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Barbara A. Curran

University of Chicago School of Social Service Administration

David I. Fand

Wayne State University

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AN ANALYSIS OF THE UNIFORM CONSUMER CREDIT CODE

*Barbara A. Curran**
*David I. Fand***

The proposed Uniform Consumer Credit Code (UCCC) developed by the *National Conference of Commissioners on Uniform State Laws* (NCCUSL) is intended to remedy many of the imperfections that have been accumulating in the consumer credit market in the last sixty years. These impediments to the free flow of credit result from a variety of legal fictions that were initially developed to circumvent outmoded usury laws, and to bypass the doctrine of productive credit—the tradition of not extending consumer credit; unfortunately, in the course of time these fictions create new problems often as difficult as the initial problems that they were designed to circumvent. The Code represents the first major attempt to deal directly with both the legal and economic dimensions of consumer credit regulation. Thus, the Code attempts to define the legal relationship—the rights and remedies of the individual borrower and creditor—in a particular transaction and also to define new “ground rules” for all consumer credit markets. Accordingly, to evaluate the impact of the Code on the consumer we must analyze the Code in its entirety; we must analyze the provisions regulating specific transactions, and the new ground rules—the general provisions outlining the conditions of entry, the supply and availability of credit, and the character of the marketplace.

The theory of the Uniform Code is that legislation enabling creditors to compete more effectively, and permitting new sources of supply to enter the market will serve the consumer interest effectively and equitably and also help to achieve a lower cost of credit. Those who support the Code contend that the legislation defining the character of the market, and the regulations defining the conditions under which lenders may compete are the powerful, pervasive, and ultimately dominant market forces which must be harnessed by those who seek to protect the consumer interest. An evaluation of the effect of the Code on the consumer interest re-

*B.A. 1950, Univ. of Mass.; LL.B. 1953, Univ. of Conn.; LL.M. 1961 Yale Univ.; Project Director, American Bar Foundation; Lecturer in the School of Social Service Administration, Univ. of Chicago. Author: *Trends in Consumer Credit Legislation* (1965).

**B.S.S. 1944, City College of N.Y.; M.A. 1950, Ph.D. 1954, Univ. of Chicago; Prof. of Econ., Wayne State University. The financial support of the National Science Foundation and Wayne State University is gratefully acknowledged by Prof. Fand.

quires, therefore, an analysis of its effect on the supply and availability of credit, on the demand for consumer credit, on the extent to which lenders can compete in legally fragmented markets, and on the cost of installment credit. Such an analysis is complex. It requires a theory of segmented credit markets, an analysis of the relation between legal ceiling rates and actual market rates, and a diagnosis of the strategies needed to effect change; it also requires an examination of the interaction between the "rules of the game" as they are defined in the Code for the market as a whole, and the economic realities that are likely to emerge in the numerous individual transactions that will take place in the marketplace.

The Code also incorporates some new regulations concerning rights and obligations of the individual borrowers and creditors. The drafters have been innovative in creating a regulatory scheme that is more general than existing legislation in its application and is therefore less likely to be frustrated by changes in the forms in which abusive credit practices may take place in the future. In addition, the Code attempts to facilitate the consumer's ability to assert his own rights as well as his ability to respond to creditor's claims against him. These provisions must, however, be assessed, not in relation to the pre-Code market, but in relation to the market forces that the Code seeks to stimulate.

The proponents of the Code have anticipated that some will disagree with the underlying theory of a uniform Code and others will disagree with the manner in which this policy is implemented in the Code. Paradoxically, criticism of the Code often focuses on its handling, or apparent oversight, of specific credit practices as though the Code were simply an amalgam of legislation designed to correct a set of immediate problems arising from particular, and presumably unrelated, credit abuses. Such criticism overlooks the economic rationale of the Code. The purpose of this paper is to discuss the rationale of the Code, the extent to which the provisions in the Code reflect the underlying analytical framework, and to evaluate these provisions in relation to the kind of market imperfections, and other impediments to the free flow of credit, that they are designed to remove.

I. STIMULATING CREDITOR COMPETITION

The primary strategy adopted by the Code to stimulate creditor competition is similar regulatory treatment of all creditors engaging in the extension of consumer credit. Particular emphasis is placed upon elimination of differential treatment of creditors with respect to entry requirements and rate ceilings.

