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LoPucki: Uniform Consumer Credit Code: Consumer's Code--Or Lender's Code?

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THE UNIFORM CONSUMER CREDIT CODE: CONSUMER'S CODE – OR LENDER'S CODE?

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In 1964 the National Conference of Commissioners on Uniform State Laws announced that it had commenced an exhaustive study of the entire field of consumer credit for the purpose of drafting uniform legislation. Four years and ten drafts later the Commissioners promulgated a proposed Uniform Consumer Credit Code (U.C.C.C.) for adoption by the state legislatures.

The U3C, as it has come to be known, is a comprehensive code that deals with such diverse problems as maximum rates of interest on sales and loans, the disclosure and advertising of rates[1] and limitations on agreements, practices, and remedies in the area of consumer credit. The practices regulated include the use of negotiable paper in consumer sales (which is prohibited), home solicitation sales (the buyer is given a three-day "cooling off" period during which he can withdraw from the transaction), and garnishment of wages and salaries (the Code sets a maximum on the portion subject to garnishment). In addition, the Act establishes an administrator to whom broad powers of enforcement are granted.[2]

While the prominence of its authors alone would have guaranteed the Code serious consideration by the legislatures, an additional pressure has added to the likelihood of adoption. In 1967, while work on the Consumer Credit Code was in progress, Congress approved the Federal Consumer Credit Protection Act (Truth in Lending). The major provisions of the Federal Act were designed to guarantee full disclosure of interest rates on a simple per annum basis in consumer credit transactions. The Act provided for federal enforcement. But the Act further provided that the Federal Reserve Board could, by regulation, exempt from coverage:[3]

> [A]ny class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement.

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1. These rate disclosures are largely a duplication of the provisions of the Truth in Lending Act, Consumer Credit Protection Act, 15 U.S.C.A. §1633 (Supp. 1969).
2. U.C.C.C. §6-108 (1).
3. Consumer Credit Protection Act §123, 15 U.S.C.A. §1633 (Supp. 1969).

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The Uniform Consumer Credit Code was prepared with this provision in mind and presumably its substantive provisions do meet the aforementioned test.[4] As the Commissioners were quick to point out:[5]

> Only if a State enacts the Uniform Consumer Credit Code . . . is there a likelihood of a Board determination by July 1, 1969, the effective date of the Federal Truth in Lending Act. . . The time factor alone will make it difficult, if not impossible, for the Federal Reserve Board to make such a determination by July 1, 1969, with respect to any other State Truth in Lending Act or Regulations.

As of this writing only two states, Utah[6] and Oklahoma,[7] have adopted the Code. Probably the major factor delaying, or perhaps preventing its adoption throughout the rest of the United States is the considerable amount of criticism of the Code that has come from consumer organizations, including the Consumer Federation of America, The National Legal Services Program, The Ad Hoc Committee on Consumer Protection, The Association of California Consumers, The Consumers League of New Jersey, and others.[8] One of the most vehement and perhaps the most influential consumer organization to oppose enactment of the Code is Consumer's Union, the publisher of *Consumer Reports,* which stated in a recent issue:[9]

> It is true that some responsible consumer spokesmen have, despite misgivings, endorsed the U.C.C.C. . . . But C.U. and its legal consultants can find little to cheer about. *We don't think any state, no matter how bad its existing credit laws, should adopt the U.C.C.C. without extensive amendments in favor of consumers.*
>
> In far more ways than can be recited here the Uniform Consumer Credit Code seems dedicated to perpetuating current unhealthy practices. The influence of the credit industry comes through in section after section.

The Uniform Consumer Credit Code was introduced in the 1969 Florida legislature as House Bill 596. Legislative hearings were held in which the Code was heavily criticized by representatives of both the credit industry and consumers. Despite early optimism, the Code was not enacted during the 1969 session, and its future is now in doubt. That the Code has not yet been adopted in Florida is perhaps understandable, but it seems most peculiar that its defeat should be in the name of consumer protection with consumer interest groups in the forefront of the opposition. While the effect of adoption of the U3C in states where consumer protection is relatively advanced, such

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4. *See* the Federal Reserve Board's Statement, Appendix A to the Prefatory Notes to the 1969 Revised Final Draft of the U.C.C.C.

5. Prefatory Notes to the 1969 Revised Final Draft.

6. UTAH CODE ANN. §§70B-1-101 to -9-103 (Supp. 1969).

7. OKLAHOMA STAT. ANN. tit. 14a, §§1-101 to 9-103 (Supp. 1969).

8. A number of these position papers are included in CONSUMER RESEARCH FOUNDATION, CRITIQUE OF THE UNIFORM CONSUMER CREDIT CODE (1969).

9. *Consumer Reports,* March 1969, at 121, 122, 126 (emphasis added).

as California or Massachusetts, may be to detract from the present level of consumer protection, the changes that the Uniform Consumer Credit Code would make in the present law of Florida would be in the direction of greater consumer protection in nearly every instance.

