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Peter J. Driscoll

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NOTES

SECURING THE GUARANTEES OF CONSUMER CREDIT LEGISLATION

The Uniform Consumer Credit Code and the Federal Consumer Credit Protection Act have surfaced from years of controversy and as predicted reflect an approach to consumer credit regulation that does violence to many traditional notions of consumer protection.

This nation's consumers have over 104 billion dollars in outstanding debt, held by a variety of institutions including commercial banks, sales finance companies, mutual savings and loan banks, industrial loan companies, savings and loan associations and innumerable retailers.¹ Circumscribing these institutions is a vast body of statutes and administrative regulations that prescribes their activities and proscribes certain conduct. Despite this wealth of legislation, or, as some suggest, because of it,² the consumer remains an ill-informed and abused participant in the consumer credit market.³

The Uniform Consumer Credit Code⁴ [hereinafter sometimes referred to

1 54 FED. RESERVE BULL., Nov. 1968, at A-52. Of this \$104 billion, more than \$82 billion is represented by installment credit. The largest single element consists of over \$33 billion in automobile paper, which accounts for over forty percent of installment credit. *Id.*

2 See Felsenfeld, *Uniform, Uniformed and Unitary Laws Regulating Consumer Credit*, 37 FORD. L. R. 209, 223 (1968).

3 The problems of the consumer have received a great deal of congressional exposure. See, e.g., *Hearings Before the Subcommittee on Financial Institutions of the Committee on Banking and Currency on S. 5*, 90th Cong., 1st Sess. (1967); *on S. 750*, 88th Cong., 1st & 2d Sess. (1963-64); *on S. 1740*, 87th Cong., 1st & 2d Sess. (1961-62); *on S. 2755*, 86th Cong., 2d Sess. (1960) [hereinafter cited as 19—*Hearings on Truth in Lending*]. For discussion of the particular plight of the low-income consumer, see H. BLACK, *BUY NOW PAY LATER* (1963); *THE LAW AND THE LOW INCOME CONSUMER* (C. Katz ed. 1968).

4 The Uniform Consumer Credit Code is a product of the National Conference of Commissioners on Uniform State Laws and has merited the appellation "uniform law" with its approval by the National Conference on July 30, 1968 and the House of Delegates of the American Bar Association on August 7, 1968. The idea for a uniform consumer law was conceived in 1957, but it was not until 1963, when the National Conference established its Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury, that work started in earnest on the project to reexamine existing consumer protection laws. The Committee's efforts took them through nine working drafts, subject to extensive discussion, before the UCCC became a reality. The final version was approved for promulgation and introduction to state legislatures.

For a summary of the work of the National Conference in its efforts to produce the UCCC, see Richter, *The Uniform Consumer Credit Code of the National Conference of Commissioners on Uniform State Laws*, 24 BUS. LAW. 183 (1968); Buerger, *Project on Retail Installment Sales, Consumer Credit, Small Loans and Usury*, 18 PERS. FIN. L.Q. REP. 110 (1964).

For an accounting and justification of the work of the National Conference in implementing other uniform legislation, see 1967 *Hearings on Truth in Lending*, *supra* note 3, at 295-97. For detailed treatment of the provisions of the UCCC, see Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285 (1966); Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81 (1967); Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COMM. L. REV. 441 (1967); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968); Robinson, *The Uniform Consumer Credit Code, A New Way of Life for the Consumer Loan Industry*, 22 PERS. FIN. L.Q. REP. 118 (1968).

All discussion of the UCCC will be based on the final draft that has been published in CCH INSTALLMENT CREDIT GUIDE (extra ed. No. 183, 1968).

as UCCC] and the Federal Consumer Credit Protection Act⁵ [hereinafter sometimes referred to as CCPA] are committed to the correction of this situation. The UCCC is designed to restructure and simplify the total statutory framework surrounding consumer credit and will replace virtually all regulations with a single consistent enactment. The CCPA is not nearly as comprehensive as the UCCC and its main impact will be in its requirement that finance charges be stated by creditors in a uniform manner, namely at a simple annual percentage rate. The draftsmen of both formulations have recognized the severe economic and social consequences of the careless use of credit. They visualize the remedy as being the return of consumer credit to the competitive influences of the market place — those influences that are revered by our free enterprise system as the most desirable method of protecting the consumer. Informed use of credit is an obvious prerequisite to this end.⁶

Existing regulations are the culmination of legislation and judicial decision operating without the benefit of perspective. The result is a mass of rules and regulations that lack integration and are subject to attack on all fronts. The most vocal criticism — and a rallying point for reform — has been the ineffectiveness of enforcement which, it is argued, renders the substantive guarantees illusory.⁷ For many,⁸ the worth of the UCCC and the CCPA will be determined

5 Pub. L. No. 90-321, §§ 101-504, 82 Stat. 146. The CCPA is composed of four titles. Title I pertaining to disclosure and advertising is the heart of the Act and most relevant to this discussion. Title II, which was a floor amendment to the bill, makes extortionate credit transactions a federal crime. Title III prescribes certain restrictions on the garnishments of earnings, and Title IV creates a National Commission on Consumer Finance to "study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally." *Id.*, § 404, 82 Stat. 165.

Truth in Lending was originally introduced by Senator Paul H. Douglas in 1960 as S. 2755 and reintroduced in the years following as S. 1740 and S. 750. It was finally passed as S. 5. A more ambitious version of the bill (H.R. 11601) was subsequently passed in the House of Representatives. A Conference report was agreed to by both Houses of Congress on May 22, 1968, and on May 29, 1968, President Johnson signed into law the Consumer Credit Protection Act.

For a discussion of the major controversies dealt with in formulating the CCPA, see McLean, *The Federal Consumer Credit Protection Act*, 24 BUS. LAW 199 (1968).

6 UCCC § 1.102(2) provides that the purposes and policies of this Act are:

(c) to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost; (d) to protect consumer buyers, lessees and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors; (e) to permit and encourage the development of fair and economically sound consumer credit practices; CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 801.

CCPA § 102 provides:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. Pub. L. No. 90-321, § 102, 82 Stat. 146.

7 See Curran, *Legislative Controls as a Response to Consumer-Credit Problems*, 8 B.C. IND. & COM. L. REV. 409 (1967).

8 See generally NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS, PUBLIC HEARINGS ON SECOND TENTATIVE DRAFT OF THE UNIFORM CONSUMER CREDIT CODE 284-342 and §§ 5, 6 (1967) [hereinafter cited as PROCEEDINGS] where statements and positions recommending amendments to the draft under discussion are presented. Paul R. Moo, Esq., a member of the Advisory Committee to the Special Committee, in-

by a judgment as to whether the guarantees provided therein will be actually secured. This Note will set the framework for such a judgment. It will examine the present legislative design for enforcement and then discuss the new formulations in light of their efforts to alleviate some of the present deficiencies in securing enforcement. It should be noted at the outset that the CCPA is, of course, to operate in the federal structure and is concerned primarily with disclosure,⁹ whereas the UCCC is of a more comprehensive design and offered for promulgation by state legislatures.¹⁰ Further, the problems faced by the respective draftsmen in providing for compliance were different.¹¹ Yet, a common question runs throughout both: *Are the guarantees provided secured by adequate enforcement provisions?*

I. Securing Compliance with the Uniform Consumer Credit Code

Consumer credit legislation has been peculiarly a matter of history. An appreciation of this statement is essential to a proper understanding of both the deficiencies of past regulation and the provisions of the new Uniform Consumer Credit Code.

A. *The Philosophy of Present Regulation*

Concern over the protection of the consumer against the unscrupulous lender or seller is by no means of recent vintage. The Bible's warning that "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury"¹² and its encouragement to "lend freely, hoping nothing thereby"¹³ reflect a prohibition that has been traced back to the Code of Hammurabi.¹⁴ This prohibition could be total as in early Anglo-Saxon jurisprudence, or it might be in the form of an interest ceiling.¹⁵ Usury and interest statutes appeared in this country as early as 1641¹⁶ and are presently in effect in all states with the exception of Maine, Massachusetts and New

cisively observed: "[I]f we had good law enforcement of many of the statutes that we have on the books today, we probably wouldn't have been spending the last three years as we have, in trying to develop a Uniform Credit Code." *Id.* at 296.

9 See note 5 *supra*. With the exception of the garnishment (Title III) and disclosure provisions (Chapters 2 and 3 of Title I) the CCPA took effect upon enactment. The disclosure provisions become effective July 1, 1969 and Title III becomes effective July 1, 1970. Pub. L. No. 90-321, 82 Stat. 167.

10 See note 4 *supra*. The Special Committee will assist in submitting the UCCC to a number of state legislatures during their present sessions.

11 The differences, which will be expanded upon in the course of this analysis, basically center on the fact that the UCCC is designed to enter a structure that has provided extensive credit regulation; it seeks to replace all these other regulations. A number of members of the credit industry have interests wedded to the existing structure and thus oppose changes in the regulatory scheme. See discussion throughout PROCEEDINGS, *supra* note 8. The CCPA, on the other hand, is the first attempt to provide, on the federal level, general credit regulation. Hostility to this federal entry into a traditionally local concern is vociferous. For expressions of this hostility, see 1960, 1961-62, 1963-64, and 1967 *Hearings on Truth in Lending, supra* note 3.

12 *Deuteronomy* 23: 19, 20.

13 *Luke* 6: 35.

14 See Benfield, *Money, Mortgages, and Migraine—The Usury Headache*, 19 CASE W. RES. L. REV. 819, 822 (1968).

15 See Berger, *Usury In Installment Sales*, 2 LAW & CONTEMP. PROB. 148, 157 (1935).

16 See Benfield, *supra* note 14, at 824.

Hampshire. They set interest ceilings that range from four percent per annum in North Dakota to thirty percent per annum in Rhode Island.¹⁷

These statutes operated adequately in dealings between businessmen. There developed, however, a substantial body of consumers, mostly wage earners, who, in need of personal loans, found credit institutions uninterested in their plight. Primarily, this was because the established rate ceilings were considered insufficient to cover the cost of making the small loan to the apparently less credit-worthy consumer. Thus, there existed a vacuum, but, as might have been expected, it was quickly filled by lenders and loan-sharks who operated in flagrant violation of the usury and interest statutes. The profit to be realized was so great that substantial penalties provided little deterrence.¹⁸

This situation was of some concern at the turn of the century, but a satisfactory solution was not found until the Russell Sage Foundation became interested and sponsored the Uniform Small Loan Law. It fulfilled the twofold need that existed: first, to eliminate the loan shark and second, to provide protection for the necessitous borrower.¹⁹ This was accomplished by carving²⁰ an exception into the usury statute that permitted qualified lenders to charge interest rates in excess of that prescribed by the applicable interest ceiling for loans of \$300 or less.²¹ A variety of small loan laws were subsequently enacted in all states.²²

The character of the necessitous borrower was paramount in the minds of the draftsmen. His experience with the loan-shark had evinced his incapacity to care for himself in the credit market. This inability would be compensated for by strict supervision of the credit transactions, and thus the "price" the lender had to pay was subjection to strict regulation. Licensing was a prerequisite to legitimate operation, and the terms and conditions of the loan contract—including maximum amount of loan and method of repayment—were carefully delineated.²³

17 B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* 15 (1965). Miss Curran's study is the definitive work on state regulation of consumer credit.

