

4-1-1967

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### Recommended Citation

Carl Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C.L. Rev. 535 (1967), <http://lawdigitalcommons.bc.edu/bclr/vol8/iss3/8>

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# SOME RUMINATIONS ABOUT REMEDIES IN CONSUMER-CREDIT TRANSACTIONS

CARL FELSENFELD\*

## I. INTRODUCTION

The draftsmen of the Uniform Consumer Credit Code (hereinafter the Credit Code) have thus far directed most of their time and effort to establishing a permissive pattern within which creditors give and debtors receive credit. Spokesmen for both sides, as well as distinguished neutral parties, have carefully described the terms under which credit may be granted, the rates that may be charged, and many other elements of the credit transaction. These statutory requirements will significantly influence the size and scope of the debtor community and will undoubtedly set the future pattern for consumer-credit transactions. Thus, these permissive, or authorizing, guidelines of the Credit Code are clearly its most important aspects.

Underlying much of the thinking of the Credit Code draftsmen is an assumption that most debtors will honor their debts and most creditors will obey the law. Remedies follow violation, and, since violation is really the exception rather than the rule, the pattern of remedies in existing consumer-credit legislation is haphazard. It is, therefore, important, though only secondarily so, to consider what happens when either debtor or creditor violates a statutory provision or a term of his bargain. In practice, of course, creditor losses resulting from debtor violations are recouped through interest rates, special charges, and penalties that yield a compensating return from those who do pay, either on time or late. Thus, those who pay in a sense subsidize those who do not. Naturally, the higher the basic rate, the more loss the creditor is generally able to sustain. Higher rates also enable creditors to reach a wider group of debtors and to extend credit to more low-quality risks. Unlike many other commodities, credit has the effect of becoming more expensive the more people it is designed to reach.

Debtor violations usually cause creditors an ascertainable money loss. On the other hand, when creditors are in violation, the economic effect is more difficult to isolate. Remedies for creditor violations are, therefore, less precise. Penalties are suggested and drafted, but they have never reached the level of sophistication that has resulted in matters related to debtor default.

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The object of this article is hardly to cover the entire field of creditor and debtor remedies. Instead, discussion is restricted to those civil remedies that apparently were considered most important by the draftsmen of the first tentative drafts of the Credit Code. Even here considerable selection has been necessary; the author's personal interests have been the major guide.

## II. SOURCE OF LAW OF REMEDIES

Fitting major new legislation into an existing legal structure is always a difficult problem.<sup>1</sup> The Credit Code, which provides a comprehensive set of consumer-credit controls, presents a particularly difficult challenge, since consumer-credit laws are found in a wide variety of statutes, as well as in case-law doctrines. This is particularly true of remedies. Imposition of "uniform" remedies, therefore, necessarily increases the risk of having varying effects in different states due to the contrasting legal structures within which they will exist. Essentially then, it is very difficult to say whether a uniform remedy is desirable until one determines its place within particular systems.

There are several major existing sources of state remedial law. Part 5 of Article 9 of the Uniform Commercial Code, for example, sets out a detailed series of provisions on a secured creditor's right to repossess collateral after a default, prepare it for sale, dispose of it, and hold the debtor liable for any remaining deficiency. Similarly, Part 5 provides the debtor with remedies should the secured party violate his obligations. Except in minor respects, the U.C.C., in its treatment of remedies, makes no distinction between consumer and business transactions.<sup>2</sup> In this respect, the U.C.C. meets with this writer's general approval. If the Credit Code provides additional uniform remedies, it will obviously benefit from the fact that forty-nine states have already adopted the U.C.C.,<sup>3</sup> because acceptance will not be hampered by conflicting legislation.

The incidental benefit of uniformity, however, does not exist among the state civil-practice laws. These laws generally cover the basic creditor remedies and will be closely related to most Credit Code provisions in this area. In the civil-practice laws, one may also find such specialized related matters as rights of assignees,<sup>4</sup> rights to replevy property,<sup>5</sup> and regulations regarding interest.<sup>6</sup> These statutes

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<sup>1</sup> See *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961), for a discussion of the problems that the Uniform Commercial Code presented in Kentucky.

<sup>2</sup> See U.C.C. §§ 9-505(1), -507(1).

<sup>3</sup> Only Louisiana has not yet adopted the U.C.C.

<sup>4</sup> E.g., N.Y. Civ. Prac. Law § 3019(c) (McKinney 1963).

<sup>5</sup> E.g., N.Y. Civ. Prac. Law § 7101 (McKinney 1963).

<sup>6</sup> E.g., N.Y. Civ. Prac. Law § 5003 (McKinney 1963).

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differ widely from state to state, and the existing differences present a fundamental problem in drafting uniform legislation.

The justification for a specific remedy in any particular situation is necessarily predicated upon the available alternatives. Thus, one finds numerous specialized remedies and interrelated statutory provisions and case-law doctrines creating distinct patterns in different states. To characterize a particular remedy as harsh or unjust in the abstract may, therefore, lead to unexpected inequities in individual situations. For instance, a "judgment note" is a device whereby a debtor confesses judgment to the creditor as part of his routine promise to pay. The instrument may normally be filed immediately as a judgment, thereby becoming a lien on the debtor's real estate which can be foreclosed in the event of his default. Obviously an extreme type of remedy, the judgment note is disfavored, if not legally forbidden, in most states. In some states, such as Pennsylvania, however, it is in general use. Pennsylvania lawyers strongly assert that to eliminate the judgment note would occasion an abrupt dislocation of the credit pattern, since garnishments are forbidden in that state.<sup>7</sup> The absence of garnishment may make a remedy such as the judgment note appropriate for proper creditor protection in Pennsylvania, but perhaps not in other states with different enforcement provisions. This is the type of difficulty the Credit Code draftsmen must consider in establishing any uniform law of remedies.

### III. DEBTORS' REMEDIES

#### A. *Existing Approaches*

For the purposes of this section, it is assumed that a creditor, in a consumer-credit transaction, has violated a statutory provision. What remedies and defenses should then be available to the debtor? The question presents conceptual difficulties no matter how it is approached. Should the answer recognize these difficulties, or should it create an aura of simplicity? The remedial provisions of existing consumer-credit laws vary from the very brief to the relatively complex. The former, while creating the appearance of simplicity and clarity, generally raise problems by virtue of the absence of coverage in certain areas, and they suffer in an attempt to provide only a few answers to what is really a series of problems. On the other hand, the more complex the remedial provision, the more it is necessary to provide appropriate answers to those problems at the drafting stage rather than in litigation.

-In an effort to derive from existing consumer-protective legisla-

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<sup>7</sup> Pa. Stat. Ann. tit. 42, § 886 (Purdon 1966). See generally Helstad, Consumer-Credit Legislation: Limitations on Contractual Terms, pp. 529-31 *supra*.

tion a model for a uniform act, one finds, not unexpectedly, a conglomeration of laws easing the debtor's financial burden when a creditor has violated a statute. The typical civil remedy in the small loan laws is avoidance of the entire debt,<sup>8</sup> whereas the sales finance laws usually deprive the violating creditor of all or a part of the finance charge.<sup>9</sup> State general usury laws commonly base their penalties upon some variation of loss of interest: either loss of the interest above the legal rate,<sup>10</sup> loss of all interest,<sup>11</sup> or loss of some multiple of interest.<sup>12</sup> Within these categories, there are myriad variations. Small loan laws<sup>13</sup> and sales finance laws<sup>14</sup> may limit the voidness penalty to more serious violations only. Within one state there may be more than one loan law or sales finance law with different penalties; general usury laws may also void principal<sup>15</sup> or part of principal.<sup>16</sup>

### B. Outline of Suggested Legislative Provisions

Drafting a model penalties section will not be attempted in this article, since so much depends on the many and varied legal duties to which penalties relate. As a statement of principles, however, the following is submitted, subject to and amplified by the discussions that follow:

(a) If an unlicensed creditor engages in direct consumer-lending activities when licensing is required, the penalty shall be avoidance of the entire obligation.

(b) If an unlicensed creditor purchases validly created sales finance obligations when licensing is required, (i) he shall be denied resort to the courts until licensing is accomplished, and (ii) the effect of the violation on the debt shall be as provided in (c)-(g) below.

(c) For all violations, however caused, the debtor shall be permitted to recover all provable damages.

(d) Except as otherwise expressly provided, all statutory violations shall cost the creditor the full amount of the finance charge plus one-quarter of the original principal balance.

(e) Subsection (d) shall not apply to the creditor who violates certain technical listed requirements (*e.g.*, type size, mathematical computation), and who can prove that the violation was due merely to honest mistake.

<sup>8</sup> See, *e.g.*, Md. Ann. Code art. 58A, § 16(b) (1964).

<sup>9</sup> See, *e.g.*, N.Y. Pers. Prop. Law § 414(2) (McKinney 1962).

<sup>10</sup> *E.g.*, Del. Code Ann. tit. 6, § 2304 (1953).

<sup>11</sup> *E.g.*, Fla. Stat. Ann. § 687.04 (1966).

<sup>12</sup> *E.g.*, Kan. Gen. Stat. Ann. § 16-202 (Supp. 1961).

<sup>13</sup> *E.g.*, N.J. Stat. Ann. § 17:10-21 (1963).

<sup>14</sup> *E.g.*, Minn. Stat. § 168.75(b) (1960).

<sup>15</sup> *E.g.*, N.Y. Gen. Obligations Law § 5-511 (McKinney 1964).

<sup>16</sup> *E.g.*, N.D. Cent. Code § 47-14-10 (1960).

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(f) The creditor shall be permitted to correct all violations resulting in a potential penalty under subsection (d), except (i) as against those who actively assert the violation against the creditor, and (ii) later than fifteen days after some act either against the creditor (as a noncontested administrative act) or by the creditor (as a voluntary correction against some debtor) which objectively demonstrates his knowledge of the violation.