MODERNIZING THE LAW

As with other uniform legislation, the drafters have billed the U3C as attempting to "simplify, clarify, modernize, and make uniform the law of the various jurisdictions."[10] Any advantages to be gained from uniformity depend upon adoption of the Code elsewhere. The first adoptions, rather than making state laws more uniform, may in fact be detracting from the uniformity already achieved under the Uniform Small Loan Act. However, the adoption of the Code, perhaps in a form slightly modified by both the Commissioners and the legislatures, seems inevitable. This prediction is based upon the fact that most opposition to the Code has been concerned with the high maximum rates, and amending them downward, as was done in Oklahoma,[11] is relatively minor surgery.

One of the major contributions that the Code would make to Florida law would be to simplify and better organize the regulation of consumer credit. Presently it is regulated under at least five different laws: the Small Loan Act,[12] the Discount Consumer Financing Act,[13] the Motor Vehicle Sales Finance Act, the Retail Installment Sales Act,[14] and the Usury Law.[15] Although the Code in its final form does not differ greatly in length from these laws, its terms are more explicit and its coverage is broader. In addition, the duplication of substantially similar provisions, which is so common in the present Florida law, has been considerably reduced. For instance, in establishing maximum rates of interest the present law specifies a rate of three per cent per month on the first 300 dollars and two per cent per month on any amount over 300 dollars for a lender under the Small Loan Act;[16] ten dollars per 100 dollars per year for a seller licensed under the Retail Installment Sales Act;[17] six per cent per annum on the total amount of the loan (not the outstanding balance) where the lender is a bank and the loan does not exceed 5,000 dollars;[18] ten per cent per annum (simple interest) for a lender under the general usury law;[19] and finally, for a seller under the

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10. U.C.C.C. §1-102 (c) (a), (8).

11. *E.g., compare* OKLA. STAT. ANN. tit. 14A §2-201 (2) (a) (i) (Supp. 1969), *with* U.C.C.C. §2-201 (2) (a) (i).

12. FLA. STAT. ch. 516 (1967.

13. FLA. STAT. ch. 519 (1967).

14. Both are included in FLA. STAT. ch. 520 (1967).

15. FLA. STAT. ch. 687 (1967).

16. FLA. STAT. §516.14 (1967).

17. FLA. STAT. §520.34 (4) (1967).

18. FLA. STAT. §659.18 (1) (1967).

19. FLA. STAT. §687.02 (1967).

Motor Vehicle Sales Finance Act the law provides a schedule of rates, depending on the age of the car and ranging from eight dollars per 100 dollars per year to seventeen dollars per 100 dollars per year.[20] Revolving charge accounts also carry a maximum rate slightly different from that under the Retail Installment Sales Act.[21]

Under the Code the corresponding maximum would be the greater of (1) thirty-six per cent on the first 300 dollars, twenty-one per cent on the next 700 dollars, and fifteen per cent on everything over 1,000 dollars; or (2) a flat rate of eighteen per cent on sales or licensed loans, eighteen per cent on unlicensed loans, and two per cent per month on the first 500 dollars and one and one-half per cent per month on the remainder for revolving credit.

MAXIMUM RATES

Together with the easing of licensing and inspection requirements in the small loan business, these changes in the maximum chargeable rates of interest are undoubtedly the most controversial changes the Code would make. The Code's maximum rates have been the subject of particularly heavy criticism. *Consumer Reports* lamented that:[22]

> [T]he part of the U.C.C.C. best calculated to appeal to lenders is its maximum interest rates . . . George Brunn, a municipal court judge in Berkeley, California, and a C.U. board member . . . wrote to the U.C.C.C. sponsors: "To give persons a right to charge 36%-plus interest (or finance charge) shocks at least my conscience and I do not believe that I am unduly sensitive."

"Thirty-six per cent plus" may well shock a Californian since the California Small Loan Law limits interest to two and one-half per cent per months on the first 100 dollars and two per cent per month on the next 200 dollars.[23] Florida, however, already permits the "thirty-six per cent plus" rate on the first 300 dollars under its small loan law.[24]

The U.C.C.C. maximum rates would exceed top rates now in effect in such important industrial states as Illinois,[25] Massachusetts,[26] Michigan,[27] New Jersey,[28] and New York.[29] On the other hand, rates higher than three

20. FLA. STAT. §520.08 (1967).
21. FLA. STAT. §520.35 (1967).
22. CONSUMER REPORTS, March 1969, at 122-23.
23. CAL. FIN. CODE §§24451, 24452 (West 1968).
24. FLA. STAT. §516.14 (1967).
25. The Illinois maximum is 3% per month, but the rates are scaled down sharply as the size of the loan increases. ILL. STAT. ANN. ch. 74, §31 (1963).
26. MASS. ANN. LAWS ch. 140, §100 (1968) (regulatory board to set minimum rate).
27. MICH. STAT. ANN. §23.667(13) (Supp. 1966) (2.5%).
28. N.J. STAT. ANN. §17:10-14 (Supp. 1969) (2%).
29. N.Y. BANKING LAW §352 (McKinney 1968) (2.5%).

per cent per month are permitted in Alaska,[30] Hawaii,[31] and Louisiana.[32] The maximum rate in most states seems to be about three per cent per month,[33] which would closely approximate the maximum rate under the U.C.C.C.

