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PARTIES AND TRANSACTIONS COVERED BY CONSUMER-CREDIT LEGISLATION

(NEIL O. LITTLEFIELD*

An examination of the parties and transactions which ought to be covered by consumer-credit legislation must indicate at the outset that there are a number of ways to limit such coverage. For example, coverage can be limited to sales of consumer goods,¹ or even sales of particular goods, such as automobiles.² It can also be limited to protection of specific parties, *e.g.*, consumers. As will become evident, however, it is somewhat difficult to discuss coverage of parties and of transactions separately. As a context for discussion, frequent reference will be made in this article to the preliminary drafts of the proposed Uniform Consumer Credit Code.³

There are many ways to classify the various types of transactions involving consumer credit, but any descriptive scheme should bear a reasonable relationship to the objectives of the legislation for which the classification is designed. Though it is not the purpose of this article to discuss the substantive provisions which consumer-credit legislation should include, it is necessary to recognize the customary goals of such legislation. Therefore, the basic assumption is made that there is a need to regulate credit transactions involving the consumer, so that credit agencies will responsibly perform their necessary function. The need for such regulation undoubtedly flows from the inappropriateness of the normal rules of contract, commercial, and property law to the consumer-credit transaction.

I. SALES VS. LOANS: THE TIME-PRICE DIFFERENTIAL

An underlying problem in considering the question of coverage of consumer-credit legislation is the extent to which credit sales and loans should be treated differently. No statute yet enacted has treated credit sales and loans as two sides of the same coin. There is an historical reason for this. Initially, the need for statutory reform

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¹ See U.C.C. § 9-109(1), which defines "consumer goods" as those goods "used or bought for use primarily for personal, family or household purposes."

² A number of states have retail installment sales legislation which applies only to motor vehicles—some in connection with an act applying to all goods and some not. See Curran, *Trends in Consumer Credit Legislation* 254-55 (Chart 11) (1965).

³ The research for the drafting of the Uniform Consumer Credit Code has been the responsibility of the Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury of the National Conference of Commissioners on Uniform State Laws. The chairman is Alfred A. Buerger, Esq. The name of the Special Committee suggests that it was given the widest latitude in coverage.

developed as a result of abuses in the so-called "small loan" business. The Russell Sage Foundation responded by sponsoring a model small loan act which applied only to creditors who made direct loans.⁴ This act was passed in a number of states long before credit sales transactions began to attract attention.⁵ Later, a second series of enactments was directed at credit sales.

The legal distinction between a loan and a credit sale was also nurtured by the judiciary. Because of the development of credit sales, the restrictive usury laws had to be relaxed to assure the creditor a fair return on his money. The courts recognized that credit sales had their place in the American economy, and agreed that a merchant could sell goods on credit, free of the usury restrictions, if the merchant sold for a "credit price" as opposed to a "cash price." Although an economist might argue that the difference represented a charge for the use of the purchase price during the term of the contract, and was therefore interest, the courts held that the difference was a "time-price differential," and thus was not interest.⁶

It would seem that the decision to draft a uniform consumer-credit code might present an opportunity to reevaluate the theory of a time-price differential and to eliminate it if it is in fact based upon a meaningless distinction. In other words, if small loans and retail installment sales are to be regulated similarly in a uniform act, it would be sensible to consider treating them as part of the same functional concept. It appears, however, that the Credit Code will retain the traditional distinction: A comment to the First Tentative Draft states that "the Special Committee firmly believes that this doctrine is sound and has preserved it in this Code."⁷

At this point, it should be noted that neither the First nor Second Draft of the Credit Code statutorily affirms the time-price differential. There is no actual language which states that the courts must treat a retail installment sales transaction and a consumer loan differently. However, there is one feature of the act which does affirm the dichotomy—the definition and scope of a "consumer credit transaction." The Special Committee could have elected to draft an act which applied generally to "consumer credit transactions" with special

⁴ This act may be found in Barrett, *Compilation of Consumer Finance Laws* 675 (1952). See generally Robinson & Nugent, *Regulation of the Small Loan Business* 96-137 (1935).