18 For additional discussion of these developments, see *id.* at 2 and Benfield, *supra* note 14, at 838-40.

19 See J. CHAPMAN & R. SHAY, *THE CONSUMER FINANCE INDUSTRY, ITS COSTS AND REGULATION* 12-13 (1967).

20 "Carving" is used here as a term of precision. It denotes the idea that out of the pervasive prohibition against usury, there was cut a very narrow exception that permitted X per cent above the usury rates to be charged for loans within carefully prescribed amounts. Further, only a select number of creditors were permitted to so operate.

21 See B. CURRAN, *supra* note 17, at 144 for the Seventh Draft of the Uniform Small Loan Law (as revised June 1, 1942). Maximum loan amounts now range from \$200 to as high as \$5000. *Id.* at 21.

22 The provisions of the Arkansas small loan law were found to be in contravention of the interest maximum prescribed by that state's constitution. See *Strickler v. State Auto Finance Co.*, 220 Ark. 565, 578, 249 S.W.2d 307, 313 (1952).

23 The policy statement of the Seventh Draft of the Uniform Small Loan Law, in part, states that:

1. There exists among citizens of this state a widespread demand for small loans. The scope and intensity of this demand have been increased progressively by many social and economic forces.

4. Interest charges are often disguised by the use of subterfuges to evade the usury law. These subterfuges are so complicated and technical that the usual borrower of small sums is defenseless even if he is aware of the usurious nature of the transaction and of his legal rights.

5. As a result, borrowers of small sums are being exploited, to the injury of the

Commercial banks and other institutions with a variety of credit arrangements also sought to enter the loan field. They petitioned legislatures for an exemption to the usury statutes and the legislatures responded by carving out other numerous, carefully delineated, exceptions. The new exceptions, however, were not integrated into the previous statutes.²⁴ Today, in addition to small loan laws, most states have statutes for industrial loans,²⁵ installment loans,²⁶ credit unions,²⁷ and pawnbrokers²⁸ that permit certain creditors to charge more than the general usury rates for loans. Also many states have special provisions authorizing higher rates for home improvement loans,²⁹ check loans,³⁰ and others.³¹

borrower, his dependents, and the general public. Charges are generally exorbitant in relation to those necessary to the conduct of a legitimate small loan business; trickery and fraud are common; and oppressive collection practices are prevalent.

7. It is the intent of the legislature in enacting this law to bring under public supervision those engaged in the business of making such loans, to eliminate practices that facilitate abuse of borrowers, to establish a system of regulation for the purpose of insuring honest and efficient small loan service and of stimulating competitive reductions in charges, to allow lenders who meet the conditions of this Act a rate of charge sufficiently high to permit a business profit, and to provide the administrative machinery necessary for effective enforcement. B. CURRAN, *supra* note 17, at 144-145.

24 See generally *id.* at 15-82, where the author discusses all aspects of legislation regulating lender credit.

25 Industrial loans or "Morris Plan" loans evolved contemporaneously with small loan laws. The industrial banks providing these loans fulfilled a need in the consumer credit market, occupying a position between the licensed small loan lender and the commercial banking institution. Small loan lenders were initially limited to the relatively small-sized loans, and commercial banks, due to restrictions set forth in the banking and interest laws at this time, did not participate in the consumer credit market. These industrial banks have become less significant today, primarily due to the encroachment of their competitors. Small loan lenders have successfully pushed for higher maximum loans, and commercial banks have vigorously entered the consumer market as a result of the passage of installment loan laws. See generally B. CURRAN, *supra* note 17, at 52-60 and chart 7 at 204-19.

26 Installment loan laws provided the primary vehicle by which commercial banks were able to successfully enter the consumer credit market. Such banks now hold more than forty per cent of outstanding consumer installment debt. FED. RESERVE BULL., *supra* note 1, at A-52-53. In addition to their direct lending activities under the installment loan provisions, they participate in the market as purchasers or discounters of retail installment sales paper. Usually these banks need no special licensing under the installment laws, but the loans must be less than a specified principal and repayable in periodic installments. See generally B. CURRAN, *supra* note 17, at 65-75 and chart 9 at 226-43.

27 With the passage of the Federal Credit Union Act of 1934, most states were allowed to pass their own credit union laws. There are now over 23,000 credit unions with over twenty million members, and their activities create a substantial impact on the credit market. Regulations are less extensive, and provisions relating to the terms of the loan contract and to the lender's conduct, characteristics of small loan laws, are not included. B. CURRAN, *supra* note 17, at 45-52 and chart 6 at 194-203.

28 Pawnbrokers' activities are regulated, for the most part, by local authorities. The pawnbrokers' loans tend to be in very small amounts (less than \$25) and for short periods of time. Their activities will not be affected by the UCCC. See generally *id.* at 79-82.

29 While financing home improvements may be accomplished pursuant to the applicable installment loan acts, a few states make special provision for home improvement loans by extending the maximum time for repayment under installment loan acts or by increasing the maximum authorized amount for loans made for home improvements or repairs. For the most part, such laws are enacted to bring the credit arrangements into conformity with Title I of the National Housing Act which provides that the Federal Housing Administration shall insure qualified home improvement loans. See generally *id.* at 75-76.

30 Banking institutions increasingly provide what have been characterized as "check loan" plans. These arrangements permit a customer to borrow amounts of money by merely drawing a check. Even though the customer has no funds in the account on which the check is drawn, the bank will honor the check pursuant to an earlier agreement. Payment of the check constitutes a loan by the bank to the drawer, and the arrangement is generally subject to the applicable installment loan law. Four states, however, have enacted legislation regulating "check loans" separately from other installment loans. See generally *id.* at 76-79.

31 For a more specific discussion of these statutes, see *id.* at 15-82.

While direct lenders found it necessary to go to the legislatures for permission to operate, retail sales credit, which has been characterized as indirect lending, developed relatively free from legislative interference. Freedom was found in the form of the time-price doctrine first announced in the early English case of *Beete v. Bidgood*,³² which limited the English usury statute to the direct loan of money.³³ Briefly, the time-price doctrine is the shorthand statement for the proposition that a merchant may fix one price for a sale for cash and another for a sale on credit, and the difference will not be treated as an interest charge. In *Hogg v. Ruffner*,³⁴ the United States Supreme Court applied the *Beete* rationale in holding that an Indiana usury statute did not apply to installment sales contracts.³⁵ The Court explained:

A vendor may prefer \$100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ, may say, with apparent truth, that B pays a hundred percent for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous. *Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.*³⁶ (Emphasis added.)

This highly suspect³⁷ economic rationale has been supplemented in one court by the argument that "a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller."³⁸ In brief, the consumer here is not the necessitous borrower.

Whatever the validity of the basis, the time-price doctrine continued, and, together with the rule that the purchase of a note or contract obligation at a discount is not subject to usury laws, it became the foundation for a vast consumer credit industry. Unrestrained, sales financing grew into a multi-billion dollar business, and with this growth came the emergence of unethical practices.³⁹ The foundation has come under increasing attack, and signs of erosion are evident.⁴⁰ Arkansas⁴¹ and Nebraska⁴² have overruled the time-price doctrine in

32 108 Eng. Rep. 792 (K. B. 1827).

33 See *id.* at 794.

34 66 U.S. (1 Black) 115 (1861).

35 *Id.* at 118-19.

36 *Id.* at 119.

37 See Felsenfeld, *supra* note 2, at 237.

38 *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 78, 262 S.W. 425, 428 (1924).

39 See Britton & Ulrich, *The Illinois Retail Installment Sales Act—Historical Background and Comparative Legislation*, 53 NW. U.L. REV. 137, 144 (1958). See generally Greene, *Better Business Bureau Activities in Aid of the Time Purchaser*, 2 LAW & CONTEMP. PROB. 254 (1935).

40 Britton & Ulrich, *supra* note 39, at 144.

41 *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 607-09, 249 S.W. 2d 973, 977-78 (1952), *rehearing denied*, 262 S.W.2d 287 (Ark. 1953). Since the parties to the transaction had relied on previous rulings sustaining the time-price doctrine, the court applied its reasoning prospectively. See B. CURRAN, *supra* note 17, at 84-86, 89-90 for a discussion of this development.

42 *Elder v. Doerr*, 122 N.W.2d 528, 537 (Neb. 1963); *Stanton v. Mattson*, 123 N.W.2d 844, 849 (Neb. 1963); *Powell v. Edwards*, 75 N.W.2d 122, 128 (Neb. 1956). See also, B. CURRAN, *supra* note 17, at 87-90 where the author describes the decisions in Nebraska and compares these with the Arkansas results; Britton & Ulrich, *supra* note 39, at 144-46.

deciding that a credit sale of goods is subject to the applicable usury or small loan laws. Other decisions have weakened the remaining foundation by holding that the sale or discounting of an installment sales contract by a dealer to a bank or finance company is a loan to the dealer.⁴³

Although the departure has not been severe and the time-price doctrine is still firmly entrenched, the attack softened the retail installment sales industry's opposition to regulation,⁴⁴ and the enactment of retail installment sales acts began.⁴⁵ These laws are diverse in coverage but may be divided into three main types: All Goods Acts, Motor Vehicle Acts and Goods Other than Motor Vehicles Acts. The element common to all of these acts is the requirement of disclosure of the essentials making up the sale. Additional provisions to eliminate certain abuses are increasingly prevalent today.⁴⁶

Regulation of retail sales creditors was less strict than that of direct lenders. As already suggested, the consumer protected by these laws was not characterized as the "necessitous borrower" and thus he was thought less vulnerable to exploitation.⁴⁷ The more recent statutes evince a tendency toward greater regulation, and many provide that the sales finance company must be licensed before it can discount paper. However, approval of the license is often just a formality, and banks which discount paper and which are supervised by a state agency are generally exempt from this licensing requirement.⁴⁸

The credit institutions and arrangements expanded swiftly under favorable economic conditions and technological advances. This expansion would not have been possible, however, but for the legislative and judicial willingness to create exceptions to the usury laws. The continual "carving out" of exemptions for new arrangements has resulted in a complexity of regulations. The state of New York is a representative example—a creditor doing business there may have to deal with a variety of regulations. There are statutes regulating loans by consumer finance companies, installment loans by commercial banks, loans by industrial banks, revolving charge accounts, bank check-credit plans, motor

43 See, e.g., *Milana v. Credit Discount Co.*, 27 C.2d 335, 341-42, 163 P.2d 869, 872 (1945). In *Daniel v. First National Bank*, 227 F.2d 353, 357 (5th Cir. 1955), rehearing denied, 228 F.2d 803, reaffirmed, 239 F.2d 801 (5th Cir. 1956), the court held that a sales financing transaction involving a national bank was usurious and subject to the national bank usury penalty of forfeiture of double the amount of the usurious interest received. The court found that the relationship between the dealer and the finance company was so close that the transaction was in fact a loan by the finance company to the buyer with the dealer acting as agent. See generally *Consumer Credit Symposium: Developments in the Law, Limiting Consumer Credit Charges by Reinterpretation of General Usury Laws and by Separate Regulation*, 55 Nw. U.L. REV. 303 (1960). See also Britton & Ulrich, *supra* note 39, at 146 for some legislative constrictions on discounting these sales contracts.