In defense of their rates the drafters have stated that their purpose "is to set ceilings and not to fix rates. . . . While this section sets rate ceilings, several other sections are designed to generate sufficient competition to set rates."[34]

The Code's detractors simply deny that this would be the effect. Indeed, the evidence seems to support the statement that:[35]

> Except in one or two states, finance charges on most short term cash loans by licensed lenders appear to be at the ceiling rates. Actual finance charges on used cars are probably at the ceiling more often than in the case of new cars, although there is no reliable evidence to support this assertion. Since in both of these particular markets, the consumer is frequently a marginal credit risk, it is not unreasonable to hypothesize that the ceilings set the rates. This is not to say that there is no competition when all the consumer finance companies in a given state charge the same rate on each size and maturity of loan, but that it must then center on obtaining customers who qualify for that rate through various forms of nonprice competition, such as prompt service and flexible terms.

The Association of California Consumers has put the case more tersely:[36]

> It is common knowledge, however, that competition never has operated as an effective check on finance charges in consumer credit transactions and that it probably will not do so now.

The obvious reply to such statements with regard to Florida law is that the Code would actually decrease rather than increase the maximum rates for licensed loans.[37] The Code would, however, increase substantially the maximum rates for other types of loans, notably bank loans, credit union loans, and revolving credit.[38] But rates in these areas of consumer credit are most likely to be competitive since generally the more sophisticated borrowers

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30. ALASKA STAT. §06.20.230 (1962) (4%).

31. HAWAII REV. STAT. §409-16 (1968) (3.5%).

32. LA. REV. STAT. ANN. §6.583 (1951) (3.5%).

33. B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 158-66 (1965).

34. U.C.C.C. §2-201, Comment 1.

35. Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81, 92-93 (1967).

36. Revised Statement of the Association of California Consumers before the Assembly Committee on Judiciary of the California State Legislature Hearings on Consumer Problems, San Francisco, Cal., Dec. 11, 1968, *reproduced in* CRITIQUE OF THE UNIFORM CONSUMER CREDIT CODE, CONSUMER RESEARCH FOUNDATION, BERKELEY, CAL. 264 (1969).

37. Florida permits a 3% charge on the first $300, which is substantially the equivalent of the Code's 36% on the first $300, but on the second $300 Florida permits 2% per month, the Code 21% per year.

38. Banks are presently permitted to charge slightly less than 12%, credit unions 12%,

qualify for these types of loans. Statistics that show that maximum rates become the norm rarely deal with these types of credit. Moreover, the Code does not rely completely on presently available factors; a number of other changes are expected to increase the probability of competition in consumer credit. Among them are disclosure of true annual interest rates and freedom of entry into the lending business.

Disclosure of Annual Rates

Under present practices, interest rates on consumer loans or sales are rarely stated as a per cent per year on the outstanding balance. More frequently they are stated as a per cent per month or as X number of dollars per 100 dollars per year of the amount outstanding at the beginning of the year.[39] Perhaps most deceptively, interest is stated at a specified annual rate on the original balance of the loan, not on the outstanding balance. In this situation, payment in installments will result in a true rate that is about double the stated rate. Those who favor continuation of the present practices argue that, while they may have been deceptive originally, consumers have come to think in terms of monthly rates, add-ons, and calculations based on the original balance; and consequently, it is the annual rate on the outstanding balance that would appear deceptively high. Proponents of a change in these practices point out that in the case of interest on savings accounts, and in other situations where the consumer is on the receiving end of the interest charge, rates are uniformly stated as a per cent per year on the outstanding balance.

In all regulated lending Florida law requires a disclosure of the rate to be charged. However, the law not only permits a lender to state the rate by the methods outlined above but actually encourages it, since the maximum chargeable rates themselves are stated in these allegedly deceptive terms. The Small Loan Law states a maximum charge of three per cent per month,[40] the Retail Installment Sales Act states the maximum rate as ten dollars per 100 dollars per year,[41] and the Banking Code allows banks to charge six per cent per annum on the total amount of the loan, not the outstanding balance.[42]

With rates stated in such various manners it is not at all surprising that there is so little price competition in the credit market. Suppose a small loan company does charge a lower rate, how is its customer to know if he does not take his interest tables with him when he goes shopping for credit?

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and revolving credit slightly more than 20%. Under the U.C.C.C., banks and credit unions would be permitted 18% and 24% respectively; revolving credit would be 2% on the first $500 and 1.5% per month on the next $500.

39. Since this type of loan will probably be paid back in monthly installments the true annual rate will be a percentage that is about double the stated amount of dollars.