A. PRE-CODE LEGISLATION

In every state that has not enacted the Code,¹ many separate pieces of legislation deal with matters now covered by the Code. Under these statutory schemes, different regulatory treatment is often accorded functionally similar credit extensions. Present statutory fragmentation originated with the Uniform Small Loan Act in which only those lenders who were licensed under the Act were permitted to make loans at the high rates authorized. Thereafter, a series of installment loan statutes were enacted over the years, each permitting a particular class of creditor to make loans at rates in excess of the maximums set forth in the general interest and usury statutes. Instead of expanding the categories of creditors eligible to make loans under the small loan act or, alternatively, under one general installment loan law, the enabling statutes set forth different regulatory treatment for different lenders. In addition, sales credit extended through the seller of goods or services was not, until relatively recently, subject to finance charge ceilings or to any other special restrictions. Moreover, when sales credit was finally regulated, the statutes often differentiated among sellers dealing with different types of commodities or different arrangements.²

The effect on the market of this statutory fragmentation, although it may vary from state to state, should not be underestimated. Any given class of creditors is for all practical purposes unable to compete for consumer credit extensions not specifically contemplated in the statute to which that class is subject. To cite New York for example, a given credit transaction may come under nine different statutes which, in turn, may specify as many as fourteen different rate ceilings, different loan maxima, disclosure requirements, penalties, and other criteria.³ This fragmented legal

¹ To date the Code has been enacted in only two states: Oklahoma and Utah. OKLA. STAT. ANN. tit. 14A, §§ 1 to 9 (Supp. 1969); UTAH CODE ANN. §§ 70B-1-101 to 70B-9-103 (Supp. 1969). For a discussion of the pre-Code legal fragmentation see B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (1965); Fand, *Competition and Regulation in the Consumer Credit Markets*, 20 PERSONAL FINANCE LAW 18 (1965).

² For example, retail installment sales contracts for motor vehicles versus contracts for other goods; revolving credit. See the discussion of fragmented laws and segmented markets in D. Fand & R. Forbes, *Supply Conditions in Consumer Credit Markets*, in PAPERS IN QUANTITATIVE ECONOMICS (1968).

³ In New York state there are nine different statutes regulating, among others, installment loans by commercial and industrial banks; bank check credit plans; retail revolving charge accounts; motor vehicle installment sales financing; installment sales financing of other goods and services; loans by consumer finance companies; and other credit unions. See Curran, *Legislative Controls as a Response to Consumer-*

framework encourages segmentation of the consumer credit market. In effect, one market is broken up (legally) into fourteen possible markets.

There are numerous examples of how statutory fragmentation fosters division of the consumer credit market among different classes of creditors. Commercial banks and credit unions do not deal directly with second mortgage real estate financing. Vendors and retailers do not make cash loans. Finance companies do not extend revolving credit. In addition, the existence of segmented and non-competing submarkets is further indicated by empirical studies on finance rates which show that the rates charged to a *given* consumer for a credit extension of *given* characteristics may vary considerably.⁴ These studies suggest that it may be desirable to remove restrictions resulting from fragmented laws, and to bring in additional creditors and additional sources of credit. Competition among creditors, no longer restricted to legally segmented submarkets, may prove helpful in lowering the cost of consumer credit.

B. THE CODE PROVISIONS

Subject to certain exceptions, the Code covers all consumer (personal and non-commercial) credit extensions of less than twenty-five thousand dollars which are repayable in installments or for which a credit charge is made.⁵ The Code regulates not only

Credit Problems, 8 B.C. IND. & COM. L. REV. 409 (1967); Fand, *Comments on the Uniform Consumer Credit Code*, 23 JOURNAL OF FINANCE 81 (1968).

⁴ Schweiger & McGee, *Chicago Banking*, 34 JOURNAL OF BUSINESS 259, 261 (1961); Jung, *Charges for Appliance and Automobile Installment Credit in Major Cities*, 35 JOURNAL OF BUSINESS 386-91 (1962); R. Shay, *New Automobile Finance Rates*, NATIONAL BUREAU OF ECONOMIC RESEARCH 1924-62 (1963); JUNG, *Commercial Bank Charges in New York and Ontario*, 2 NATIONAL BANKING REV. 397-401 (1965). For an analysis of these findings see the discussion of *Evidence on Market Imperfections* in D. FAND, *SAVINGS INTERMEDIARIES AND CONSUMER CREDIT MARKETS* (1970) [hereinafter cited as FAND].

⁵ UCCC §§ 2.104, 3.104. Credit sales of an interest in land are exempted from the Code if the finance charge is 10% or less per annum. Where the rate for such a transaction is greater than 10% the Code provisions apply even though the amount financed exceeds \$25,000. A credit sale of an interest in land, otherwise exempt, is subject, however, to Code disclosure provisions and a provision relating to rescission by the buyer. The situation with loans secured by an interest in land is the same except that the exemption for loans bearing an interest rate of 10% or less will only apply if the value of the collateral is substantial in relation to the amount of the loan. See also Curran, *Administration and Enforcement Under the Uniform Consumer Credit Code*, 33 LAW & CONTEMP. PROB. 737 (1968).

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the terms of the arrangements but also creditor practices in the offering, extension, and collection of credit. In effect, the Code integrates into one document virtually all consumer credit regulation and, most importantly, reduces legal impediments restricting competition by applying substantially similar treatment to all creditors and transactions coming within the purview of the Code.