44 Britton & Ulrich, *supra* note 39, at 148.

45 Indiana enacted the first such legislation in 1935. See Ind. Acts 1935, ch. 231, as amended, IND. ANN. STAT. §§ 58-901 to 934 (1961). Much of this legislation has, however, been enacted since 1957 and most states now have some form of a retail sales act. Most of the new retail devices such as revolving credit and add-on contracts have been brought within the coverage of these acts. For a more thorough accounting of the development of retail legislation, see the discussion and charts in 1 CCH INSTALMENT CREDIT GUIDE ¶ 35 (1967). See generally B. CURRAN, *supra* note 17, at 254-329 where the author includes numerous charts on the details of the retail installment sales acts.

46 See B. CURRAN, *supra* note 17, at 100-01, discussing the provisions proscribing the use of waiver of defense clauses.

47 See text accompanying note 38 *supra*.

48 See B. CURRAN, *supra* note 17, at 115-16.

vehicle installment sales financing, installment financing of other goods and services, insurance premium financing and loans by credit unions.⁴⁹ If this creditor were a national consumer finance company operating in all the states he might find himself dealing with more than seventy statutes controlling lending, and if he desired to finance retail sales he would probably deal with another fifty retail sales statutes.⁵⁰

This brief analysis has demonstrated a twofold evolution in the law. On the one hand, we see the growth of indirect lending through the time-price doctrine and a variety of more or less comprehensive retail sales acts. On the other hand, the growth of direct lending through numerous exceptions to the usury laws has taken place. New forms of credit and the increasing diversification of credit grantors has resulted in a credit market wherein the arrangements look more and more alike. For example, there seems to be little reason for calling a credit card purchase of goods either a sale or a loan, simply because the issuer of the card is or is not the seller of the goods. It appears that this traditional ad hoc approach is unsuitable for an intelligent use of credit — a conclusion that is particularly supported by the experience with enforcement of the present regulations.

B. Enforcement of Present Regulation

1. Licensing and Supervision

The variegated status of existing regulation is mirrored in the methods of enforcement authorized in the respective acts. Initially, the plight of the "necessitous borrower" prompted extensive regulation of those who sought to deal with him. The cornerstone of this control was laid in licensing, which has served a number of interrelated functions in providing supervision: first, it is used to limit entry into the market place and thereby eliminate marginal operators; second, it is used as a basis for providing information to state officials as to the identity of creditors and the areas in which they operate; third, it is sometimes nothing more than a transparent means of raising revenue to sustain administrative expenses; and fourth, the revocation or suspension of licensing is often used as a sanction itself.⁵¹ The licensing statutes of the various states serve at least one, if not all, of these functions.

The standards used for the granting of licenses to direct lenders are important. Finance companies in a number of states are permitted to lend money only if the state supervisory authority determines that the grant of a license to them will "promote the convenience and advantage of the community."⁵² Estab-

49 Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, *supra* note 4, at 444-45 & n.7. For a slightly different accounting of the applicable law, see Felsenfeld, *supra* note 2, at 213-16. See also Johnson, *Economic Rationale of the Uniform Consumer Credit Code*, 23 J. FINANCE 303, 304-05 (1968).

50 Felsenfeld, *supra* note 2, at 212-13.

51 See Moo, *The Administrative Provisions of the Uniform Consumer Credit Code* 7 (unpublished paper on file with the *Notre Dame Lawyer*).

52 Thirty-four small loan statutes use, in whole or in part, the "convenience and advantage" test. The New York statute combines a "convenience and advantage" test, a character and fitness test and a minimum assets test. It provides that a license shall be issued if the superintendent of banks shall find that the financial responsibility, experience,

lishing this standard often requires a burdensome preparation by an applicant.⁵³ Other states require that the applicant meet prescribed standards of character and fitness,⁵⁴ and still others ask only that the applicant file the appropriate forms and pay the designated fees.⁵⁵ Additional common prerequisites to issuance of a license—and thereby permission to operate—are designation of an agent for service of process and filing of a bond in lieu of or in addition to the applicant's assurance that he has minimal assets.⁵⁶

Continued supervision is often guaranteed by provisions for periodic investigation;⁵⁷ a few states even permit surprise inspection⁵⁸ and free access to all records.⁵⁹ Authority is frequently given to investigate non-licensees in the same manner as licensees, if the administrator suspects they may be violating the applicable act.⁶⁰ These investigatory provisions require the licensee to keep books and submit annual reports to the administrator.⁶¹ His broad supervisory authority is often complemented by general terminology to the effect that the supervisor may promulgate whatever rules and regulations are necessary to carry out his administrative duties.⁶²

Due in part to the non-necessitous character of the consumer in a sales transaction, and in part to the judicial rejection of the requirement of a legislative fiat for their existence, members of the retail sales credit industry have, in the past, suffered a decidedly lesser burden of administrative regulation than did the small loan creditor and his counterparts in the direct lending business.⁶³ Although the provisions of the respective state sales finance laws concerning licensing and supervision are quite diverse, there is discernible today a trend toward more extensive administrative supervision. Progress of this sort has, however, been slow and sporadic in the face of the dogged resistance of the "indirect lenders."⁶⁴

character, and general fitness of the applicant . . . are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently . . . and if . . . allowing such applicant to engage in business will promote the convenience and advantage of the community . . . and if . . . the applicant has available for the operation of such business at the specified location liquid assets of at least twenty-five thousand dollars . . .

N.Y. BANKING LAW § 343 (McKinney Supp. 1968). The thirty-four small loan statutes are cited in Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 BUS. LAW. 227, 232 n.22 (1963). See also Hubocheck, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4, 17-18 (1954).

53 See Felsenfeld, *supra* note 2, at 243.

54 See, e.g., IND. ANN. STAT. § 18-3001 (1964).

55 B. CURRAN, *supra* note 17, at 17. Wyoming provides simply that:

No person shall make any loan . . . until after payment of ten (\$10.00) dollars to the clerk of the municipality in which such loans are made; such payment shall entitle said person to receive a license for the making of such loans, during the current calendar year. . . . These statutes are obvious revenue raising devices.

WYO. STAT. ANN. § 13-490 (1957) (emphasis added).

56 B. CURRAN, *supra* note 17, at 17.

57 See, e.g., ARIZ. REV. STAT. ANN. § 6-605A (1956); IDAHO CODE ANN. § 26-2036(a) (1968); WIS. STAT. ANN. § 214.07(4) (1957).

58 See, e.g., ARIZ. REV. STAT. ANN. 6-605B (1956).

59 See, e.g., ARIZ. STAT. ANN. § 6-605C (1956); ILL. ANN. STAT. ch. 74, § 28 (Smith-Hurd 1966).

60 See B. CURRAN, *supra* note 17, at 19. The administrator or supervisor of the small loan laws is generally designated to be a specific state agency, e.g., the Banking Department.

61 See, e.g., N.J. STAT. ANN. § 17.10-12 (1963).

62 B. CURRAN, *supra* note 17, at 19.

63 *Id.* at 117.

64 For a brief chronology of the progress of the enactment of retail sales laws, see Britton & Ulrich, *supra* note 39, at 151-53.

A number of enactments require that persons engaged in the business of purchasing contracts covered by retail installment sales acts be licensed.⁶⁵ In only one state are all retailers required to be licensed,⁶⁶ but others have statutes providing that if the retailer retains substantial amounts of his own paper,⁶⁷ engages in purchasing installment paper from other sellers,⁶⁸ or is a motor vehicle dealer,⁶⁹ he may be required to obtain a license. These statutes, for the most part, serve only recording and revenue functions and the discretion of the supervisory authority to refuse to issue licenses is restricted. Proper application, posting of a bond, and payment of a fee are generally all that is required.⁷⁰

The comprehensive machinery for detection of violations set out in small loan laws is not customarily provided for in retail sales acts. Discovery of violations is commonly left to the buyer-obligor, and the authority of the licensing official to investigate grievances is limited to those complaints actually made by the consumer.⁷¹ Some statutes, however, also permit the administrator to initiate investigations.⁷² As under small loan statutes, the sales finance company may be required to keep books and records, but annual reports are seldom required.⁷³

2. Penalties under Existing Regulation

Assuming that a violation has been detected, a variety of sanctions is available. They may be categorized into three groupings: (1) administrative action; (2) civil remedies made available to the debtor-obligor; and (3) criminal penalties. The extent to which any combination of these is used in actions against the

65 For a chart showing the application of licensing provisions to sales finance companies, see B. CURRAN, *supra* note 17, at 323-29.

66 FLA. STAT. ANN. § 520.32(1) (Supp. 1969) provides:

For the privilege of conducting, engaging in and carrying on the business of retail seller engaging in retail installment transactions as defined in this act, there is hereby levied and assessed upon every such retail seller, for each store located and operated within this state for the conduct of such business an annual license fee in the sum of five dollars.

FLA. STAT. ANN. § 520.32(2) limits the issuance of licenses to "persons of good moral character."

67 See, e.g., N.Y. BANKING LAW § 491(7) (McKinney Supp. 1968), which provides that a "sales finance company" includes

a retail seller of motor vehicles engaged, in whole or in part, in the business of holding retail instalment contracts acquired from retail buyers, which have aggregate unpaid time balances of twenty-five thousand dollars or more at any time, exclusive of contracts repurchased from a sales finance company or financing agency; . . .

68 PA. STAT. ANN. tit. 69, § 603 (1965) provides that a "sales finance company" includes a "person engaged . . . in the business of financing . . . the installment sales contracts made between other parties . . ."

69 WIS. STAT. ANN. § 218.01(2)(a) (Supp. 1968) provides that:

No motor vehicle dealer, motor vehicle salesman or sales finance company shall engage in business as such in this state without a license therefor as provided in this section. . . . Every motor vehicle dealer shall be responsible for the licensing of every motor vehicle salesman in his employ.

70 See B. CURRAN, *supra* note 17, at 116. But see N.Y. BANKING LAW § 493 (McKinney Supp. 1968) where the superintendent of banking is given the authority to

refuse to issue a license . . . if he shall find that the experience, character and general fitness of the applicant are not such as to command the confidence of the community and to warrant the belief that the business will be conducted honestly and fairly within the purposes and intent of this article.