40. FLA. STAT. §516.14 (1967).

41. FLA. STAT. §520.34 (4) (1967).

42. FLA. STAT. §659.18 (1) (1967).

On July 1, 1969, the disclosure requirements of the Federal Consumer Credit Protection Act became effective. This law requires that regardless of the manner in which finance charges are calculated they must be stated to the borrower as an annual rate on the outstanding balance.[43] Although the elimination of the rate disclosure barrier does not guarantee that there will be price competition in the credit market, it does make it more likely. In discussing whether an increase in actual rates can be avoided through increased price disclosure requirements, it should be remembered that Florida faces a threatened increase in bank and credit union rates, not small loan rates. Rate disclosure may not be sufficient to enable small loan borrowers to shop for credit, but generally a person who can qualify for credit at bank rates (whether twelve or eighteen per cent) would have enough sophistication to make the rational decision necessary to the functioning of the market. Even without disclosure of annual rates there is evidence of some price competition in the bank loan market. Florida banks generally lend money at two, and sometimes as many as five, different rates depending upon the credit worthiness of the borrower.

Freedom of Entry

A second change in present law that is designed to promote the competitive functioning of the consumer credit market is freedom of entry. Before granting a license under the Small Loan Act or the Consumer Discount Financing Act, Florida law requires not only positive findings as to the character, fitness, and financial responsibility of the applicant, but also a finding that granting the license will promote the "convenience and advantage of the community." This latter phrase has generally been interpreted to mean that if there are already enough lenders in operation to serve the community's needs, no further licenses will be granted. The Uniform Consumer Credit Code would abandon this requirement and rely upon competition to keep the number of lenders at an appropriate level. Whether the market will in fact accomplish this result has been questioned by some writers,[44] but judged by the states presently operating without any requirement of convenience

43. The Act defines the annual percentage rate in 15 U.S.C.A. §1606(a)(1)(A) as being: "(A) that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed; or (B) the rate determined by any method prescribed by the Board as a method which materially simplifies computation while retaining reasonable accuracy as compared with the rate determined under subparagraph (A)."

The Uniform Consumer Credit Code §2-304(2) adopts an almost identical definition.

44. F. Hubacheck, Annotations on Small Loan Laws 53-58 (1938); Conference on Personal Finance Law, Convenience and Advantage Clause (1946); Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 Bus. L. 227 (1968); Sullivan, *Administration of a Regulatory Small Loan Law*, 8 Law & Contemp. Prob. 146 (1941).

and advantage[45] the results of free entry are unlikely to be disastrous to the lending institutions.

Some additional changes related to freedom of entry have met with more strenuous objection. Licenses would not be required for persons lending at rates of eighteen per cent or less, and the rather heavy fees for licenses to lend at rates in excess of eighteen per cent would be eliminated.[46] The Code provides instead that funds for operation of the office of the administrator are to be derived from general appropriations.[47] In addition, not only does the approach of the Code to examination of licensees represent an apparent easing of the burden upon them,[48] but periodic examination of regulated lenders is not required. Objection to these changes has come from the Florida Banker's Association, which, in its "Memorandum of Objections" to the Code, points out that the freedom from licensing and periodic examination for lenders at rates under eighteen per cent per year would not apply to banks. They would continue to be regulated by the Banking Code, which has strict licensing and examination requirements. This would put banks at a comparative disadvantage in the consumer credit market. Whether this disadvantage will have any effect upon consumers will depend upon the examination policy adopted by the administrator in his broad discretion.

With regard to the other changes that the Code would make in the law regulating consumer credit practices, there can be no question that the law would move toward greater consumer protection. However, there are doubts as to the efficacy or importance of particular changes. A number of what appear to be the most important changes are discussed in the remainder of this article.

COOLING OFF PERIOD

One consumer problem that has succeeded in attracting substantial publicity is high-pressure selling by door-to-door salesmen, especially those dealing in home improvements. This problem is particularly difficult to deal with because of the wide varieties of techniques employed and the fear of disrupting legitimate commerce through the use of broad prohibitions. In 1964 England adopted a statute giving consumers who made installment purchases in their own homes seventy-two hours to withdraw from the transaction, a so-called "cooling off period."[49] Similar statutes were enacted in two

45. *E.g.*, ARIZ. REV. STAT. ANN. §§6-608 to -610 (1956); COLO. REV. STAT. ANN. §73-2-(2) (1963); D.C. CODE ANN. §26-602 (1961); IND. ANN. STAT. §18-3001 (1964). At least ten other states presently do not require a finding of convenience and advantage for issuance of a small loan license.

46. FLA. STAT. §516.03 (1) (1967) requires the payment of a $100 fee for processing an application for a small loan license and in addition a $100 per year license fee.

47. U.C.C.C. §3-502, Comment 3.

48. Under present law each licensee must undergo at least two examinations per year. Depending on the amount of loans outstanding, the fee for each examination will range from $30 to $100, FLA. STAT. §516.11 (2) (1967). Under the Code the administrator would be free to set the interval at which periodic examinations would be conducted and no fees are suggested. U.C.C.C. §3-506.

