actions or actions to reform contracts?

<sup>134</sup> U3C § 5.201(7).



tion of this act." It may refer to all violations for which a court will order relief, or it may only refer to those violations which create express liability under the statute. The latter construction limits recovery to the five violations specified in U3C sections 5.201 and 5.202. In any case, the statute should not be so unclear as to require subsequent litigation over the recovery of earlier litigation expenses.

Cancellation of interest charges is inappropriate as the sole relief for unconscionable debt collection techniques, because injuries can vary from nominal to extremely severe. For such violations, tort damages are the only measure which can provide appropriate compensation for the injuries received. Another situation in which cancellation of interest is inappropriate is when the violation concerns an inducement to the consumer to contract. In such circumstances, rescission seems more appropriate to protect the consumer's expectations.

### C. *An Illustration of the U3C in Operation*

Let us take, as a possible example of the effectiveness of the U3C's enforcement provisions, the referral sale transaction in which a discount is offered if referrals subsequently buy from seller. The draftsmen attempted to abolish this device, expressly stating that no one may offer to make such a sale.<sup>135</sup> But suppose someone does, what can anyone do about it?

The Administrator may seek to prevent this course of dealing, or to halt it once it has begun. He may approach the problem either through a cease and desist order or a civil action for an injunction. Both approaches are formal and eventually depend upon court orders, so that notice and hearing are prerequisites to any permanent relief. Even temporary relief is greatly delayed, regardless of the circumstances. The U3C makes notice and hearing mandatory before issuance of a temporary restraining order, in contrast to normal equity practice. The length of notice required is not specified, but he may not seek court enforcement of cease and desist orders until 30 days after the agency hearing and the issuance of the agency order. Thus delays may be lengthy indeed, making agency proceedings unsuitable for the mass violation situation. The scope of the order provided through the agency proceeding also seems limited, since it can prohibit only past practices and may not apply to similar, but slightly different, violations.

No informal method of handling such violations is expressly

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<sup>135</sup> U3C § 2.411.

authorized. Thus the halting of each violation requires large expenditures of resources, especially attorney's time. Nor is the Administrator reimbursed for any of these expenditures, as such, even when the creditor is proved to have violated the statute.

If the Administrator cannot quickly halt violations of the statute, he must rely heavily on his ability to deter them through penalties. However, in order to recover any deterrent penalty under the U3C, he must prove that the creditor willfully *and* repeatedly violated the statute.<sup>136</sup> Proof of several violations may be insufficient, because of the willfulness requirement; and proof of a consistent course of dealing may be required, according to the Comment.<sup>137</sup> Thus, the creditor who is careful enough to make such sales only from time to time is arguably not subject to any penalty. In practice, this would require the Administrator to allow many violations to occur, establishing a practice, before he would consider his evidence sufficient to seek a penalty. Such a deterrent provision is of little practical utility, because the Administrator should not be willing to delay prosecution until such a practice is established.

The Administrator is especially unlikely to wait as violations occur when he knows that he is powerless to provide any redress to aggrieved individuals under the U3C. There is no express authority for him to bring an action to seek such redress, or even to negotiate with the creditor on behalf of the aggrieved consumer. The only possible avenue for attempting redress is U3C section 6.110 which permits an action for an injunction "and other appropriate relief." Even if he can persuade a court that redress to aggrieved consumers would be an appropriate relief, he probably still cannot succeed. The court cannot impair the creditor's contract rights except as "otherwise provided" by the statute.<sup>138</sup> The only such provision creates a right of action in the consumer to cancel the contractual interest charge.<sup>139</sup> But the statute gives the Administrator no standing to represent consumers, even in a class action for redress; so he may not have standing to seek such cancellations, and therefore no ability to obtain any redress for individuals.

The consumer's rights to enforce the statute are even more limited. He has no power to seek to enjoin the violations. Instead, the statutory remedy provided him for all purposes is the cancella-

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<sup>136</sup> U3C § 6.113(3).

<sup>137</sup> U3C § 6.113, comment.

<sup>138</sup> U3C § 5.201(1).