(g) The debtor whose obligation in a consumer-sale transaction is assigned to a financing agency shall be required to pay the assignee who takes in good faith, regardless of the debtor's objections to the goods or services bought, but only where the debtor has specifically waived his defenses against an assignee and the assignee buttresses this by a separate notice of assignment to the debtor.

### C. *Policy Considerations Behind Civil Penalties*

A rational civil penalty can be attained only after clear consideration has been given to what that penalty is designed to accomplish. In addition, it is essential that any remedy leading to a variation of the obligation be set out in the statute with maximum clarity. Although it can be argued that there are some situations which require a degree of judicial discretion rather than specific penalties,<sup>17</sup> such an approach is inappropriate to the consumer-credit area, because commercial decisions are often influenced by the nature of contingent sanctions. Due to the inherent complexity of consumer-credit statutes, a lawyer's advice to his client is more often in the nature of a value judgment than a reading of well-defined rules. For the financier to steer a completely conservative course can, in a very real sense, often mean financial ruin. The exercise of judgment, however, includes evaluation of risk, and cannot be made intelligently without a reference to sanctions. Poorly defined civil penalties impede balanced decision-making, and may injure the community by inducing financiers to avoid areas of uncertain risk.

The draftsmen of the Credit Code, in evaluating methods of penalizing violating creditors, considered many approaches. A preference, however, was shown for a statutory provision which would penalize such creditors a multiple of the amount of the excess finance charge imposed on the debtor. Allowing recovery of only the excess charge itself was deemed an insufficient deterrent; voidability was tentatively disapproved as too severe. In evaluating this approach, several policy factors should be considered.

1. *Compensation and Deterrence.* Certainly no one will deny that when a creditor violates the law, he should recompense the debtor

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<sup>17</sup> *General Motors Acceptance Corp. v. Kyle*, 54 Cal. 2d 101, 110, 351 P.2d 768, 773 (1960).

for actual injury. Typically, however, the consumer's monetary losses (*e.g.*, unlawful charges by a consumer lender, insufficient refunds upon prepayment, improper "service" charges or the like) are minimal. Other violations, such as misstatements of rate or other charges, improper contract disclosures, false advertising, or insufficient record-keeping create a financial loss that is conjectural at best.

Probably the most important function of consumer-credit-law penalties is to admonish creditors not to commit the wrong.<sup>18</sup> Deterrence is necessary since the relatively low amount of excess charge is often not worth the cost of a legal action. Thus, creditors, over the long run, can gain an undeserved, unlawful windfall. Sometimes compensatory damages will serve this preventive function.<sup>19</sup> Where a lender has overcharged, for example, and the law requires him to return the overcharge only, no deterrent function is served. The lender derived gain from the illegal act, but the compensatory remedy only returns him to where he should have been. Where, however, the lender obtains no clearly recognizable financial advantage in perpetrating the wrong (as in utilizing illegal contract forms, assuming for the moment that no competitive advantage is gained from the violation), compensatory damages for the debtor's loss do tend to act as a deterrent. Since actual loss for such violations will normally be small and difficult to prove in individual consumer-credit transactions, however, even the latter class of compensatory remedies will be an inadequate preventive device. Something more must be added for practical effectiveness. The quantity and quality of the additive is the principal and most difficult problem.

An acceptable penalty should, at the very least, provide the debtor sufficient incentive to bring an action or pursue a defense based upon an alleged violation. Worthy of consideration here, although not traditionally a part of American jurisprudence, is the awarding of attorney's fees and court costs to a debtor who sustains a charge that a creditor has violated the statute.<sup>20</sup> However, in view of the generally minor actual damages suffered by an individual debtor, such a provision, without some degree of punitive damages, would probably inure to the sole benefit of attorneys and, while of possible deterrent value, would therefore be of advantage to a class not intended as the primary beneficiaries of the statute.

The practice of penalizing the violating creditor by charging him a multiple of the full or excess charge is familiar to state usury

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<sup>18</sup> The theory here follows that in tort claims. See Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 522 (1957).

<sup>19</sup> See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931).

<sup>20</sup> Mich. Laws 1966, Pub. Act. 326 added attorney's fees and court costs to the usury penalty of loss of interest.

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laws, where the most common penalty is double the full legal interest.<sup>21</sup> The treble-damages penalty found in many trade-regulation statutes presents a worthy analogy.<sup>22</sup> It is questionable, however, whether a remedy based on an actual-damages factor will have a significant deterrent effect in consumer-loan legislation. The following examples illustrate the use of a "multiple-of-charges" penalty:

(1) The purchase of a new car in New York for \$3,000, payable monthly over a three-year period at the maximum rate of seven per cent add-on, would cost the buyer \$630 in gross finance charges.<sup>23</sup> Five times the charge would result in a creditor *penalty* of \$3,150, and almost void the \$3,630 contract. Three times the charge would result in a creditor penalty of \$1,890, limiting his *recovery* to \$1,740 of his \$3,000 disbursement.

(2) A small loan in New York in the statutory maximum amount of \$800 for two years, payable monthly at the maximum statutory rate, would cost the borrower \$166.48 in interest.<sup>24</sup> A multiple of five would again almost void the contract, resulting in a reduction of about \$830 from the total debt of \$966.48. Three times the charge is about \$500, allowing the creditor to recover about \$300 of his \$800 outlay.

Obviously, any penalty based on a multiple of charge loses appeal to the complaining debtor as the charge diminishes. Although twice the charge may be substantial enough in a \$3,000 credit, it might not be in an \$800 loan. A similar consideration applies to multiples of excess charge. The latter, of course, has the virtue of automatically increasing in severity as the excess increases. Its cogency, however, is questionable in consumer-credit transactions, where violations by a *licensed* lender tend to result in only minor overcharges and are likely to be in areas other than that of rate. The obvious flaw of a penalty based solely on overcharge is that the violation need not necessarily result in an overcharge.

In the numerous transactions involving merely two or three hundred dollars, or the typical revolving-credit transactions involving very small balances with only slight charges, something approaching a voidness penalty should be considered in order to accomplish the deterrent effect. A penalty in a flat dollar amount, or a combination of such an amount plus charge or a multiple of charge, might also be tailored to achieve the desired result. The suggestion previously made

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<sup>21</sup> E.g., Kan. Gen. Stat. Ann. § 16-203 (Supp. 1961); Mont. Rev. Codes Ann. § 47-126 (1947); Okla. Stat. Ann. tit. 15, § 267 (1966).

<sup>22</sup> See Clayton Antitrust Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

<sup>23</sup> See N.Y. Pers. Prop. Law § 303(1)(a) (McKinney 1962).

<sup>24</sup> See N.Y. Banking Law § 352 (McKinney Supp. 1966).



that one-quarter of principal be forfeited as the basic civil sanction is presented only as one of many possible compromise figures.

2. *Administrative Supervision.* Civil penalties applicable to *licensed* creditors will reflect the degree to which the legislature wishes the courts to substitute their judgment for that of the credit administrators. A serious civil penalty in addition to the supervisory pattern would encourage the general debtor public and counsel to seek recourse in the courts. It is questionable whether this practice would be desirable.

The act of licensing generally indicates the creditor's willingness to comply with the law.<sup>25</sup> Continuous supervision over licensed activities by administrative officials has in practice demonstrated a conscientiousness and expertise that has further induced the creditor community to comply with the statute. In addition, violations by licensed creditors tend to be detected and remedied more quickly and at considerably less cost at the administrative level than in traditional law suits.<sup>26</sup> While the courts must retain their jurisdiction to correct abuses as well as to provide appeal and redress from improper administrative action, it is submitted that in licensed activities, the administrators should be the first line of protection. This can be so only if the public can secure adequate recovery at the administrative level.

3. *Adjustment of Penalty to Violation.* Penal sanctions are usually not adjusted as well in the civil law as in the criminal law.<sup>27</sup> In general, a statutory violation per se—whether major or minor—supports a stated civil penalty. Where penalties are based upon actual damages or multiples thereof, as in the fair-trade laws, there is a built-in scale. Where, however, penalties are unrelated to actual damages, the penalty may bear no particular relationship to the nature of the wrong. The outstanding example in the consumer-finance field is the voidness penalty of the small loan laws; here minor or technical errors lead to the same penalties as flagrant violations.

As the complexity of the laws and the number of possible violations increase, there is an increasing need to make penalties commensurate with the wrong committed. Failure to meet the licensing requirement is probably the most significant violation of a regulatory statute. Yet here, too, there may be extenuating circumstances justifying mitigation of the penalty for infraction. For instance, it is entirely possible that a lender will neglect to acquire a license due to a good-faith belief that the nature or legal situs of his transactions does not re-

<sup>25</sup> See Note, 58 Colum. L. Rev. 854, 883-84 (1958). See also Comment, Policing Contracts Under the Proposed Commercial Code, 18 U. Chi. L. Rev. 146 (1950).

<sup>26</sup> Cf. Tomlin, Private Recovery Under the Robinson-Patman Act—An Analysis and a Suggestion, 43 Texas L. Rev. 168, 173 (1964).

<sup>27</sup> See Kirk, Use of Statistics in Criminalistics, 55 J. Crim. L., C.&P.S. 514 (1964).

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quire licensing.<sup>28</sup> It is also possible for an unlicensed creditor to impose charges well within the statutory maximum and cause the debtor no actual damage.

