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MULTIPLE SOURCES OF CONSUMER LAW AND ENFORCEMENT (OR: "STILL IN SEARCH OF A UNIFORM POLICY")

Ralph J. Rohner[†]

In 1972 the National Commission on Consumer Finance surveyed and made recommendations for improving the legal and marketplace environments for consumer credit. Twenty years later, industry, consumer groups, government agencies, and the national and state legislatures are still groping for a coherent approach to the regulation of consumer credit. It is time for another national commission, or similar group, to make an objective and informed assessment of appropriately uniform policy for consumer financial services, and to craft a blueprint for future developments.

I. THE SETTING

Against a backdrop of more than two decades of history, the relationships among the state and federal laws and enforcement structures affecting consumer financial services transactions have become more, not less, complex. The patchwork of sources of law continues to inhibit the development of a consistent and uniform policy for industry practices, practices that now, more than ever, are national in scope and integrated into the larger financial structures of our economy.¹ Multiple sources of law have other effects. They complicate creditor compliance efforts and compound costs (the current catchphrase is "regulatory burden"); they also produce uneven consumer protection when regulatory rules vary depending on the consumer's or supplier's location, the type of transaction or the type of supplier (e.g., bank, retail store,

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1. This perspective, was addressed nearly a decade ago in Fred H. Miller & Ralph J. Rohner, *In Search of a Uniform Policy—State and Federal Sources of Consumer Financial Services Law*, 37 BUS. LAW. 1415 (1982). Details of virtually all the lawmaking described here have been discussed in the *Annual Survey of Consumer Financial Services Law*, appearing regularly in the *Business Lawyer* since 1979.

finance company), and whether the controlling standard is state or federal.

These troublesome "sources of law" range from formal legislation and regulatory implementations, to varying enforcement policies applied by supervisory agencies and often imaginative interpretations by federal and state courts. Some of the frictions come from federal and state competition for regulatory control; others reflect internally inconsistent taken approaches without regard for the complications of federalism at one or the other level of government. Altogether, it may be said, the problem is a lack of consensus on proper national policy toward the consumer financial marketplace.

It so happens that this symposium coincides with the twentieth anniversary of the publication of the Report of the National Commission on Consumer Finance in 1972.² This Report, ordered by Congress in 1968,³ was the first comprehensive review of the conditions prevailing in the consumer credit markets. Though clearly a product of its time and not especially visionary, it provides a useful reference point for appreciating the changes since its publication, and it serves to remind us of the difficulty of predicting or recommending future developments. In connection with "sources of law" issues in particular, the Report helps set the context from which those issues arise.

II. GENERAL BACKGROUND

A. *State Law*

Until the wholesale intervention of federal law in the late 1960s and 1970s, consumer finance was regulated mostly by state law. This included state usury and small loan laws, retail installment sales acts, various disclosure requirements, and some restrictions on terms and practices.⁴

These "consumer protection" laws were reinforced by general state law provisions, such as the Uniform Commercial Code, and

2. The full title is *Consumer Credit in the United States: Report of the National Commission on Consumer Finance* [hereinafter NCCF Report].

3. Title IV of Pub. L. No. 90-321. This was the "Consumer Credit Protection Act of 1968," containing the original Truth in Lending Act.

4. This background is discussed throughout the NCCF Report. See also *Symposium on Consumer Credit in the 70's*, 26 BUS. LAW. 743 (1971); B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* (1965).

by state common law doctrines such as fraud, deceit and unconscionability. Enforcement of these laws was typically split among licensing authorities, bank supervisors, state attorneys general or comparable officials, or was effected in civil litigation initiated or defended by the consumer.⁵ There was little impact of federal policies on what were essentially state law transactions. (But note that there were historically *some* federal policies at work, such as the FTC's mandate to police unfair or deceptive acts or practices,⁶ Regulation Q restrictions on rates payable on deposit accounts, or unique interest rate privileges for national banks and credit unions.)

The rise of consumerism in the 1960s prompted activism in the state legislatures. They passed a myriad of state laws addressing almost all aspects of consumer credit, from disclosure to permissible rates and terms. Specific practices thought to be overreaching were outlawed (*e.g.*, cognovit notes) or restricted (*e.g.*, door-to-door sales, balloon notes). Interest rate ceilings were a central concern and were vigorously debated,⁷ high ceilings characterized by consumers as usurious gouging, and low rate caps alleged by the industry to be artificial barriers to competition.

A "uniform" state law on consumer credit, the Uniform Consumer Credit Code (UCCC), was drafted and promulgated in 1968, then revised and repromulgated in 1974. By the mid-1970s, substantial parts of the UCCC had been enacted in about ten states, but then the momentum for uniform state law waned. One problem was the inherent difficulty of gaining a political consensus in the states on proposed legislation that was often

5. A canvass of these structures and practices can be found in the first law school "casebook" on the subject, H. KRIPKE, *CONSUMER CREDIT: TEXT-CASES-MATERIALS* (1970).

6. This included FTC assaults on deceptive advertising and bait-and-switch tactics in consumer credit transactions. *See, e.g.*, *Tashof v. Federal Trade Comm'n*, 437 F.2d 707 (D.C. Cir. 1970) (credit practices); *All-State v. Federal Trade Comm'n*, 423 F.2d 423 (4th Cir. 1970) (bait and switch); *Ford Motor Co. v. Federal Trade Comm'n*, 120 F.2d 175 (6th Cir. 1941) (rate advertising).

7. *See, e.g.*, NCCF Report, *supra* note 2, chs. 6, 7; *cf.* Carl Felsenfeld, *Consumer Interest Rates: A Public Learning Process*, 23 *BUS. LAW.* 931 (1968); William D. Warren, *Rate Limitations and Free Entry*, 26 *BUS. LAW.* 855 (1971) (panel discussion). The debate over rate structures was the heart of the matter, for it brought industry and consumer spokespersons to the same drafting table. Both Truth in Lending at the federal level, and the Uniform Consumer Credit Code (UCCC) as state law, grew out of concerns about the pricing of consumer credit.

seen as an unacceptable compromise from all sides.⁸ Another was the massive intervention by the federal government into the arena of consumer financial services transactions.