71 See, e.g., COLO. REV. STAT. ANN. § 13-16-4 (1964).

72 See, e.g., N.Y. BANKING LAW § 497 (McKinney Supp. 1968).

73 B. CURRAN, *supra* note 17, at 117.

various credit institutions reflects, once again, the historical segmentation that pervades legislation in this area.

The licensing authority in the small loan area is given a veritable arsenal to carry out its responsibility of protecting the "necessitous borrower." The administrator is empowered to revoke or suspend licenses for a violation of the act.⁷⁴ He also commonly has the power to issue cease and desist orders,⁷⁵ and he may invoke the provisions that allow cancellation of interest and/or principal.⁷⁶ Injunctions may be brought through the attorney general's office when deemed necessary by the administrator.⁷⁷ Very often, however, the supervisory authority prefers to avoid these formal procedures, and instead informally tells the creditors of their error and, if appropriate, requests them to make refunds. It has been suggested that this non-judicial procedure is justifiable, since it is primarily corrective in nature rather than punitive.⁷⁸

The usual civil remedy made available to the borrower in the small loan laws is the avoidance of his entire debt.⁷⁹ Still, a variety of other more or less severe civil remedies may be imposed on the erring creditor depending on the nature of the violation.⁸⁰ Criminal penalties for wilful violations are almost invariably provided.⁸¹

Remedies left to the obligor and criminal penalties are of little import in evaluating the effectiveness of small loan acts due to the extensive provisions for administrative supervision. Their significance is much different in retail installment sales acts where remedial procedures have been traditionally left to the aggrieved consumer in the form of an action for recovery of all or part of the finance charge.⁸² In this area, it is true that the trend toward requiring licenses for sales finance companies does provide relief via the administrative sector, but this only indirectly affects the erring retailer, who is not subject to any direct administrative control.⁸³ Wilful violations are again cause for a criminal prosecution.⁸⁴ It is noteworthy that the criminal and civil penalties are very often subject to a limitation in the form of a savings or exculpatory clause that makes them inapplicable if the violation is the result of an accidental or bona fide error,⁸⁵ or if the creditor corrects the overcharge after notice from the buyer.⁸⁶

74 *Id.* at 17-18. For a general discussion of enforcement powers, see *Consumer Credit Symposium: Developments in the Law, Enforcement of Consumer Credit Regulation*, 55 NW U.L. REV. 403 (1960).

75 *See, e.g.*, ARIZ. REV. STAT. ANN. § 6.606A (1956); IDAHO CODE ANN. § 26-2036(d) (1968).

76 This power seems to be derived from the general civil remedy provisions, and is sparingly used. *See generally* Felsenfeld, *Some Ruminations About Remedies in Consumer Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 545 (1967).

77 *See, e.g.*, IDAHO CODE ANN. § 26-2036(d) (1968).

78 *Consumer Credit Symposium, supra* note 74, at 407.

79 *See, e.g.*, MD. ANN. CODE art. 58A, § 16(d) (Supp. 1968). For an excellent discussion on the conformity of penalties to different types of violations, see Felsenfeld, *supra* note 76.

80 *See* B. CURRAN, *supra* note 17, at 43-44 and chart at 172-93 where an enumeration of the various penalties is provided.

81 *See, e.g.*, N.Y. BANKING LAW § 358 (McKinney 1950).

82 *See, e.g.*, N.Y. PERS. PROP. LAW § 414(2) (McKinney 1962).

83 *See* note 66 *supra* and accompanying text.

84 *See, e.g.*, N.Y. PERS. PROP. LAW § 414(1) (McKinney 1962).

85 *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-628 (1956).

86 *See, e.g.*, N.Y. PERS. PROP. LAW § 414(3) (McKinney 1962).

3. Evaluation of Present Enforcement

The division of supervisory authority along institutional lines makes generalization difficult. It is clear that the administration of commercial banks, their installment loan departments, and the other supervised financial institutions in the large loan field, is primarily directed toward safeguarding the savings of the public who supply the funds for the use of these institutions. The attitude of the administrators seems to center on preventing the overly generous or careless extension of credit to a high-risk consumer. In short, their charge as promulgated by the legislature is not consumer protection, but depositor protection.⁸⁷ This absence of consumer orientation in the supervisory authority is also common to credit unions. The agency charged with the general supervision of the creation and operation of these organizations is given responsibility for all aspects of the credit unions and is not merely concerned with regulating the lender's conduct toward the borrower.⁸⁸ This is not true of the administrator of the small loan companies. His control of licensing, together with his authority for continuous supervision and power to impose severe penalties, has been regarded as effectively securing protection for the consumer.⁸⁹ The truth of this is apparent from the fact that the private remedies of the consumer are not of great significance and the criminal penalties are seldom used. On the basis of a savings in time and money, there seems to be little doubt that an effectively functioning supervisory authority is superior to the traditional law suit.

Administrators have, in turn, called for an arsenal of effective weapons to be placed at their disposal: "Licensing is the most effective enforcement weapon";⁹⁰ in addition, "striking at the pocketbook" in the form of power to cancel interest and principal⁹¹ is also highly regarded. Two additional remedies — cease and desist orders and the permission to seek an injunction — round out the available weaponry. These are, of course, prospective in nature and consequently the injured debtor must maintain his own action to make himself whole.

The evolution of direct and indirect lending has seen administrative authority charged with the responsibility of enforcing the consumer-borrower's rights, whereas the consumer as buyer has found it necessary to "fight" for himself, without any assistance from the state.⁹² In evaluating this enforcement potential, however, it is unlikely that the distinction between the available retail sales credit and direct borrowing remedies is justified. Experience has demonstrated that the consumer in the credit sale is no less subject to exploitation than our

87 See Jordan & Warren, *The Uniform Consumer Credit Code*, *supra* note 4, at 418.

88 See B. CURRAN, *supra* note 17, at 46-47.

89 See Jordan & Warren, *The Uniform Consumer Credit Code*, *supra* note 4, at 419.

90 Letter from M. L. Rye, Minnesota Commissioner of Banks, to Peter J. Driscoll, January 7, 1969, on file with the *Notre Dame Lawyer*.

91 Letter from H. Johnson, Counsel, Nebraska Department of Banking, to Peter J. Driscoll, January 2, 1969, on file with the *Notre Dame Lawyer*. Mr. Johnson further observed that "[u]nder the installment loan act we cancelled about \$300,000.00 of notes of one licensee and of course cancelled his license. In another case we cancelled about \$100,000.00 of notes and also cancelled the person's license. In another case there was \$900,000.00 of notes cancelled."

92 See Jordan & Warren, *The Uniform Consumer Credit Code*, *supra* note 4, at 427.

"necessitous borrower" in the direct loan situation. The fact is that, for the most part, he is economically and educationally unable to deal with the market, and these deficiencies have militated against the possibility of deriving effective enforcement from the private sector. The consumer, in the first place, is generally ignorant of violations, and even if he does realize that he has been victimized, the small amounts recoverable, measured against the expense of litigation, are conducive to apathy on his part.⁹³ In addition, attorneys are very often unwilling to take a consumer's case because of the minimal size of the recovery.⁹⁴ Consumer ignorance reduces the effectiveness of the criminal penalty also. Very few violations are brought to the attention of the prosecuting officials and, even when they are, these officials are usually too overburdened with the prosecutions of other crimes to be interested in the seemingly minor or technical statutory violations occurring in business transactions.⁹⁵

The exculpatory provisions for inadvertence or prompt corrections of violations in both civil and criminal penalties are regarded as further hindrances to the effectiveness of these sanctions. The critics argue that they encourage the dishonest seller or lender to risk a violation since, even if the violation is detected, he can still collect the legal service charge, and need return only the illegal excess to the consumer.⁹⁶

C. The Conflicts, Compromises and Resultant Theory of Enforcement in The Uniform Consumer Credit Code

The basic philosophy of the new Code is founded on three fundamental principles: first, the belief that the segmentation of the credit market according to institutions and arrangements is artificial, since there is an essential identity to every credit transaction; second, the conviction that the submission of this credit transaction to the competition of the market place is the best method of securing credit at a reasonable cost; and third, the view that comprehensive and flexible administrative supervision is essential to effective consumer credit legislation.⁹⁷ Formulating a code to insure the application of these principles has proven to be a particularly troublesome task. The essence of the problem is that an internally consistent application of these three tenets results in the discarding of interests and notions that have received the imprimatur of acquiescence in the existing regulatory scheme. All sectors of the credit market are on record as faulting one or more of the provisions of the Code. This section will examine the draftsmen's philosophy as it is reflected in the enforcement provisions and will discuss the substance of the opposition that arises from the respective sectors of the industry when they foresee their interests or beliefs being jeopardized.

93 *Economic Institutions and Value Survey: The Consumer in the Market Place — A Survey of the Law of Informed Buying*, 38 N.D. LAWYER 555, 593 (1963).

94 Comment, *Translating Sympathy For Deceived Consumers Into Effective Programs For Protection*, 114 U. PA. L. REV. 395, 409 (1966).

95 *Id.* at 421, 426.

96 *Consumer Credit Symposium*, *supra* note 74, at 412 & n.68, 416-17.

97 For a statement of the basic assumptions on which the UCCG is predicated, see CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at 6-7.

1. Licensing

The first and second tenets mentioned above are complementary in that the artificiality of the present market place precludes consumer comparison and thus precludes effective, recognized competition. The present regulatory scheme has fostered quasi-monopolistic positions in some areas of the market — for example, small loan lenders enjoy a virtual lack of competition from other institutions. The Code does away with this traditional monopoly for small loan companies with the elimination of amount and rate variances, and thereby permits consumer finance companies, commercial banks, credit unions and industrial loan companies to compete for the same consumer-customers.⁹⁸ In addition, the uniform disclosure provisions are designed to enable the consumer to compare the advisability of obtaining a direct loan with financing the product through the dealer from whom he purchases it. In brief, credit is being placed in an atmosphere that will subject it to the stabilizing effect of competition.

The difficulty of primary concern here arises in a consideration of the third tenet. Consumer history was the basis for the decision to have a strong administrative body to guarantee compliance with the Code's provisions. The sales and large loan fields have until now been supervised by weak administrators, with the result that enforcement of substantive rights in these areas has been ineffective.⁹⁹ Effective enforcement and, consequently, consumer protection have been provided only where there exists an aggressive consumer-oriented authority, as under the small loan statutes. Licensing has served as the cornerstone of this enforcement. Its "convenience and advantage tests" have precluded marginal operators, and the threat of license revocation or suspension, joined with liberal investigatory powers, has served as an adequate deterrent.