To some degree, the similarity of treatment of vendor and lender credit is obscured by the fact that the drafters chose to treat loans and sales credit in separate sections for purposes of disclosure, rate ceilings, and restrictions on contract terms.⁶ In addition to the unnecessary complexity created by this approach, the formal distinction tends to perpetuate a notion of functional difference that does not exist for regulatory purposes. In doing so, it may encourage future differential treatment of credit arrangements or creditors on this basis. Nevertheless, the Code ultimately must be judged on its substance and not on form and, even in its present form, the Code attempts, wherever possible, to regulate consumer credit from an overall market perspective without creating substantive segmentation of classes of creditors or arrangements.

With only one significant exception, no license is required under the Code for a creditor to engage in the business of credit extensions or collections.⁷ The only creditors who must obtain a license are those who wish to charge in excess of eighteen percent per annum effective rate on consumer *loans*. Exempted from licensing provisions are institutions otherwise supervised by state administrative agencies, such as banks and credit unions. The license requirement applies not only to the lender but to his transferee, if the transferee is in the business of acquiring such obligations for the purpose of collection and enforcement as a creditor. It may be inferred from the provisions of the Code, as well as the official comments, that licenses will be issued pro forma except in the case where information about the applicant indicates he is likely to engage in unscrupulous or overreaching behavior in the market. The license is a permit to transact the business of loan extensions and collections where the credit charge is in excess of eighteen percent; it remains in force unless and until relinquished by the holder or suspended or revoked for cause by the issuing agency.⁸ Loans made by non-licensees at rates in excess of eighteen percent are unenforceable.⁹

⁶ UCCC §§ 2.101 to 2.605, 3.101 to 3.604.

⁷ As to licensing, see UCCC §§ 3.201, 3.501, 3.502.

⁸ UCCC § 3.504.

⁹ UCCC § 5.502.

All persons engaging in the business of extension or collection of consumer credit obligations, regardless of whether they are licensed, must register annually with the state consumer credit administrator.¹⁰ The presumption here is that, in a market place so large and diverse, licensing per se is not likely to check objectionable behavior and that the more effective strategy is to rely on the administrator to ferret out, investigate, and deal with noncompliant behavior. In this case, registration is sufficient to identify and locate market participants. This rationale for a registration system, if valid, would seem to be equally applicable to lenders charging in excess of eighteen percent per annum. The licensing requirement for this group is a curious and possibly unfortunate retrogression to earlier theories of consumer credit regulation.

Rate ceilings are the same for all consumer credit transactions covered by the Code with two important exceptions.¹¹ First, a special rate applies to revolving credit arrangements made in connection with a sale.¹² Second, although these rate ceilings apply to all sales credit, they are not applicable to *loans* unless made by licensed lenders or state supervised institutions specifically exempted from licensing.¹³ The similarity in rate ceilings is intended to inhibit market segmentation and, consequently, to increase creditor competition across the board. Moreover, the ceilings established are relatively high—the theory being that stimulation of creditor competition will tend to reduce going rates below the ceilings. The important question is whether the removal of legal impediments to increased competition among creditors will in fact lower the cost of credit for the consumer.

C. THE EFFECT ON THE MARKET

The UCCC, if enacted, would, in fact, make it easier for additional lenders to enter the market. These entry provisions have been criticized by consumer groups on the grounds that the UCCC:

¹⁰ UCCC §§ 6.201 to 6.203.

¹¹ 36% per year on unpaid balances of \$300 or less; 21% per year on unpaid balances of more than \$300 but not over \$1000; 15% per year on unpaid balances of more than \$1,000; 18% per year on unpaid balances over \$1,000. See UCCC §§ 2.201, 3.508.

¹² Revolving Sales Credit: 2% per month on basis of (a) average daily balance, (b) unpaid balance on same day of billing cycle, or (c) the median amount within a range within which (a) or (b) fall where (a), (b), or (c) is \$500 or less and 1½% per month on excess (50¢ minimum charge per month permitted). UCCC § 2.207.

¹³ The maximum rate for lenders who are not licensed or do not qualify as supervised institutions is 18% per annum. UCCC §§ 3.201, 3.501.

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. . . opens the door to anyone who wants to go into the money-lending business. No license would be required unless interest rates charged were higher than 18 percent, and no limit would be placed on the number of above-18 percent lenders. Retailers could sell on credit, as they do now, at high legal interest rates without need of a license—and thus without fear of losing it for misbehavior.¹⁴

The implication that ease of entry and fewer restrictions on lenders may be undesirable is neither self-evident nor correct. The conditions of entry in the Code are designed not only to bring additional lenders into existing markets, but also to facilitate the ability of present lenders to compete more effectively. This move to widen the scope of competition among the existing lenders is an important part of the philosophy underlying the Code.

It is a fact that ceiling rates in the Code would exceed the top rates now in effect in states such as California and Massachusetts. And it raises an understandable fear that the rise in ceilings envisaged in the Code would not have much effect in increasing the supply or availability of credit, but would mainly enable the existing creditors to charge higher rates. This theory, which assumes that a rise in ceiling rates will generally tend to raise actual rates, may be plausible and accurate in many instances; but it is much too simple a theory, in our opinion, to be applied to the Code.