Violations of maximum-charge provisions are also potentially serious—but only potentially. A lender may, for example, charge only minor excess amounts by computing the charge on a 360- instead of a 365-day year. Or he may in good faith impose an investigation or appraisal charge upon a borrower, only to be met later by a judicial finding that the charge was “interest.” Even improper recordkeeping can be more serious than overcharging if the degree of the former is flagrant and the latter minor. It is impossible, however, to determine, as a general rule, which violations are serious and which minor. Nevertheless, the practicalities of the situation and the experience of the industry do indicate that certain derelictions should be considered more serious than others.<sup>29</sup>

4. *Punitive Damages.* Damages beyond the compensatory level have been criticized because private parties thus derive “unjust” enrichment from sanctions whose basic function is to protect the public interest.<sup>30</sup> In a sense, of course, the charge is justified. It is also true, however, that in such a situation the plaintiff himself is performing a public function, and encouragement in the form of financial reward is necessary to induce him to do so. The purpose in designating a penalty which is commensurate with the violation is not to prevent the unjust enrichment of successful litigants, but rather to stimulate debtors to take action in appropriate circumstances without subordinating public benefit to private gain.

In addition to the element of private reward, punitive damages are also open to the objection that they subject a defendant to the severities of the criminal law without its protections:<sup>31</sup> Civil judgments are supported only by a preponderance of the evidence rather than by proof going beyond a reasonable doubt as required in criminal trials; basic elements of most crimes, such as evil intent, are sometimes not required; and the defendant, if found civilly liable, may also be criminally prosecuted and thus subject to a kind of double jeopardy.

The objections involving weight of evidence or elements of intent may be formally correct, but the traditional criminal-law safeguards are probably not required in the imposition of consumer-protection penalties. These are not the kind of sanctions involving imprison-

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<sup>28</sup> See *People v. Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1964).

<sup>29</sup> Consideration might well be given to classifications of penalties which vary in degree depending upon the type of wrong committed.

<sup>30</sup> A rough analogy would be a complaining party in a criminal case pocketing the fine.

<sup>31</sup> See Prosser, *Torts* § 2 (3d ed. 1964).

ment, permanent disgrace, or the like, against which one is so carefully protected by the criminal law. Instead, they mainly involve money judgments against financial institutions. The problem does, however, again emphasize the need to place penalties at a rational level. The deterrent effect should be achieved without simultaneously reducing the defendant to quasi-criminal status.

The double-jeopardy argument is of more theoretical than actual interest. For one thing, traditional criminal penalties in the consumer-credit area are so different from civil penalties that there is little likelihood of double anything. Fines tend to be insignificant when compared to the potential dollar loss a large financier faces when credit transactions involving millions of dollars may be subject to civil penalties. Imprisonment is, of course, possible, but this need not be evaluated as a "doubling" of a civil dollar penalty. Finally, experience has proven that there is little risk of this kind of double jeopardy in the consumer-credit field. *Licensed* creditors' violations of credit-regulatory legislation tend to be slight and technical—usually not enough to interest the state prosecutor's office. *Unlicensed* creditors are also rarely exposed to "double jeopardy." Some, in good faith, do not believe they require licensing and generally will not interest the public prosecutor; others are criminals who will usually avoid the civil courts.

#### D. Discussion of Suggested Legislative Provisions

1. *The Voidness Penalty.* As noted, the traditional civil weapon of the small loan laws, and an occasional penalty in other consumer-protection statutes, is avoidance of the entire transaction. Essentially, the court accords a cash gift to the borrower and a free automobile to the person who buys on a time plan. This extremely harsh remedy developed in the early period of small loan legislation when only the most severe sanction was considered adequate to protect the public against the evils of illegal lending. It was believed that any lesser penalty, such as loss of interest, would not sufficiently deter loan sharks from the proscribed activities. In addition, small loan companies were, some fifty years ago, virtually the only source of consumer loans.<sup>32</sup> Only a voidness penalty was deemed effective to control their "monopolistic" power. This penalty has remained in the small loan laws more from tradition than from basic considerations of policy, and a difficult political problem would face anyone who proposed to eliminate it.

In analyzing the voidness penalty, a distinction must be made between licensed and unlicensed lenders. Where a statute requires licensing and provides for continuous state administrative supervision

<sup>32</sup> The appearance of credit unions and the widespread entry of banks into this field were later phenomena.

over the licensed activities, experience has proven that (1) by obtaining a license, a lender indicates a recognition of state law and an inclination to comply with it, and (2) active administrative supervision is clearly the fastest and most effective way to discover and cure violations of law. The most serious risk to the public exists where creditors who do not choose to obtain a license engage in consumer-credit transactions. These are the individuals, operating in direct contact with consumers and in violation of the primary state requirement, who should be subject to a voidness penalty. This severe penalty would serve as a deterrent to a most serious violation, and should be acceptable to both the judiciary and the public.

At this point a *caveat* is in order. The exact status of consumer-creditor licensing under the proposed Credit Code is far from settled, and it is not improbable that a system will be established within which licensing in the traditional sense will be eliminated. Naturally, any such result will necessitate certain changes in the analysis contained in this article. It is, however, probable that any form of mass consumer lending will, whatever the licensing system, be subject to some form of regular administrative supervision and some form of formal authority to lend. It is the subjection to administrative supervision, not the act of licensing alone, that is the essence of the approach taken herein. With that in mind, the concepts expressed in this article would still be applicable even if formal "licensing" were eliminated in the final draft of the Credit Code.

State administrators have considerable power over licensed creditors: they are constantly examining offices; they have wide latitude in promulgating regulations; and they can usually suspend licenses *eo instanti*. Although conclusive statistics are not available, there is good reason to believe that they rarely enforce the voidness penalty as written, although legally they could do so. Instead, when administrators discover violations, they simply tell the creditors to correct their procedures and, if appropriate, to make refunds. Creditors normally comply, because, in fact, the overwhelming number of "violations" are due to human error or differing, good-faith interpretations of complex statutory provisions. Furthermore, unless the matter is of some import and the administrator is believed to be clearly in error, it is generally more politic for the creditor to do as he is directed. Cases do exist where technical violations have caused entire debts to be voided,<sup>33</sup> but such results offend principles of fundamental justice. It is likely that the problem with this penalty exists because the statutes adopt avoidance as the sole remedy, providing no clear sub-

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<sup>33</sup> *New Finance Ltd. v. Ellis*, No. 11024, Cir. Ct., Jefferson County, Ala., June 24, 1966, is a recent lower-court case which voided loan contracts for inclusion of attorney's fees and court costs upon the debtor's default.

stitute for it. Consumer-credit legislation should, therefore, restrict this penalty to the area of its need, and provide a sensible and practicable substitute elsewhere.

2. *Right to Correct Violations.* A few statutes impose "penalties" (*i.e.*, damages beyond a compensatory measure) upon creditors for willful or deliberate violations only.<sup>34</sup> Most penalize for all violations, including those which result from honest mistake. In certain circumstances, however, consumer-credit legislation should allow a creditor or his assignee to correct violations without incurring a penalty.<sup>35</sup> There seems to be little deterrent value, for example, in "penalizing" for an honest error, unless one feels that the possibility of penalty reduces the likelihood of error. Furthermore, certain specific technical mistakes should not lead to a penalty. The creditor should be held responsible for what he has done except in the minor areas where mistake is permitted.<sup>36</sup>

The policies favoring compensation and deterrence can still be fulfilled within the context of correction allowance. The former policy is satisfied by a correction provision requiring a return of the excess charge or reimbursement for loss. Implementation of the latter policy, however, creates greater difficulty.

An unrestricted right to correct will have the effect of reducing the deterrent aspect of a penalty, thereby encouraging risk-taking. Similarly, the incentive of the wronged party to seek redress will be reduced if a creditor can simply correct any transaction any time it is challenged. The following approach is submitted as a workable compromise:

(a) As against the complaining party, the creditor should have no right to correct without incurring a penalty, no matter how innocent his violation. Such a restriction is deemed necessary to provide the debtor with incentive to make a formal objection. This objection might take the form of a complaint to the creditor or the institution of a legal action. A penalty should not be imposed, however, in a class action if the creditor would be precluded from correcting as against all debtors similarly situated. The restriction either should not be applied to a class action or should be limited to the lead party.

(b) As to all uncomplaining parties, the creditor should have an unrestricted right to correct voluntarily. In other words, if the creditor himself discovers a violation, he should be able to correct it

<sup>34</sup> See, e.g., Cal. Civ. Code § 1812.9 (West Supp. 1966).

<sup>35</sup> Several statutes do so provide. See, e.g., Del. Code Ann. tit. 6, § 4349 (Supp. 1964).

<sup>36</sup> It should be perfectly clear that the creditor is responsible for his or his lawyer's interpretation of the law. See *River Hills, Inc. v. Edwards*, 190 So. 2d 415, 424 (Fla. Ct. App. 1966) for the proposition that an attorney's opinion does not prevent an overcharge from being deemed deliberate.

by returning any excess charge and reimbursing for other damages without incurring an additional penalty. If a debtor discovers the violation and informs the creditor of it, the right to correct should exist against all but him. As against those who do not complain, however, there should be some incentive to encourage a creditor to correct a violation of which he has actual knowledge. This could be accomplished by terminating the right fifteen days after the creditor has learned of a violation through some objectively ascertainable event (e.g., an adverse judgment, an administrator's uncontested advice that a violation has occurred, or a voluntary correction with any particular debtor).

The above limitations on a creditor's right to correct suggest that undue risk-taking may be encouraged, because, if the creditor's judgment is wrong, he can merely correct (as against all but the complaining party) and be safe. However, in those states where an unrestricted right to correct does exist,<sup>37</sup> there has been no particular evidence that financiers are willing to incur greater risks. Administrative control and attendant risk of loss of license, as well as general public attention to lenders and other financiers, have been more than sufficient to prevent extreme risk-taking.

3. *Rights of Assignees.* When the consumer-credit transaction is a direct loan, there are normally only two parties involved—a lender and a borrower. When the initiating transaction is a sale of goods or services, however, one must often consider the rights and liabilities of a third party—the assignee of the buyer's obligation. It is, of course, typical of a seller to finance his sales by selling (or pledging) to a bank or finance company his deferred-payment obligations.<sup>38</sup> If the retail seller has violated a provision of the protective statute, and the assignee acquires the obligation without knowledge of the violation, to what degree should civil penalties be imposed against the latter?