With this experience, it might be suspected that licensing would serve the Code as the foundation for administrative supervision. However, this was not feasible for a number of reasons. First, since licensing is the implement of a restrictive market, precluding creditors through operation of the "convenience and advantage test," it is repugnant to the tenet of fostering competition.¹⁰⁰ Second, there exists the very practical reality of the administrative quagmire that would result from an attempt to license the thousands of retailers who, under the Code, fall within the direct supervision of the Administrator.¹⁰¹ Third, retailers have in fact enjoyed their freedom from direct administrative supervision and have placed themselves on record as being "completely and unalterably opposed to . . . an administrator."¹⁰² These retailers, supported by the sales finance companies and banks that buy their paper, must be acknowledged as a power to be reckoned with.¹⁰³ They see licensing as wholly unacceptable. From a conceptual, practical and political point of view, therefore, licensing is

98 See N. BUTLER, A SUMMARY OF THE UNIFORM CONSUMER CREDIT CODE 7; Johnson, *supra* note 49, at 307; Richter, *supra* note 4, at 189-90.

99 Moo, *supra* note 51, at 1; Warren, *The Uniform Consumer Credit Code*, 24 BUS. LAW. 209, 213-14 (1968).

100 Warren, *supra* note 99, at 211.

101 See *Consumer Credit Symposium*, *supra* note 74, at 410 n.56.

102 PROCEEDINGS, *supra* note 8, § 6, at 353.

103 See Richter, *supra* note 4, at 189.

an unsuitable cornerstone for building an effective administrative authority that will be charged with securing compliance from the entire credit industry. On the other hand, a tentative decision to eliminate all licensing has met strong and formidable opposition from the National Association of Consumer Credit Administrators, who believe that the exercise of licensing authority is essential to administration and should not be displaced. Objection has also come from small loan creditors who have, in the past, paid the "price" of licensing, and today find themselves rewarded with a virtual monopoly in the small loan field.¹⁰⁴

The UCCC "resolved" this apparently irreconcilable conflict with a statutory compromise that requires any person other than a supervised financial organization¹⁰⁵ to obtain a license if he wishes to engage in the business of

- (1) making supervised loans, or
- (2) taking assignments of and undertaking direct collection of payments from or enforcement of rights against debtors arising from supervised loans, but he may collect and enforce for three months without a license if he promptly applies for a license and his application has not been denied.¹⁰⁶

"Supervised loans" are defined as "regulated loan[s] in which the rate of the loan finance charge exceeds eighteen percent per year as determined according to the provisions on loan finance charges for consumer loans" ¹⁰⁷ In effect, the coverage of the Code's licensing provisions approximates the scope of licensing under present legislation. Indirect lenders, including retailers and sales finance companies, need not obtain licenses. Only the high interest-low amount creditors, commonly referred to as small loan lenders, must be licensed under this section.

Further analysis of the application of this section reveals that even this "compromise" is, in fact, a rejection of the contention that licensing should be at the heart of effective administration. Many of the ingredients of the customary licensing requirements are eliminated. The draftsmen, fully aware of the increased scope of administrative responsibility, have removed some of the day-to-day mechanics of licensing. With the hope that the licensing personnel will concentrate their efforts on detecting violations rather than on the interminable processing of licensing applications,¹⁰⁸ the UCCC requires that the supervised lenders need obtain only a single license for all operations conducted within a state; in addition, it does not make necessary any burdensome annual renewal of licenses.

¹⁰⁴ Moo, *supra* note 51, at 6.

¹⁰⁵ "Supervised financial organization" is defined in the Code as a person, other than an insurance company or other organization primarily engaged in an insurance business, (a) organized, chartered, or holding an authorization certificate under the laws of this State or the United States which authorize the person to make loans and to receive deposits, including a savings, share, certificate or deposit account, and (b) subject to supervision by an official or agency of this State or of the United States. CGH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 811 [UCCC § 1.301(16)]. These organizations primarily are banks and credit unions.

¹⁰⁶ *Id.* at ¶ 917 [UCCC § 3.502].

¹⁰⁷ *Id.* at ¶ 916 [UCCC § 3.501(3)]. Only supervised lenders, *i.e.*, those that make available loans in which the rate of the finance charge exceeds eighteen per cent, need be licensed. Regulated lenders, *i.e.*, those that impose more than a ten per cent finance charge, are within the ambit of the Code but need not be licensed. *Id.*

¹⁰⁸ Dunham, *Unconscionable Conduct and the Uniform Consumer Credit Code*, 23 J. FINANCE 312, 318-19 (1968).

The draftsmen's belief that "[t]here is no apparent reason why competitive forces in a free market cannot be relied on to produce efficient firms which will serve the public interest"¹⁰⁹ required that the traditional "convenience and advantage tests" for licensing be discarded. The UCCC provides a more lenient standard:

No license shall be issued unless the Administrator, upon investigation, finds that the financial responsibility, character and fitness of the applicant . . . are such as to warrant belief that the business will be operated honestly and fairly within the purposes of this Act.¹¹⁰

It is hoped that this licensing test will encourage freedom of entry into the consumer credit market place; and not be used by the Administrator to preclude lenders.¹¹¹ Free entry, along with disclosure of credit terms in a uniform manner, and a high rate ceiling that will permit interest costs to level off somewhere below it, are seen as the foundations for securing effective competition¹¹² — one of the basic tenets of the Code.¹¹³ However, the antithesis of free entry, the "convenience and advantage test," has a long history in consumer credit and many members of the industry, for a variety of reasons, object to its absence. The small loan lender, as earlier noted, has had little competition from other creditor institutions. Free entry will eliminate his monopoly. The commercial banking industry believes that it will suffer if free entry is permitted. Indeed, the Consumer Bankers Association, representing the industry, originally supported the UCCC project but now opposes the Code primarily because of the free entry concept.¹¹⁴ The banks' objection lies in the fact that they cannot expand due to

109 Jordan & Warren, *The Uniform Consumer Credit Code*, *supra* note 4, at 432.

110 CCH *INSTALLMENT CREDIT GUIDE*, *supra* note 4, at ¶ 918 [UCCC § 3.503(2)].

111 The Comment to UCCC § 3.503 notes that

[t]he purpose [of the section] is to facilitate entry into the cash loan field so that the resultant rate competition fostered by disclosure will generally force rates below the permitted maximum charges

A secondary purpose is to reduce the likelihood of establishing local monopolies in the granting of cash credit. *Id.* at ¶ 918.

112 *Id.* at ¶ 918 [Comment to UCCC § 3.503].

113 See note 6 *supra* and accompanying text.

114 In a resolution adopted by the Consumer Bankers Association at their 48th Annual Convention, at the Homestead, Hot Springs, Virginia, on October 24, 1968, the Association expressed its disfavor of free entry. This disfavor was reiterated in an addendum to the resolution. The addendum provided that:

The nation's banks and organizations representing them should strongly oppose provisions of the Code that deal with the following objections:

Objection No. 2. . . . "Free Entry"

The proposed Code would allow any "person" to enter the direct consumer loan field, permitting:

1. Inter and intra-state branching by large retail chains, personal finance chains, consumer service companies.
2. The upset of the competitive balance in the consumer lending market because banks are limited in branching activities.
3. Lenders to enter the field without the restrictions, regulations, examination procedures and tax structure with which commercial banks must comply.
4. The dilution of the power of the individual States to control lending activities within its borders. [This particular objection was prompted by UCCC § 3.502 which does not require that a licensee be a state resident.]
5. The burden of paying for administrative costs of the program to be carried by commercial banks. Addendum to the Consumer Bankers Association Resolution on the Uniform Consumer Credit Code, on file with the *Notre Dame Lawyer*.

Resolution on the Uniform Consumer Credit Code, on file with the *Notre Dame Lawyer*.

restrictions on branch offices in their charters, and thus free entry, permitting other lenders to establish more offices, will be discriminatory toward them. This objection is acknowledged by the draftsmen who lamely express their confidence in banking ingenuity to circumvent the problem.¹¹⁵ Opposition is also voiced by the administrators who will likely be charged with the responsibility of enforcement.¹¹⁶ The Commissioner of Banks in Minnesota observed that "[i]t is my opinion, and it is shared by many, that in this State it would be necessary to have an amendment to the Code to include convenience and advantage laws"¹¹⁷

In addition to this opposition, a more serious challenge has been thrust at the heart of the Code's philosophy. It is argued that there is neither historic nor economic justification for the draftsmen's expectations that free entry will foster an efficient and competitive market.¹¹⁸ The principle of free entry creates a market composed of small operations, whereas the actual economics of the small loan business demonstrates that it is only through large volume offices that efficient operations can be provided.¹¹⁹ In sum, then, the licensing "compromise" achieved by the Code is subject to severe attack, both by those who have vested interests under present regulations, and by critics who take issue with the basic principles of the Code.

Having rejected licensing, the UCCC still needed to provide for some of the functions that licensing had customarily performed.¹²⁰ Provision is made for the procurement of funds to cover costs of administration,¹²¹ and information as to the essentials of the creditors' business operation is received by requiring that all creditors file a notice of doing business.¹²² These obligations are also designed for simplicity in administration.¹²³

¹¹⁵ Warren, *supra* note 99 at 211-12.

¹¹⁶ On May 6, 1968, the National Association of Consumer Credit Administrators approved a resolution expressing opposition to the UCCC on a number of grounds including the unacceptable licensing provisions. For the text of the resolution, see *Consumer Credit Administrators Oppose Uniform Consumer Credit Code*, 22 PERS. FIN. L.Q. REP. 131 (1968).

¹¹⁷ See letter from M. L. Rye, Minnesota Commissioner of Banks, *supra* note 90.

¹¹⁸ Harper, *supra* note 52, at 228, states: "In response to the unsubstantiated urgings that freedom of entry will lead only to the good of all, one is reminded of the title of the song in Gershwin's 'Porgie and Bess'—*It Ain't Necessarily So*."

¹¹⁹ *Id.* This writer draws on economic studies of the consumer finance business to develop a thorough attack on the free entry concept. For an argument in support of free entry also based on economic studies, see Warren, *supra* note 99, at 210; Johnson, *supra* note 49, at 310. Both sides, strangely enough, are able to draw their economic arguments from the same study: J. CHAPMAN & R. SHAY, *THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION* (1967).

¹²⁰ For an enumeration of these functions, see text accompanying note 51 *supra*.

¹²¹ CCH *INSTALLMENT CREDIT GUIDE*, *supra* note 4, at ¶ 987 [UCCC § 6.203].

¹²² CCH *INSTALLMENT CREDIT GUIDE*, *supra* note 4, at ¶ 986 [UCCC § 6.202].