Throughout the 1970s, the state legislatures remained active, albeit not uniformly. States often were ahead of the "feds" in identifying problem areas and legislating on them (*e.g.*, restrictions on holder in due course status). The states also tended to refine and extend consumer protections enacted as federal law; this was probably nowhere more obvious than in the area of credit cost disclosure.⁹ With uniformity no longer an aspiration, the states at times seemed to be competing among themselves for unique approaches to perceived problems (*e.g.*, the Maine rule requiring that interest rates be drastically reduced on refinancings, to discourage "flipping").

B. Federal Legislation and Regulation.

The dozen years from 1968 to 1980 saw an almost nonstop sequence of consumer credit lawmaking from the federal government. The list includes:

- Truth in Lending Act (1968)
- Credit Card Amendments to TILA (1970)
- Fair Credit Reporting Act (1970)
- Fair Credit Billing Act (1974)
- Equal Credit Opportunity Act (1974)
- FTC "Holder Rule" (1975)
- Real Estate Settlement Procedures Act (1975)
- Equal Credit Opportunity Act Amendments (1976)
- Consumer Leasing Act (1976)
- Fair Debt Collection Practices Act (1977)
- Electronic Fund Transfer Act (1978)

Interspersed among these federal enactments was the aforementioned Report of the National Commission on Consumer Finance, statutory strengthening of the powers of the Federal Trade Commission (through the FTC Improvements Act of 1975), the initiation of "credit practices" rulemaking by the FTC, and

8. For a contemporary description of one state's political battles, see Jeffrey Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiations and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3 (1973).

9. The problems of reconciling federal and state disclosure rules are described in Drew V. Tidwell, *Preemption of State Disclosures by the Truth in Lending Act: The Continuing Quest for a Workable Formula*, 40 BUS. LAW. 933 (1985).

the enactment of the Home Mortgage Disclosure Act and the Community Reinvestment Act, both seeking to influence the lending policies of financial institutions in the direction of greater community responsibility.

The decade of the 1970s ended with a slowdown of affirmative federal regulation and the beginnings of a federal policy of deregulation. Truth in Lending "simplification" was in the works.¹⁰ The Depository Institutions Deregulation and Monetary Control Act of 1980,¹¹ responding to economic pressures of the prior few years, effectively deregulated interest rates for mortgage lenders, and extended "most favored lender" privileges to all federally insured depository institutions.¹² On the deposit side, Regulation Q retrenchment was also in the wind.

C. *Relation of State and Federal Laws*

During this period, and into the early 1980s, the relationship between federal and state laws affecting consumer financial services was uneasy, and some would say schizophrenic. The basic approach of the federal laws was one of very limited interference with state laws on the same topic. The policy was generally stated as preempting state laws only when they were "inconsistent," and then only to the extent of the inconsistency.¹³

This meant that state and local legislatures or agencies were free to regulate aspects of consumer transactions untouched by federal law—to build up a structure of auxiliary regulations that would augment the federal laws as applied in a particular state. And the states did not hesitate to adopt local law in the interstices of federal regulation.¹⁴ It also meant that states

10. Cf. William J. O'Connor, Jr., *Truth in Lending Simplification*, 35 BUS. LAW. 1221 (1980).

11. Pub. L. No. 96-221, 94 Stat. 132 (1980).

12. See William M. Burke, ed., *Federal Preemption of State Usury Laws*, 37 BUS. LAW. 747 (1982); William M. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 BUS. LAW. 1079 (1982).

13. For contemporary sentiment, see Fred H. Miller, *The Problem of Preemption in Consumer Credit Regulation*, 3 OKLA. CITY U. L. REV. 529 (1979); Barbara S. Leonard & Drew V. Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary?*, 35 BUS. LAW. 1291 (1980).

14. A mid-70s synopsis of prevailing federal and state laws ran nearly a thousand pages in two volumes. CREDIT RESEARCH CENTER, PURDUE UNIV., MONOGRAPH NO. 8, A COMPILATION OF FEDERAL AND STATE LAWS REGULATING CONSUMER FINANCIAL

could tinker with the rules as adopted by Congress or federal agencies, adding substantive details and refinements, and adding the weight of state enforcement mechanisms or state-law sanctions where they pleased. The Federal Reserve Board, interpreting this limited preemption policy, was loath to find much state law inconsistent.¹⁵

The major federal laws also allowed "exemptions" for states with laws substantially similar to the federal ones. Only a handful of states, however, sought exemptions under this authority. Where they did, state law and state enforcement agencies became the vehicle for effecting federal policy, except of course for federally chartered institutions where a federal supervisory agency had exclusive visitorial powers.¹⁶

Most of the federal laws authorized private enforcement actions by aggrieved consumers, including class actions. These could be brought in state or federal courts, and often created another layer of regulatory gloss as courts interpreted and reinterpreted the requirements of the federal regulations.¹⁷ In addition, federal agencies were authorized to use their generic examination and enforcement powers against violators of the consumer protection laws.¹⁸

Even in matters governed solely by state law, there could be conflicts in the sources of law for interstate transactions. Common law or statutory choice-of-law rules in the states often made it difficult to rely on the law of a specific state for transactions crossing state lines. If the law of the debtor's domicile controlled, this meant customizing credit products from state to state.¹⁹

SERVICES (1977). Much of this state law dealt with usury ceilings, creditor remedies, and licensing structures—topics not addressed in federal law.

15. The then-attitude of the Board and its staff is described in Tidwell, *supra* note 9, at 936-37.

16. For an analysis and suggested improvements of the exemption mechanisms at the end of the 1970s, see Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: (pts. 1 & 2)*, 29 CATH. U.L. REV. 1, 31-37 (1979), 29 CATH. U.L. REV. 313, 357-62 (1980).

17. The Truth in Lending Simplification Act of 1980 was specifically intended to reduce the instances of court conflicts, first by streamlining the disclosures themselves, and secondly by limiting the misdisclosures that would allow recovery of statutory damages in private actions. Truth in Lending Act § 130(a), 15 U.S.C.A. § 1640(a) (West 1980).

18. See, e.g., Truth in Lending Act § 108, 15 U.S.C.A. § 1607 (West 1980). This provision on administrative enforcement was replicated in virtually all subsequent federal laws regulating consumer financial services.