Although the problem is perfectly apparent, it has rarely been directly confronted. Existing sales financing acts provide little guidance. A provision such as that in the California act, stipulating that a good-faith assignee will not be penalized *if he corrects* the violation,<sup>39</sup> is rare. Most of the statutes indicate either that a penalty will be imposed against the violating party only, or that an obligation in which a violation exists will be unenforceable by assignor or assignee

<sup>37</sup> E.g., Fla. Stat. Ann. § 520.39(4) (1962).

<sup>38</sup> See Warren, Regulation of Finance Charges in Retail Instalment Sales, 68 Yale L.J. 839 (1959). The financier's contacts with the retail sale may vary from none whatever to intimate involvement. See Frankfurt Fin. Corp. v. Cox, 142 S.W.2d 553 (Tex. Civ. App. 1940). He may supply forms, rate charts, and instructions. He may check the credit of the retail buyer. Since many retail sellers deal with more than one financier, he may, after the sale has been completed, be requested to purchase the retail "paper."

<sup>39</sup> Cal. Civ. Code § 1812.7 (West Supp. 1966).

in whole or in part.<sup>40</sup> Financers have assumed, except where it is perfectly clear otherwise, that they will bear some responsibility for violations committed by their assignors. Administrative officials have generally agreed.

Evaluating this position under the "compensatory-deterrent" tests, it is clear that the assignee must pay for the violations of his assignor. The compensatory result is the more apparent. By hypothesis, both the buyer and the financer are innocent. Since a loss must be suffered, and since the statute exists to protect the consumer from paying more than the law authorizes, the proper result is to compensate the buyer whether the loss falls on the financer or on the seller. Furthermore, the assignee, who may also have benefited from the illegal bargain, is usually the financially stronger party. Of course, the retail buyer is not deprived of his redress against the seller. Essentially, he may seek and gain recourse against seller or assignee. However, since the buyer is in regular contact with the assignee—the one most likely to initiate an action on the debt—the issue of legality will probably arise more often against the assignee than the seller. Protecting the good-faith assignee from suit would lead to an undesirable result: an action on the debt might be initiated by the assignee against the buyer, with the buyer simultaneously suing the seller for a violation of the statute.

The deterrence issue presents a more troublesome question: Should the assignee be held for more than merely compensatory damages without regard to his knowledge of the type of violation involved? This, too, requires an affirmative answer. To hold otherwise would necessarily create difficult problems of proof as to whether or not the assignee acted "in good faith," whether he had actual notice of violation, whether he had knowledge of facts that should have put him on notice, and so forth. More significantly, it is indisputable that commercial financers are intimately involved with retail sales, even though divorced from the initiating consumer transactions. Information regarding forms, procedures, and charges is either supplied by potential assignees or arranged between sellers and assignees jointly. A course of "retail" financing with the same seller and financer(s) normally extends over a period of years. One is forced to conclude, therefore, that a threat to even an innocent financer must stimulate the exercise of greater care at the seller level.<sup>41</sup>

The unlicensed assignee of consumer-credit obligations presents a somewhat different problem from that posed by the unlicensed direct lender. Although a voidness penalty is not inappropriate for the

<sup>40</sup> See, e.g., Mass. Gen. Laws Ann. ch. 255D, 29 (Supp. 1966).

<sup>41</sup> There is no attempt here to solve the problems of correction which arise. See Cal. Civ. Code §§ 1812.8, 2984 (West Supp. 1966) (requirement that the debtor receive a copy of the corrected contract).

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latter,<sup>42</sup> this penalty should not be imposed upon the former. The purpose of the statute is to protect the consumer, and since it is the assignor (usually a seller of goods or services) who deals with the public, it is logical and necessary to subject him to stringent requirements. On the other hand, failure by the assignee to license may or may not be a direct danger to the consumer or to society. This, of course, would depend on such factors as the assignee's reasons for not licensing, his role in the initiating transaction, and his ability to comply with the prerequisites to licensing. One suggestion is to forbid the assignee to bring an action to enforce an obligation against a debtor until he has licensed. This would, in effect, create a quasi-voidness penalty when the assignee's conduct or structure makes him ineligible to license. Where, however, circumstances permit the assignee to license, and he does in fact license, he should be permitted to enforce an otherwise valid obligation created by another.

4. *The "Waiver-of-Defense" Clause.* In a time-sale transaction, the seller of goods or services who is in need of cash instead of the buyer's obligation normally sells that obligation to a financing agency. The agency, typically either a bank or a finance company, pays the seller a cash sum that approximates what he would have received had he made a cash instead of a time sale. The difference between this sum and the total received by the financier from the retail buyer is the financier's profit. The buyer is usually informed of the assignment of his obligation and pays the financier directly.

The foregoing, only a schematic diagram since the seller-buyer-financier arrangement is financially more complex, indicates that the financier is used purely as a source of money. He has made it possible for a seller and a buyer, with insufficient cash resources, to transact business. Obviously, the only object of the financier is to recoup his investment and make his profit. He does not care whether the car is running smoothly, whether the sofa has faded, or whether the dance instructor has insulted the young student. He would prefer, therefore, to avoid the effects of the basic doctrine that an assignee of a contract acquires it subject to the buyer's defenses against the assignor.<sup>43</sup> In a retail time sale, this avoidance is commonly accomplished by a term in the buyer's contract that any defense he might have relieving him of his duty to pay the seller shall remain an issue solely between themselves; he shall pay any assignee of the obligation in accordance with the schedule terms, without regard to nonfinancial issues. This is the "waiver-of-defense" clause.

The merits of this clause have been hotly disputed for decades.<sup>44</sup>

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<sup>42</sup> See p. 544 supra.

<sup>43</sup> *Associates Loan Co. v. Walker*, 76 N.M. 520, 416 P.2d 529 (1966).

<sup>44</sup> See *Quality Fin. Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).



The Uniform Commercial Code permits the clause in consumer-credit transactions unless the statutory or case law of the state forbids it.<sup>45</sup> Most retail installment sales laws permit it, either expressly or by failing to forbid it. Some require an assignee to notify the retail buyer of its existence after he buys the obligation.<sup>46</sup> The buyer is then given a period of time within which he may assert defenses against the assignee, after which he is precluded from doing so.

The clause has been criticized for the following reasons:

(a) The retail buyer rarely reads the contract. When he does, he still cannot be expected to understand the waiver-of-defense clause, usually written in the fine technical jargon of the finance-company lawyer. All that the ordinary buyer usually cares about is that he has bought something, and, if it is defective, that he should not have to pay for it.<sup>47</sup>

(b) The clause is of little benefit to financiers, since the typical assignment is accompanied by a seller's warranty that the retail buyer received what he bought and has no defense, set-off, or the like to his duty to pay. If such a defense is available, the financier may reassign the obligation to the original seller because of the breach of warranty, thereby placing the seller and buyer in the positions the buyer expected, with the buyer able to withhold payment.

(c) An adjunct to point (b) is that it is only the poor, weak, or dishonest sellers who cannot or will not honor their warranties. Therefore, where the waiver-of-defense clause matters most is in transactions affecting the poorer members of the community. The indigent consumer in this situation has not received a satisfactory product, but his claims against the seller are futile, and he has no defense when the finance company presses for the money. In other words, those most needy of protection are those who suffer the most under the clause.

(d) The only real protection a consumer has against improper sales is his power to withhold payment. A waiver-of-defense clause effectively precludes this.

(e) As between two presumably innocent parties, the financier rather than the consumer should bear the loss if the seller fails to satisfy the consumer. The financier is usually involved with the seller under some continuing arrangement, is often aware of the seller's general behavior and type of operation, and has some power to correct abuses. Also, the financier is in a better position to afford the loss.

(f) If the seller's responsibilities become those of the assignee, sales financiers would tend to offer their services to only the stronger

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<sup>45</sup> U.C.C. § 9-206.

<sup>46</sup> See Cal. Civ. Code § 1804.2 (West Supp. 1966).

<sup>47</sup> See *Gramatan Nat'l Bank & Trust Co. v. Moody*, 326 Mass. 367, 94 N.E.2d 771 (1950).

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sellers. Credit might, therefore, tend to disappear for the more marginal sellers who are equally, if not more, in need of financing.

The waiver-of-defense clause has also been vigorously defended:

(a) The financier is only a source of credit. The economic effect of a "sales-finance" transaction is the same as if the buyer financed his purchase through a bank or a loan company. Certainly the fact that a commodity is defective should not vary the terms of a loan debt simply because the loan proceeds went to buy it. In fact, the difference between a direct loan for the purpose of making a purchase and an assignment of a retail sale obligation to a financier is often more a matter of form than substance: even the latter financier often has some form of contact, if not actual agreement, with the retail buyer before the sale is made. Furthermore, the two types of transaction are often given identical legal treatment.<sup>48</sup>

(b) The warranties of seller and manufacturer are usually sufficient to protect the retail buyer. Therefore, there is no need to involve the financier in such matters.

(c) Eliminating the waiver-of-defense clause would cut off the sources of credit which depend upon its existence.

(d) Objection (f) above may also be an argument in defense of the clause. Withholding credit from marginal sellers may be a social good; needy buyers who would otherwise go to such a retail outlet would be diverted to more responsible sellers who are able to stand behind their warranties.

(e) If the waiver-of-defense clause were eliminated, the ultimate result might be to force financing agencies to change the form of the credit transaction from a purchase of a time-sale account to a direct loan to the buyer (where they would have no concern with the goods sold). The potency of this argument depends, of course, upon the statutory requirements (licensing, etc.) imposed on lenders.