We need to distinguish the following three cases: (1) a law which raises ceiling rates where the effect may well be to raise actual rates; (2) a law which imposes a *uniform* set of ceiling rates in all states where the effect may be to raise actual rates in some states and lower them in others; and (3) a law, such as the Code, which imposes a *uniform* set of ceilings *coupled* with entry conditions designed to facilitate competition by opening up the market to additional creditors and additional sources of credit. Even if one assumes that a rise in ceiling rates in one market will always result in higher actual rates in that market, it does not follow that the imposition of a set of uniform ceilings will raise rates in all markets, nor does it follow that the Code will have the effect of raising rates even in California and Massachusetts. Two implicit, but common assumptions about interest rates need to be carefully examined. These are (1) that the legal ceiling rates always end up as the actual market rates, and (2) that actual market rates can only be lowered by a reduction in ceilings, and not by strengthening competition among lenders. In the case of the Code, it is necessary to consider the effect of a uniform set of ceilings together with the other changes affecting entry and the degree to which creditors may compete.

¹⁴ *A Consumer Credit Code . . . for Lenders*, 34 CONSUMER REPORTS 121, 122 (1969).

It is often argued that the actual cost of installment credit is essentially determined by the ceiling rates in the statute, and is relatively independent of supply and demand. It follows from this assumption that an increase in the supply of credit may increase the quantity of outstandings, but will not have much effect on the cost of credit. On the other hand, if *actual* credit terms are not determined by the legally defined ceiling rates (except for particular categories of marginal credit) and if market rates are, in the main, responsive to demand and supply conditions, then it is not legitimate to assume that the cost of credit is independent of availability.

The assumption (that an increase in supply or availability of credit may increase outstandings but will not have much effect on credit terms) leads very naturally to a conclusion that we do not need to increase either extensions or outstandings. It has been argued that the installment debt has been expanding at a record pace under the present rate ceilings and that it would not be socially desirable to bring in additional sources of supply. This, however, is a *non sequitur*. One could equally argue that because imports have been expanding at a record pace under present tariffs and quotas are readily available, it would not be desirable (or beneficial to consumers) to lower import tariffs.

An increase in the supply or availability of credit may, in fact, be most effective in lowering the cost of credit without there being any necessary increase in either the rate of extensions or in the volume of installment debt outstanding. Indeed, an increase in supply will have the greatest impact in reducing the cost of credit, precisely when there is no change in outstandings. Accordingly, those who seek to increase the supply or availability of credit do not necessarily assume that there is a shortage of credit, or that it is socially desirable to increase either the rate of credit *extensions* or the volume of installment debt *outstanding*, but rather that this may be an effective instrument for lowering the rates of installment credit in particular markets.

We do not wish to suggest that the rate ceilings in the Code should not be criticized. It may well be that these ceilings, drafted so as to compromise a host of conflicting viewpoints, may be too low for marginal borrowers to obtain credit from legitimate lenders, and may be too high for others. These ceiling rates may not be the appropriate strategy to implement the NCCUSL philosophy to set ceilings and not fix rates. Moreover, the formal uniformity of rates for all types of credit engineered by the draftsmen in the Code ceiling schedule may be more apparent than real. Different ceilings

are provided for revolving and non-revolving sales credit, and for certain non-licensed lenders; a formal distinction between cash loans and credit sales is still made. These could easily perpetuate, if not generate, actual segmentation. Moreover, the Code has been criticized because it fails to take adequate account of many of the serious credit abuses, especially those affecting poor people with low credit standing, which occur in sales credit more so than in cash loans. Paradoxically, while the ceiling rate compromises are justified as a means for effecting uniformity of rate regulation, they may well incorporate enough latent diversity to effectively stifle the extent to which the Uniform Code can liberate market forces for service to the consumer. It is possible that the compromises and fragile distinctions incorporated into the provisions of the Code will ultimately undermine the progressive NCCUSL philosophy and imaginative economics underlying that Code.

II. INCREASING CONSUMER AWARENESS OF THE FINANCE CHARGE

Disclosure provisions are the primary device used in the Code to increase the consumer's awareness and knowledgeability about credit cost.¹⁵ The Code opts for the contract document as the primary instrument for disclosure. Although advertising is subject to requirements relating to the manner in which finance charges may be quoted, credit extenders are not obligated to make any statement about charges in their advertisements. It is only when they choose to do so that they must conform to the standards of the Code.