19. Cf. U.C.C.C. § 1.201. A series of cases involving mail-order creditors upheld the

This "choice of law" problem took on a federal dimension in 1978, when the Supreme Court, in the *Marquette* case,²⁰ held that national banks could export home-state rates notwithstanding state laws to the contrary. This planted the seed for widespread regional and national marketing of credit cards and other products from banks nominally located in deregulated states like South Dakota and Delaware.

D. Federal Level Frictions

Even at the federal level there was discordance in the pursuit of consistent, uniform policies. Some of this was attributable to mixed signals from Congress in the various pieces of legislation it passed,²¹ and to occasional agency-bashing for what Congress perceived to be lax enforcement of those laws.

Further disharmony arose from the way regulatory and enforcement responsibilities were scattered among a number of federal agencies. The Federal Reserve Board had primary regulation-writing authority for *all* creditors under the substantive titles of the Consumer Credit Protection Act, yet enforcement responsibility was parcelled out to the line supervisory agencies according to their traditional constituencies. This led at times to unevenness in the interpretation and application of the consumer laws by the banking agencies, while the Federal Trade Commission, seeking out unfair or deceptive practices, seemed to plot a more aggressive course.²²

It was argued that the Federal Reserve Board, preoccupied with monetary policy, could not give the appropriate emphasis to

applicability of local law to resident consumers. See, e.g., *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979); *Whitaker v. Spiegel, Inc.*, 623 P.2d 1147, *modified*, 637 P.2d 235 (1981).

20. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

21. For example, statutory damages were recoverable for any violation of the Truth in Lending Act, but only actual and "punitive" damages under the Equal Credit Opportunity Act. Damages under the Fair Credit Reporting Act required proof of negligent or willful noncompliance. The Federal Reserve Board was directed to issue implementing regulations under most of the credit laws, but not the Fair Credit Reporting Act or the Fair Debt Collection Practices Act.

22. The disharmony among the federal agencies during this period is described in Ralph J. Rohner, *"For Lack of a National Policy on Consumer Credit . . ."; Preliminary Thoughts on the Need for Unified Federal Agency Rulemaking*, 35 BUS. LAW. 135 (1979). See also Miller & Rohner, *In Search of a Uniform Policy—State and Federal Sources of Consumer Financial Services Law*, 37 BUS. LAW. 1415, 1418-25 (1982).

consumer protection and was generally too cautious. The Board was accused of not understanding the special circumstances of retailers, finance companies and other nonbank entities. Meanwhile, Congress directed that the banking agencies presumptively must follow suit whenever the Federal Trade Commission promulgates a trade regulation rule affecting consumer financial services.²³ Responding to congressional criticism in the late 1970s, the federal banking agencies beefed up their enforcement efforts through separate consumer compliance examinations.

E. The NCCF Report: A Noncrystal Ball

Looking backward from the perspective of 1980, it is a bit surprising that the NCCF Report of 1972 did not more clearly anticipate the "sources of law" complications described above. The bulk of that report dealt with symptomatic improvements in the marketplace—reasonable rate ceilings and "free entry," enhanced disclosure and consumer education, elimination of abusive creditor practices, and the like. There is no comprehensive discussion of the preemptive relationship between federal and state law, nor any recognition of potential compliance burdens from the multiplicity of such laws. The Report urges the strengthening of enforcement mechanisms both in the states and at the federal level, but acknowledges neither the double-jeopardy phenomena this could create nor the risk of uneven enforcement by state and federal agencies.

Perhaps the most intriguing suggestion in the Report (but possibly its most impractical at the time) was to create a federal watchdog agency, a "Bureau of Consumer Credit," to oversee the whole arena. That Bureau would

issue rules and regulations, . . . supervise all examination and enforcement functions, . . . encourage state consumer credit administrators and banking departments to . . . improve existing examination and enforcement procedures, . . . monitor progress in the development of competitive consumer credit markets, . . . [and] cooperate

23. Federal Trade Commission Act § 18(f)(1), 15 U.S.C. § 57a(f)(1) (1979). The bank agencies did follow the FTC's lead with respect to its Credit Practices Rule.

with and offer technical assistance to states in matters relating to consumer credit protection.²⁴

Together with its recommendations for federal chartering of finance companies,²⁵ the suggestion for a federal "Bureau" gave the report a tilt in the direction of federal supremacy over conflicting state sources of law.

The National Commission, looking at the consumer credit world in 1972, was not prescient enough to anticipate clearly the changes that would occur in the coming decade: enormous demand for consumer credit, the proliferation of new federal and state laws, dramatic changes in credit products and marketing structures, and economic conditions that made consumer credit a significant profit center for institutional vendors. And those phenomena have now evolved for another dozen years since 1980. If the perceptions of the NCCF Report were blurred when written, can they have any utility at all for the 1990s? As discussed below, they may. But a look at the 1980-1992 time period is needed first.

III. PHENOMENA OF THE '80S AND EARLY '90S

The period since 1980 has seen extraordinary growth in the demand for (and availability of) consumer credit,²⁶ the development of remarkably sophisticated and complex credit products,²⁷ the near universal computerization of applicant evaluation and customer monitoring systems,²⁸ and amazing

24. NCCF Report, *supra* note 2, at 58-59.

25. *Id.* ch. 9. Such federally chartered finance companies would have "powers to supersede state laws in three of the basic areas where state restrictions now sometimes severely limit competition and availability of credit: limitations on entry, unrealistic rate ceilings, and restraints on amounts and forms of financial services offered consumers." *Id.* at 167.

26. Total U.S. household debt grew from \$1.3 trillion in 1980 to \$3.4 trillion in 1990, an average 10% annual increase. Canner & Lockett, *Payment of Household Debts*, 77 FED. RESERVE BULL. 218 (1991). Over that same period the ratio of household debt as a percentage of disposable personal income also rose significantly, from about 65% to over 80%, suggesting that consumers are comfortable incurring more and more debt. *Id.* at 219.

27. *See, e.g.*, variable rate mortgages, home equity lines, overdraft checking, combined credit/debit cards.

28. Computerized data networks through national credit reporting agencies, and sophisticated credit scoring models, permit creditors to do customer prescreening and account monitoring of a type never envisioned by the National Commission in 1972. Its report speaks plaintively of the need for increasingly accurate and centralized data bases, and even suggests "the eventual Federal chartering and regulation of

changes in marketing techniques and delivery structures.²⁹ The regulators and legislators have become as interested in consumer protection on the deposit side as on the credit side of banking relationships. The contextual national economy has gone from years of rampant inflation through a boom period and into recession. But there has been no significant change in the synchronization of consumer financial services law. Recent activity at the state and federal levels sometimes continues approaches of the past, and sometimes creates new ones. The problems of multiple sources of law persist.