The notification shall state:

- (a) the name of the person [creditor];
- (b) name in which business is transacted if different from (1);
- (c) address of principal office, which may be outside this State;
- (d) address of all offices or retail stores, if any, in this State at which consumer credit sales, consumer leases, or consumer loans are made, or in the case of a person taking assignments of obligations, the offices or places of business within this State at which business is transacted;
- (e) if consumer credit sales, consumer leases, or consumer loans are made otherwise than at an office or retail store in this State, a brief description of the manner in which they are made;
- (f) address of designated agent upon whom service of process may be made in this State (Section 1.203); and
- (g) whether regulated or supervised loans or both are made. *Id.*

¹²³ See, e.g., *id.* [UCCC § 6.202(2)], which provides: "If information in a notification

2. Administrator

Today in many states there exists an administrative division of responsibility to the extent that different agencies supervise the activities of sales finance companies, commercial banks, and credit unions.¹²⁴ It is clear that this disintegration of uniform authority is conducive to ineffectiveness. It has been argued that there is

nothing inconsistent as a matter of law or administrative practice in centralizing the supervision and enforcement of the Consumer Credit Code in a single agency. That other agencies or departments may supervise, regulate or examine credit unions or savings banks or commercial banks for fiscal soundness, financial responsibility, asset liquidity, etc., does not conflict or overlap with the enforcement of the provisions of the Consumer Credit Code.¹²⁵

The Code draftsmen are less certain of the feasibility of this approach and, although they encourage centralized administration, they have realized that this may not always be politically or constitutionally possible. Therefore, while the Code recommends that a single official be designated Administrator, it mentions that where a state elects to appoint two or more agencies to supervise different creditors, these different agencies should be made components of a single commission and this commission should be designated the Code's administrative authority.¹²⁶

Banking institutions and credit unions — often referred to as “supervised financial organizations” — are expected to remain under the general supervision of a federal or state official other than the Code Administrator. Yet even in this situation the UCCC attempts to cultivate uniformity of protection. The Administrator is precluded from exercising those powers that might interfere with the internal operations of these “supervised financial organizations.” Consequently, he may exercise neither his powers of investigation nor his authority to issue cease and desist orders. However, as may any individual, the Administrator can petition the courts to enjoin violations of the Code and seek to have

becomes inaccurate after filing, no further notification is required until the following January 31.”

¹²⁴ See text accompanying notes 87-88 *supra*.

¹²⁵ PROCEEDINGS, *supra* note 8, § 6, at 354. Mr. Moo continued:

As a matter of fact, the Comptroller, the State Banking Department or agency, the Federal Reserve Board, the FDIC, etc., should welcome and encourage the assumption by a Consumer Credit Administrator of the duties and responsibilities to see that the particular supervised financial organizations involved are complying with the rules for making consumer loans or financing consumer credit sales. The expertise of Administrators charged only with enforcement of consumer credit laws and regulations is highly preferable to split authority or dual responsibility or the casting of the burden of enforcement of the Consumer Credit Code on the agencies of government whose primary responsibility in examining supervised financial organizations is to protect financial responsibility and liquidity to safeguard the time and demand savings of the public supplying funds for the use of those institutions. *Id.* § 6, at 354-55.

For a brief discussion of the delicate question of the Administrator's authority over institutions supervised by other officials, see Jordan & Warren, *The Uniform Consumer Credit Code*, *supra* note 4, at 420.

¹²⁶ See CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 971 [Comment to UCCC § 6.103].

penalties imposed.¹²⁷ Further uniformity is provided under directions given to the Administrator to cooperate with any state authority having supervisory responsibility, through joint investigations, prosecution of suits and other official actions, in enforcing the provisions of the Code.¹²⁸ The Administrator is directed to report information about violations that come to his attention to the appropriate supervisory authority and is given permission to request information regarding "supervised financial organizations" from the agencies to whom they are responsible.¹²⁹

3. Debtor's Remedies, Criminal Penalties and Administrative Powers

Prior to focusing attention on the actual remedies provided by the UCCC, the provisions for detecting erring creditors should be mentioned. Those creditors who are required to be licensed under the Code must maintain appropriate records and submit annual reports to the Administrator.¹³⁰ The Administrator, in turn, is required to make general periodic investigations of all licensees "at such intervals as he deems appropriate,"¹³¹ and he is given free access to the records these licensees are required to keep.¹³²

These potent investigatory tools are not available to the Administrator in his dealings with those non-licensed creditors who still come within the Code's jurisdiction. Not only are these creditors not required to maintain complete records, but it is only upon a finding of "probable cause to believe that a person has engaged in an act which is subject to action by the Administrator" that an investigation to determine whether the act has been committed may proceed.¹³³ Allowing investigations of non-licensees only upon a finding of "probable cause" has been subject to some criticism.¹³⁴ However, since a showing of "probable cause" does not require that a complaint must issue from an aggrieved consumer, the probable cause limitation may not be unduly burdensome, and, in fact, may be justifiable, for it will serve to reduce the hostility of indirect lenders towards submitting to any supervision whatsoever.

Once the investigation is allowed to proceed, liberal methods are provided to insure its effectiveness. The Administrator is given the authority to compel the production of books and records, subpoena witnesses and administer oaths.¹³⁵ If the person's records are located outside the state, they must either be made available to the Administrator within the state, or the party under investigation must pay the expenses for investigation elsewhere. The provision for aiding an out-of-state investigation is valuable in that it allows the Administrator to "designate representatives, including comparable officials of the State in which the records are located, to inspect them on his behalf."¹³⁶ Similar provisions have

127 *Id.* at ¶ 973 [UCCC § 6.105(1)].

128 *Id.* [UCCC § 6.105(3)].

129 *Id.* [UCCC § 6.105(2)].

130 *Id.* at ¶ 920 [UCCC § 3.505].

131 *Id.* at ¶ 921 [UCCC § 3.506(1)].

132 *Id.*

133 *Id.* at ¶ 974 [UCCC § 6.106(1)].

134 Moo, *supra* note 51, at 10.

135 *Id.* at ¶ 921, 974 [UCCC §§ 3.506(3), 6.106 (1)].

136 *Id.* [UCCC §§ 3.506(3), 6.106(2)].

been made available to Insurance Commissioners and, through their national associations, joint investigations have been successfully conducted.¹³⁷

The private sector has been of little consequence in existing statutory schemes. As previously mentioned, the consumer's ignorance and subsequent mistreatment are not adequately remedied through expensive private litigation. The Code's provisions for debtor's remedies, therefore, do not seem to be idle work. The requirement of disclosure of finance terms and new simplifications of the existing credit structure not only will make many consumers more aware of their rights, but should make them more ready to seek enforcement of them. Allison Dunham, Executive Director of the National Conference, expressed the expectations of the Commissioners when he predicted

that the availability of legal services will continue to increase and that along with this increase will come an increased awareness of the advantages of consulting a lawyer, publicly or privately provided, about credit problems. Although there is nothing in the Code which provides for legal services for the lower income portion of society, a statutory scheme giving debtors rights can work well as a deterrent only if the creditor segment of society takes into account the probability of laws [*sic*] suits for violation of the Code.¹³⁸

The inadequate use of private remedies because of the possibility of obtaining only a small recovery is partially met by a provision that allows the court to award attorney's fees to the successful debtor.¹³⁹ This, it is hoped, will encourage lawyers to assist debtors. Specific provisions permitting recovery of more than the amount of proven damages are also designed to encourage private actions.¹⁴⁰ Although no explicit provision was thought necessary in the Code,¹⁴¹ a procedural development, one that creditors truly fear, is the increased use of class actions.

For violation of the restrictions on the use of negotiable notes in a consumer credit sale or lease, or of the limitations on the schedule of payments and terms for regulated loans, the debtor is freed from his obligation to pay the credit service or loan finance charge; he may also recover a penalty. If a creditor making supervised loans fails to get a license, the debtor is relieved of his obligation to pay principal or interest. The consumer-debtor is given the right to demand a refund if he has paid an excess charge, and if the creditor refuses to repay after a reasonable time, the debtor may recover a penalty not to exceed the amount of the credit service charge or ten times the amount of the excess charge, whichever is greater.¹⁴² This last penalty has been criticized as worthless,¹⁴³ but it does seem to provide the debtor some leverage in obtaining a refund

137 Moo, *supra* note 51, at 9.

138 Dunham, *supra* note 108, at 316.

139 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 963, 964 [UCCG §§ 5.202(8), 5.203(1)(b)]. Some states provide for a mandatory recovery of attorney's fees; see, e.g., MICH. COMP. LAW ANN. § 438.32 (1967).

140 See, e.g., CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 963 [UCCG § 5.202].

141 Dunham, *supra* note 108, at 316.

142 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 963 [UCCG § 5.202(4)].

143 The Maryland Banking Commissioner stated that:

This section is an exercise in futility at best. The skilled and experienced creditor who acts unconscionably has to give back the excess. He still gets to keep the principal and the maximum legally allowable rate of interest; even when he loses, he wins. PROCEEDINGS, *supra* note 8, § 5, at 341A.

without going to court. If the excess charge was made in deliberate violation of or in reckless disregard for the Code requirements, the penalty may be recovered even though the creditor refunded the excess charge.¹⁴⁴ The often-criticized exculpatory clause¹⁴⁵ is apposite and the above-mentioned penalties are not imposed "[i]f the creditor establishes by a preponderance of evidence that a violation is unintentional on the result of a bona fide error"¹⁴⁶ Criminal sanctions follow existing statutory patterns and provide penalties for wilful violations.¹⁴⁷ However, the Code's draftsmen have suggested that heavy reliance is not to be placed on these provisions.¹⁴⁸

Separate civil and criminal remedies are established for disclosure violations of the Code.¹⁴⁹ This was done to bring the Code into conformity with the CCPA's "truth in lending" provisions. The CCPA provides that if a state has substantially similar requirements of disclosure, and adequate enforcement, that state shall be exempted from the disclosure requirements of the federal act.¹⁵⁰ The Code is thus designed to qualify for this exemption and thereby return control of all aspects of credit transactions to the state level.

In delineating the powers and functions of the supervisory authority, the National Conference demonstrated a sensitivity toward the existing causes of present ineffectiveness in administration. It was obvious that, under the Code, the Administrator would have to be more than a representative of the aggrieved consumer, in light of the thousands of retailers he must now deal with. However, it was also clear that private action was not yet an effective weapon and something more was needed to make the abused debtor whole.

The draftsmen have provided the Administrator with the authority to issue cease and desist orders¹⁵¹ and to seek injunctions¹⁵² for violations of the Code. Temporary relief is also available where appropriate.¹⁵³ A controversial innovation was the authority given to the Administrator to

bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of

- (a) making or enforcing unconscionable terms or provisions of consumer credit sales, consumer leases, or consumer loans;
- (b) fraudulent or unconscionable conduct in inducing debtors to enter into consumer credit sales, consumer leases, or consumer loans; or
- (c) fraudulent or unconscionable conduct in the collection of debts arising from consumer credit sales, consumer leases, or consumer loans.¹⁵⁴

144 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 963 [UCCG § 5-202(4)].

145 See text accompanying note 96 *supra*.

146 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 963 [UCCG § 5.202(7)].

147 *Id.* at ¶ 967 [UCCG § 5.301].