Disclosure may serve either to (1) inform the consumer of the terms prior to his assumption of the obligation or (2) inform the consumer of the nature of the obligation (including his rights and duties) that he has already undertaken when he signed the contract. To the extent the method of disclosure centers on the contract instrument, it can hardly assist the consumer in making a circumspect and informed decision to undertake that particular obligation. The inclusion of disclosure provisions in the contract instrument tends to restrict their effectiveness in assisting the consumer in negotiating or shopping for credit. Even though the consumer is not technically obligated until he signs the document, he probably already feels that the commitment is made on both sides by the time the contract is presented to him for signature. In only two situations—home solicitation sales and certain credit extensions secured by an interest in land—is the consumer given the opportunity to change

¹⁵ UCCC §§ 2.301 to 2.313, 3.301 to 3.312. These provisions essentially incorporate Federal Truth in Lending requirements.

his mind about a particular obligation after he has signed the contract.¹⁶ Moreover, an individual consumer may be less likely to share cost information with other consumers—whether fellow workers or friends—when it is based on his own obligation than if the source of his information were less personal, for example, if it became available through advertising copy. Without a requirement that creditors advertise rates, however, the Code ignores what might be a substantial instrument for disclosure.

These qualifications aside, what can be expected to be the effect of pre-contract rate disclosure required by the Code? The emphasis in the Code is on disclosure of cost as having a shopping function; it will permit the consumer to compare cost among alternative credit sources. It is clear from the Code provisions and the official comments that the intent is to facilitate market competition among creditors by the heightened sensitivity of the consumer to cost of credit.¹⁷

In the past, however, the consumer's concern was primarily with the amount of credit he could obtain and the period and amount of installment payments which were due. To what extent segmentation of the market permitted or encouraged creditors to create or foster this view is an interesting matter for speculation. If disclosure does increase consumer awareness and sensitivity to the cost of credit, what are the implications for the individual consumer? Some consumers may be somewhat more circumspect in selecting among credit sources and some may refrain from obtaining credit. It is unlikely that the individual consumer will be able to negotiate with the creditor about the rate of charge for a specific obligation. Consumers may, however, benefit from an aggregate increase in awareness about costs of credit. A general increase in consumer concern about cost, or among specific classes of consumers, will be a factor to be taken into consideration by creditors in establishing rate schedules or in circulating information about credit costs. In the long run, consumer rate sensitivity may affect the general cost of credit if it affects the demand for credit or if it indirectly has an effect on the supply and availability for those who are willing to make consumer credit extensions. There may also be some differential effects if creditors restrict extensions to particular classes of consumers. Some indication of the impact of consumer pressure on either the level or the differential structure of rates may become evident if particular credit costs settle below the ceilings in the Code.

¹⁶ UCCC §§ 2.502, 5.204.

¹⁷ See UCCC § 2.201, Comment 1.

III. REGULATING CREDITOR ACTIVITY IN CREDIT EXTENSIONS, COLLECTIONS, AND CONTRACT TERMS

Stimulation of creditor competition and availability of credit sources will not, by itself, assure arm's length dealings between the individual consumer and creditor. Whatever benefits flow from increased competition in a mass market, they accrue to consumers as a class and are realized by the individual consumer because he is a member of that class, or of a subgroup within it. It is doubtful that these market developments will result in melioration of contract terms, other than lower credit costs, for the consumer—particularly terms relating to creditor rights and remedies. Indeed, creditors pressed by competition to reduce rates or lower credit standards are likely to strengthen their remedial position to minimize losses presumed to follow relaxation of credit standards. Similarly, in a highly competitive market the likelihood that some creditors will resort to high pressure (and even misleading or fraudulent) sales and collection techniques is increased. Moreover, no amount of stimulation of creditor competition can deal effectively with the problem of the unscrupulous creditor bent on, or specializing in, taking advantage of the individual consumer—particularly the economically disadvantaged or unsophisticated consumer. For these reasons, the Code cannot rely upon competition alone to protect the consumer in the market place and must address itself to: (1) creditor behavior in the solicitation and offering of credit, (2) collection practices, and (3) terms of the formal contract.

Code restrictions on the conduct of the creditor in the solicitation and offering of credit attempt to define how far the creditor can go in inducing the consumer to undertake a particular obligation. They indicate when and how the creditor must inform the consumer of the terms of the arrangement. Additionally, they give some guidelines as to what limitations there are on what the creditor may tell the consumer. The prohibition against misleading and false advertising embraces the traditional notion that there is a point beyond which the creditor may not go in puffing his wares.¹⁸ Further definition is given to these terms in the Code, however, in relation to credit costs. Advertising in which the creditor refers to the amount of charge or installments is misleading if it also fails to state the *rate* of charge in the manner specified in the Code.

Offering practices, which are not technically false or misleading but take undue advantage of the consumer's situation, have in the past been ignored in consumer credit regulation. The Code attempts to deal, albeit cautiously, with this serious consumer problem. The

¹⁸ UCCC §§ 2.313, 3.312.