49. Hire-Purchase Act of 1965, c. 66, §11 (1).

Australian states[50] and five Canadian provinces.[51] In the United States feelings about high-pressure home solicitation sales first came to a boil over the home improvement racket. Fly-by-night operators would promise the improvements and obtain the buyer's signature to a negotiable contract. The contract was then quickly negotiated to a holder in due course, and the sellers disappeared leaving their hapless customer to pay off the bank or finance company. Statutes providing for a cooling off period in home improvement contracts were enacted in both Michigan and Pennsylvania in 1965,[52] partly as a reaction to the fraud described above and partly because of a feeling that consumers should have an opportunity to reconsider without the salesman present.

In 1966 Massachusetts enacted a one-day cooling off period for "retail installment contracts consummated at other than the seller's place of business."[53] Since then, general cooling off periods have been enacted in eight more states[54] and have been considered by the legislatures in a number of others. Florida presently has no cooling off period.

The Federal Truth in Lending Act provides for a three-day cooling off period in any consumer credit transaction in which a security interest in the borrower's residence is acquired. The section does not apply to "a first lien against a dwelling to finance the acquisition of that dwelling."[55] While the Federal Act deals with the most troublesome kinds of home solicitation sales, it does not reach the heart of the problem. Schemes such as the one described above would continue to be effective so long as the sellers did not seek the security of a mortgage. The taking of negotiable contracts and the ability of the seller to employ high-pressure methods to convince the buyer to sign against his better judgment make this questionable business profitable.

The Uniform Consumer Credit Code makes an attempt to deal with both of these techniques. It incorporates the federal provision[56] and a three-day cooling off period for *all* home solicitation contracts. Until midnight of the third business day after the contract is signed, a purchaser may cancel a consumer credit sale solicited at his residence if for any reason he does not

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50. The Door to Door [Sales] Act 1963, Vict. No. 7091 (Austl.); Door to Door [Sales] Act 1964, STAT. W. AUSTL. No. 107.

51. The Direct Sales Cancellation Act, STAT. ALBERTA c. 28 (1966); Consumer Protection Act, STAT. BRIT. COLUM. c. 14, §§3-10 (1967); The Consumers' Credit Act, STAT. MANITOBA c. 15, §§6-11 (1965), *as amended*, STAT. MANITOBA c. 11 (1966); The Direct Sellers Act of 1966, STAT. NEWF. No. 85, §23; The Direct Sellers Act, REV. STAT. SASK. c. 331, §20 (1965).

52. MICH. STAT. ANN. §19.417-202 (c) (4) (Supp. 1965); PA. STAT. ANN. tit. 73, §500-202 (c) (4) (Supp. 1969).

53. MASS. ANN. LAWS ch. 255 D, §14A (1968).

54. Home Solicitation Sales Act, Pub. Act No. 749, §2 (a) [1967], CONN. GEN. STAT. ANN. §42-137 (Supp. 1969); HAWAII REV. STAT. §476-3 (Supp. 1968); ILL. ANN. STAT. ch. 121½, §262B (Smith-Hurd Supp. 1967); Door to Door Retail Installment Sales Act of 1968, N.J. STAT. ANN. §§17:16C-61.1 to -61.9 (Supp. 1969); Home Solicitation Act, R.I. GEN. LAWS ANN. §§6-28-1 to -8 (Special Supp. 1968); VT. STAT. ANN. tit. 9, §2454 (Supp. 1969); WASH. REV. CODE ANN. §63.14.154 (Supp. 1969).

55. Consumer Credit Protection Act §125, 15 U.S.C.A. §1635 (Supp. 1969).

56. U.C.C.C. §5-204.

want to go through with the transaction.[57] The Code provides that when the contract is made the buyer is to be notified in writing of his right to cancel. After cancellation the seller may retain the lesser of the cash downpayment or five per cent of the cash price. Upon cancellation the seller has ten days to return any payments made and forty days to pick up the goods at the buyer's home. If the seller fails to retrieve the goods within this time period they become the property of the buyer and he need not pay for them. These provisions give the home solicitation buyer a fair opportunity to examine the bargain he has made without outside pressure. But they deal only indirectly with the problem of negotiable contracts, since often the buyer will not be aware of his problem until some time after the negotiable contract is made.

HOLDER IN DUE COURSE AND WAIVER OF DEFENSES

The use of negotiable paper in order to separate an obligation to pay from the contract out of which it arises is a time-honored and accepted business practice. But in transactions where the buyer is a consumer, the use of negotiable paper has come into serious question. Typically the transfer of the instrument is made by prearrangement to a finance company, bank, or acceptance corporation in the business of buying such paper. The usual arrangement is for the purchaser to buy all of a seller's paper. In addition, the purchaser frequently is merely a separately incorporated adjunct of the seller's business, set up to allow the seller to obtain indirectly the status of holder in due course. In a decision of national significance the Supreme Court of Florida ruled[58] that if the relationship between the seller and the purchaser of the paper were too close, the purchaser would be denied the status of holder in due course.[59] But from the standpoint of the consumer this made little difference since, if the negotiable contract were sold to an outsider, perhaps a bank or finance company, that entity could still become a holder in due course.