(f) Under the doctrine of freedom of contract, there is no right to preclude the parties from agreeing to a waiver-of-defense clause.

In this writer's opinion, the significance of the waiver-of-defense clause has been overemphasized in consumer sales. In actual practice, there have been no obvious differences in the availability of financing or the profits of sellers or financiers among those states—the clear majority—that recognize it, those that forbid it, and those in an intermediate position, if indeed any differences do exist. When one discusses the problem with representatives of the financing community, one hears of the disturbing effects that will result from a removal of the

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<sup>48</sup> See, e.g., *Jackson v. Commercial Credit Corp.*, 90 Ga. App. 352, 83 S.E.2d 76 (1954).

clause. One can only suggest that in practice this has not happened; the reasons are probably a combination of the factors discussed above as arguments against the clause. Most sales of goods and services probably do satisfy the buyer, at least to the extent that he accepts the duty to pay for them; most deficiencies are cured by responsible sellers or by manufacturers' warranties; and most of the remaining problems are resolved, insofar as the financier is concerned, by the seller honoring his warranty to the financier and "repurchasing" the obligation.<sup>49</sup>

California law may provide a reasonable compromise.<sup>50</sup> There, the waiver-of-defense clause is effective in a consumer-credit sale only if the assignee gives the retail buyer separate notice of its existence after the obligation is assigned. This reduces, to some degree, the status of the buyer as someone who is bound by a contractual provision of which he has no knowledge. Under this statute, the buyer, to preserve his defenses against the assignee, must determine his satisfaction with the transaction and report any objections to the assignee within a specified period of time.<sup>51</sup>

A significant objection to this approach is that defects in goods may be discovered after the time period elapses. A new furnace, for example, purchased in the summer may not be properly tested for several months. For services, such as dance lessons, that are rendered over a long period, a time limit for objecting is even less helpful. A statutory provision excepting defects that, by the nature of the sale or related circumstances, are not reasonably discoverable within the prescribed time period, has existing precedent,<sup>52</sup> and would probably not encumber the judicial system.

Despite whatever legal alliance exists between the seller and his assignee, one should not lose sight of the latter as principally a supplier of money. Certain claims related to the goods sold are sufficiently removed from the assignee's function and, therefore, should not be his responsibility. Probably most important are product-liability claims. Independent causes of action in this area should be assertable against the seller only (or prior parties in his chain of title), and not against the supplier of funds. In addition, the issue of the buyer's right to a return of payments made after he has discovered an objection to the sale presents difficulty. To require a finance company-assignee to return previous payments creates contingent liabilities, and puts a level of responsibility upon the financier that tends to be dispropor-

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<sup>49</sup> Typically, a retail seller warrants to his assignee that the sale transaction complies with the law. Any recovery by the buyer against the assignee on this basis will thus generally give the assignee a cause of action against his assignor.

<sup>50</sup> See Cal. Civ. Code § 1804.2 (West Supp. 1966).

<sup>51</sup> *Ibid.*

<sup>52</sup> See N.Y. Pers. Prop. Law § 403 (McKinney Supp. 1966).

tionate to his place in the transaction. At most, the buyer should only have the right to suspend future payments, and not the right to recover what he previously had paid during, presumably, a period of satisfaction.

5. *Modifications of Unconscionable Contracts.* So far it has been assumed that a creditor has violated a provision of a statute, for which the appropriate debtor remedy has been sought. This has presupposed the existence of an objective standard by which creditor performance is measurable, although it has been noted that even so-called objective standards may, by their very complexity, affect the remedies problem. The question now considered is whether a standard beyond "objective" statutory strictures should be imposed.

The preliminary position of the draftsmen of the Credit Code seems to be that a "conscionability" standard for consumer-credit transactions is appropriate beyond the formalized Code standards. The result would be to present a test, in addition to the specific statutory requirements (the "objectively ascertainable" requirements), which will permit the courts to require a higher level of creditor compliance. When finally drafted, the provision as now conceived is likely to require that a consumer-credit transaction or the conduct of the creditor be "fair," "conscionable," "equitable," or "reasonable."

One is reminded, of course, of Section 2-302 of the Uniform Commercial Code, which similarly imposes a conscionability requirement on all sales of goods. That section has been criticized for prescribing vague and unascertainable standards and for substituting the views of the judiciary for the decisions of the parties to the contract.<sup>53</sup> It has been defended on the ground that it is better to have a properly expressed, equitable basis for decisions that the courts customarily reach by the use of artificial legalisms rather than clear direction.<sup>54</sup> In effect, however, section 2-302 has not created a flood of litigation; nor does it seem to have substituted the desires of the judiciary for those of the contracting parties.<sup>55</sup> Actually, the occurrence of such a substitution would not present a compelling argument against a conscionability test.<sup>56</sup> The judiciary has its methods of reaching what

<sup>53</sup> King, Suggested Changes in the Uniform Commercial Code—Sales, 33 Ore. L. Rev. 113 (1954).

<sup>54</sup> See Llewellyn, *The Common Law Tradition* 365 (1960).

<sup>55</sup> Unconscionability in consumer-credit transactions is an important consideration in "contracts of adhesion." Under such contracts, creditors supply and debtors execute forms that are generally not read by the debtor and, if read, would not be understood. Probably the only elements of such contracts actually "agreed to" by debtor and creditor are those that are specifically inserted in the blanks of the form as part of the transaction and those that basically support the insertions. *Id.* at 362-63.

<sup>56</sup> See Comment, 70 Yale L.J. 453 (1961).

it considers to be a "fair" result,<sup>57</sup> although, without a specific statute on point, it is regrettable but historically true that it has failed to articulate an effective or standard technique.<sup>58</sup> It is possible, then, that a statutorily defined conscionability test would tend to coalesce into at least an observable device, if not an objectively ascertainable standard, the various approaches to contractual fair dealing.

Although conscionability is an obvious objective in consumer-credit transactions, this writer is opposed to including a conscionability test in the Credit Code as presently conceived. Since credit per se is only a segment of the problem facing the consumer in his acquisition of goods and services, the statute provides only partial protection to consumers. The entire problem must be faced in order to make uniform legislation effective. For example, the sale of expensive stereo equipment to a family on relief<sup>59</sup> is just as unconscionable as the sale to an elderly widow of a \$13,200 life membership in a dance studio.<sup>60</sup> The former, arising in a credit transaction, would be subject to the conscionability test; the latter, a cash sale, would not. To the extent that the social problems are alike, the social control should be consistent. The answer to the foregoing type of unconscionability is appropriate fair-trade-practice or consumer-fraud legislation<sup>61</sup> and not an indirect swipe through the medium of a statute designed to control credit.

The unfortunate fact is that most unconscionable transactions result from the unequal bargaining power of the parties or from consumer ignorance. It cannot and should not be the function of a *credit* code to limit the sale of shoddy merchandise or to prevent loans to indigent borrowers for the purchase of improvident luxuries. To some degree, the requirement of accuracy in the statement of cash prices and finance charges promotes conscionability by informing the consumer of exactly what expense he is undertaking, and this is a legitimate objective of vigorous disclosure requirements. Whether the transaction itself *should* have been consummated, however, is not

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<sup>57</sup> All courts today are influenced somewhat by judicially created equitable doctrines. 1 Corbin, Contracts § 128 (1963); Note, 109 U. Pa. L. Rev. 401, 403 (1961). In addition, § 2-302 of the U.C.C. has been used as a statement of principle applicable to contests outside the area of sales of goods.

<sup>58</sup> See Llewellyn, *op. cit. supra* note 54, at 364. It may be that unconscionable contracts were void at common law. See *Hume v. United States*, 132 U.S. 406 (1889).

<sup>59</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>60</sup> *Lawless v. Ennis*, 3 Ariz. App. 451, 415 P.2d 465 (1966).

<sup>61</sup> See, e.g., Ill. Ann. Stat. ch. 121½, §§ 261, 262 (Smith-Hurd Supp. 1966). The Federal Trade Commission, in a current consideration of the need for "retail credit guidelines," lists among the abuses requiring correction a deception whereby buyers were requested to sign "receipts" for merchandise delivered on approval. The receipts turned out to be sales contracts. Obviously, this is not solely a credit problem. See *American Banker*, Oct. 28, 1966, p. 24.

basically an adjunct to credit regulation. Attempts to include the issue of conscionability within the context of a consumer-credit statute must be inadequate, and will create a fragmented control at best.

Perhaps at this point it is appropriate to inject a personal reservation regarding uniform legislation. State fair-trade-practice legislation is particularly associated with the "imaginative" deceptions of the moment. Such legislation is normally adaptable to changing conditions, and can adjust with relative ease as the circumstances that prompted the original statute vary. An unfortunate characteristic of "uniform" legislation, however, is that it tends to "freeze" as passed, and thereby assumes some of the static nature that is an intrinsic problem of federal legislation. Not only are many people involved with the typical "uniform" statute, but a change in any single state necessarily leads to implications as to the meaning of the statute in other states where there was no change.<sup>62</sup> In this respect then, "uniform" legislation is not ordinary state legislation. If any code of unconscionability or unfair trade practices is considered for incorporation into the Credit Code, this aspect of uniform legislation should be kept in mind.

#### IV. CREDITORS' REMEDIES

In a consumer-credit transaction, the needs of the creditor are basically simpler than those of the debtor: he wishes to be paid; all else is in support of that. A debtor can receive the money, credit, or goods that he thinks he needs and still be injured in the eyes of the law. But if a creditor is repaid, the obligation is satisfied, and there is no social need to ensure him a higher order of protection relative to his debtor.<sup>63</sup>

The creditor's need for legal assistance arises after the debtor has violated the agreement. Usually this means failure to pay, although a consumer-credit agreement normally imposes several obligations upon the debtor, breach of any of which could be a default. These other obligations, however, usually relate to items of collateral protection,

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<sup>62</sup> One is reminded of the current problem in correcting the deficiencies of the U.C.C. in the area of the subordinated debt. See Coogan, Kripke & Weiss, *The Outer Fringes of Article 9*, 79 *Harv. L. Rev.* 229 (1965). Because of the difficulties mentioned in the text, it was impossible to find a generally acceptable amendment in New York State.