148 Dunham, *supra* note 108, at 317.

149 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶¶ 964, 968 [UCCG §§ 5.203, 5.306]. For discussion of these remedies under the CCPA, see text accompanying notes 193-98 *infra*.

150 Pub. L. No. 90-321, § 123, 82 Stat. 146. The National Conference has already petitioned the Federal Reserve Board requesting that the UCCG be recognized as qualified for the exemption.

151 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 976 [UCCG § 6.108].

152 *Id.* at ¶ 978 [UCCG § 6.110].

153 *Id.* at ¶ 980 [UCCG § 6.112].

154 *Id.* at ¶ 979 [UCCG § 6.111]. In this section, the Code points out guidelines to be used in determining what conduct should be classified as "fraudulent or unconscionable."

This section manifests a forethought that runs throughout these provisions for enforcement: the Administrator must have the flexibility to deal with the imaginative schemes that a small minority of dishonest creditors are likely to devise. This departure from setting out well-defined standards of conduct disturbs creditor representatives.¹⁵⁵ For them, the discretion that this provision spells out too often results in arbitrariness. Their success in the courts has not been encouraging as of late, and they would prefer an acknowledged definiteness in the control of their behavior. It has been observed that

[t]hose types of contract provisions or clauses which are unfair and oppressive can be specifically interdicted and the validity and enforceability of financial contracts aggregating more than seventy billion dollars need not be subjected to the whims and caprice of the personal prejudices of a court or jury.¹⁵⁶

In addition to these formal provisions, the Administrator's use of informal action to obtain voluntary compliance with statutory demands is codified. This procedure authorizes the Administrator to accept from erring creditors written assurance that they will not engage in illegal conduct in the future; it is designed to encourage creditors and the Administrator to continue to resolve disputes without court proceedings.¹⁵⁷

All of the administrative provisions discussed above have aimed at preventing future illegality, and do not make the aggrieved debtor whole for any present injustice. Under existing regulations, the aggrieved consumer would probably have to institute his own legal action to recover his loss. The UCCC draftsmen, although optimistic about the future of securing enforcement through efforts by private sector, were not satisfied with the condition of the aggrieved debtor. Consequently, they also gave the Administrator the characteristics of a debtor representative. The civil action that allowed the consumer to recover excess charges is also made available to the Administrator, who may secure the refund for the debtor.¹⁵⁸ The Administrator's action may, in fact, "relate to transactions with more than one debtor,"¹⁵⁹ and the thought of the Administrator leading what looks like a class action would not seem to be a happy sight for careless creditors. There is, finally, a provision that authorizes the Administrator to sue for a civil penalty of \$5,000 for a wilful violation of the act "if the court finds that the defendant has engaged in a course of repeated and wilful violations in this Act."¹⁶⁰ It would appear that this provision's resemblance to a criminal sanction is more than coincidental.

D. Conclusion

The Uniform Consumer Credit Code reveals a perceptive awareness of the weaknesses that have plagued past efforts at consumer credit legislation. The

155 *See* PROCEEDINGS, *supra* note 8, § 6, at 364c-367.

156 *Id.* § 6, at 366.

157 CCH INSTALMENT CREDIT GUIDE, *supra* note 4, at ¶ 977 [UGCC § 6.109].

158 *Id.* at ¶ 981 [UGCC § 6.113(1)].

159 *Id.*

160 *Id.* [UGCC § 6.113(2)].

elimination of these defects was envisioned by a complete restructuring of the entire credit regulatory scheme. The basis for this rebuilding rested in the central philosophy of the Code — the belief that credit should be returned to the market place.

The consistent application of this philosophy in the drafting of the Code has produced decisions that alienate various members of the credit industry. Such alienation, however, is not due to a "short-sightedness" on the part of the draftsmen. Conflicts were presented, discussed in detail, and compromises were made. The alienation was the inevitable result of the very application of the Code's philosophy to the variegated consumer credit market. Competition requires the informed use of credit, and the informed use of credit demands that credit transactions be treated uniformly. Uniformity, however, requires disturbing many of the traditional beliefs and "vested interests" existing in a disparate market.

Licensing as the implement for the creation of a restrictive market was repugnant to the Code's philosophy and was totally unacceptable to retailers. The present supervisory authorities, however, demanded the licensing of creditors who were already subject to their control. The conflict was irreconcilable and the solution can only guardedly be called a "compromise." The resulting elimination of "convenience and advantage tests" raised a wide spectrum of opposition. Small loan lenders opposed it, and the National Conference of Consumer Credit Administrators and the Consumer Bankers Association both passed formal resolutions opposing the Code because of its licensing provisions. Their hostility will be forcefully manifested in state legislative halls when the UCCG is considered for adoption. We may expect an attempt to have the Code amended to include the "convenience and advantage" test, although the addition of this clause would endanger the goal of competition and thus contravene the basic philosophy of the Code. On the other hand, an attempt to expand the coverage of the licensing requirements will draw the ire of indirect lenders, especially retailers. They oppose administrative interference with their activities and have succeeded in obtaining a codified requirement that the Administrator must have "probable cause" to believe they are contravening the Code before he can inquire into their operations. It can be expected that state administrators will fight to eliminate this restriction on their authority.

Potential legislative conflict exists also in an analysis of available remedies. The arsenal of remedies made available to the Administrator is a potent one. It includes injunctions, cease and desist orders and the right to sue for a civil penalty on behalf of an aggrieved consumer. The additional authority to enjoin fraudulent and unconscionable conduct gives the Administrator the needed flexibility to deal with an ever-changing credit market. A real possibility exists that this last remedy may be eliminated by states who adopt the Code, in light of the opposition that the credit industry as a whole has demonstrated toward this "arbitrary" weapon.

Experience indicates that any predictions regarding the possibility of securing effective enforcement of consumer rights through civil debtor remedies should be made cautiously. The improved nature of legal services, and the

employment of class actions in conjunction with the improved UCCC remedies do, however, offer some encouragement for the future enforcement of rights by the private sector.

These observations assume, of course, that the UCCC will be adopted without substantial dilution — if it is enacted at all. Bankers oppose it; direct and indirect lenders dislike all or part of it; and even the Administrators who will be charged with enforcing the Code have recorded their hostility to the provisions for administration. The UCCC may not survive such opposition. The very segmentation that is marked for elimination may have fostered interests capable of preventing the fulfillment of the UCCC promise.

II. Securing Compliance With the Federal Consumer Credit Protection Act

A. *The Truth in Lending Promise*

Dissatisfied with the progress of state legislation in dealing with the problems of the consumer, and finding that severe economic consequences arise from the uninformed use of credit, the federal government decided to make an entry into the consumer credit regulation field.¹⁶¹ The result of this effort is the CCPA, commonly called the Truth in Lending Act.¹⁶² Unlike the comprehensive UCCC, the federal act is limited to assuring “a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.”¹⁶³ It does not purport to supplant existing state regulatory schemes; rather, it superimposes on them a requirement that credit terms and costs be explained to the consumer in a uniform manner by revealing the “annual percentage rate of the total finance charge.”¹⁶⁴

What the CCPA may lack in comprehensiveness is compensated for by its immediacy. Whereas the UCCC has yet to be adopted by any state, the Truth in Lending Act goes into effect on July 1, 1969.¹⁶⁵ Our concern here, as with the UCCC, is whether the guarantees provided in the statute will be effectively secured. This concern is not an idle one. Sheldon Feldman, the attorney in charge of the Truth in Lending activities in the Federal Trade Commission, has noted that:

161 See note 6 *supra* for the statement of the congressional findings that prompted the enactment of the CCPA. The federal government has had extensive experience in regulating consumer credit transactions as part of the interstate commerce power granted to Congress by the United States Constitution. U.S. CONST. art. I, § 7. The most notable exercise of this power was its “Regulation W,” which required that the consumer be informed of precisely what he was paying. Both national and state banks are subject to federal authority, and the federal government regulates federal credit unions. The Federal Trade Commission, in addition to its activities in the field of advertising, proscribes certain conduct and requires disclosure in connection with the sale of automobiles. For citations to the authority for this federal activity and discussion of other federal interest in consumer transactions, see *Symposium, supra* note 74, at 403 n.2.

162 Title I of the CCPA has the short title “Truth in Lending Act”; however, the entire act is generally referred to by that name. Pub. L. No. 90-321, § 101, 82 Stat. 146.

163 *Id.* § 102.

164 *Id.* § 126, 82 Stat. 153.

165 *Id.* § 504, 82 Stat. 167. The garnishment restrictions take effect July 1, 1970; the remainder of the CCPA took effect upon enactment.

All of the words spoken on the need for this legislation will be hollow phrases and all of the legislative work and regulation writing will be meaningless and wasted effort unless we [the Federal Trade Commission] *fulfill the promises that have been made to the American consumer.*¹⁶⁶ (Emphasis added.)

B. *The Problems of Enforcement in the Federal Structure*

Much of the controversy that occurred in the eight year gestation period of the CCPA surrounded the assignment of responsibility for administration and enforcement of the new Act. Senator Douglas, the original sponsor of Truth in Lending, proposed that the Board of Governors of the Federal Reserve System be the administrative and enforcing authority.¹⁶⁷ This was thought by some to be a transparent attempt to avoid the "interstate" limitations placed upon the jurisdiction of the Federal Trade Commission.¹⁶⁸ President Kennedy felt that this responsibility would be best left to the Federal Trade Commission,¹⁶⁹ and Chairman Martin of the Federal Reserve Board observed that "administration of such legislation would not constitute an appropriate activity of the Federal Reserve System."¹⁷⁰

Senator Douglas and later Senator Proxmire seemed to muddy the water surrounding the issue of who should assume administrative and enforcement responsibility. They believed the Act would be adequately secured by activity from the private sector:

Is it not true that under section 7(a) of the bill that the law would be largely — I would anticipate — self-enforcing; that a consumer who felt that the law had been violated can sue in court, and in general *it would be my understanding that the law would be enforced in this way.* This isn't to say that it is the only way. But much of the enforcement could be done on this basis, rather than with the necessary activity of either the Federal Reserve Board or another Federal agency other than perhaps the Justice Department.¹⁷¹ (Emphasis added.)

It would seem that the private enforcement experience under state statutes belies this argument,¹⁷² as does the House Report accompanying the Act:

For the relatively unsophisticated consumer, particularly those of modest means, administrative enforcement will provide their only protection against unscrupulous merchants or lenders. Such consumers neither will have the means for instituting their own civil suits, nor adequate knowledge or ex-

166 Address by Sheldon Feldman, Attorney, Federal Trade Commission, before the American Home Economics Consumer Credit Workshop at the Cooperative Extension Service, West Virginia University, Oct. 26, 1968, at 17 [hereinafter referred to as Feldman]. Paginated copy on file with the *Notre Dame Lawyer*.

167 *Survey*, *supra* note 93, at 596.

168 *Id.*

169 Presidential Consumers Message to Congress, 108 CONG. REC. 4167, 4170 (1962).

170 1961 *Hearings on Truth in Lending*, *supra* note 3, at 16.