Source-of-law activity in the 1980s and 1990s includes the following:

A. *State Action*

While there has been no further movement toward *uniform* legislation (like the UCCC), state laws on consumer financial services continue to be enacted. Recently, these laws seem to be more free-standing, addressing matters not covered by federal law (such as rent-to-own leases), rather than overlapping or extending federal laws.³⁰ There are still instances where state legislative activity identifies problem areas and eventually prompts federal action, for example, on funds availability and early credit card disclosures. Some state legislation, though dealing with the same topic as federal law, accepts compliance with the federal rules as satisfying state requirements.³¹ Sometimes the variety of statutory laws within a given state leaves doubt as to which enactment controls a particular transaction.³²

credit reporting agencies." NCCF Report, *supra* note 2, at 213. Some of the current practices are described in Jeffrey I. Langer & Andrew T. Semmelman, *Creditor List Screening Practices: Certain Implications Under the Fair Credit Reporting Act and the Equal Credit Opportunity Act*, 43 BUS. LAW. 1123 (1988).

29. Mail order and telemarketing campaigns proliferate. Secondary markets thrive on mortgages, student loans, and portfolios of securitized consumer obligations. Market competition is dominated by large holding companies dealing in regional and national markets.

30. Much of the state law activity deals with rate ceilings and related cost implications not touched by federal law, such as requirements that quoted mortgage rates be committed for a reasonable time. *But see, e.g.*, John H. Mancuso, *New York Passes Mortgage Lending Statute: All Mortgagees Beware*, 42 BUS. LAW. 977 (1987) (describing state law that complicates compliance with federal rules).

31. *See, e.g.*, Ferran v. Sanchez, 734 P.2d 758 (N.M. 1987), applying such a statute in a disclosure challenge.

32. *See, e.g.*, *In re Brown*, 134 B.R. 134 (Bankr. E.D. Pa. 1991) (creditor thought it

Courts continue to develop and apply general common law doctrines, such as unconscionability, good faith and fair dealing, and the various "lender liability" doctrines.³³ The *Perdue* case³⁴ from California is an example, and it is notable that the court specifically found that state common law principles of contract formation and unconscionability were not preempted by federal banking laws.

By contrast, a confrontation between state and federal law produced the Supreme Court's *de la Cuesta*³⁵ decision in 1982, holding that Federal Home Loan Bank Board regulations on due-on-sale clauses *did* preempt state restrictions. This result was soon codified into federal law.³⁶

The underlying state law for consumer transactions continued to develop in other ways, such as through the adoption and judicial interpretation of unfair and deceptive practices acts (UDPA),³⁷ and refinements of the generic commercial law (*e.g.*, expansion of the UCC to deal with personal property leases in new Article 2A).

Control of the pricing of consumer credit, through usury laws, was historically an area of strong state interest, and despite the federal preemption of rate ceilings for mortgage credit, the price of most other credit products remains under state control. State legislation on rates in recent years tends either to amount to deregulation (removal of rate ceilings) or tinkering with the formulas for calculating rates and related nonfinance charges. One by-product of the populist, states-rights nature of rate regulation is that state officials often chafe at the asserted preemptive effect of federal laws affecting interstate transactions and bank privileges. This has produced some threatened and some actual court challenges by state officials.³⁸

was making loans under the Consumer Discount Company Act and Motor Vehicle Sales Finance Act, but factual aspects of the transaction brought it under, and caused it to violate, the separate Home Improvement Finance Act).

33. *Cf.*, Dwight Golann, *Consumer Litigation in the Age of Combat Banking*, 45 BUS. LAW. 1761 (1990); Sheldon Feldman, *Breach of Contract as an Unfair Consumer Practice—The Orkin Case*, 44 BUS. LAW. 1047 (1989).

34. *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985).

35. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

36. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 341, 96 Stat. 1469 (1982).

37. See generally D. PRIDGEN, CONSUMER PROTECTION AND THE LAW chs. 3, 4 (1986).

38. *Attorney Gen. of Md. v. Equitable Trust Co.*, 450 A.2d 1273 (Md. 1982)

Two recent federal court decisions have brought some clarity, but also further intensity, to the question of the ability of states to control credit pricing by out-of-state banks. In *Greenwood Trust Co. v. Massachusetts*,³⁹ the state-chartered bank (purveyor of the Sears "Discover" card) sought and obtained a declaratory judgment that, since it was authorized to impose late charges by the law of its home state (Delaware), it could export those late charges to customers in Massachusetts notwithstanding a Massachusetts prohibition on such fees. This holding was based on the language of section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980,⁴⁰ and on the precedent of the *Marquette*⁴¹ case which construed similar language in the National Bank Act to authorize the exporting of interest rates.⁴² Soon thereafter, a federal court in Minnesota, combining the *Greenwood* and *Marquette* precedents, ruled that national banks could also export nonrate charges such as late fees from their home state without regard to restrictions in the customers' states.⁴³

So long as there are hospitable home states like Delaware in which banks can locate their credit subsidiaries, these holdings prevent any other state from controlling the banks' credit pricing and *de facto* permit a uniform national market for bank credit products. Nonbank creditors, such as finance companies and retailers, enjoy no comparable exporting privileges—unless they affiliate with (*i.e.*, buy) a bank through a holding company structure and extend credit through that bank. And that, of course, is exactly what has been happening.

(challenging state banks' ability to borrow "most favored lender" rate); Citibank (South Dakota), N.A. v. Miller, Civil Action No. 88-258-E (S.D. Iowa 1989) (challenging exportability of Citibank credit card charges to Iowa residents); Greenwood Trust v. Commonwealth of Massachusetts, Civil Action No. 89-2583-Y (D. Mass. 1989) (seeking declaratory relief on exportability of late payment charges). See generally, Robert A. Burgess & Monica A. Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 BUS. LAW. 929 (1987).

39. 971 F.2d 818 (1st Cir. 1992), *rev'g* 776 F. Supp. 21 (D. Mass. 1991).