<sup>63</sup> It is, of course, theoretically possible to deem violations, such as improper charges, as violations by both parties, since both are privy to the transaction. This is not sound, however, since statutory requirements exist primarily for the benefit of the debtor. In addition, such debtor "violations" do not, in practice, create the type of social danger against which consumer-credit regulatory legislation must protect. The doctrine of *pari delicto* is inapplicable where the statute exists for the benefit of one of the parties in particular. *McAllister v. Drapeau*, 14 Cal. 2d 102, 92 P.2d 911 (1939); 3 Pomeroy, *Equity Jurisprudence* §§ 942, (c) (5th ed. 1941).

and operate more as incidental rules for the transaction than as requirements indispensable to its formation.<sup>64</sup> Many of these obligations are satisfied at the inception of the transaction, but thereafter the debtor usually enjoys a freedom from examination, and violations will rarely come to the creditor's attention unless there is a failure of payment. Although the secondary duties are quite important to a lender, it is doubtful whether more than a handful of consumer-debt obligations have been enforced because of contract violations other than that of the duty to pay.<sup>65</sup> Some of the creditor's more important remedies upon debtor's breach are examined below.

#### A. *Repossession of Collateral*

The remedy of repossession of collateral is critical to the secured creditor, and is normally the first to which he will resort once he learns that the debtor will not pay without some coercion. In most cases the creditor effectuates foreclosure upon the collateral, without resort to the courts, through an agent or representative who takes physical possession of the security. Generally, the security agreement grants the creditor the right to "enter" the premises of the debtor for this purpose, thereby eliminating any action in trespass.<sup>66</sup>

The right to repossess property without judicial process, essentially a continuation of the common-law remedy of self-help,<sup>67</sup> has not been challenged as an appropriate creditor remedy, although some of the procedures used to effectuate this right have met with sharp criticism. It is submitted that the right to nonjudicial foreclosure should remain in the form provided by the Uniform Commercial Code, which places few restrictions upon the creditor's actions beyond that he act "reasonably."<sup>68</sup> The specific restriction on the creditor's freedom to repossess is that it must be done without "breach of the peace,"<sup>69</sup> a requirement which may not be waived by the debtor.<sup>70</sup>

In some states, statutes covering consumer loans or consumer time sales limit the creditor's right to retake the collateral.<sup>71</sup> There is no evidence that these states have accorded debtors more protection

<sup>64</sup> For example, the creditor will probably want the collateral free of adverse liens, insured in his favor, and kept within the state.

<sup>65</sup> The situation is somewhat different in commercial transactions, where observance of contractual warranties is considered of greater importance.

<sup>66</sup> Restatement (Second), Torts § 168 (1965).

<sup>67</sup> Bogert, Commentaries on Conditional Sales, 2A U.L.A. § 109 (1924).

<sup>68</sup> See U.C.C. §§ 9-501 to -507.

<sup>69</sup> U.C.C. § 9-503.

<sup>70</sup> U.C.C. § 9-501(3). The Code provisions were derived from § 16 of the Uniform Conditional Sales Act.

<sup>71</sup> See, e.g., Maryland Retail Instalment Sales Act, Md. Ann. Code art. 83, § 141(a) (1965); Pennsylvania Motor Vehicle Sales Finance Act, Pa. Stat. Ann. tit. 69, § 623B (Purdon 1965).

than states without such rules. In an excess of zeal, some states have required methods of consumer protection that have imposed unnecessary and costly restrictions upon the creditor's right to collect.<sup>72</sup> A requirement that a debtor be given notice of the creditor's intent before collateral is actually repossessed, for example, only serves to enable the debtor to conceal or damage it, thereby reducing the likelihood of collection. The debtor, who has probably received numerous communications from the creditor, knows that he is in default and that default entails risk.

The only area in which some protection beyond that provided by the U.C.C. might benefit consumers is in connection with security interests in household furniture.<sup>73</sup> It might not be inappropriate to require some degree of creditor "warning" before such goods are to be repossessed. These goods are not of the mobile type, such as automobiles, which can be easily hidden; nor is a homeowner as likely to damage them as he might an automobile which he already considers the property of the finance company. Finally, the protection a secured party receives from the ability to repossess household goods without judicial process is probably not as important as the avoidance of undue humiliation and discomfort to the unfortunate family.

### B. *Election of Remedies*

The "election-of-remedies" doctrine provides that a secured creditor who repossesses collateral, disposes of it, and realizes less than the balance due, is prevented from suing on the debt for recovery of the balance. This doctrine, it is submitted, is illogical:<sup>74</sup> Since an unsecured creditor may sue on the debt and collect the *whole* amount owed, why should the secured creditor not be entitled to the same relief?

Assume a seller of goods contracts to sell for \$100: If the buyer changes his mind, and the seller reasonably disposes of the goods elsewhere for \$85, there can be no quarrel with his right to sue for and collect the \$15 balance. If he actually sells to the original buyer for \$100 and delivers, then repossesses after no payment, and disposes elsewhere for \$85, the same action should lie. Even if a seller chooses to sue first for the entire amount owed and is unable to collect on his judgment, he should not be precluded from recovering the property.<sup>75</sup>

<sup>72</sup> Note, 17 Minn. L. Rev. 66, 71 n.31 (1932).

<sup>73</sup> There has been occasional legislation substantially prohibiting such security interests. See, e.g., Conn. Gen. Stat. Ann. § 42a-9-209 (Supp. 1965).

<sup>74</sup> "This exclusiveness of each remedy was developed without much rational basis." Coogan, Hogan & Vagts, Secured Transactions Under the U.C.C. § 8.08(1), at 17 (1963). See also 3 Williston, Sales § 579 (rev. ed. 1948).

<sup>75</sup> See *Yellow Mfg. Acceptance Corp. v. Handler*, 249 Minn. 539, 83 N.W.2d 103 (1957).



The U.C.C. has completely eliminated the election-of-remedies doctrine,<sup>76</sup> and has thereby undermined arguments supporting it, e.g., that a conditional seller has "rescinded" the sale when he repossesses,<sup>77</sup> or that a chattel mortgagee has taken property to which he already has "title."<sup>78</sup> No function would be served by including the doctrine in uniform consumer-credit legislation.

It has been suggested that in low-balance debts (perhaps under \$500), the secured creditor should look to the debtor or to the security, but not to both. Here, again, the election doctrine places an unfair burden on the creditor, since he must speculate as to whether it is more worthwhile to repossess or to institute legal action on the debt.<sup>79</sup> If the possibility of repossession plus suit is deemed a nuisance to the low-balance debtor, this applies as much, if not more, to the secured creditor who must take the affirmative action, bear the initial costs, and suffer the risks of collection.

The argument favoring the election doctrine is illustrated by the situation in *Schwegler Bros. v. Johnson*,<sup>80</sup> where a buyer bought a radio for \$64, paid \$11, and then defaulted; the seller repossessed the radio, sold it for a net of about \$3, and sued to recover the \$50 deficiency. The court was horrified that the buyer would have to pay \$61 and, after only three months, have no radio. In a spirit of rough justice, it allowed the creditor only an additional \$10.<sup>81</sup> It is, of course, true that most low-cost items, and many of higher cost, particularly furniture, are of little value to the secured creditor as collateral, since they have notoriously low resale value. Consequently, the buyer's debt may not be substantially reduced after repossession and resale.<sup>82</sup>

### C. Deficiency Judgments

A typical solution proposed by those concerned with this last aspect of the election-of-remedies problem is to forbid deficiency judgments when the original debt is below a prescribed dollar amount. Suggested figures run anywhere between \$200 and \$500. This solution is reasonable only when *original* debt amount is the test, not when the unpaid

<sup>76</sup> U.C.C. § 9-501(1).

<sup>77</sup> 3 Jones, Chattel Mortgages and Conditional Sales § 1316 (1933).

<sup>78</sup> 2 Id. § 702. See *First Nat'l Bank v. Flynn*, 190 Minn. 102, 250 N.W. 806 (1933).

<sup>79</sup> See *Third Nat'l Bank v. Olive*, 281 S.W.2d 675 (Tenn. 1955). Compare *Yellow Mfg. Acceptance Corp. v. Handler*, supra note 75.

<sup>80</sup> 161 Misc. 451, 291 N.Y. Supp. 321 (Buffalo City Ct. 1936), rev'd by Sup. Ct. Erie County, Jan. 11, 1937 (unreported).

<sup>81</sup> It is unknown whether \$3 was a reasonable net resale price or whether repossession expenses may have reduced the net recovery.

<sup>82</sup> Actually, the only well-established market for used consumer goods where a reasonable resale value is generally obtainable is in used automobiles and, to a lesser degree, boats. For all other consumer commodities, the only practical value of the collateral is in terms of its use by the debtor.

balance has been *reduced* to that amount, since the reduction situation may force an election of remedies in all secured transactions at some point, regardless of the value of the collateral.

If one agrees that deficiency judgments are proper as a general matter, the next consideration relates to the amount for which the debtor may be held liable after repossession and resale of the collateral. This is determined by adding (1) the amount unpaid on the obligation, with (2) any other costs to which the creditor may be entitled by virtue of the default and repossession, and subtracting (3) the resale price. Each element creates its own problems.