Nationally there has been a substantial amount of agitation and some success in the direction of eliminating the concept of holder in due course from consumer financing.[60] In the wake of newspaper articles and consumer complaints concerning the use of negotiable installment contracts in fraudulent home improvement schemes and other consumer credit rackets, an attempt was made to bar the doctrine of holder in due course from a large proportion of consumer credit transactions during the drafting of the Uniform Commercial Code.[61] However, the provision was deleted in a later drafting.

57. U.C.C.C. §§2-501 to -505.

58. Mutual Fin. Co. v. Martin, 63 So.2d 649 (Fla. 1953).

59. *See also* Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

60. *See, e.g.*, Comment, 52 MARQ. L. REV. 285 (1968).

61. The spring 1950 draft of the Uniform Commercial Code, §9-209(3), reads: "In the case of a seller's purchase money security interest in consumer goods an agreement not to assert claims and defenses arising out of the sales contract against an assignee is not effective and a note given as part of such a transaction is subject to such claims or defenses

Since then, Massachusetts and Maryland have substantially eliminated the holder in due course doctrine from consumer credit sales.[62]

The Uniform Consumer Credit Code takes a strong stand against the use of negotiable instruments in consumer credit sales. The Code prohibits the taking of a negotiable instrument other than a check in a consumer credit sale.[63] If a seller takes a negotiable instrument in violation of the Code provision, the buyer need not pay any interest and may recover from the seller a penalty to be determined by the court, not to exceed three times the finance charge on the transaction.[64] If the violation is willful it may carry an additional penalty in an action by the Administrator.[65] It is recognized, however, that some negotiable instruments will be taken in violation of this provision; if such an instrument ends up in the hands of a holder in due course, the debtor must pay the instrument and cannot assert his defenses. However, under the Code, a person who buys a negotiable instrument would not be a holder in due course if he knew the instrument arose out of a a consumer credit transaction.[66]

Although the drafter of the Code would appear to have dealt firmly with the emotion-laden issue of negotiable instruments in consumer credit sales, the Code may not dramatically improve the position of consumers whose new refrigerators do not work. Even though sellers do not take negotiable instruments, essentially the same effect can be achieved in two different ways.

The same *legal* effect can be achieved by a waiver of defenses. In such a case the contract (nonnegotiable, but assignable) provides that the debtor agrees he will not assert against the seller's assignee any defenses he may have against the assignor. The drafters of the Code provided two alternative sections to deal with this problem.[67] Alternative *A* would make any waiver of defenses in a consumer credit sale ineffective. But alternative *B* would make the waiver ineffective only with respect to defects that the buyer complains of in the first three months after notice of the assignment. If alternative *B* were adopted, undoubtedly many of the sellers who presently take negotiable instruments would switch to the use of waiver of defenses. A critical factor in evaluating the importance of this "loophole" would be the number of cases in which buyers do not discover and complain of defects within the three-month period.

The same *practical* effect as sellers taking negotiable instruments can be achieved if sellers simply refuse to extend credit, since the buyer will then presumably borrow elsewhere and probably sign a negotiable instrument.[68] Certainly, sellers who cannot take negotiable instruments will be at a comparative disadvantage in competition with lenders who can. Some increase

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even though in the hands of a holder in due course."

62. MD. ANN. CODE, art. 83, §147 (1957); MASS. ANN. LAWS ch. 255, §12C (1968).

63. U.C.C.C. §2-403.

64. U.C.C.C. §5-202 (1).

65. U.C.C.C. §6-113 (2).

66. U.C.C.C. §2-403.

67. U.C.C.C. §2-404.

68. The Code does not prohibit a *lender* taking a negotiable instrument.

in the proportion of loans granted by lenders as opposed to sellers can be expected, but the critical question is how great an increase. Since the convenience of seller credit would in the vast majority of cases outweigh the additional cost, the shift would probably not be massive. But an important factor is how to make lender credit convenient. Can a large department store, for instance, invite an "independent" lender onto the premises and let its clerks sign up customers for loans? Although the Code is silent as to how cozy a seller and lender may become, the *Martin*[69] and *Unico*[70] cases may provide some guidelines. Although it is hardly reasonable to suppose that substantially all sellers are going to quit making installment sales, the very fact that the use of negotiable instruments will be made substantially more inconvenient is bound to yield substantial benefits to consumers.

GARNISHMENT OF WAGES

Garnishment is the procedure by which a creditor who is unable to collect money due him is able, through a court order, to collect the money from a third party who owes money to the debtor. The process becomes controversial when the third party from whom collection is made is the debtor's employer and the debt garnished is salary or wages. The concern is twofold: the garnishment may leave the debtor without the means to support himself or his family; and second, it seems to be a well-known (although not very well-documented) fact that many employers follow a policy of discharging employees against whom writs of garnishment are issued.[71] Whatever the specific effect, some indication of the powerful over-all effect that garnishment has on debtors is given by the high correlation between rates of voluntary bankruptcies and the protections afforded debtors under the states' wage garnishment laws.[72]

Florida's garnishment laws are, at best, uneven in the protection that they afford to debtors. On the one hand, Florida law provides that all wages or salary of a head of a household are entirely exempt from garnishment;[73] this statutory generosity is matched in only two other states.[74] On the other hand, however, *no* exemption is provided for the earnings of one *not* the head of a household. Florida's garnishment procedures are cumbersome enough to

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69. Mutual Fin. Co. v. Martin, 63 So. 2d 649 (Fla. 1953). *See* text accompanying note 58 *supra*.

70. Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

71. For an attempt at documenting the relationship between garnishment and firing, see Brunn, *Wage Garnishment in California, A Study and Recommendations*, 53 CAL. L. REV. 1214, 1229-33 (1965); Satter, *Argument for Abolition of Wage Attachment*, 52 ILL. B.J. 1026, 1034-35 (1964).

72. Brunn, *supra* note 71, at 1234-38; Satter, *Wage Assignments and Garnishments Cited as a Major Cause of Bankruptcy in Illinois*, 15 PERSONAL FINANCE L.Q. REP. 50 (1961); U.S. Bureau of Labor Standards, DEP'T OF LABOR, DEBT POOLING AND GARNISHMENT IN RELATION TO CONSUMER INDEBTEDNESS 4 (fact sheet ser. No. 4-F 1966).

73. FLA. STAT. §222.11 (1967).

74. PA. STAT. ANN. tit. 42, §886 (1966); TEXAS CONST. art. 16, §28.

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render garnishment a relatively ineffective means of directly enforcing collections,[75] but unfortunately the remedy can usually accomplish its effect *in terrorem*. The position of a debtor *not* the head of a household is further eroded by the fact that in Florida garnishment of wages under certain circumstances is available before judgment.[76] In these cases the debtor must face the prospect of losing his job before he has even had the opportunity to litigate the validity of the creditor's claim.

The Federal Truth in Lending Act prohibits the discharge of an employee because his wages have been garnisheed for a single indebtedness, and provides for a fine of 1,000 dollars or imprisonment for not more than one year for violators.[72] In addition, it limits the portion of disposable earnings that may be garnisheed to the lesser of twenty-five per cent or the amount by which the individual's income exceeds thirty times the federal minimum wage.[78] These provisions become effective July 1, 1970.[79]

The Code's provisions on garnishment are similar to the congressional provisions but offer the debtor an additional measure of protection. The exemption is increased to the lesser of twenty-five per cent of disposable earnings or the amount by which his disposable earnings exceed forty times the federal minimum wage.[80] Discharge from employment is prohibited for any garnishments arising out of a consumer credit sale or loan.[81] The Code also prohibits garnishment before judgment where the debt arises out of a consumer credit sale.[82] None of these Code provisions would in any way detract from the protection afforded consumers under the federal[83] or Florida law.[84] Since the Code makes no changes in garnishment procedure, enforcing a judgment through garnishment of wages will be as difficult after adoption of the Code as it is presently. The 100 per cent exemption for a head of a household would also remain in effect.

A problem closely related to garnishment is that of assignment of wages. A creditor who cannot garnish wages can accomplish the same result by taking an assignment of wages at the time the loan is made. Thus, meaningful protection against garnishment must include protection against assignment of

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75. Garnishment in Florida can only be had against a debt that is not contingent. West Fla. Grocery Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 77 So. 209 (1917). Presumably a writ could not cover wages unaccrued at the time of the answer; thus possibly necessitating a series of proceedings to satisfy a single obligation.

76. FLA. STAT. §77.031 (1967).

77. Consumer Credit Protection Act §304, 15 U.S.C.A. §1674 (Supp. IV, 1968).

78. Consumer Credit Protection Act §303 (a), 15 U.S.C.A. §1673 (a) (Supp. IV, 1968).

79. Consumer Credit Protection Act §504, 15 U.S.C.A. §1631 n.1 (Supp. IV, 1968).

80. U.C.C.C. §5-105.

81. U.C.C.C. §5-106.

82. U.C.C.C. §5-104.

83. See Consumer Credit Protection Act §§305, 307, 15 U.S.C.A. §§1675, 1677 (Supp. IV, 1968).

84. Comment 5 to U.C.C.C. §5.105 provides: "This section [dealing with exemptions] is not meant to displace other provisions of state law which may provide additional protection to the debtor." The example makes clear that this statement applies to exemptions at a rate higher than the Code rate.

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wages. While current Florida law permits assignment of wages or salary,[85] under the Code neither a lender[86] nor a seller[87] can take an assignment of earnings.