⁵ See *id.* at 134, listing eighteen jurisdictions which enacted various versions of the Uniform Small Loan Law between 1917 and 1934.

⁶ See *Consumer Credit Symposium*, 55 *Nw. U.L. Rev.* 301, 303-04 (1960).

⁷ Credit Code § 1.201(21), comment (Tent. Draft No. 1, 1966). This comment follows the definition of "loan," which includes the purely gratuitous statement: "The credit sale of goods or services does not involve a loan of money to the buyer either by the seller or by a transferee of the debt arising from the sale."

sections where separate treatment was necessary; instead, they divided the act into individual parts dealing with "consumer credit sales"⁸ and "consumer loans,"⁹ designating both as within the concept of "consumer credit transaction."¹⁰

The validity of the time-price-differential doctrine has been challenged by commentators in the past. One writer, for example, has stated:

Little support is afforded by underlying economic realities for drawing a fine legal distinction between interest on a loan and interest on an instalment sale. From an economic point of view, the credit sale and the loan are alike in nature. In each, one party is seeking to gain present goods in return for a promise to pay in future goods.¹¹

Since this distinction is at best a difficult one to defend, is there a reason for the position taken by the Special Committee on this important policy consideration? Simply because the explanation may lie in the bailiwick of "practical politics" should not bar a discussion of it here.

At first glance, it would seem that if the Credit Code contained reasonable maximum rates and certain acceptable disclosure provisions for both credit sales and consumer loans, there would be no need for the time-price-differential doctrine. It would seem further that the credit industry itself would have little reason for objection. The enactment of uniform legislation, however, is not automatic. Perhaps industry opposition to abrogation of the doctrine is based upon a real fear of what would happen in the interim between promulgation of the act and its adoption by all jurisdictions. Suppose the Code did abrogate the doctrine. The promulgation of the act would itself stand as respectable authority for the proposition that the distinction upon which the doctrine is based is at best a mere fiction and no longer necessary. There would then be the danger that a court in a jurisdiction which had not yet enacted the Credit Code would be persuaded to abandon the doctrine. Without the Credit Code or some similar legislation, elimination of the time-price

⁸ "Consumer credit sale" means a consumer credit transaction in which the creditor sells goods or services." Credit Code § 1.204 (Tent. Draft No. 1, 1966). See Credit Code § 2.102(1) (Tent. Draft No. 2, 1967).

⁹ "Consumer loan" means a consumer credit transaction in which the creditor loans or makes a firm commitment to loan money." Credit Code § 1.203 (Tent. Draft No. 1, 1966). See Credit Code § 3.102(2) (Tent. Draft No. 2, 1967).

¹⁰ The structure of the First and Second Tentative Drafts indicates the choice made by the drafters, since "Sales" and "Loans" are covered by separate articles. These articles have parallel treatment of, for example, maximum charges, deferral charges, delinquency charges, and limitations on assignment of earnings.

¹¹ Berger, *Usury in Instalment Sales*, 2 *Law & Contemp. Prob.* 148, 153 (1935).

differential would drop the retail installment credit industry into the treacherous waters of the usury laws.¹²

Since there is the possibility of involvement with the usury laws, it is reasonable to inquire what damage would be done or what abuses left uncured by retaining the concept of time-price differential. This inquiry presumes, of course, that there is no objection to prolonging a fiction for purposes of "practical politics" if the continuation is harmless. Contemporary criticism of the time-price differential focuses upon the exorbitant rates and lack of adequate disclosure in many retail installment credit sales. This criticism should be stifled if the Credit Code prescribes maximum rates and disclosure requirements which are similar for both sales and loans. There may, however, be other abuses of consumer credit which are made possible by the decision to retain the dichotomy between sales and loans.

