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Should States Adopt the Uniform Consumer Credit Code?

GEORGE W. STENGER

Prior to the twentieth century there was little use of consumer credit. Until the advent of the automobile, consumer credit was generally limited to occasional sales on credit by local merchants and infrequent borrowings from friends or employers. Although consumer credit increased gradually from 1900 until World War II, most of it was utilized in the financing of automobiles or other expensive hard goods. Most of the loans were made by small loan companies. In 1950 consumer credit obligations aggregated over $21,000,000,000. Since then, it has increased phenomenally. From 1950 to 1960 it increased from 21 billion to 56 billion dollars. It has now increased to over 120 billion dollars. As of February 28, 1971, the Federal Reserve Board reported our outstanding consumer credit to be as follows:

<table>
<thead>
<tr>
<th>Installment Credit</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Automobile</td>
<td>$34,869,000,000</td>
</tr>
<tr>
<td>Other Consumer Goods</td>
<td>28,928,000,000</td>
</tr>
<tr>
<td>Home Repair and Modernization</td>
<td>4,051,000,000</td>
</tr>
<tr>
<td>Personal Loans</td>
<td>31,396,000,000</td>
</tr>
<tr>
<td>Total Installment Credit</td>
<td>$99,244,000,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-Installment Credit</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Single Payment Loans</td>
<td>$ 9,506,000,000</td>
</tr>
<tr>
<td>Charge Accounts</td>
<td>7,353,000,000</td>
</tr>
<tr>
<td>Service Credit</td>
<td>7,712,000,000</td>
</tr>
<tr>
<td>Total Non-Installment Credit</td>
<td>$24,571,000,000</td>
</tr>
<tr>
<td>Total Consumer Credit</td>
<td>$123,815,000,000</td>
</tr>
</tbody>
</table>

* Professor of Law, University of Mississippi, B.B.A., 1939, Ohio State; J.D., 1944, Univ. of Mich., L.L.M., 1948, Harvard. The author wishes to express his appreciation for the assistance of Mr. James G. Woltermann, a third-year law student at the University of Kentucky, who served as a research assistant for the author in the preparation of this article.


2 Id.

3 Id.

There seems to be little likelihood of any diminution in this growth of consumer credit. We have come to rely upon our casual buy-now-pay-later attitude to accelerate economic growth and to provide both luxuries and necessities for our affluent society. Undoubtedly, it has enabled many of us to enjoy comforts of life which we could not have enjoyed for several years under a cash economy. But over-indulgence of consumer credit has burdened a high percentage of American families in every income bracket, especially the poor. Today, over half of our families are paying off installment debts which they incurred for the purchase of consumer goods and services. By the mid-sixties twenty-five percent of American families had committed one-third of their income to such payments; ten percent of them had committed at least forty percent of their income.\(^5\) Since those obligations did not include rent or home mortgage payments, it is obvious that little income was left in many cases to purchase food and other necessities. As a result of overcommitments for consumer purchases, personal bankruptcies increased about seven hundred percent from 1950 to 1970.\(^6\)

Notwithstanding the tremendous increase in consumer credit in recent years and the social and economic problems which have been caused by the increase, there has been little change in state laws concerning consumer credit. There have been a few minor changes, such as enactment of small loans laws, installment sales acts, and laws regarding garnishment and wage assignments. Prior to the Uniform Consumer Credit Code only a few states, notably Massachusetts and California, had adopted any comprehensive legislation aimed at mitigating the hardships of consumer debtors. In the other states (including Kentucky) consumer credit has been governed by the laws which were developed for the regulation of debtor-creditor relationship between business men who were financing business activities. Consumer groups are now clamoring that the laws which are adequate to govern the debtor-creditor relationship between business men and business organizations do not provide adequate protection for consumer debtors.

There are innumerable aspects of our present debtor-creditor law that consumer groups believe to be unfair to consumer

\(^5\) Consumer Reports, Mar. 1969, at 122.

debtor. Consideration of a few of their objections to our present laws will show the basis for their current agitation for more favorable treatment for consumer debtors, and lay a foundation for our consideration of the major provisions of the Uniform Consumer Credit Code.