Code permits the consumer to extricate himself from an arrangement in three specific instances where undue creditor pressure often occurs: (1) the home solicitation sale,¹⁹ (2) the referral sale,²⁰ and (3) the credit extension involving the second mortgage lien.²¹ In the referral sale, the creditor appeals to the natural cupidity of human beings—the desire to get something for nothing—by promising the consumer a rebate for customer referrals. In most cases, the rebate never materializes. Not only is the creditor aware of this fact at the time the sales solicitation is made but he relies upon it. In the case of the referral sale, it is the ploy itself that is regarded as unfair. In the home solicitation case, it is situs of the sale that is the controlling factor. It is often argued that rescission is appropriately limited to the home solicitation sale because there is a special kind of pressure associated with the sales solicitation occurring in the customer's home. The reasons for giving special treatment to the home solicitation sale and not to high pressure techniques in other contexts are, in our opinion, not convincing.

Aside from the specialized provisions noted above and the disclosure provisions already discussed, the only other provision specifically applicable to unfair solicitation practices is one empowering the consumer credit administrator to bring an action to restrain a creditor from "engaging in a course of . . . fraudulent or unconscionable conduct in inducing debtors to enter into consumer credit [arrangements]."²² This provision benefits the prospective customer but not the consumer who has already been taken in. The remedy for the latter is found in a different section which adopts, almost verbatim, the unconscionability provision of the Uniform Commercial Code.²³ Strictly construed, however, this remedy is not available if the consumer is induced by unconscionable conduct to enter the agreement if the terms of that agreement are not unconscionable.

Extortionate collection practices are prohibited by the Code, and any credit arrangement made with the threat or understanding that the creditor will use such practices is unenforceable.²⁴ The administrator's power to obtain a restraining order for unconscionable conduct also applies to collection practices.²⁵ By and large, however, restrictions on collection practices are implicit in many of the limitations imposed on contract terms. For example, the

¹⁹ UCCC §§ 2.501 to 2.505.

²⁰ UCCC § 2.411.

²¹ UCCC § 5.204.

²² UCCC § 6.111(1)(b).

²³ Compare UCCC § 5.108 with UCC § 2-302.

²⁴ UCCC § 5.107.

²⁵ UCCC § 6.111.

elimination of the wage assignment and the retention of garnishment coupled with the provision relating to discharge from employment because of garnishment are aimed more at minimizing harassment tactics in collections than at restricting the creditor's security interest in the debtor's future wages.

Whatever the process of exchange between the consumer and the prospective creditor prior to the consummation of the arrangement, the terms of the contract itself, other than the principal amount, the method of repayment, and in some cases the collateral required, are not the subject of negotiations or discussions by the parties. And there is no reason to expect that they will become so. The contract is a standard printed form containing appropriate blank spaces. Neither the consumer nor the creditor's representative is qualified to negotiate about any of the printed contract terms and, in the latter case, not authorized to do so. Although disclosure emphasizing rates may affect costs, no amount of disclosure or stimulation of creditor access to the market is likely to change the pattern of contract negotiations for most other contract terms.

Code provisions limiting contract terms deal essentially with three matters: (1) credit cost, (2) method of payment, and (3) creditors' remedies. The justification for developing a set of ceilings for finance charges, rather than rate controls or a fixed set of rates, is that the Code seeks to have rates determined in the market by the forces of supply and demand. At the same time, these ceiling rates set a limit beyond which the credit cost is regarded as unreasonable under any circumstances. A whole series of provisions relating to costs and terms of repayment are included. Although they differ in some respects from existing legislation, they are, by and large, modified versions of provisions appearing in many existing statutes. Matters covered include delinquency charges, deferral charges, refinancing, consolidation, debtor's right to prepay in full, refunds on prepayment, balloon payments, and insurance.²⁶

With the exception of the above restrictions, most Code provisions deal with contract terms relating to creditor remedies. This is only natural as once the arrangement is consummated the primary obligation rests with the consumer, namely, repayment. Confessions of judgment are prohibited.²⁷ Attorneys' fees are limited.²⁸ Although assignment of wages is prohibited, garnishment subse-

²⁶ See UCCC §§ 2.201 to 2.210, 3.201 to 3.210, 3.508 to 3.511, 4.101 to 4.304.

²⁷ UCCC §§ 2.415, 3.407.

²⁸ The Code gives two alternatives: (1) A provision for payment by consumer of attorney's fees is unenforceable. UCCC § 2.413, Alternative A. (2) The contract may provide for reasonable attorney's fees up to 15% after default and referral to an attorney not a salaried employee of the creditor (or, in the case of sales credit, his assignee).

quent to judgment is not.²⁹ In this case, however, maximums are imposed on the amount that may be deducted for each pay period. The deficiency judgment is eliminated where the original cash price of the goods is less than one thousand dollars.³⁰ A seller's right to take collateral is restricted to a security interest in the property sold; or with respect to which services are provided or goods sold for installation where the debt is at least one thousand dollars if secured by land or three hundred dollars if secured by personal property. In addition, the seller may obtain a security interest in property sold by him previously if he has an existing security interest in that property; or he may obtain a security interest in the subject of the present sale as collateral for a prior sales obligation.³¹ These restrictions do not, however, apply to lenders. The only restriction on collateral for lenders applies to an interest in land where the debt is less than one thousand dollars.³² Similar treatment could have been afforded sellers and lenders—at least in the case where a lender customarily, through direct loans, finances sales for particular sellers. From the point of view of the consumer, there is no functional difference.