There is at least one problem the resolution of which, arguably, is made more difficult because of the preservation of the distinction between sales and loans. This problem concerns the availability of consumer defenses against a financing agency. Generally, the purchaser of a negotiable instrument takes the instrument free and clear of any defenses which may exist between the obligor and the payee if the purchaser takes without notice of such defenses.¹³ In the consumer-credit situation, therefore, the finance company that purchases consumer negotiable paper¹⁴ without knowledge of valid defenses can enforce the promise to pay. Mere knowledge that the negotiable instrument is issued pursuant to a consumer sale is not notice of a consumer defense.¹⁵

A result insulating finance companies from consumer defenses has been avoided by some courts when there has been a sufficiently close connection between the retailer and the financing agency.¹⁶ That is, when the finance company has supplied forms, rates, and credit check, when it has agreed in advance to take the retailer's consumer paper, and when it has a continuing relationship with the retailer, the courts have been willing to find, on one of a number of

¹² See, e.g., *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952), where the Supreme Court of Arkansas disapproved of the time-price differential, and required a creditor to prove as an issue of fact that his so-called "credit price" was not employed as a cloak for usury.

¹³ U.C.C. §§ 3-302(1), -305(2).

¹⁴ Negotiability is based on form only. See U.C.C. § 3-104(1).

¹⁵ See U.C.C. § 3-304(4)(b).

¹⁶ See, e.g., *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940); *Mutual Fin. Co. v. Martin*, 63 So. 2d 649 (Fla. 1953); *Norman v. World Wide Distribs., Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963). See generally Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 So. Cal. L. Rev. 48 (1966).

theories,¹⁷ that the financing agency is insufficiently insulated from the execution of the negotiable instrument to claim the status of a good-faith purchaser. The purpose, of course, is to preserve consumer defenses in situations where the consumer has little reason to expect that his obligation to pay has been separated from the retailer's duty to supply satisfactory goods.¹⁸

This judicial trend is acknowledged in the First and Second Tentative Drafts of the Credit Code, which provide that in a consumer-credit sale, the use of a negotiable instrument is forbidden.¹⁹ The question now focuses on the wisdom of applying this prohibition to consumer loans. To answer this question, some of the paperwork behind consumer-credit transactions must be examined.

In a consumer loan, as opposed to a consumer-credit sale, the prevailing rule is that the obligation to pay, evidenced by a negotiable or nonnegotiable note, cannot be conditioned upon any independent obligation which a third party may owe to the borrower as a result of any transaction involving the borrowed money. That is, the factual situation constituting a loan of money to be used for the purchase of consumer goods is legally distinguishable from the factual situation of a credit purchase of goods followed by an assignment of the obligation to pay to a financing agency. This may seem to support the dichotomy between a sale and a loan, but let us examine three fact situations involving a consumer, a retailer, and a financing agency.

The first fact situation, designated type *A*, occurs when a consumer purchases on credit from a retail merchant. Typically, the retailer will have the consumer execute an instrument evidencing a monetary obligation and often an instrument giving the retailer a security interest in the subject matter of the sale. The documents executed by the consumer are generally termed "chattel paper"²⁰ or "consumer paper."²¹ This consumer paper is customarily sold or discounted by the retailer to a financing agency.

In the second transaction, type *B*, the consumer begins by going to the financing agency and asking to borrow money for consumer purchasing. The agency will have the consumer execute a promissory

¹⁷ See *id.* at 67-74.

¹⁸ See generally the excellent treatment in Shuchman, *Consumer Credit by Adhesion Contracts*, 35 *Temp. L.Q.* 125, 281 (1962). Note particularly the discussion of the expectations of the unknowledgeable consumer. *Id.* at 286-89.

¹⁹ Credit Code § 6.101 (Tent. Draft No. 1, 1966); Credit Code § 2.403 (Tent. Draft No. 2, 1967). In addition, the next section in each draft denies a transferee the benefit of clauses which waive claims and defenses of the debtor as against the seller.

²⁰ "Chattel paper" is defined in § 9-105(1)(b) of the U.C.C. as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods."