Probably the foremost objections to present consumer credit laws arise from what are deemed to be excessive interest rates. The cost of consumer credit is much higher than the cost of other types of credit. Of course, that is in part due to the higher risk and higher cost of servicing consumer credit as compared with other types of credit. There has also been some gouging by loan sharks and merchants who specialize in credit sales. Abuses have also occurred through the use of “add-on contracts,” “flipping,” and loan brokers fees, inter alia.

In combination with consumer finance charges that have frequently been excessive, much chagrin has been caused by misleading and inadequate information as to the cost of consumer credit. Deception has occurred at the time credit is extended, due to inadequate disclosure of the credit terms, and it has been aggravated to a large extent by some of our credit advertising. We now have federal legislation which is aimed at those evils. The Truth in Lending Act regulates consumer credit cost disclosure with respect to credit transactions and credit advertising [some consumer groups say the act is deficient because it does not provide standard contract forms].

One of the doctrines of our present debtor-creditor law that is most abhorred by consumer groups is the holder in due course rule with respect to negotiable instruments. That rule is, of course, the whole foundation of our law with regard to commercial paper. It enables negotiable instruments to circulate almost like money. But it often causes great hardships to consumer debtors. For example, a purchaser may sign a negotiable note and give it to the seller in payment for some goods. He soon finds that the goods are not as warranted and that he was induced to buy them by fraudulent misrepresentations on the part of the seller. His first impulse is to rescind the contract and refuse to make any payments on the note. However, if the note has been negotiated to a holder in due course, the maker cannot assert his defenses of breach of warranty and fraud against the holder. He must pay the
note. His only recourse is to bring a suit against the seller. At best, the purchaser will be left with an expensive law suit. At worst, the seller will be outside the jurisdiction, departed for parts unknown or insolvent. Modification, or abolition, of the holder in due course rule, insofar as it applies to consumer credit, is high on the list of reforms advocated by consumer groups.

Another reform advocated by consumer groups is the abolition of cognovit notes in states where they are legal. A cognovit note contains a warrant of attorney clause providing that, in event of default, the parties liable on the note empower any attorney at law to appear for the maker, confess judgment and waive all errors. In states in which cognovit notes are legal, printed forms are commonly used which contain blank forms of a petition; an answer admitting liability on the note and confessing judgment; and an entry of judgment to be signed by a judge. In suing on a cognovit note an attorney will fill out the form and take it to another attorney, anyone he chooses, for confession of judgment. The other attorney usually examines the note to see that it is in order and, if so, signs the answer admitting defendant's liability on the note and confessing judgment against him. The paper will then be taken to a judge and, if the petition, answer, and note are in order, he will enter judgment against the defendant. Only a minute or two are usually devoted to the matter by the judge and "defendant's" attorney. The whole proceeding is ex parte. The plaintiff's attorney may now proceed with a levy of execution and in many cases garnish the defendant's wages.

In many jurisdictions the most oppressive aspect of the consumer credit laws has resulted from garnishment of wages. Employers, of course, do not like to be bothered with such proceedings. Some employers have taken a very strict attitude toward employees whose wages were garnished. In many cases the employee was told that he must avoid garnishment of wages or be discharged. In states in which prejudgment garnishment was allowed, such a policy frequently coerced an employee to pay a fraudulent claim. The most abusive aspects of garnishment of wages have recently been abolished at the federal level.

7 A power of attorney to confess judgment before action is instituted is void in Kentucky. Kentucky Rev. Stat. § 372.140 [hereinafter cited as KRS]. Therefore, cognovit notes are void in Kentucky insofar as they authorize confession of judgment.
Snidach v. Family Finance Corp. of Bay View,\(^8\) the Supreme Court held a state statute which authorized garnishment prior to judgment was invalid for failure to satisfy the due process requirements of the fourteenth amendment. Also, section 304 of the Federal Consumer Credit Protection Act prohibits an employer from discharging an employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness. The act also exempts part of an employee's wages from garnishment\(^9\) [consumer groups contend that this federal act does not go far enough in relieving wage earners from garnishment for consumer debts].

In states in which irrevocable assignments of future wages are enforceable,\(^10\) a debtor may assign his future earnings as payment or as security for payment of a debt. The creditor may then take his wages without a court order for garnishment; and the debtor does not even have an opportunity to have his debt determined by a court before his wages are taken by his creditor. Consumer groups are practically unanimous in demanding that irrevocable wage assignments be banned.