What could be the most significant Code provision regulating contract terms in the long run is the unconscionability provision taken from the Uniform Commercial Code. A contract, or terms of a contract, found by a court to be unconscionable is unenforceable against the consumer.³³ In addition, the administrator is authorized to obtain a restraining order against any creditor making or collecting unconscionable agreements.³⁴ There are, however, significant limitations imposed upon application of the concept by the drafters. As already noted, only the administrative remedy is available for unconscionable solicitation and collection practices. In addition, even though it is conceivable that some acts or practices authorized by the Code may, under certain circumstances, be unconscionable, the drafters specifically state that a charge or practice expressly permitted by the Code is not in itself unconscionable. Exactly how this

UCCC § 2.413, Alternative B. If alternative (2) is selected, the provision applicable to supervised loans is different: "With respect to a supervised loan in which the principal is \$1000 or less, the agreement may not provide for the payment by the debtor of attorney's fees. A provision in violation of this section is unenforceable." UCCC § 3.514(1).

²⁹ UCCC §§ 2.401, 3.403, 5.104 to 5.106.

³⁰ UCCC § 5.103.

³¹ UCCC §§ 2.406, 2.407. These provisions provide for allocation of payments.

³² UCCC § 3.510.

³³ UCCC § 5.108.

³⁴ UCCC § 6.111.

qualification will be applied is not clear. It suggests, however, that unconscionability is not an overriding concept, of which specific Code prohibitions may be examples, but only applies to practices not otherwise specifically dealt with in the Code. In addition, the question of whether a particular contract or activity is unconscionable is a question of law and not of fact. Although guidelines are given as to the criteria for determining unconscionability for purposes of applying the administrative remedy and for determining if a contract term relating to insurance is unconscionable, the term receives no further definition. It therefore remains for the courts to give operational meaning to unconscionability. Although a strong sanction is imposed for unconscionable agreements on those creditors who take the risk of engaging in marginal activity, the imprecision of the concept itself to some extent limits its immediate value as a deterrent to the unscrupulous creditor.

IV. IMPROVING THE CONSUMER'S REMEDIAL POSITION

In addition to imposing some limitations on creditors' remedies, the Code has also attempted to improve the consumer's remedial position. The most significant provision in this respect is that which specifies that it is a violation of the Code to take a negotiable instrument as evidence of a consumer debt.³⁵ A transferee is a holder in due course only if he takes a note executed in violation of the Code and without notice of the fact that it is based on a consumer obligation. The drafters state, and in this respect they are probably correct, that a transferee cannot argue that he has no notice when he is dealing with a creditor regularly engaged in consumer credit transactions.³⁶ The Code provision is a substantial improvement over legislation in most states since it permits the consumer to assert against most transferees claims and defenses arising out of the original transaction. Unfortunately, the drafters dilute the impact of this provision elsewhere—in one of the alternate provisions relating to assertion of consumer claims against transferees, it is stipulated that defenses may only be asserted against the assignee if, within three months of notice of the assignment, the assignee has received notice of claims arising before that time.³⁷ Moreover, in making the general provision relating to non-negotiability applicable only to sales credit obligations, the drafters overlook the functionally similar situation where a lending institution extends credit to a consumer for the purpose of paying for purchases made from sellers who have an arrangement with the lending institution, such as the bank credit card.

³⁵ UCCC § 2.403.

³⁶ See UCCC § 2.403, Comment.

³⁷ UCCC § 2.404, Alternative B.

Other special remedies are available to the consumer for acts in willful violation of the Code. He may recover specified multiples of the finance charge for violation of the disclosure provisions, the execution of a negotiable instrument, or violation of loan limits.³⁸ Supervised loans made by non-licensees are void.³⁹ Time limitations on assertion of claims by consumers do not apply when the claim is asserted either as a defense or set off in a suit by the creditor.⁴⁰ Moreover, the debtor has a right to a refund of excess charges made, and, if the excess charge is made willfully or the creditor refuses on demand to make the refund, the creditor is liable to the consumer for an amount equal to ten times the excess or the total finance charge, whichever is greater.⁴¹ In these cases the burden of proof is on the creditor to show that the violation was not willful.

The value to the individual consumer of improvement of his remedial position may well be illusory if he does not have the capability and resources to assert his claims. To this extent, the deterrent effect of the Code prohibitions is also diminished. The drafters cautiously attempt to deal with these difficulties. In the case of excess charges, the Code encourages settlement by relieving the creditor from liability if he refunds excess charges made, as long as the violation is not willful. In the case of violation of disclosure provisions, the consumer may collect costs and attorneys' fees where he is successful in an action for the Code provided civil penalty.⁴² However, by and large, the consumer must bear the cost and risk of asserting claims against the creditor. It may often be the case that it is economically not feasible for the consumer to assert his claims in court even when the creditor has instituted the proceedings.