²¹ "Consumer paper" is simply a term to describe chattel paper executed by a consumer.

note, usually negotiable, and often will take a security interest in either the consumer's property or his wages. Then the consumer presumably shops with cash for what he wants.

Transaction type *C* is a combination of the two prior situations. The consumer goes to a retailer and decides to purchase specific goods. The retailer then suggests that the consumer may want to borrow the purchase price from a local financing agency. Varying degrees of cooperation between the retailer and the financing agency will effectuate the transaction. The consumer presumably will execute a negotiable promissory note payable to the finance company, and the finance company will give him a check payable to the retailer or to the retailer and the consumer jointly. Perhaps, in accordance with an agreement, the consumer will simultaneously grant the finance company a security interest in the goods purchased.²² Thus, the paper work and legal obligations are nearly identical with type *B*, even though the factual pattern begins as in type *A*.

As indicated earlier, judicial decisions have attempted to preserve consumer defenses in transaction type *A* when there is a close connection between the dealer and the finance agency. The Credit Code suggests that the same result be reached by prohibiting the use of negotiable instruments in consumer sales.²³ But what about the consumer loan as outlined in transaction type *C*? Is it not evident that as far as the consumer is concerned, transactions type *A* and *C* are identical? Any factual distinction lies only in paperwork. The consumer has no more reason to expect that the obligation has been separated from the retailer's performance in *C* than in *A*. It therefore seems that the retention of the time-price differential in the Credit Code will permit retailers and financing agencies to improve their positions, relative to the consumer, by the appropriate paper shuffling.

Assuming that the above analysis sets forth the one possible objection to the retention of the time-price-differential doctrine, the question then becomes whether this problem can be resolved. It is submitted that a frank recognition of the need to preserve consumer defenses should be made. Section 6.102 of the First Draft (retained as section 2.404 in the Second Draft) should be amended as follows:

Except as provided in section 6.101 [2.403 in Second Draft], with respect to a consumer credit sale a transferee

²² U.C.C. §§ 9-108, -204 permit the creation and filing of a security interest to take effect in the future. With prepared forms and standardized procedure, transaction type *C* would present no practical problems in its execution. The resulting legal obligations would be substantially identical with those of transaction *B*.

²³ *Supra* note 19. It is true that a holder in due course (taking free of defenses) could be created when a retailer ignores the statutory prohibition against use of negotiable instruments. It is submitted that this likelihood is rare enough so that it is unnecessary to completely invalidate the negotiability of consumer paper.

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of the seller's rights *or a lender subject to this Act who loans money to the debtor knowing it will be used as the purchase price of specific consumer goods* is subject to all claims and defenses of the debtor against the seller arising out of the sale notwithstanding an agreement to the contrary. (Suggested amendment in italics.)

Such an amendment is necessary to counteract the act's preservation of the distinction between a consumer-credit sale and a consumer loan. Without the amendment, the protection of the consumer's valid defenses will be lost in certain transactions. They will be lost because the Credit Code has chosen to preserve a dichotomy which has no function or economic significance.

II. PARTIES COVERED

At the outset, it must be recognized that the coverage of consumer legislation can be determined either by the character of the parties or by the character of the transactions into which the parties enter. Usually it is the latter which is controlling, but even when this is the case, consideration should be given to the character of the parties. It could be said, for example, that a retail installment sales act covers retail buyers, but it is probably more fruitful to talk of a retail transaction rather than a retail buyer.

No one suggests that a sophisticated business entity with substantial bargaining power needs protection from those who extend it credit or loan it money. The legislator, however, is faced with the problem of defining a class of persons to be protected by the act, and may have to utilize a formula which either includes *some* parties not needing protection or neglects *some* parties entitled to protection.