40. Pub. L. No. 96-221, 94 Stat. 132 (1980).

41. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

42. The holding in *Greenwood* involves two steps: (1) the language in § 521 of DIDMCA must be read consistently with that in § 85 of the National Bank Act; thus state-chartered banks can export rates to the same extent as national banks under *Marquette*; (2) Exporting powers are not restricted to numerical "interest rates" but include other components of a creditor's pricing structure (such as late fees).

43. *Tikkanen v. Citibank (South Dakota), N.A.*, 801 F. Supp. 270 (D. Minn. 1992).

B. Federal Legislation

The past dozen years saw the pace of federal legislation revive: the Truth in Lending Simplification and Reform Act,⁴⁴ the Expedited Funds Availability Act (EFAA),⁴⁵ the Fair Credit and Charge Card Disclosure Act (FCCDDA),⁴⁶ the Home Equity Loan Consumer Protection Act (HELCPA),⁴⁷ and the Truth in Savings Act (TIS)⁴⁸ are the major pieces. There were also significant impacts on consumer financial services wrought by Title V of DIDMCA, the Alternative Mortgage Transactions Parity Act,⁴⁹ FIRREA,⁵⁰ FDICIA,⁵¹ and others. Each enactment seems to present new source-of-law complications.

1. Legislative (Im)precision

At times Congress legislates so comprehensively and in such detail that the Federal Reserve Board is left with little flexibility in setting regulatory ground rules. The Board often must write lengthy and excruciatingly complex regulations to be faithful to the statute while also trying to make compliance reasonably efficient. This is true of EFAA, FCCDDA, HELCPA, and TIS.⁵² Committing this detail to the statute makes future adjustments difficult, and forces the Board to make difficult judgment calls which may precipitate more uncertainty.⁵³ It also makes one wonder how Congress so quickly forgot the lessons of Truth in Lending "simplification."

44. Pub. L. No. 96-221, tit. VI, 94 Stat. 168 (1980).

45. Pub. L. No. 100-86, tit. VI, 12 U.S.C. §§ 4001-4010 (1987).

46. Pub. L. No. 100-583, 102 Stat. 2960 (1988).

47. Pub. L. No. 100-709, tit. IV, 102 Stat. 4725 (1988).

48. Pub. L. No. 102-242, tit. II, 105 Stat. 2236, 12 U.S.C. § 4301 (1991).

49. Pub. L. No. 97-320, tit. VIII, 96 Stat. 1545 (1982).

50. This is the massive bank restructuring legislation called the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (1989).

51. The Federal Deposit Insurance Corporation Improvement Act, Pub. L. No. 102-242, 105 Stat. 2236 (1991).

52. For example, the final version of Regulation DD to implement the Truth in Savings Act, with its explanatory material, occupies 56 three-column pages in the Federal Register. 57 Fed. Reg. 43,337 (1992).

53. Consumers Union thought the Federal Reserve took some liberties with the HELCPA statute in drafting the regulations, and sued the Board, with partial success. *Consumers Union v. Fed. Reserve Bd.*, 938 F.2d 266 (D.C. Cir. 1991). This prompted the Board to modify the regulation. 56 Fed. Reg. 67,233 (1991) (proposed rule); 57 Fed. Reg. 34,676 (1992) (final rule).

At the opposite extreme, Congress sometimes does not clearly articulate its intent, creating uneasiness and risk for future transactions. An example is the failure in Title V of DIDMCA, to clarify the range of most-favored-lender privileges for depository institutions other than national banks.⁵⁴ The vagueness of the standards under the Community Reinvestment Act is another instance.⁵⁵

2. Federal Preemption

The TIL Simplification Act recast the preemption formula somewhat, with the result that the Federal Reserve Board staff has issued a series of rulings on whether specific words or phrases of state law disclosures are preempted as being inconsistent.⁵⁶ Pending such rulings, creditors are protected if they include the state disclosures, no matter how potentially confusing to consumers.

The TIL Act still has minimal preemptive impact on state disclosure rules, and this carries over to the TIL amendments contained in HELCPA (home equity disclosures). But those recent amendments also add substantive restrictions on terminating or modifying home equity line terms,⁵⁷ entanglements with state law contract rights seem unavoidable and will need to be resolved under the "inconsistency" rubric. Meanwhile, the new credit and charge card disclosure rules embodied in the FCCCDA carry a separate, *plenary* preemption rule with respect to state disclosures in card solicitations.⁵⁸ A

54. It is nowhere explicit in the text or legislative history of Title V that Congress meant to accord to state-chartered banks the same freedom to export rates that the Supreme Court had recognized for national banks in the *Marquette* case. The banking industry wants to assume so, but the matter is just beginning to get judicial clarification. See *supra* notes 39-42 and accompanying text. Cf. Jeffrey I. Langer & Jeffrey B. Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks*, 42 CONSUMER FIN. L.Q. REP. 4 (1988).

55. Cf. Connally, *The Evolution of the Community Reinvestment Act*, 44 CONSUMER FIN. L.Q. REP. 253 (1990).

56. Regulation Z, § 226.28. The commentary to that section includes the numerous Board staff findings on inconsistent (and thus preempted) state disclosures. Findings that state law is *not* preempted are published, but are not included in the commentary. See, e.g., 56 Fed. Reg. 3,005 (1991) (New Mexico law not inconsistent and so not preempted).

57. TIL Act § 137, 15 U.S.C.A. § 1647. Cf. Regulation Z, § 226.5b(f) and the commentary thereto.

58. TIL Act § 111(e), 15 U.S.C.A. § 1610(e). Even this sweeping displacement of

double irony follows: while preempting state disclosures, that same section allows states to establish their own enforcement mechanisms for the rules imposed by the federal law. And in the same statute, another section,⁵⁹ dealing with the disclosure of a change in insurance carrier, explicitly makes a point of stating that this federal disclosure rule does *not* supersede any state laws regulating insurance.

The "inconsistent" standard for preemption of state law was incorporated in the EFAA and its implementing Regulation CC.⁶⁰ How this will play out against the comprehensive provisions of UCC Articles 3 and 4, as these are being amended, remains to be seen. Potential conflicts, such as in liability for wrongful dishonor, seem likely.