<sup>139</sup> U3C § 5.201(4).

tion of the interest charge.<sup>140</sup> However, the consumer would be well-advised to obtain either a court order or a written release admitting the intentional nature of the violation before failing to pay interest. Otherwise, he may be in default if a court later finds that the violation was unintentional.<sup>141</sup> This requires an investment in legal fees, with or without litigation; and the resulting award seems insufficient to induce the undertaking of such expenses when coupled with the risks of litigation.<sup>142</sup>

Further, a creditor who wishes to avoid private actions, *and any redress*, may easily do so by simply raising his cash price and eliminating the express interest charge. The remedy available would then be the striking of the conditional discount provisions from the contract, leaving the remainder of the contract enforceable without impairment,<sup>143</sup> including the original sale price. This seems a strange result, and indicates that the draftsmen have not yet thought the problem through. One solution to this problem is to provide a minimum recovery, as in the federal Truth in Lending Act.<sup>144</sup>

However, the minimum recovery does not solve the deeper problems created by the inappropriate relation of the injuries to the cancellation of the interest charge. The referral sale is prohibited because of its capacity to defraud the consumer by inducing unwarranted expectations of large discounts which will usually not be realized. There is no necessary relationship between these asserted discounts and the interest charge, so that there is no relation between the consumer's loss of expectations and the damages provided by the statute. It can usually be presumed that the consumer would not have purchased from the particular seller without the supposed discounts, so the appropriate remedy to protect his expectations is rescission. Further, this remedy is appropriate whenever the violation concerns a prohibited inducement to form the contract, such as misrepresentation of the cash price, interest rate or payment schedule, including the use of the balloon note.<sup>145</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> U3C § 5.201(6)(b). *See* text at notes 63-64 *supra*.

<sup>142</sup> *See* text at notes 58-60 *supra*.

<sup>143</sup> U3C § 5.201(1).

<sup>144</sup> *See* note 121 *supra*.

<sup>145</sup> Contrast the remedy available under U3C § 2.405, which provides mandatory refinancing of a balloon payment. The remedy assumes that the consumer desires to refinance, which may not in fact be correct if he was induced to contract because low weekly payments were quoted and were available only because of the balloon. What is an appropriate remedy if the last payment is equal to the original principal, so that the consumer must make payments forever? .....

The referral sale illustrates the difficulties of enforcing the U3C. The Administrator realistically has the power only to enjoin violations. He faces difficult problems of proving intent if he seeks to impose a penalty, and seems barred from seeking redress through a class action or otherwise. Any possible recovery by the consumer is both uncertain and inappropriate. Thus it can neither deter violations nor provide redress related to the injuries suffered. Perhaps the public is better protected by the ambiguities of the present law which permits such sales to be attacked as frauds<sup>146</sup> or as illegal lotteries<sup>147</sup> with potent remedies available to the aggrieved consumer.<sup>148</sup>

### III. SUGGESTED CHANGES

Any analysis of a statute involves an evaluation on two different levels: (1) the policy decisions made by the draftsmen, and (2) the drafting techniques used to implement them. Often it is very difficult to differentiate the two. However, one policy decision of the U3C draftsmen stands out clearly—they seek to provide a “strong” Administrator who will aggressively protect the consumer and assume an ombudsman role.<sup>149</sup> This seems a wise decision and necessary in the present credit economy.<sup>150</sup> A second policy decision is also apparent—private enforcement has been rigidly limited, sufficiently so to defeat its effectiveness. This decision cannot be logically supported. Limitations on private enforcement are not necessary to provide a strong Administrator, nor to enhance his powers. He can protect effectively without having enforcement powers vested exclusively in him. If it is the result of a compromise among the draftsmen, the consumers’ need for alternative methods of enforcement in states traditionally having underfinanced or unaggressive

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<sup>146</sup> See, e.g., *Norman v. World Wide Distrib. Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

<sup>147</sup> See, e.g., *Sherwood & Roberts-Yakima, Inc. v. Leach*, 67 Wash. 2d 630, 409 P.2d 160 (1965).

<sup>148</sup> See authorities cited in notes 146-47 *supra*. In *Norman*, the court voided a prior judgment held by the creditor and ordered rescission of the purchase agreement, directing the buyer to return the goods. In *Leach*, the court held the purchase agreement unenforceable and rendered a summary judgment against the creditor when it sued for the purchase price. Such remedies are both more potent and more appropriate for the misled consumer than cancelling the interest charge.

<sup>149</sup> NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REPORT OF SPECIAL COMMITTEE ON RETAIL INSTALLMENT SALES, CONSUMER CREDIT, SMALL LOANS AND USURY 37 (1965).

<sup>150</sup> See text at notes 5-8 *supra*.

administrators has been ignored.<sup>151</sup> A Uniform Act should be flexible enough to operate effectively in different bureaucratic climates. Thus, this basic policy decision should be reconsidered.