1. Normally, default charges and/or additional interest will be imposed as a result of the debtor's default, such interest continuing to accrue on the outstanding balance until the debt is paid. However, in agreements containing acceleration clauses, which make the *entire* unpaid debt payable upon debtor's default, problems arise when interest has been "precomputed" and, for purposes of payment, is treated much the same as the principal portion of the debt.<sup>83</sup> In such cases, the debtor should not have to pay unearned interest or charges. That is, any interest that has been discounted, "precomputed," or otherwise included in the amount of the debt should be reduced at the proper time to indicate that the debtor's obligation is no longer outstanding and that the creditor's investment is no longer earning interest.

Precisely when the act of acceleration occurs, however, is itself difficult to determine. If a debtor has failed to pay, and a creditor threatens suit, has he accelerated? If the creditor sends a letter saying that by virtue of the default, the full balance is "due," has he then accelerated? If he is required to rebate at this time and then earn interest at a reduced rate thereafter on the unpaid principal balance, the lender will be earning less for his investment than he bargained, in addition to the fact that he is not being paid. If the collateral is sold and the resulting deficiency against the debtor bears interest at less than the contract rate, the same result follows.

A reasonable way to handle the acceleration problem would be: (a) to permit the creditor to continue the obligation in its original form if he desires, but to charge interest on installments in default at the rate applicable to the original contract; (b) to permit the creditor, after a debtor default lasting a few (perhaps two) months, to "recast" the debt at that time, giving an appropriate rebate of unearned charges, and to charge on the unpaid balance at the originally agreed rate;<sup>84</sup> (c)

<sup>83</sup> In other words, a debtor may borrow \$1,050 and execute a note for \$1,200 payable in 12 installments of \$100 each, containing no reference to the original loan amount or to an interest rate.

<sup>84</sup> This right to "recast" exists in a substantial number of small loan laws. See, e.g., Ky. Rev. Stat. Ann. § 288.530(7) (Baldwin 1963); Ohio Rev. Code Ann. § 1321.13 (Baldwin 1964).

to consider a deficiency after collateral resale the same as the original debt, bearing interest as provided in the agreement; (d) to require a cut-off time after which the obligation would bear interest at a lower rate (possibly the state "judgment" rate), in order to protect debtors in high-interest transactions under which an unpaid obligation subject to, say, an effective twenty per cent rate, would reach monumental proportions if not stopped at some time; (e) to allow, as a severe remedy, even an unpaid judgment to bear interest at the originally agreed rate rather than at the state judgment rate.<sup>85</sup>

2. Most consumer-loan statutes, although not the typical installment sales laws, prohibit the creditor from imposing charges not specifically authorized by the statute. It is generally agreed that "charges" includes expenses of repossession, repair, resale, and others authorized by the U.C.C.<sup>86</sup> The question of whether consumer-credit legislation should allow these costs should be decided only after determining what original rate to permit and the nature of the public interest to be served, because repossession expenses not recoverable from the debtor will become additional creditor costs and will reduce net yield from whatever basic rate is charged. The long-range effect of this would be to diminish the breadth of the debtor community, for, in order to operate profitably at the permitted rates, creditors will grant credit to fewer people who are credit risks. Varying the rate of yield, it may be noted in passing, probably does not vary the long-range profit of the creditor, but instead has the effect of varying the class of debtors to whom the creditor is willing to extend credit.

In sales of collateral to satisfy a small or reduced debt, a debtor may find a disproportionate amount added to a relatively small debt because of the creditor's expenses of foreclosure and sale. After all, it does not necessarily cost less to repossess and resell a commodity when \$50 is owed than when the debt is \$5,000, but total expenses of \$75 seem unfair in the former case. This problem is part of the reason for advocating an election of remedies in low-balance transactions. That solution, however, does not really meet the problem. An election forces a creditor to gamble on the value of the collateral, and establishes no absolutely equitable manner of giving either the creditor or the debtor the benefit of his bargain. In situations where the expenses of resale are deemed an undue burden to a debtor owing less than a statutorily stipulated amount, the solution may be to eliminate those expenses from foreclosure, rather than to require a creditor to elect remedies. In contrast to the situation discussed above in relation to collateral of little

<sup>85</sup> See Tex. Rev. Civ. Stat. Ann. art. 5072 (Vernon 1948). Cf. Ohio Rev. Code Ann. § 1321.14 (Baldwin 1964).

<sup>86</sup> U.C.C. § 9-504(1). Cf. Peoples Fin. & Thrift Co. v. Blomquist, 16 Utah 2d 157, 397 P.2d 293 (1964).

resale value, the proper time at which to apply the statutory stipulation is the time of repossession, not the time of the original obligation.

3. Determining the "correct" resale price for repossessed collateral (*i.e.*, the "correct" value that should be given to the debtor in reduction of his debt) is a problem that, despite its antiquity, has always existed in a state of legal imprecision. There is no doubt that a pledgee or other secured party must deal fairly with collateral so as to give the debtor that to which he is entitled.<sup>87</sup> Beyond this, there are few settled principles.<sup>88</sup>

In an action for recovery of the deficiency, the court will generally direct its consideration toward the *method* of resale rather than to the price obtained.<sup>89</sup> Where the method utilized was appropriate, and followed statutory prescriptions, there has been comparatively little independent judicial examination of the liquidation price obtained to reduce the debtor's ultimate liability.<sup>90</sup> However, if collusion or other acts in violation of the creditor's general duty of trust are present, the resale may be nullified.<sup>91</sup> A court may consider a grossly inadequate price, although price is not directly in issue, as evidence that a proper resale did not in fact occur.<sup>92</sup>

The foreclosure and liquidation of collateral is, however, subject to the general control of a court of equity.<sup>93</sup> Where statutes do not specify a method of resale, a "public" sale or auction, at which disinterested parties bid for the collateral, is usually an acceptable mode of disposition. While a court will not attempt its own valuation of the collateral when there has been a public sale,<sup>94</sup> it may do so when the sale is "private."<sup>95</sup> In the latter case, the sale is simply a disposition by the secured party to one buyer or a very restricted group of buyers, and there is no compelling reason to believe that a fair price was obtained. The courts may, in such circumstances, examine the price to ascertain whether the debtor has received fair value.<sup>96</sup>

The U.C.C. requires only that a resale, either public or private, be

<sup>87</sup> Norton v. National Bank of Commerce, 240 Ark. 131, 398 S.W.2d 538 (1966); Matter of Kiamie, 309 N.Y. 325, 130 N.E.2d 745 (1955); Restatement, Security § 49 (1941).

<sup>88</sup> But see U.C.C. § 9-207.

<sup>89</sup> See Strahan v. Atlanta Nat'l Bank, 206 Ark. 522, 176 S.W.2d 236 (1943).

<sup>90</sup> See Island Factors Co. v. Lance Cleaners, Inc., 25 Misc. 2d 365, 202 N.Y.S.2d 828 (Sup. Ct. 1960).

<sup>91</sup> Hanan v. Threadgill, 296 Fed. 569 (S.D. Fla. 1924).

<sup>92</sup> Fleischmann v. Clausen, 222 App. Div. 7, 225 N.Y. Supp. 288 (1927). In this case, property was sold at a foreclosure sale for \$8,000 and subsequently resold by the buyer for \$16,500. Here, the inadequate price obtained by the reposessor was an element of bad faith. As far as possible he must try to obtain the fair market value.

<sup>93</sup> See McClintock, Equity § 35 (2d ed. 1948).

<sup>94</sup> Strahan v. Atlanta Nat'l Bank, *supra* note 89.

<sup>95</sup> Wolf v. Aero Factors Corp., 126 F. Supp. 872, 878 (S.D.N.Y. 1954).

<sup>96</sup> Cf. 2 Bonbright, Valuation of Property 839 (1937).

"commercially reasonable."<sup>97</sup> If confronted with a "reasonable" method of sale, the court has no formal power under the U.C.C. to reexamine the price independently, and is forced to allow the debtor only the actual price received at the sale. In determining whether the sale was "commercially reasonable," however, the court may consider the adequacy of the price as one factor.<sup>98</sup>

The equitable tests of the U.C.C. are sufficient to give debtors proper value upon liquidation of collateral. No absolute rule need be made as to what that value is, and the existing judicial emphasis on methods of foreclosure, rather than price derived therefrom, appears to be correct. As business conditions and markets change, so will the considerations of what is "commercially reasonable." More specific standards in the Credit Code would be neither wise nor useful to protect the consumer in this regard.

#### D. Wage Assignments and Garnishment

1. *Some General Comments.* A wage assignment is a voluntary act by a debtor assigning to a creditor all or a portion of his future wages for payment of an obligation. Normally, the employer does not make payments directly to the creditor until he is notified that the debtor, his employee, has defaulted. Thus, the wage assignment "secures" the debt—it is not the source of primary payment. A garnishment is a judicial proceeding which enables a creditor to reach the debtor's wages after default, usually to enforce a judgment. The fundamental effect of the two devices is substantially the same—payment of the debtor's wages by his employer directly to a creditor.<sup>99</sup>

The existing pattern of laws covering wage assignments and garnishment varies enormously from state to state. These procedures are typically regulated by civil-practice laws, small loan laws, retail installment sales laws, and independent statutes governing one or both of the devices specifically. Since no two states have identical statutes, the safest course in drafting uniform legislation is either to say very little on the subjects or to treat them fully.

States differ as to whether consumer debts may support an assignment or garnishment. Although most consumer-loan laws authorize wage assignments as security,<sup>100</sup> most consumer installment sales laws forbid them, the policy being that the creditor should secure himself

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<sup>97</sup> See U.C.C. §§ 9-501 to -507. The unregulated system of repossession and resale of the U.C.C. differs markedly from the detailed structure of such statutes as the Uniform Conditional Sales Act.

<sup>98</sup> See *Atlas Constr. Co. v. Dravo-Doyle Co.*, 3 U.C.C. Rep. Serv. 124 (Callaghan 1965).