The tension over appropriate federal and state roles at times can dominate the substantive issues being addressed. During the most recent Congress (the 102nd) there was a concerted effort to fix some of the major problems in the outdated Fair Credit Reporting Act. Industry and consumer representatives reached fairly substantial agreement on a number of healthy improvements to the Act. But the leading bill⁶¹ collapsed when its protagonists reached an impasse over its preemptive effect on state credit reporting laws. Industry refused to support the bill *unless* it contained a plenary preemption of state laws; consumer groups refused to support it *if* such a provision were included. Disagreement over preemption scuttled a useful reform effort.

3. State Overrides & Exemptions

The policy of permitting states to opt out of federal regulation is employed in several of the recent laws. While Title V of DIDMCA is primarily a positive preemption of state laws on mortgage interest rate ceilings, and extends most-favored-lender status to federally insured depository institutions, that same title permits states to opt out of several of the federal provisions by

state law leaves some untidy loose ends. See R. ROHNER, THE LAW OF TRUTH IN LENDING ¶ 14.03[3] (Supp. 1989).

59. TIL Act § 127(g)(4), 15 U.S.C.A. § 1637(g)(4) (Supp. 1993).

60. Regulation CC, §§ 229.20, 229.41. A finding that state law is not preempted usually means more stringent state law rules on funds availability apply. See the Board's interpretation on California law, 55 Fed. Reg. 11357 (1990).

61. H.R. 3596, 102nd Cong., 2d Sess. (1992) (the bill would have been known as the Consumer Reporting Reform Act of 1992 and was sponsored by Rep. Esteban Torres).

specific state legislation reflecting the desire to override.⁶² A number of states have done so.

The "exemption" mechanisms in the major federal consumer laws remain in place, but no additional states have sought exemptions in recent years.⁶³ States are discouraged from seeking or maintaining these exemptions by the need to keep local regulations current with often-changing federal rules. Some states have, however, sought exemptions under the comparable mechanism in the Credit Practices Rule (Regulation AA for the Federal Reserve Board).

Perhaps the ultimate in deference to state law was included in the TIL Simplification Act. Under new Section 111(a)(2),⁶⁴ a state may seek narrow authorizations to substitute state law terminology for that specified in TIL, if the state disclosure language is "substantially the same in meaning." Happily, this piecemeal substitution device has not been used.

4. *Co-opting State Law*

In several important instances, Congress has effectively displaced state law without formally "preempting" it. One example is in the Alternative Mortgage Transaction Parity Act,⁶⁵ which authorizes state-chartered lenders to make adjustable mortgage loans in accord with the regulations of specified federal agencies notwithstanding contrary state law.

Another example is in the most-favored-lender provisions of Title V of DIDMCA, which authorize federally insured lenders to charge interest at the highest rate permitted in their state of location. Assuming this power is exportable, via the *Marquette* and *Greenwood* cases,⁶⁶ it provides a basis for nationwide marketing of credit products from hospitable home states, regardless of laws in the consumer's state of residence.⁶⁷ Those

62. See generally, William S. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 BUS. LAW. 1079 (1982).

63. In fact some states have forfeited their earlier exemptions under particular federal statutes. See, e.g., FRB Order Terminating Exemptions for Connecticut, Massachusetts, and New Jersey under Regulation C (Home Mortgage Disclosure Act), 55 Fed. Reg. 5443 (1990).

64. 15 U.S.C.A. § 1610(a)(2).

65. Title VIII of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, codified at 12 U.S.C.A. § 3801 (1989). See Gilbert L. Rudolph et al., *Federal Legislation Affecting Mortgage Credit*, 38 BUS. LAW. 1311, 1317-27 (1983).

66. See *supra* notes 39-42 and accompanying text.

67. But what happens when a bank seeks to export home-state rates into another

cases, and the underlying statutes, are commonly described as preempting state usury laws. This is not technically true, since they merely establish a federal choice-of-law rule (the bank's home state law controls). The bank can only export those rates and charges permitted by its home state law.

C. Federal Agency Coordination

The problem of fragmented federal agency rulemaking has changed shape somewhat, but has not disappeared. The Federal Reserve Board remains the primary regulation-writer under the various consumer protection laws, including the EFAA (Regulation CC) and TIS (Regulation DD).

The Federal Trade Commission retains its authority to promulgate Trade Regulation Rules, and it finalized one during the 1980s (the Credit Practices Rule⁶⁸). Both the Federal Home Loan Bank Board and the Federal Reserve Bank dutifully followed suit with companion credit practices rules of their own as required under the FTC Act. The Federal Trade Commission has recently been reviewing the efficacy of its Trade Regulation Rules, and has terminated the second portion of the "Holder Rule," pending since 1975.⁶⁹

Collaboration among the banking agencies seems healthier now than in prior years, probably as a consequence of their concerted enforcement work in the Federal Financial Institutions Examination Council (FFIEC). The best evidence of this is the final agreement by the Office of the Comptroller of the Currency, the Federal Home Loan Bank Board, the Department of Housing and Urban Development, and the Federal Reserve Board on a basic disclosure format for adjustable rate mortgages.⁷⁰ The agencies also seem to be collaborating better in rulemaking

jurisdiction which has opted out of that preemptive rule? Which federal provision—most favored lender or state deference—controls the other?

68. 16 C.F.R. pt. 444.

69. The mellowing posture of the FTC is reflected in Ann P. Fortney, *Consumer Credit Compliance and the Federal Trade Commission: Continuing the Process of Education and Enforcement*, 41 BUS. LAW. 1013 (1986).

70. The earlier four-way split is described in John Jin Lee & D. Edwin Schmelzer, *Adjustable Rate Mortgages: Continued Debate Over Disclosure and Underwriting Standards*, 41 BUS. LAW. 1065 (1986). Essentially the other three agencies agreed that disclosures pursuant to a revised Federal Reserve Board Regulation Z, § 226.19(b) would suffice for their purposes as well. *But see* the vestigial footnotes 45a and 45c in Regulation Z.

under the Community Reinvestment Act.⁷¹ But despite cooperative efforts at the rulemaking level, it is doubtful whether there is consistent application of those standards at the bank examiner level.