#### A. *The Administrator's Powers*

Even if the Administrator has all the personal characteristics sought by the draftsmen, he has not been given sufficient powers to exercise control easily and efficiently. The draftsmen have concentrated primarily on giving him tools to halt violations, or enjoin them. The other possible enforcement tools have not received equal emphasis, resulting in a slighting of the deterrent function and omission of redress capabilities. Further, there seems a preference for formality which has resulted in the elimination of informal enforcement devices. This requires the Administrator either to ignore some violations or to escalate the conflict into the courts, an unnecessary drain on his resources. It also slows down his speed of reaction to serious violations. He needs a variety of powers to meet the countless subtly different situations which will arise. The following suggestions therefore accept the basic U3C policy of creating an Administrator with strong powers, and seek to improve the efficiency and ease with which he may enforce the U3C's regulatory provisions.

First, he should be given the power to issue declaratory orders, which he presently does not have. This would provide creditors information about agency beliefs, and a method of testing those beliefs without violating the statute to obtain approval of specific proposed courses of conduct without risking consumer good will. The creditor could place more reliance upon such an order than upon informal advice, although they should be subject to reversal by courts or rescission by the Administrator.<sup>152</sup>

Second, he should have the power to accept assurances of discontinuance for first violations by a creditor, so that he may deal with these violations in an informal manner if he so chooses. The present draft allows use of this device only after an agency or a court order is in force against a creditor. This limitation on the availability of the device is a change from prior drafts,<sup>153</sup> and there

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<sup>151</sup> See text at notes 9-16 *supra*.

<sup>152</sup> See note 25 *supra*.

<sup>153</sup> U3C § 6.109 (Working Draft No. 4, 1967). The prior draft permitted use of the assurance against practices "which could be restrained by the Administrator . . . or a court. . . ." (emphasis added.) The use of the conditional language obviated any necessity that the practice be already subject to an administrative or court order when the assurance is accepted.

seems to be no reason for the limitation. Further, the power of the Administrator to attach conditions to his acceptance of the assurance should be expressly stated, so that he may require redress to consumers, reimbursement for investigation expenses, admissions of past violations, and establishment of escrow funds to cover costs of future violations in return for his decision not to initiate more formal proceedings.<sup>154</sup> With such an enforcement tool, many cases could be processed cheaply, allowing more efficient use of agency resources.

Third, the Administrator should be enabled to issue orders of broader scope through agency proceedings than under the present draft. Although it is necessary to be able to issue cease and desist orders, the effectiveness of the agency proceeding would be greatly enhanced if it could also provide resolution of problems relating, for example, to redress for aggrieved individuals. Some mechanical drafting problems also need attention. Must the court issue an enforcement order if the Administrator makes the showing required in section 6.108(5), or is this discretionary?<sup>155</sup> Can defenses be interposed by the creditor at this point?

Fourth, the Administrator must be able to act quickly to restrain violations where there is evidence of irreparable, immediate harm threatened to large segments of the population. Thus he must be able to seek a temporary restraining order without notice or hearing when appropriate.<sup>156</sup> Equity courts are well-equipped to determine whether prior hearings should be required, and the express limitation on the Administrator's power under the U3C seems an unnecessary interference with their normal discretionary powers.

Fifth, the Administrator has no express powers to seek redress for individual aggrieved consumers. If the draftsmen believe that few consumers will act affirmatively to seek such redress, and do not promote actions by them, the Administrator must be able to bring such actions or a vacuum may be created. The most feasible solution to this problem is to provide expressly that he may represent consumers and bring class actions in their name to obtain any relief

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<sup>154</sup> Detailed rules need not be established, although this seems preferable and examples exist. See notes 28 & 29 *supra*. The objective could also be achieved by permitting the Administrator to set any "reasonable" conditions on his acceptance of the assurance. See UCC § 2-609(2).

<sup>155</sup> The reference is to the second sentence of U3C § 6.108(5). See text at note 82 *supra*.

<sup>156</sup> He should also be able to seize and condemn any forms or advertising matter which do not comply with the statute. See note 36 *supra*.

available to them, including rescission and cancellation of contracts. He should also have power to obtain redress for himself, through reimbursement for investigation expenses. Where a creditor has in fact violated the statute, the costs of processing the violation should be borne by the creditor, not the general public. Such redress will also induce the creditor not to attempt to exhaust the Administrator's resources by endless appeals. Redress to both the aggrieved consumer and the Administrator should be available without regard to the creditor's intent in committing the violation.