Under the Uniform Commercial Code, unless otherwise agreed, a secured party has the right to take possession of the collateral on default.\(^11\) In taking possession the secured party may use self-help if that can be done without a breach of the peace. Repossessions of collateral (especially automobiles) are frequently made in the debtor's absence. Goods are frequently repossessed after most of the debt secured by the security agreement has been paid. Until recently, most states permitted the secured creditor to simply retain the collateral in such cases. Although the debtor has a right of redemption, that right frequently requires a large sum of money because of an acceleration clause making the entire balance payable upon default. That could be very unjust to a debtor who lost his job after paying off most of the secured obligation. There are stories circulating about an appliance dealer who boasted that he had sold and repossessed the same appliance or...

\(^10\) Future wages may be assigned in Kentucky. See KRS §§ 371.110 et seq. The assignment is not binding on the employer until he assents to it in writing on the instrument of assignment. KRS § 371.120.
\(^11\) UNIFORM COMMERCIAL CODE § 9-503 [hereinafter cited as UCC].
television set several times. Some of the worst evils of this practice were mitigated by the Uniform Commercial Code. For example, under the Uniform Commercial Code, if sixty percent of a secured obligation on consumer goods has been satisfied, the secured party must dispose of the collateral within ninety days after taking possession, and he must use the UCC method of sale.\textsuperscript{12}

The creditor's remedy of reposssession is in many cases greatly enlarged by an obscure clause in the security agreement providing that all payments shall be allocated \textit{pro rata} to all articles purchased from the creditor.\textsuperscript{13} Under such a clause none of the goods will be fully paid for until the full account is paid. Thus, if a debtor purchased $3,000 worth of goods from a seller over a five-year period, without ever completely paying off his account, and defaulted when $200 was owing on the secured obligation, the seller could repossess all of the goods he had sold to the debtor over the five-year period. As might be expected, consumer groups want to require that the debtor's payments be credited to his earliest purchases and that the taking of excess security be prohibited.

In a depression or recession, a man who loses his job may not only lose the goods which he financed by a security agreement, but he may have a deficiency judgment entered against him. Since used furniture and appliances will bring only a small fraction of their original cost, the deficiency judgment, including court costs may be almost as large as the balance he owed on the debt when he lost his job. Many consumer groups contend that deficiency judgments should not be permitted. The secured party would then have an election of two remedies. He could repossess the goods or bring an action for the balance owing on the debt.

In many places home solicitation sales give rise to a large number of consumer grievances. Although some responsible businesses sell their goods and services in that manner, a large percentage of door-to-door salesmen use high pressure techniques. Often the door-to-door salesman represents an out of state business establishment. In addition to their high pressure, such salesmen

\textsuperscript{12} UCC § 9-505.

\textsuperscript{13} The same situation may result from the Kentucky Installment Contracts Act, KRS §§ 371.210-330. That statute requires that payments shall be allocated to all of the various purchases in the same ratio as the original cash sales prices of the various purchases bear to the total of all. KRS § 371.290(5).
often employ other practices which result in hardships to the consumer. Frequently, they obtain the buyer's signature on a negotiable instrument and forthwith negotiate it to a holder in due course. Sometimes they will obtain a negotiable note secured by a mortgage on the maker's home. "Referral sales" schemes are also frequently used by door-to-door salesmen. Under such a scheme, the seller will tell the buyer that the price of the goods will be reduced by a certain amount for every name provided by the buyer of persons who subsequently buy similar goods from the seller. For example, a salesman may sell a buyer some goods for $1,000 and tell him that he may submit a list of twenty names of other prospective buyers and receive a credit of fifty dollars for each of the persons who buy similar goods from the salesman. If all of the persons buy from the salesman, the buyer will receive credit for the full purchase price of his goods. Usually, the buyer will be disappointed in his hopes for referral sales. In the first place, the buyer's friends are apt to be less gullible than he was. In the second place, the salesman will usually obtain a negotiable instrument from the buyer and negotiate it to a holder in due course, who will not be bound by the salesman's referral agreement.

All of those problems and many more are dealt with in the Uniform Consumer Credit Code [hereinafter UCCC].