The FFIEC is not likely ever to see uniform enforcement of consumer protection laws as its sole or highest priority, for it is under immense pressure from Congress and the public to help assure the continuing solvency—the safety and soundness—of our financial institutions industry. This pressure includes a directive from Congress to conduct a broad review of all laws under the jurisdiction of the federal banking agencies to assess whether they impose “unnecessary burdens” on insured depository institutions.⁷² It would not be surprising for the FFIEC to recommend some comprehensive revisions of the consumer laws to reduce their regulatory burden on the banks. Meanwhile other federal agencies, such as the Federal Trade Commission, proceed without statutory concern for the financial stability of the marketers they regulate.

There is yet another discordant note for uniform federal enforcement. As the marketing of consumer financial services becomes more sophisticated and more integrated into the larger financial markets, other federal agencies begin to play a role. The securitization of consumer receivables, for example, may require guidance from the Securities and Exchange Commission and the Internal Revenue Service. Telemarketing can invoke the jurisdiction of the Federal Communications Commission. The Department of Housing and Urban Development (HUD) regulates certain mortgage arrangements. The Department of Education oversees student loan programs. Whether these agencies can and will mesh their policies with the federal regulations already in place for consumer financial services is a challenge for the 1990s.

In the same vein, the consumer credit markets are not immune from the legal impact of broader public policy concerns, spilling over from such areas as securities, insurance, human rights, criminal law, and of course the vast legal and economic consequences of the collapse of the thrift industry and fear for the solvency of the bank insurance funds.⁷³ The universe of

71. See, e.g., Uniform Interagency CRA Final Guidelines, 55 Fed. Reg. 18,163 (1990).

72. This directive is in section 221 of FDICIA, the FDIC Improvements Act of 1991.

73. Recent articles in the Annual Surveys on consumer financial services show

legal complications for consumer financial services is constantly expanding.

D. Litigation

The volume of litigation over consumer financial services continues, though the patterns are different than in earlier years (e.g., there is much less TIL litigation now).⁷⁴ A healthy smattering of that caselaw involves "source of law" issues, principally on preemption matters and most of this under Title V of DIDMCA.⁷⁵ The federal bankruptcy courts seem to have become a frequent forum for the litigation of consumer disputes.⁷⁶

The sadder commentary is that the sheer volume of this litigation could almost certainly be diminished if the nation's lawmakers, federal and state, spoke with a more singular voice reflecting a broader consensus on appropriate policy.

IV. THE CONTINUING POLICY DISSONANCE

Over the twenty years since the NCCF Report, the political nature and short attention span of Congress, coupled with the vested interests and separate agendas of the federal agencies, have created a climate of uncertainty, indecisiveness, and equivocation in the development of comprehensive, consistent federal policy. Add in the persistent but unsynchronized

these broadened horizons: David Teitelbaum, *Accessibility of ATMs to Handicapped Persons*, 45 BUS. LAW. 1981 (1990); Robert M. Kurucz et al., *Securities and Investment Advisory Activities of Banks*; 45 BUS. LAW. 1919 (1990); Barry A. Abbott & Helen W. Leslie, *Financial Institutions and Insurance: Major Developments in 1988*, 44 BUS. LAW. 1013 (1989); Kenneth E. Scott, *Deposit Insurance and Bank Regulation: The Policy Choices*, 44 BUS. LAW. 907 (1989).

74. See Dwight Golann, *Consumer Litigation in the Age of Combat Banking*, 45 BUS. LAW. 1761 (1990).

75. Recent examples include *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907 (3d Cir. 1990); *Shelton v. Mutual Sav. & Loan Ass'n*, 738 F. Supp. 1050 (E.D. Mich. 1990); *Burris v. First Fin. Corp.*, 733 F. Supp. 1270 (E.D. Ark. 1990). In the early 1980s there was a furious round of lawsuits, principally in Georgia, over the mobile home preemptions in DIDMCA. See, e.g., *Doyle v. Southern Guar. Corp.*, 795 F.2d 907 (11th Cir. 1986), cert. denied 484 U.S. 926 (1987).

76. For a sharp exchange on whether and why this should be so, see David A. Scholl, *Bankruptcy Court: The Ultimate Consumer Law Forum?*, 44 BUS. LAW. 935 (1989); Lawrence A. Young, *Bankruptcy Court: The Ultimate Consumer Law Forum?*—*The View From the Other Side of the Looking Glass*, 44 BUS. LAW. 1401 (1989).

regulatory and enforcement activity at the state level, together with the policy of very limited federal preemption, and the result is a true patchwork of regulatory rules and enforcement structures. Ever since the NCCF Report in 1972 this condition was, and remains, problematic for a number of reasons:

- (a) Consumers in different states may be entitled to different rates, terms and protective rules, depending on actions of individual state lawmaking bodies.
- (b) The increasing number of creditors engaged in multistate marketing must customize their products from state to state (unless of course they can "export" via *Marquette*, in which case they have a competitive advantage over creditors who cannot do so).
- (c) Creditor costs, and compliance risks and burdens, are enhanced by state to state variations in the law, by the uncertain blend of federal and state rules, and by the uncertainty of judicial interpretations of that overlay.
- (d) Congress's desire not to preempt the field and to leave room for the states to experiment and improvise encourages legislative forum shopping and invites further complexity in the regulatory structure.
- (e) Industry members compete on an unlevel field, depending on their charter, where they are located, what products they market and to whom, who their supervising agency is, and the disposition of local courts.
- (f) Enforcement resources are scattered unevenly among state and federal agencies.

The most serious objection is also the most elusive. That is, because of the vagaries of combined state-federal involvement in the regulation of consumer financial services, there is no coherent, over-arching policy for the marketing of those services. Individual statutes and regulations set out rules for particular aspects of marketplace activity, but there is no long-term legislative or regulatory memory and thus no attempt to synthesize this year's enactment with last year's. *Mostly, there are no overall principles, even though there are many questions calling for principled answers. For example:*

* Are consumer financial services (credit and investment opportunities) worthwhile products that consumers should be encouraged to seek, like health care, education and

housing? Or, are they tolerated dangers that need health warnings like cigarettes, or prohibitions or recalls like unsafe cars or toys?

* Who should be entitled to offer those products, under what circumstances and conditions, and with what level of community responsibility?

* Can the markets be structured to permit banks and other lenders to make informed economic differentiations among customers, without invidious personal or class discrimination or over-reaching, and without arbitrary subsidization of some groups of consumers by others?