<sup>99</sup> *City & Suburban Homes Co. v. John J. Reynolds, Inc.*, 39 Misc. 2d 299, 240 N.Y.S.2d 628 (N.Y. City Civ. Ct. 1963).

<sup>100</sup> See Curran, *Trends in Consumer Credit Legislation* 41 & n.239 (1965).

## REMEDIES

with the goods sold and not have easy and immediate access directly to his debtor's wages. On the other hand, there does not appear to be any legislation preventing a creditor from garnishing the debtor's wages if default under the installment sale is followed by suit and judgment. The fundamental difference between the two procedures is that the wage assignment, a voluntary, contractual arrangement, is initiated with the agreement, while the garnishment is instituted by operation of law. Inequities or undue coercion inherent in gaining access to the debtor's wages will, to some degree, be reduced due to judicial presence. The author is not sure whether this justifies major differences in the remedies.

Similarly, why should differences exist in the amount of wages exempt from assignment and the amount exempt from garnishment? Here, where the only question is how much the debtor needs in order to live—a more important consideration than the payment of his creditors—similar treatment of garnishment and assignment seems correct. Since the court is present in the former, however, flexible treatment might be possible. The court could vary the statutory standard when a debtor requires more, or less, to live than the statutory exemptions allow. One proposal, rejected by the New York Legislature,<sup>101</sup> embodied a flexible garnishment and wage assignment approach based upon minimum-wage indices. While not the only possibility, it is certainly a viable alternative. Another approach is to give the courts latitude to vary a basic exemption in individual cases.<sup>102</sup> There is, however, much to be said for making exemptions alike in wage assignments and garnishments.

Undoubtedly, the social movement is toward reduction in the use of wage assignments and, to a lesser degree, garnishments. While statistics are scarce and inconclusive, it does appear that both devices do more harm than good.<sup>103</sup> Evidence indicates that consumer bankruptcies are higher in those jurisdictions where wage-assignment or garnishment laws are liberal toward the creditor.<sup>104</sup> In installment selling, where wage assignments are not generally used, there is no evidence that collections have been hampered as a result. Further-

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<sup>101</sup> N.Y. Assembly Print 6952, Intro. 5983 (1966).

<sup>102</sup> See N.Y. Pers. Prop. Law § 48—a(2)(a) (McKinney 1962), which establishes a fixed test; N.Y. Civ. Prac. Law § 793 (McKinney 1963) (since repealed), which authorized judicial flexibility.

<sup>103</sup> A debtor's employer may become involved in the defaulting employee's personal economic difficulties, often causing job tensions, if not dismissal. In addition, the employer will be greatly inconvenienced if he has to adjust his bookkeeping or his IBM check-processing machine, and these adjustments may be costly.

<sup>104</sup> See Brunn, Wage Garnishment in California: A Study and Recommendations, 53 Calif. L. Rev. 1212, 1236 (1965).

more, the growth of installment selling hardly seems to have been stunted.

2. *Assignment of Wages.* Only long usage can really justify allowing a wage assignment as security for a loan of money while prohibiting it for a deferred-payment sales obligation.<sup>105</sup> It is not inconceivable, moreover, that a total elimination of wage assignments would increase rather than reduce the total number of collections by curtailing employee dismissals and bankruptcies.

Where it is deemed proper to retain the wage assignment, considerable debtor protections should always exist. One must, for example, establish the proper level of wages to exempt; and the assignment should be effective only in the event of employee default.<sup>106</sup> There is no reason why a wage earner should be annoyed or embarrassed in his employment relationship while he is honoring his obligations. In addition, a clear system of priorities among competing assignees of wages,<sup>107</sup> perhaps based upon a filing system, would not only avoid unnecessary conflict, but reduce the tendency of secondary assignees to contact employers.

3. *Garnishment.* The problems of garnishment, not only in consumer-credit transactions, but as a judicial remedy in general, have wide implications which a uniform consumer-credit code must consider—especially to prevent changes in other areas of the law where change may not be intended.

A garnishment has judicial force behind it and is, therefore, a somewhat more potent remedy than the assignment of wages. Its use, therefore, should be restricted to situations where a judgment on the debt has been obtained. While this is the prevailing pattern, some states permit a formal garnishment upon initiation of the lawsuit.<sup>108</sup>

Legislative control over employee discharges because of wage garnishment is another issue the draftsmen of the Credit Code should consider. There are two primary alternatives: (1) The draftsmen may choose to ignore the problem entirely. In view of the fact that garnishment is a legal remedy affecting much more than consumer credit, this would not be an unreasonable choice. (2) They may decide to forbid employee dismissals because of garnishment.<sup>109</sup>

<sup>105</sup> Where a loan is made to enable the borrower to make a purchase, there is clearly no valid distinction in so far as security is concerned.

<sup>106</sup> The New York law prescribes time periods and other procedures after default before the wage assignment may be enforced. N.Y. Pers. Prop. Law § 48 (McKinney 1962).

<sup>107</sup> See, e.g., *County Fed. Sav. & Loan Ass'n v. Cummings*, 42 Misc. 2d 949, 249 N.Y.S.2d 449 (Sup. Ct. 1964).

<sup>108</sup> E.g., Ala. Code tit. 7, §§ 314, 995, 996 (1958); Ariz. Rev. Stat. Ann. §§ 12-1521, -1571 (1952); Fla. Stat. Ann. §§ 77.18, .19 (1965).

<sup>109</sup> New York recently adopted this approach. N.Y. Laws 1966, ch. 613.

It is uncertain what effects, if any, would flow from implementation of the second alternative. Difficult issues of proof, such as whether the dismissal resulted because of the garnishment or for other reasons, may arise. Legal techniques based upon such traditional concepts as proximate cause, materiality, and the like would seem, however, sufficient to deal with this. Perhaps a more basic issue is whether the state should forbid an employer to dismiss an employee because of a wage garnishment. Although unpaid debts resulting in judgments are a man's personal problems, they may affect his desirability as an employee. Similarly, the expense and nuisance of garnishment can create employer costs that are not a normal part of the employment bargain.

New York has made a policy choice that the problems of garnishment are assumed by the employer.<sup>110</sup> An employee may be dismissed because he is discovered to have exorbitant debts, because he is in default, or because he is sued, but not because his income is garnished. The New York position is clearly defensible based upon the social need for consumer protection. It would be more equitable to the employer, however, if the procedures for enforcing the garnishment were made simpler. Proposals for simplified wage-earner receivership at the state level represent a step in this direction.

#### V. CONCLUSION

Consumer credit is an issue of increasing national concern.<sup>111</sup> Although there seems to be little question that something must be done to remedy abuses, there is practically no consensus on what those abuses are. Attention revolves generally around the problems of the poor. Those problems obviously go much deeper than types and costs of credit, and, therefore, the ultimate contribution of the Credit Code, which treats only these external areas, will probably be minor at best.

Unfortunately, ignorance exists at all levels of the problem. The potential debtor is uninformed as to the various sources of credit and as to the methods of obtaining maximum credit benefits. The legislator is uninformed on the needs of the credit industry. Neutral parties in government and the universities are only gradually developing an expertise as consumer problems become both more pressing and more respectable as a field of investigation. Law school courses are slowly introducing consumer problems as such; law reviews are recognizing consumer law as a research area;<sup>112</sup> the President's Committee on Consumer Interests is uncovering interesting and stimulating material;

<sup>110</sup> See *ibid.*

<sup>111</sup> See *N.Y. Times*, Feb. 16, 1967, p. 1, col. 8.

<sup>112</sup> See also Symposium—Consumer Protection, 64 *Mich. L. Rev.* 1197 (1966).



the Council on Consumer Information, based at the University of Missouri, has also published valuable consumer-credit information.

Probably most significant is the study of consumer-credit counseling agencies now being conducted by the Family Service Association.<sup>113</sup> It is envisaged that a widespread network of such agencies will ultimately be available on a nonprofit basis to inform and advise the consumer in his credit problems. Both consumer and responsible creditor groups are wholeheartedly—and financially—behind the formation of such agencies. More intelligent use of credit can only benefit both groups. Present plans are for the Credit Code to provide a framework within which such agencies can act as an integral part of its regulation of consumer credit.

This writer believes that the problems of consumer credit can only be resolved through the combination of effective legislation and informed consumers. The former is already much better than many critics would have us believe, but the latter is still almost entirely unattained. Consumers need a true understanding of the basics of credit and not merely the antiseptic disclosures given or proposed to be given in consumer-debt agreements. It may, in fact, be that the lengthy covenants of the consumer contract cause more confusion than enlightenment and, after numerous disclosures are made, the terms of the deal might merely be a reference to a statute or a "master" contract on file with a supervisory agency. Certainly, such isolation of the basic elements of the transaction would emphasize to the uninitiated what really are the most important portions of his obligation.

Studies have barely scratched the surface of the law of remedies, as applied particularly to consumer-credit problems. What has passed for learning has more often been generalization drawn from limited experience. It is hoped that studies, such as that of the Family Service Association, will lead to a true understanding of where remedies are being abused and where remedies can be provided, in a manner that will serve the ultimate ends of consumer credit.

Meanwhile, remedies are undoubtedly a neglected stepchild of the Credit Code. The issues raised in this article are only some of the obstacles that must be passed in developing a cohesive legal system of remedies.<sup>114</sup> The issues are difficult, and one regrets the present signs that the Credit Code will be less than satisfactory in resolving them. Progress is, however, often slow, and one may find encouragement in what will be one more forward step toward the needed resolution.

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<sup>113</sup> See Hall, *Developments in the Study of Family Credit Counseling Being Conducted by Family Service Association*, 20 *Pers. Fin. L.Q. Rep.* 122 (1966).

<sup>114</sup> The issues of bankruptcy and the related issues of state insolvency laws, both of which are vital in dealing with the problem, have been largely ignored in this article.

# BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

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VOLUME VIII

SPRING 1967

NUMBER 3

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