Sixth, the Administrator should have greater powers to seek to penalize violations after occurrence, and thereby deter them before occurrence. If declaratory orders are available, provision of an absolute liability standard for civil penalties should be reconsidered by the draftsmen. Even if this standard is not adopted, the present standard, requiring proof of both repeated violations *and* willfulness, is too severe. The intent requirement allows the "white-hearted" creditor to proceed without attempting to ascertain the requirements of a statute regulating his business. Surely, if the statute is to have any meaning, the creditor who carelessly ignores it should be subject to sanction. Thus penalties should be available for violations which are either repeated *or* willful.<sup>157</sup>

Seventh, the whole range of enforcement devices available to process other violations should also be available to act against unconscionable debt collection techniques. The present provisions, which require formal court proceedings in all circumstances, can only inhibit understanding of the concept, and prolong the creditor's uneasiness at being subject to unknown requirements. The Administrator should be able to furnish information, including declaratory judgments, about the agency's beliefs as to its scope. He should also be able to process such violations through agency proceedings, to foster agency expertise in analyzing the definitional problems.

### B. *Effective Private Enforcement*

The present draft of the U3C rigidly limits the enforcement powers of the individual consumer through private action. However, under such a policy, the consumer has no protection in a state

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<sup>157</sup> The draftsmen should also reconsider their deletion of criminal sanctions for most violations. Such sanctions may provide a powerful deterrent, even if not used, because the violation can then never be considered only a risk of money, for which accountants may calculate the odds. See note 43 *supra*.

in which the Administrator is dominated by the industry, personally unaggressive, or simply underfinanced from public funds. Thus the following suggestions do not accept the basic U3C policy and seek to provide effective private enforcement where there presently is none.

First, the consumer's right of action against unconscionable collection techniques should not be left in doubt. If he *ever* needs the ability to act on his own initiative, without hinderance from administrative inertia, it is when he is being harassed by all-night telephone calls or his job is in jeopardy. There are tort theories which are developing to deal with such situations. But if the U3C regulates this conduct through administrative action only, the growth or even availability of these doctrines may be limited. Thus the statute should either undertake to provide an effective statutory cause of action to redress such unconscionable conduct, or should expressly disclaim any intention to limit the development of the tort doctrines. It would seem preferable to deal with the problem in a consumer protection statute, but only if it is possible to forge as strong a remedy as will eventually be created by case law, including recovery of all damages available in tort actions. If this is not politically possible, development should remain in the judicial forum, but without any interference from the statute.

Second, the statute should provide an express right of action to redress all violations of its provisions. Earlier working drafts so provided,<sup>158</sup> and there is no reason for the change in Working Draft No. 6. The attempt at creating "self-executing remedies" has in turn created at least two unnecessary problems. Even if the courts will recognize actions for reformation of the contract or declaratory judgment in such circumstances, and do not limit such remedies to defenses only,<sup>159</sup> they can only strike a void clause. Thus they cannot afford the consumer complete redress for the violation, but only relief from its injurious effects. Additionally, the self-executing remedies concept has led the draftsmen to formulate inappropriate remedies in some situations, and remedies which are enforceable only

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<sup>158</sup> U3C § 5.201(3) (Working Draft No. 4, 1967). Further, courts should be allowed more flexibility in designing appropriate remedies. Thus U3C § 5.201(1) seems unwise, because it expressly limits the court to the statutory formulation, whether effective or not, and whether appropriate or not. If it were deleted, courts could exercise a useful discretion to adapt the remedy to the numerous different types of fact patterns which will be presented.

<sup>159</sup> See note 133 *supra*. Another problem is the recovery of attorney's fees by the successful consumer litigant. See text following note 133 *supra*.



through court orders in others.<sup>160</sup> Thus, if Working Draft No. 6 proves anything, it is that effective private enforcement must start from an express grant of a right of action against all violations, and the nature of the remedies may then be developed without artificial limitations.

Third, the consumer must be provided redress which fully compensates him not only for the injury caused by the violation itself but also for his actions in obtaining a correction of the violation. This concept has several ramifications. Thus, where the matter is settled out of court, the consumer must be compensated for his investment in attorney's fees and his own time and reputation in seeking the settlement. A consumer protection statute must seek to route him to an attorney, and a necessary inducement is that he not be economically penalized for seeking such counsel. This requires that he receive, through a negotiated settlement, not only a refund of an overcharge or the striking of a void clause, but also an additional award to compensate him for acting. The award suggested herein is a stated dollar amount related to a typical attorney's fee or cancellation of the interest charge, whichever is greater. However, where the violation created a false inducement to contract, such an award is entirely inappropriate, because the consumer's basic expectations have been destroyed. The only relief which will protect his expectations is rescission, and it should be optionally available in all such circumstances.