* To what extent does a freedom-of-contract model (reinforced by disclosure) work for those services, or do consumers need an imposed structure of price and terms?⁷⁷

* If chartering and licensing rules force various consumer financial services suppliers to compete on unfair terms, how should the playing field be levelled?

* Are differences in rules from state to state, or by type of creditor or type of transaction, justified by local circumstances?⁷⁸

* To what extent should credit be allocated or steered to certain consumer purposes? Which purposes? And to what extent should this be at public (taxpayer) expense, or the responsibility of private industry?

* Are reliable econometric assessments of costs versus benefits possible in this area? How are they relevant to policy choices, and what are the public policy weights in the equation?⁷⁹

77. As unlikely as it may be that the government would ever want to dictate the design and marketing of consumer financial services, there is occasional evidence that the industry's inventiveness gets away from them. One example was the massive credit card fraud resulting from unsolicited card mailings in the late 1960s. A current instance is the apparently widespread inability of many lenders to calculate adjustable rate mortgages correctly.

78. The historical justification for leaving regulation to the states was that consumer credit markets were predominantly local. With increased consumer mobility, banking-by-mail, and the dominance of national suppliers (e.g., Citibank, Sears), that premise is no longer so obvious. But a recent Federal Reserve staff study found that a surprisingly high percentage of consumer banking—for deposit services, mortgages, and credit lines—is still centered on “local” institutions. Elliehausen & Wolken, *Banking Markets and the Use of Financial Services by Households*, 78 FED. RESERVE BULL. 169 (1992). Still, whether it is wise to encourage states to conduct regulatory experiments, or supply regulatory gap fillers, is increasingly debatable with each new federal intrusion. A purely philosophical states rights position begs the question.

79. Legislators answer these questions implicitly, with or without empirical data,

* Are consumer financial services properly considered *sui generis*, or as part of the larger national economy, and if the latter, what are the linkages?

These questions are posed provocatively, for while there may be a fair consensus on some of them, it can only be derived from circumstantial evidence. Individuals may have answers, but they are more likely to be intuitive than scientific. There is no clear articulation of national policy on these questions, and related variations on them, anywhere.⁸⁰

At the same time it has to be said that the existing arrangements for regulating consumer financial services are not intolerable. Supply and demand seem healthy (given the current and hopefully short-lived recession). Consumer spokespersons argue for this or that addition to the regulatory arsenal, or expansion of the industry's community responsibility. The consumer financial services industry generally resists regulation it sees as burdensome or unnecessary, and marketing ingenuity generally keeps the industry a bit ahead of the regulatory curve anyhow. Neither side seems to be clamoring for a national charter on financial services policy.

Regulatory imperfections, frustrating though they may be, are not stifling industry creativity, expansiveness, or profitability. And, recession aside, they are not stifling consumer demand. The question remains open, therefore, whether the frustrations with the status quo are felt strongly enough to support a real and serious quest for greater uniformity in the law of consumer financial services, and if so, how can it be accomplished?

whenever they introduce or pursue legislation, whether it is to enhance consumer protection or reduce regulatory burden. Consider the rhetorical contrast between bills aimed at "Truth in Savings" or "Fair Credit Reporting," and recent proposals such as the "Community Bank Regulatory Relief Act of 1992," S. 2794, 102nd Cong., 2d Sess. (1992) which among other things would dramatically scale back bank liability for Truth in Lending violations.

80. Answers to these questions would not always help at the technical level (e.g., determining the precise content and format of savings account disclosures), but should provide a framework for evaluating the dimensions of a problem and how best to deal with it (e.g., is disintermediation in the housing markets harmful, and if so can it best be corrected by disclosure, tax incentives, government subsidy, increased CRA pressure, or otherwise?).

CONCLUSION

Perfect uniformity, such as by an all-encompassing federal or state code touching all aspects of consumer financial services, is probably not necessary, or politically feasible.⁸¹ But a greater degree of consistency in the regulatory approach to those services would help assure orderly growth in those markets into the twenty-first century, without undue risks to either service providers or service users. A rough analogy may be drawn to the need to synthesize the ground rules for securities marketing in the 1930s.

In this respect the NCCF Report of 1972 was far-sighted. It recognized the value of having a centralized agency—its recommended “Bureau of Consumer Credit”—as a repository of regulatory authority, enforcement oversight, and federal-state coordination. With monitoring, research, and evaluative functions as well, such an agency could supply sufficiently uniform policy to avoid the worst of the frictions that have arisen. Whether a permanent bureaucracy such as this is desirable now is itself one of the unsettled questions.⁸²

An improvement in the present regime will never emerge from continuing *ad hoc* legislation at the federal and state levels. Rational restructuring, or remodeling, of the regulatory environment for consumer financial services needs a blueprint, and a useful blueprint needs skilled architects and draftsmen and researchers,⁸³ who are professional, knowledgeable, and to the greatest degree possible objective and dispassionate. Thus it may be time to gather or create a mechanism (a second National

81. The truism “the devil you know is better than the devil you don’t” applies here. This author has sat in countless meetings of consumer, industry, and lawyer groups hearing lamentations about the problems caused by multiple sources of law, and devising strategies to deal with the latest brushfire. But there is little will to pursue a broader solution. The reason is clear: without knowing whether the substantive results, and the transition costs, will be worth the effort, no one with vested interests wants to hazard it. The half-hearted acceptance of the UCCC, and the abortive failure of a comprehensive federal code, are object lessons in the difficulties of uniformity.

82. For instance, a nongovernmental group analogous to the Permanent Editorial Board for the Uniform Commercial Code might make more sense.

83. At one level, the National Commission on Consumer Finance was very good at this latter function. Its empirical and field studies shed much light on the utility and cost effectiveness of many creditor remedies and contract provisions, permitting the Commission to recommend numerous restrictions or bans on what had previously been industry’s sacred cows.

Commission on Consumer Finance, or a congressional task force, for example) to review and assess the experience described above, and draft that blueprint for the future. The make-up, duties, and fact-finding authority of "Commission II" can be debated,⁸⁴ but there is a compelling case that such an effort would be worthwhile.

84. The original Commission consisted of three members of the Senate, three from the House, and three "public" members. Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, tit. IV, § 402, 82 Stat. 146 (1968). In any current reincarnation it would seem essential to have some representation from state governments.