One obvious way of determining the scope of consumer-protection legislation is to make the act applicable to all transactions with consumers. Very few acts, however, attempt to define "consumer." It is possible to state the definition in terms of one who purchases for "personal, family and household use,"²⁴ but this results, in effect, in a definition dependent upon the subject matter of the transaction. It would be difficult to define "consumer" in a way which would identify objectively the individual with whom the creditor was dealing. The characteristics of a consumer who needs protection from possible abuses of certain segments of the credit industry are too nebulous. It would require far too much legislative energy to define such attributes. And after all, the creditor should not be put to the burden of investigating whether a purchaser usually consumes personally what he buys, or what his degree of economic literacy may be. Thus, the

²⁴ See, e.g., U.C.C. § 9-109(1).

drafters of consumer-credit legislation are well advised to find, in some aspect of the transaction itself, a standard which will allow the needed protection without overregulation.

Assuming that the nature of "consumer" presents an unattractive criterion to determine the coverage of consumer-credit legislation, is it advisable to include transactions with all but business entities? Such coverage would arguably exclude corporations, partnerships, and joint-stock companies. A number of factors, however, militate against acceptance of this possibility. Individuals may incorporate for tax purposes. Businessmen may buy for personal, household, and family purposes using their business identity. Also, there seems little reason for broadly denying protection to a class of consumers simply because they are also businessmen.²⁵

III. TRANSACTIONS COVERED

A. *Consumer Goods*

Rejecting the distinction between retail and nonretail sales as indeterminative,²⁶ a legislative draftsman may attempt to focus upon the purpose of the purchase.²⁷ The Uniform Commercial Code includes a definition of "consumer goods" which does look to purpose: Section 9-109(1) states that goods are consumer goods if "they are used or bought for use primarily for personal, family or household purposes." A number of states have adopted a definition similar to this in their respective retail installment sales acts.²⁸ The concept of "consumer goods" has three principal advantages: (1) it focuses upon the transaction; (2) it identifies the included subject matter fairly reliably in the business world; and, (3) it probably applies to most transactions where protection is needed. The definition, however, does suffer from a certain ambiguity, upon which some writers have focused;²⁹ but ambiguity is present in any definition.

A sales-financing act could conceivably apply to retail sales of one or more particular kinds of goods, focusing on the goods them-

²⁵ Report of Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury to the National Conference of Commissioners on Uniform State Laws 16 (1965).

²⁶ Many acts termed "retail installment sales financing" acts seem to apply to retail sales, but most of them include other limiting criteria. See, e.g., Ill. Ann. Stat. ch. 121 ½, § 223 (Smith-Hurd 1960) which states that "'retail installment sale' or 'sale' means and includes any sale, other than for a commercial or business use . . ."

²⁷ Note the distinction between the purpose of a particular purchase and the purpose of the buyer's purchases generally. The latter purpose would be a characteristic of a buyer and not of a transaction. The reader is urged not to deduce any conceptualization from the writer's use of a classification of subject matter into "parties covered" and "transactions covered."

²⁸ See, e.g., Conn. Gen. Stat. Ann. § 42-83(3)(b) (Supp. 1965); Mass. Gen. Laws Ann. ch. 255D, § 1 (Supp. 1966).

²⁹ See, e.g., Spivak, Secured Transactions 44-45 (3d ed. 1963).

selves. Thus, it would be possible to have an act applying to automobiles, to hard goods (as defined), or soft goods (as defined). The only time this type of coverage has been used is in the motor-vehicle-financing acts prevalent in a number of states. It is submitted that the limited coverage of these acts is justifiable only on the historical basis of obtaining new legislation by degrees in areas where the trouble is greatest. Any current proposals for consumer-protection legislation should not make distinctions among types of goods.

Some consumer-protection acts cover all retail sales with certain named exclusions, such as sales for "business or commercial purposes."³⁰ The First Tentative Draft of the Credit Code was of this type. In the definition of "consumer credit transaction," which appeared in section 1.202, the draftsmen had decided to cover all credit transactions³¹ with certain exceptions, rather than to specify transactions for "personal, family, or household purposes." The Second Draft, however, in section 2.102(1), explicitly accepted the latter alternative. The formulation in the First Draft indicated a policy decision that it is more appropriate to exclude transactions obviously not needing protection than to risk a definition of included transactions which might not apply to certain unforeseen circumstances that ought to be covered. The drafters had favored overprotection as opposed to underprotection. Considering the slight and harmless consequences of overprotection, it is submitted that their original decision was correct.