Where a violating creditor refuses to settle, compelling litigation, the investments of time and money are greatly increased, so the compensation for them must be greater. Also, the award given the successful consumer litigant must recognize the uncertainties of litigation and increase the award both to compensate him for undertaking such risks and to induce him to do so. Without such inducements, the test cases necessary to clarify the statute, and to develop new theories to conform to changing social concepts, may never be brought. The proper award to achieve such results would seem to be a voiding of the obligation, both as to principal and interest.

No compensatory award should depend upon the willfulness of the creditor in causing the violation. Conditioning the award on intent misconceives its purpose, and introduces an irrelevant deterrent analysis. The lesser awards for negotiated settlements are

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<sup>160</sup> *E.g.*, the balloon note: U3C §§ 2.405, 3.402, *see* note 145 *supra*; and the wage assignment: U3C §§ 2.410, 3.403, *see* text following note 132 *supra*.

primarily compensatory and only incidentally a deterrent. The increase in the awards to a successful litigant serves multiple purposes. It compensates for expenses, especially awards of attorney's fees; it provides incentive to the consumer to undertake litigation risks; and it promotes negotiated settlements by deterring litigation. Even its deterrent function relates only to the creditor's decision to compel litigation, not to his decision to commit the original violation. Thus, if he decides to compel litigation, his earlier lack of *mens rea* in violating the statute is irrelevant to increasing the award.

If the redress awards provided are fully compensatory, they will also provide a deterrent to violation enforceable through private actions. This would be available on the individual's own initiative, and could not be frustrated by agency inertia, philosophy or underfinancing. Further, this device could provide a significant deterrent. Although each award would be fairly small, the aggregate of the possible awards to all the customers of a large-volume creditor through a class action could add up to a formidable sum. In those cases where such awards would not be effective, such as a widely dispersed and diverse class, a private injunction action seems preferable to a larger award to the individual consumer. Thus, the draftsmen should reconsider their present decision not to allow such actions and determine whether an appropriately limited right in aggrieved consumers to seek such injunctions can be devised.

#### IV. CONCLUSION

The U3C, as presently drafted, does not provide for effective enforcement of its regulatory provisions. A strong, well-financed Administrator can enjoin conduct to prevent violations from re-occurring; but he cannot redress the effects of prior violations upon aggrieved consumers, and the deterrent provided is practically useless. Further, even to halt violations, court proceedings are always required, which is costly, difficult and inefficient; and there is never any reimbursement to the Administrator. Thus useful public enforcement will be provided under the U3C primarily in the larger states having large budgets for state agencies and a tradition of aggressiveness by agencies. However, all enforcement will continually be dependent upon the mood of the legislature in establishing budgets, which will limit the Administrator's independence.

In the smaller states, where "weak" and underfinanced agencies are more traditional, the U3C cannot be enforced. The expense of

the formal court procedures required will preclude their use, and the informal procedures in the statute have no express teeth. The obvious answer to this lack of public enforcement is to provide for effective private enforcement, but the U3C has no such provisions. The consumer not only has no deterrent powers, but also in most circumstances cannot obtain any appropriate redress for his grievance. The draftsmen seem to have decided that consumers are inherently unable to protect themselves through private actions. This is a judgment by urban attorneys which underestimates the interest and ability of the "country lawyer" in consumer problems if there is some likelihood of some payment. It also indicates a real difference between available resources to solve problems in rural and urban settings. The Administrator is less likely to be effective in the smaller states, while private action is more likely to be effective.

Effective private enforcement depends upon the solution of two problems: The consumer must be induced to seek legal counsel; and the attorney must be paid, whether he litigates or not. The U3C attacks neither of these problems, however, which indicates to this author that the problems have not been sufficiently analyzed. There are similar problems in the public enforcement article, as is illustrated by the Administrator's lack of power to obtain redress for aggrieved individual consumers and his inability to act quickly against mass violations creating irreparable harm. Is a statute with this many problems still unsolved ready for either final adoption by Commissioners or enactment by any state?<sup>161</sup>

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<sup>161</sup> Non-uniform amendments to Articles 5 and 6 of the U3C are another potential solution to these problems. Uniformity in the remedies sections is not necessary to achieve the purposes of the statute, as is discussed in greater depth in Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, 23 *BUS. LAW.* 1039, 1053-54 (1968).