171 1967 *Hearings on Truth in Lending*, *supra* note 3, at 682 (remarks of Senator Proxmire).

172 See text accompanying notes 93-94 *supra*.

perience to enable them to file a complaint through proper channels to obtain redress through the Attorney General in a criminal action.¹⁷³

The final resolution regarding the administration issue was that the Federal Reserve Board would be the central agency for formulating and issuing all substantive regulations on credit disclosure and advertising.¹⁷⁴ Responsibility for enforcement, however, was given to the Federal Trade Commission, except as to those institutions already subject to the authority of federal supervisory agencies. Under this exception, the Federal Home Loan Bank Board will be responsible for the enforcement of those regulations affecting savings and loan institutions; the Comptroller of Currency for national banks; the Federal Reserve Board itself for state banks which are members of the Federal Reserve System; and the Federal Deposit Insurance Corporation for federally-insured state non-member banks. The Director of the Bureau of Credit Unions will enforce requirements for federal credit unions. In addition, the Civil Aeronautics Board or the Federal Aviation Agency, the Interstate Commerce Commission and the Department of Agriculture will exercise jurisdiction over the institutions that they traditionally control.¹⁷⁵ It is submitted that this divisiveness will do little to ensure consistent enforcement. The traditional lack of consumer-orientation in these agencies may well produce inconsistencies that will render the ideal of meaningful disclosure illusory. It is conceded, however, that the creditors under the jurisdiction of these agencies should not be the institutions that give rise to problems with compliance.

The major problem areas are expected to fall within the ambit of the Federal Trade Commission's responsibility. The Commission expects its jurisdiction to encompass creditors holding approximately fifty billion dollars in consumer debt.¹⁷⁶ These creditors will include consumer and sales finance companies; home improvement companies, service creditor companies and retailers of all kinds.¹⁷⁷ For the purpose of pursuing its assigned responsibility, the Act provides:

All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.¹⁷⁸

Providing the Commission with this weaponry seems to exhibit an unawareness of past experience and suggests an expedient solution rather than a complete perception of the problem.

The Federal Trade Commission has been constantly decried as "notoriously

173 H. R. REP. No. 1040, 90th Cong., 1st Sess. 18 (1967).

174 Pub. L. No. 90-321, § 105, 82 Stat. 148. Pursuant to its mandate the Board issued proposed regulations. 33 Fed. Reg. 15506 (1968).

175 Pub. L. No. 90-321, § 108, 82 Stat. 150.

176 Feldman, *supra* note 166, at 13.

177 *Id.* For an idea of the scope of the FTC's responsibility, consider that there were 1200 sales finance companies with outstanding credit of over sixteen billion dollars in 1965, and 2500 personal finance companies with loans totaling nine billion dollars. These companies have innumerable branches, and the Commission also has responsibility for approximately two million retailers. *Id.* at 13-14.

178 Pub. L. No. 90-321, § 108(c), 82 Stat. 150.

ineffective,¹⁷⁹ and the cause of this ineffectiveness is found in the limited scope of its enforcement powers and their attendant inexpeditious procedure.¹⁸⁰ The Commission has no authority to punish or to collect damages; its only function is to prevent, through the use of cease and desist orders.¹⁸¹ This scope of authority might have served well the slower-paced antitrust problems for which the Federal Trade Commission was originally designed, but when the Commission decided to concern itself with false advertising, the cease and desist order did not function to provide immediate relief for the consumer.¹⁸² Realizing this, the Commission developed the procedure of "consent orders" which permit an earlier resolution of complaints, since they do not require the time-consuming administrative processes that surround the issuance of cease and desist orders.¹⁸³ In addition, informal procedures are employed. Yet even these additional procedures cannot rid the Commission of the label "ineffective."

Little value would be derived from a documentation of the deficiencies in the Commission's performance of its duties. Myriad studies have analyzed them,¹⁸⁴ and the Commission itself acknowledges its past ineffectiveness and seems acutely aware of it in light of its newly assigned responsibility:

The Commission is not deaf to the voices of its critics, and we know full well that there is ample room for improvement in the effectiveness of our activities. . . . In spite of what some would have you believe, we are not content with our past efforts, and I think that this lack of complacency is in itself a healthy sign. We recognize that we must search for new ways to make progress in a war that can never be completely won — and that is what we hope to do in Truth in Lending.¹⁸⁵

The Commission expects that the very nature of its new charge will be conducive to a more expedient determination of violations.¹⁸⁶ Although it will continue to petition for a power in the nature of a temporary injunctive order,¹⁸⁷ it is ex-

179 Warne, *Advertising—A Critic's View*, J. MARKETING 10, 13 (Oct. 1962). See also Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548 (1964); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964); Comment, *supra* note 94, at 442-45.

180 Comment, *supra* note 94, at 444.

181 1968-69 U.S. GOV'T ORG. MANUAL 465.

182 See Millstein, *supra* note 179, at 451.

183 For an enlightening discussion of the development of the use of consent orders, see Baum & Baker, *Enforcement, Voluntary Compliance, and the Federal Trade Commission*, 38 IND. L.J. 322 (1963).

184 See articles cited in note 179 *supra*.

185 Feldman, *supra* note 166, at 19-20.

186 Interview with Sheldon Feldman, Attorney-in-Charge of Truth in Lending, Federal Trade Commission, in Washington, D.C., January 7, 1969.

187 A number of interests have recommended that the FTC be given a power in the nature of a temporary cease and desist order. In its most recent report to Congress, the Commission has suggested in its legislative recommendations that section 13(a)(1) of the Federal Trade Commission Act be amended to read as follows:

Section 16(a). Whenever (1) the Commission has any reason to believe that any person . . . is engaged in, or is about to engage in, acts or practices that violate any law administered by the Commission, and the Commission has issued, or intends to issue, a complaint against such acts or practices, and (2) it would be in the public interest to enjoin such acts or practices until such complaint is dismissed by the Commission or set aside by the court on review or until an order to cease and desist made thereon by the Commission has become final, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States . . . to enjoin such acts or practices. Upon proper showing

pected that efficiency in securing the "Truth in Lending" guarantees will be attainable without it.¹⁸⁸ Cases presently take about a year to reach the Commission level for issuance of a complaint;¹⁸⁹ this is primarily because the nature of the activities dealt with demands time-consuming investigation. Violations of "Truth in Lending," however are of per se nature, and should therefore be clearly definable without extensive fact gathering. Tentative plans exist to shorten the period prior to the issuance of a complaint to a few weeks through the use of field examiners that will periodically investigate the institutions within the Commission's jurisdiction, as well as receive complaints. If the erring creditor does not submit to a consent order at the time of the complaint, it is again expected that the per se nature of the violation will permit rapid follow-through and issuance of a cease and desist order.¹⁹⁰ This order, however, can be challenged by the respondent in the court of appeals by an action brought within sixty days of issuance; it is not final until exhaustion of the last opportunity to appeal.¹⁹¹ In this way, if a creditor does not wish to conform to the mandate of the CCPA, it will be possible for him to continue his profitable violation of the Act for an extended period. If all available appellate review is taken advantage of, an order that can actually terminate the illegal practice might not be forthcoming for as long as three years.¹⁹²

For failure to conform to the disclosure requirements, the creditor is liable for twice the amount of the finance charge in an action brought by an aggrieved consumer. Liability, however, is limited to a minimum of \$100 and cannot be greater than \$1,000.¹⁹³ Litigation from the private sector is encouraged by a provision that allows costs plus attorney's fees to be recovered.¹⁹⁴ Although such a civil remedy appears necessary for consumer protection, it has been criticized as creating an influx of unwanted small claims in the federal courts. Since the jurisdictional amount requirement was recently raised to \$10,000 to relieve the crowded dockets in the federal courts, Congress appears inconsistent in permitting \$100 suits to be brought there.¹⁹⁵ In any case, the creditor may escape liability if he "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such error."¹⁹⁶ Liability is also avoided if correction of the error is made before its detection by the creditor.¹⁹⁷

Criminal penalties are applicable for a knowing and wilful violation of the

a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such persons, partnership, or corporation resides or transacts business. 1967 ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION, at 75-76. This request would seem futile in light of the fact that even presidential requests that the FTC be given injunctive powers have fallen on deaf ears. Comment, *supra* note 94, at 445.

188 Interview with Sheldon Feldman, *supra* note 186.

189 Comment, *supra* note 94, at 444.

190 Interview with Sheldon Feldman, *supra* note 186.

191 15 U.S.C. § 45 (1964).

192 1967 ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION, at 76.

193 Pub. L. No. 90-321, § 130, 82 Stat. 157.

194 *Id.*

195 See 1961 *Hearings on Truth in Lending*, *supra* note 3, at 800-01.

196 Pub. L. No. 90-321, § 130, 82 Stat. 157.

197 *Id.*

disclosure and advertising provisions.¹⁹⁸ As previously noted, the UCCC has adopted these federal provisions providing civil and criminal remedies for disclosure violations in its effort to qualify as a statute that will pre-empt the application of the CCPA.¹⁹⁹

C. Conclusion

Whereas the UCCC was placed under the control of a new, powerful and flexible Administrator, the enforcer of the Consumer Credit Protection Act is of an altogether different breed. Not only is the Federal Trade Commission a creature of an earlier era, but it is today severely restricted in the implements it may employ to secure the new promise of "Truth in Lending." Nevertheless, the Commission has expressed optimism about its ability to enforce the guarantees of the CCPA. Present proposals envision field offices staffed with lawyers who will scrupulously examine the numerous creditors under the Commission's authority. The inexpedience so prevalent in other Commission activities will hopefully be eliminated in part through the readily detectable nature of the violation itself.

The plans which will, hopefully, render the Commission effective are, of course, only preliminary, and subject to the assurances of increased manpower and available funds. Chairman Dixon admits that the Commission is understaffed now;²⁰⁰ in addition, it is possible that Congress will only provide a fraction of the Commission's appropriation request. Analysis here might easily slip into cynicism, yet it must be noted that some of those who contributed to the near unanimous vote that made "Truth in Lending" the law, may have done so because support of the bill was politically advantageous.²⁰¹ There may be practical insight to be gained from the fact that after Congress passed the popular truth-in-packaging legislation it proceeded to trim the appropriations for the enforcement of it.²⁰² It would be unfortunate indeed if meaningful enforcement of the consumer guarantees provided in the CCPA become jeopardized by an unresponsive political climate.

Peter J. Driscoll

198 Pub. L. No. 90-321, § 112, 82 Stat. 151.

199 See text accompanying notes 149-50 *supra*.

200 Dixon, *Rx for Consumer Protection—"Hard" and "Fair" Competition*, 1967 N.Y. STATE BAR ASSOCIATION ANTITRUST SYMPOSIUM, 47, 55 (1967).

201 See ADVERTISING AGE, Jan. 29, 1968, at 16.

202 *Id.*