B. *Amount of Credit Extended*

There is at least arguably a reasonable relationship between the amount of credit extended and the need for regulation. Presumably, the larger the loan or credit, the more economically sophisticated the borrower. The Russell Sage legislation, for example, designated, as its sole criterion of coverage, loans not in excess of a certain sum of money,³² and many retail sales financing acts now in force use amount of credit extended as one of the criteria of coverage.³³

It is submitted that there is a contemporary concern which supports the argument for a correlation between the amount of credit granted and the protection necessary. Attention focused upon the characteristics and habits of the poor in our society has not been limited to traditional matters of welfare, education, and housing. It

³⁰ E.g., Motor Vehicle Sales Act, Ky. Rev. Stat. Ann. § 190.090 (1963). See 1 CCH Instalment Credit Guide 1502-25 (1965).

³¹ "Credit transaction" is defined in § 1.201(11) of the First Draft as "a transaction (a) in which credit is granted in connection with (1) a loan, (2) a sale of goods or services, or (3) an open-end lease of goods, or (b) in which debt is refinanced."

³² See note 4 *supra*.

³³ See Curran, *op. cit.* *supra* note 2, at 353-55.

has been shown that the purchasing, and especially credit-purchasing, habits of the poor warrant particular attention. The poor often pay more for credit, because they are both greater credit risks and more naturally the prey of those who abuse the credit system. This does not mean that consumer-protection legislation ought to be limited to transactions involving an amount within the range of the indigent borrower. It may well indicate, however, that the poor ought to have a greater degree of protection than the average consumer purchaser. Since circumstances make it unlikely that the poor will receive the protection of the letter of the law, it may be advisable to provide administrative control or supervision to a degree which would assure them some measure of realistic protection. There are indications, in Article 7 of the First Tentative Draft and Article 6 of the Second, that the drafters are seriously considering advocacy of a strong administrative agency with jurisdiction over all consumer-credit transactions. The policy decision as to the extent of the commissioner's powers and the nature of his office has not yet been completely formulated.³⁴

C. Secured Transactions

1. *Personal-Property Security.* One of the primary reasons for consumer-credit regulation is certainly the prevention or amelioration of abusive practices in personal-property security. No citation of cases is needed when it is stated that the usual legal remedies available to a secured creditor—legal remedies designed for commercial purposes—are much too harsh and unrealistic when applied to a consumer's household furniture, appliances, or automobiles. The earliest retail installment credit acts limited the secured lender's enforcement remedies.³⁵ Is it meaningful to limit consumer-protection legislation to transactions involving a security interest in personal property? Such a limitation would deny rate and disclosure protection to certain classes of credit consumers. While security is generally required in consumer financing, there are many situations in which the dealer and the financing agency will extend installment credit on the good credit standing of the consumer. The creditor may be unconcerned with security when the subject matter of the sale has little resale value, when the value of the object is small compared to the costs of perfecting a security interest, and when the transaction involves such things as revolving credit.

³⁴ It is possible that in some states the administration of consumer-credit legislation will be entrusted to an existing agency such as the Banking Commission. It is submitted that this decision would significantly weaken the effectiveness of a credit code patterned on the uniform version.

³⁵ See, e.g., Ind. Laws 1935, ch. 231, §§ 8, 9.

As a criterion, the presence of certain types of security may serve to exclude the underlying commercial transactions. For example, credit extended on the security of negotiable documents of title or investment securities might indicate that the transaction need not be covered by consumer-protection legislation.³⁶ It is doubtful, however, whether the difficulty of defining such purely commercial security is compensated for by valid distinctions in coverage which could not be more easily obtained by a judicious use of other relevant criteria. It is true that consumer-protection legislation ought to regulate the use of security in connection with consumer-credit transactions, but there seems no reason to limit the coverage to secured transactions.