**Major Provisions of the Code**

**In General**

The UCCC is divided into seven articles. Article I contains general provisions, rules of construction and definitions. Article 2 deals with credit sales and leases. It prescribes maximum finance charges and rules for disclosure and advertising, and contains several limitations on agreements and practices with respect to credit sales and home solicitation sales. Article 3 contains most of the provisions concerning consumer loans. It prescribes maximum finance charges for consumer loans, regulates disclosure and advertising with regard to such loans and contains several limitations on agreements and practices with respect to them. Articles

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14 Referral sales are prohibited in Kentucky. KRS § 436.360; Commonwealth v. Allen, 404 S.W.2d 464 (Ky. 1966).
2 and 3 contain many similar provisions because one article deals with credit sales and the other article with loans. Article 4 contains provisions with respect to insurance in connection with consumer credit transactions. Article 5 contains several limitations on traditional creditors' remedies and provides remedies to debtors for violations of the Code. It also prescribes criminal penalties for its violation. Article 6 provides for an administrator for the Code, defines his powers and functions and provides administrative remedies for enforcing the Code. Articles 7 and 8 are reserved for future provisions with respect to consumer credit counseling and wage earner receiverships. Article 9 prescribes the effective date of the Code and contains the repealer clause for repeal of superseded laws.

Because of its comprehensiveness and prolixity, it is impossible to paraphrase all the provisions of the Code in the space allotted for a law review article. We can, however, examine its most important provisions.16

With minor exceptions, the UCCC applies to all consumer credit transactions and excludes business transactions. Consumer credit is credit extended for personal, family, household or agricultural purposes of the person to whom the credit is extended where the amount involved is not over $25,000.16 Real estate transactions in which the credit cost is in excess of ten percent are subject to the Code without regard to the $25,000 limit. Real estate loans at less than ten percent interest are only subject to

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16 UCCC § 2.104; UCCC § 3.104.
the disclosure and debtor’s remedies provisions of the Code.\textsuperscript{17} Loans to individuals for business purposes are subject to the maximum rate protection of the Code.\textsuperscript{18} The UCCC does not apply to credit activities of pawnbrokers or to sales of insurance companies except in connection with a consumer credit transaction (under article 4).\textsuperscript{19}

\textbf{Limitations on Interest Rates and Licensing of Lenders}

The UCCC repeals existing laws fixing maximum credit charges and replaces them with the same maximum rates for all types of consumer credit grantors. One of the basic tenets of the Code is that interest rates should be determined by competition rather than by legislation. Consequently, the Code establishes ceilings on credit charges (which are rather high) and provides for “freedom of entry”\textsuperscript{20} into the consumer financing field to create competition. The draftsmen of the Code thought that a combination of credit cost disclosure and freedom of entry would generally keep consumer credit costs below the maximum fixed by the Code.

The Code prescribes interest ceilings\textsuperscript{21} on consumer credit sales,\textsuperscript{22} consumer loans,\textsuperscript{23} revolving charge accounts\textsuperscript{24} and revolving loan accounts.\textsuperscript{25}

The basic maximum rate of interest under the UCCC is eighteen percent per year. Anyone may lend money at eighteen percent per year or less. Sellers of goods and supervised lenders may charge much higher rates. All financial institutions are supervised lenders\textsuperscript{26} and may make loans at rates in excess of eighteen percent per year. Other persons or organizations may be licensed as supervised lenders.\textsuperscript{27} Sellers of goods may finance their sales

\textsuperscript{17} UCCC § 2.104(2); UCCC §§ 3.104-.105.
\textsuperscript{18} UCCC § 3.602.
\textsuperscript{19} UCCC § 1.202.
\textsuperscript{22} UCCC § 2.104.
\textsuperscript{23} UCCC § 3.104.
\textsuperscript{24} UCCC § 2.108.
\textsuperscript{25} UCCC § 3.108.
\textsuperscript{26} UCCC § 3.502.
\textsuperscript{27} UCCC § 3.503.
at rates in excess of eighteen percent without being licensed.