The Code has authorized the state consumer credit administrator to seek redress for certain violations. In addition to the right to issue cease and desist orders and to obtain restraining orders against further violations, the administrator may also bring an action for redress on behalf of a group of consumers where the violation is the making of excess charges.⁴³ This provision has the flavor of a class action, and assuming that the administrator is willing to take action, deals in some respects with the economic problem that the individual consumer faces in pursuing his own individual claim. But the administrator's power to bring a civil action

³⁸ UCCC §§ 5.202, 5.203.

³⁹ UCCC § 5.202.

⁴⁰ UCCC § 5.205.

⁴¹ UCCC § 5.202.

⁴² UCCC § 5.203.

⁴³ UCCC §§ 6.104, 6.108, 6.113.

on behalf of a number of consumers is not extended beyond claims relating to excess charges; nor is there any provision by which a group of consumers can move the administrator to seek the civil remedy even for excess charges. No class action is specifically authorized for consumers either in respect to excess charges or any other Code violations. Finally, the successful consumer in an action by or against a creditor is not specifically allowed attorney's fees and costs except in the disclosure case previously mentioned. Some of the procedural devices noted above may well be available under state laws. However, even in those cases, it would not have been inappropriate for the Code to have restated the availability of such rights—if only to clarify Code policy.

V. CONCLUSION

We often underestimate the extent to which the cost of consumer credit, even today, is still affected by the usury laws and related ideas about productive credit popular in the last century. Usury laws, as is well known, prevented many of the established financial intermediaries from making consumer loans in the last century. The Russell Sage sponsored Uniform Small Loan Act, the Morris Plan Industrial Banks and the Industrial Loan Laws, the Installment Loan Laws (the enabling legislation for the commercial banks), the credit union legislation, the rigid adherence to the time-price doctrine by the courts, and the Retail Installment Sales Acts have, in the last sixty years, exempted particular groups of creditors from the usury laws. And these creditors developed methods of quotation such as the "add-on rate," the "discount rate," the "simple interest rate," the use of a discount plus fee, and the dollar amount for monthly payments, all of which tend to suppress the finance charge and thus enable them to operate in spite of usury laws and the "six percent myth." Nevertheless, in spite of these laws and devices to get around the usury limits, many financial intermediaries cannot, even today, easily or readily enter the installment loan market, without enactment of a special statute. Hence the need for a Uniform Consumer Credit Code to stimulate competition and also permit new lenders to enter this market. Those who question the need to strengthen competition among existing credit extenders, and the need to open up the market to new lenders assume, implicitly, that the supply of consumer credit at the present time is normal. They also assume that the legal fictions that have developed in the last fifty years have offset and cancelled out the effect of usury laws and the tradition of not extending consumer credit. But this view overlooks the historical development of the consumer credit industry. We should recall that the combination of

usury laws coupled with an unwritten doctrine of productive credits prevented the development of a market for consumer loans at the turn of the century. In those days most of the consumer loans were handled by loan sharks—hence the interest of the Russell Sage Foundation in developing the Uniform Small Loan Act. It is only in the last sixty years that finance companies, commercial banks, and credit unions have been freed from the restrictions of usury laws and are ready, together with retailers, to engage in this kind of business. Nevertheless, even today, thrift intermediaries (such as savings and loans and mutual savings banks), pension funds, life insurance companies, and other financial intermediaries cannot readily make consumer loans even if they should wish to.⁴⁴ Accordingly, those who wish to free the consumer credit market from the shackles of outmoded usury laws, from the “six percent myth,” and from any lingering vestiges of the doctrine of unproductive credit are not trying, arbitrarily, to bring in additional lenders and inflate the volume of credit in this market over that which would occur naturally in a market of easier entry. They are trying to remove some of the vestiges of restrictive usury laws and primitive views of productive credit and interest rates.

The Code may be criticized for not going far enough in removing the legal fragmentation of cash loans and credit sales, the time-price doctrine, and the continued segmentation of the consumer credit market into open end, closed end, lender and vendor credit. But it should at least be recognized that it has taken a few important steps in the right direction of removing entry restrictions and facilitating competition, and removing many of the problems that are associated with the usury laws and the doctrine of unproductive credit.

By the same token, the Code can be criticized for not going far enough in protecting the individual consumer against solicitation and collection practices or insuring that the consumer can effectively assert claims against creditors. Nevertheless, the Code again reveals an innovative approach. At most it can be criticized for not going far enough with its innovations. But taken in its entirety, there is no question that the Code represents an advance over existing consumer credit regulation.

⁴⁴ See FAND, note 4 *supra*.