2. *Real-Property Security.* One might suppose that installment contracts secured by real property would not require the type of regulation found in typical consumer-protection legislation. It is true that the earliest retail installment sales acts were limited to personal property or to goods and did not apply to real-estate sales. However, the use of second mortgages as security for consumer loans, and the phenomenon of retail installment consumer contracts for home-improvement loans, evidence as much need for regulation as other consumer loans.³⁷ The wage earner who is persuaded to have aluminum siding placed on his home on credit terms secured by a second mortgage needs protection just as surely as an automobile buyer.

There is reason to suggest, however, that draftsmen would do well to exclude the type of real-estate mortgages usually provided by a bank or savings and loan association.³⁸ The possibility of enacting proposed legislation over the articulate protests of the banking industry would be slight. In addition, it would be unfortunate if the banking procedures used in completing installment contracts for the sale of homes required unnecessary changes.

A number of tests might be suggested to separate those transactions which should be subject to regulation from those which should not. Initially, it is submitted that it would be unwise to exempt banks and savings and loan institutions from coverage of the act. Banks do engage in many types of consumer-credit transactions, and their share of typical consumer-credit business is continually increasing.³⁹ Likewise, it would perhaps be unwise to exempt only first mortgages on real property. There is not that much functional difference between the use of the first mortgage and the use of the second

³⁶ See Special Committee Report, *supra* note 25, at 17.

³⁷ See, e.g., *New Jersey Mortgage & Inv. Corp. v. Calvetti*, 68 N.J. Super. 18, 171 A.2d 321 (1961); *Davis v. Commercial Credit Corp.*, 87 Ohio App. 311, 94 N.E.2d 710 (1950).

³⁸ See generally Prather, *Economics, Morality and the Real-Estate Loan*, p. 475 *infra*.

³⁹ See *Developments in Consumer Credit*, 52 Fed. Reserve Bull. 768, 777-80 (1966).

mortgage. Also, banks do use second mortgages for commercial as well as for consumer purposes.

A recent New Jersey statute⁴⁰ regulating loans secured by second mortgages applies to any

loan made to an individual or partnership not to be repaid in 90 days or less which is secured in whole or in part by a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families, which property is subject to the lien of one or more prior mortgages. . . .⁴¹

Banking institutions are excluded from the act,⁴² and second mortgages are required to be licensed.⁴³ The New Jersey act sufficiently excludes commercial second mortgages by limiting coverage to individual or partnership debtors, by limiting coverage to second mortgages on dwellings, and by excluding banks.

IV. CONCLUSIONS

The Second Tentative Draft of the Uniform Consumer Credit Code is likely to undergo some changes before a promulgated version is available. However, the draftsmen are not likely to make significant changes regarding coverage. Special groups will undoubtedly attempt to win exclusionary provisions, but any such provisions should not affect the overall coverage of the act.

This article has attempted to pinpoint some rather obvious considerations regarding coverage of consumer-credit legislation. A few main conclusions might be restated here for the earnest consideration of any draftsman.

(1) Care ought to be exercised so that the proposed retention, in legislative form, of the time-price differential does not have unforeseen ramifications which could hamper the basic purposes of consumer-protection legislation.

(2) Coverage of consumer-protection legislation is better designed when it focuses upon excluding certain transactions obviously not needing protection, rather than attempting to define coverage by identifying those specific transactions which, for the moment, apparently need protection.

(3) Coverage of consumer-protection legislation can best be structured by using a number of relevant criteria, rather than attempting use of a broad general category, either of parties or of transactions.

⁴⁰ Secondary Mortgage Loan Business Law, N.J. Stat. Ann. §§ 17:11A-1 to -33 (Supp. 1966).

⁴¹ N.J. Stat. Ann. § 17:11A-1a(1) (Supp. 1966).

⁴² N.J. Stat. Ann. § 17:11A-1b (Supp. 1966).

⁴³ N.J. Stat. Ann. § 17:11A-2 (Supp. 1966).