With respect to a supervised loan, including a loan pursuant to a revolving loan account, the maximum rates are thirty-six percent on the first $300, twenty-one percent on the next $700 and fifteen percent on the amount in excess of $1,000; but if the graduated rates yield less than eighteen percent per year, the maximum is eighteen percent. 28

The same maximum rate applies with respect to consumer credit sales other than revolving charge accounts. On revolving charge accounts the maximum charges are two percent per month on the first $500 and one and one-half percent on the remainder. 29 A minimum charge of five dollars may be charged on an installment sales contract when the amount does not exceed seventy-five dollars and $7.50 when the amount financed exceeds seventy-five dollars. 30 The minimum for a revolving charge account is fifty cents per month. 31

Besides the categories already mentioned as subject to the Code, two other situations may come within its provisions. The first is a transaction where the parties agree in writing that the sale or loan is to be made subject to the Code. 32 The second is a "consumer related sale" 33 or a "consumer related loan." 34 These classifications are primarily defined in the same way as a consumer credit sale or consumer loan except that the seller or lender is not limited to one regularly engaged in similar credit or loan transactions, nor is the purpose of the sale or loan restricted to a personal, family, household or agricultural purpose but may also include a sale or loan to an individual for a business purpose. In addition, a sale or loan in which the debt is secured primarily by a security interest in a one or two family dwelling occupied by a person related to the debtor is also included without regard to whether the sale or loan is made to an individual or an organization.

The allowable credit service charge on a consumer related sale made pursuant to a revolving charge agreement is the same two

28 UCCC § 3.508.
29 UCCC § 2.207.
30 UCCC § 2.201(6).
31 UCCC § 2.207(4).
32 UCCC § 2.601; UCC § 3.601.
33 UCCC § 2.602(1); see also UCCC § 2.602, Comment 1.
34 UCCC § 3.602(1).
to one and one-half percent per month limitation that is provided for revolving charge accounts. Otherwise the credit service charge or loan finance charge is limited by an eighteen percent per year rate ceiling.35

"Credit Service Charge" and "Loan Finance Charge" lie at the very heart of the Code's rate limitation, and without a clear definition of these terms any limitation would be meaningless. Although the Code does not attempt to restrict the manner of contracting for the credit service charge or loan financing charge, it does define those terms both generally and specifically. Generally, such charges include all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the seller or lender as an incident to the extension of credit. More specifically, they include premiums for insurance protecting the seller or lender against the debtor's default or other credit loss, charges incurred for investigating the collateral or the consumer's creditworthiness, and other listed items and a time price differential.36 Items which are excluded are default charges, additional charges,37 delinquency charges38 and deferral charges.39

One of the most controversial features of the Code is its licensing provisions for sellers and lenders who make credit sales and loans. Except for supervised loans, the only requirements for entry into the credit or lending industry is the filing of notification within thirty days after the commencing of business in the state (and each year thereafter)40 and payment of an annual fee.41 But a lender may not engage in the business of making or collecting loans at interest in excess of eighteen percent until he has been licensed as a supervised lender.42 In order to receive such a license a lender must make an application to the Administrator of the Code43 containing such information as the Administrator may require. Before issuing a license the Administrator must investigate the applicant and his associates if the

35 UCCC § 2.602(2) and (3); see also UCCC § 2.602, Comment 2, UCCC § 3.602(2); and UCCC § 3.602, Comment 2.
36 UCCC § 2.109; UCCC § 3.109.
38 UCCC § 2.203; UCCC § 3.203.
39 UCCC § 3.204 and 3.205.
41 UCCC § 6.203.
42 UCCC § 3.502.
43 UCCC § 3.503(1).
application involves a copartnership or association, and the officers and directors if the application involves a corporation, as to their financial responsibility, character and fitness so that the Administrator is satisfied that the business will be operated honestly and fairly within the purposes of the Code.\textsuperscript{44} In addition, supervised lenders are subject to special revocation or suspension provisions\textsuperscript{45} and recording, reporting,\textsuperscript{48} examining and investigation\textsuperscript{47} provisions. Supervised financial organizations may make loans at interests in excess of eighteen percent per year without obtaining a license.\textsuperscript{48}

**Disclosure of Finance Charges**

Disclosure is closely aligned with one of the rate limitation's purposes, namely, the fostering of increased competition in the financing industry. It is presumed that a consumer armed with adequate disclosure of the cost of credit will be better able to compare costs in similar transactions and shop for the lowest cost. But even if credit shopping does not materialize, it is still a matter of elementary fairness that a consumer is entitled to a meaningful disclosure of the pertinent elements of the transaction. Basically, the Code advances these considerations by providing for a uniform and understandable disclosure which must be made in writing to the consumer.\textsuperscript{49}