Other Practices

In a number of states a borrower commonly agrees at the time a loan is made that the lender may confess judgment against him in case of any later dispute. If the authorization is employed, the debtor does not receive notice of the lawsuit. Subsequently, unless he can later reopen the judgment, he loses his chance to defend. Although the practice of taking and using confessions of judgment is prevalent in a number of states, particularly Pennsulvania, Ohio, and Illinois, they are seldom if ever employed in others.[88] Florida prohibits confessions of judgment,[89] as does the Code.[90]

Florida lenders do, however, frequently extract from borrowers a promise to pay the lender's attorney fees should any difficulty arise in collection. Florida law restricts the practice with regard to installment sellers in that the fee cannot be collected unless the case is referred to an attorney not a salaried employee of the installment seller.[91] The charging of such a fee can of course be a serious deterrent to a borrower who is somewhat in doubt as to his rights under the agreement. The Code provides two alternative sections on attorneys' fees. Alternative *A*[92] would prohibit and make unenforceable any agreement to pay the attorney's fees of the lender or seller. Alternative *B* would limit such a charge to not more than fifteen per cent of the unpaid debt after default, except in the case of a supervised loan of 1,000 dollars or less where no charge would be permitted.[93] Even under alternative *B* the Code would retain the requirement that the case be referred for collection to an attorney who is "not a salaried employee" of the seller or lender.[94]

Under present Florida law a debtor who has his property repossessed upon default must still face the prospect of paying the difference between the amount due and the amount netted upon resale, that is, a "deficiency judgment."[95] The Code would prohibit the granting of a deficiency judgment to a seller where the original purchase price of the repossessed goods was 1,000 dollars or less.[96]

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85. Fla. Stat. §519.11 (1967).
86. U.C.C.C. §3-403.
87. U.C.C.C. §2-410.
88. Some interesting survey data on the use of confessions of judgment clauses can be found in Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. Chi. L. Rev. 111 (1961).
89. Fla. Stat. §§55.05, 516.16 (1967).
90. U.C.C.C. §3-407.
91. Fla. Stat. §§520.37, .05 (5) (1967).
92. U.C.C.C. 2.413 with respect to sales, §3-404 with respect to loans.
93. U.C.C.C. §3-514 (1).
94. U.C.C.C. §2-413 alternative *B*; §3-404 alternative *B*.
95. Fla. Stat. §679.9-504 (2) (1967).
96. U.C.C.C. §5-103 (1) (2).

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One of the problems in allowing a higher interest rate on smaller loans is that lenders may make a number of small loans to a borrower rather than one large one in order to obtain a higher finance charge than the lawmaker intended. Florida law prohibits the splitting or dividing of a loan to obtain a higher rate of charge.[97] The Code provides the same protection against this and similar practices by providing that a seller[98] or a supervised lender[99] may not use multiple agreements to obtain a higher rate of charge. The phrasing with regard to lenders is substantially the same as the present law.

Finally, present Florida law provides only weak disclosure requirements[100] to protect a consumer against "balloon payments," the practice of scheduling "invitingly small installment payments until the end of the contract when the buyer is confronted with a balloon payment too large to pay."[101] Under the Code a payment could be "more than twice as large as the average of earlier scheduled payments" only if the "schedule is adjusted to the seasonal or irregular income of the buyer,"[102] or if the seller is willing to let the buyer refinance on no less favorable terms than the original sale or loan.[103]

SUMMARY AND CONCLUSION

Whether the proposed Uniform Consumer Credit Code represents an advance in consumer credit legislation depends upon one's criteria. But if the relevant criteria is, as many lawmakers seem to believe, the degree of protection and advantage afforded consumers, there can be little doubt that the Code compares favorably with present Florida law. The provisions of the Code would increase the maximum chargeable rate of interest to a significant degree only in the case of bank, credit union, and revolving credit sales or loans where market forces already seem to operate reasonably well. To improve competition in all areas of the market, the Code would ease restrictions upon entry into the lending business and further implement the disclosure requirements of the Federal Truth in Lending Act. While this may have an adverse effect on banks there is little reason to assume that consumers will be hurt.

Although the advantages of increased competition may be somewhat speculative, the Code's regulation of certain questionable business practices provides greater substance. The provisions as to the assignment of wages and limitations on garnishment add needed protection to the consumer's future earnings and increase the security of his employment situation. Other protections such as those against deficiency judgments, home solicitations, payment of lenders'

97. FLA. STAT. §516.14(3) (1967).
98. U.C.C.C. §2-402.
99. U.C.C.C. §3-509.
100. FLA. STAT. §520.34(2) (1967).
101. U.C.C.C. Comment to §2-405.
102. U.C.C.C. §2-405 applies to sellers; the corresponding section for lenders is §3-402.
103. U.C.C.C. §§2-405, 3-402.

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attorneys' fees, and balloon payments also extend the level of consumer protection. The fact that some of the protection may be partly illusory, as in the case of the prohibition against the use of negotiable instruments, is unfortunate. Even though the Code may ignore or deal ineffectively with a number of consumer problems, the change that the Code would make, with the exception of maximum interest rates for certain kinds of lenders and possibly the easing of examination requirements for licensees, would increase consumer protection without limiting current Florida protection.

It would be unfortunate if Florida's lawmakers were to confuse the issue of the Code's adoption throughout the rest of the United States with the issue of its adoption here. Whether or not the Uniform Consumer Credit Code is finally adopted in Florida, its consideration has drawn attention to the fact that the level of consumer protection in Florida is inadequate and compares unfavorably with that in other states.