This writing must include a description of what was purchased, the cash price of the item and the amount of the down payment, if any; or, in case of a loan, the net amount paid to the debtor or to his account. The disclosure must also include an identification and the amount of any charge for registration, certificate of title, license or official fees and taxes; a description and the amount of any insurance provided or paid for by the seller or lender; any additional charges; the dollar amount of the credit service or loan finance charge; the percentage rate of the credit service or loan finance charge; the schedule of payments; the amount of any default or delinquency charge which may become due because of late payment; and a description of any security

\textsuperscript{44} UCCC § 3.503(1) and (2).
\textsuperscript{45} UCCC § 3.504.
\textsuperscript{46} UCCC § 3.505.
\textsuperscript{47} UCCC § 3.503.
\textsuperscript{48} UCCC § 3.502.
\textsuperscript{49} UCCC §§ 2.302 and 3.302.
interest to be held by the lender or seller and a clear identification of the property subject to the security interest.\textsuperscript{50}

Where a sale or loan is made pursuant to a revolving charge or loan account the seller or lender is required to make a disclosure before the sale or loan is made\textsuperscript{51} and, if at the end of any billing cycle there is an outstanding balance or if a credit service or loan finance charge is made, there must be another disclosure within a reasonable time after the end of the billing cycle.\textsuperscript{52}

The disclosure provisions before a sale or loan and at the end of the billing cycle are essentially the same. They differ to the extent that the former deals with anticipated rates and charges on sales and loans not yet made, while the latter deals with rates and charges made on actual sales and loans. They both call for a disclosure of the balance upon which a credit service or loan finance charge is to be computed; the determination of the credit service or loan finance charge; the percentage used to calculate the charge; the corresponding annual percentage rate; and any additional charges.\textsuperscript{53} With respect to a disclosure at the end of a billing cycle, the seller or lender must also include the outstanding balance at the beginning of the cycle; a description of the activity in the account during the cycle; the outstanding balance at the end of the cycle; and the time within which the payment must be made in order to avoid additional credit service or loan finance charges.\textsuperscript{54}

The disclosure requirements of the UCCC are substantially the same as under the federal Truth in Lending Act. The Truth in Lending Act exempts state-regulated transactions from its operation if the state regulations are substantially similar to the federal regulations and there is adequate provision for enforcement.\textsuperscript{55}

**Credit Advertising**

Since a consumer may rely upon claims made through advertising as well as by face to face disclosure, it is important that credit advertising also be regulated. The Code does this by a gen-
eral prohibition against false or misleading advertising concerning
the terms or conditions of credit with respect to a consumer credit
sale, lease or loan.\footnote{UCCC §§ 2.313(1) and 3.312(1).} Because of the many and varied forms of
advertising and the unlimited nuances of advertising method, the
Code does not specifically define misleading advertisement. It
does, however, prohibit certain advertising practices. Thus, where
the rate of the credit service or loan finance charge is not stated
in conformity with the provisions on disclosure\footnote{UCCC §§ 2.313(2)(a) and 3.312(2)(a).} or where the
advertisement states the credit service or loan finance charge or
installment payments but does not also state the rate of the charge
and the amount of the installment payments,\footnote{UCCC §§ 2.313(2)(b) and 3.312(2)(b).} the advertisement
is misleading. The application of this provision is very broad.
It applies to any advertisement in the mass media, including radio,
television, magazines, newspapers, catalogs or by the posting of a
public sign.

The credit advertising provisions of the UCCC are not of great
practical significance, since Chapter 13 of the Federal Consumer
Credit Protection Act contains similar regulations. There is no
exemption in the federal act with respect to state-regulated credit
advertising.

\section*{Prohibited Agreements and Practices\footnote{See Hogan, Integrating the UCC and the UCC—Limitations on Creditors’
Agreements and Practices, 33 LAW & CONTEMP. PROB. 686 (1968); Note, Limitations and Agreements under the Uniform Consumer Credit Code, 56 IOWA L. REV. 171 (1970).}}

\textit{The “Holder in Due Course” Doctrine}

As was pointed out in the first part of this article, one of the
most troublesome doctrines in the field of consumer credit is the
holder in due course doctrine.\footnote{For a discussion of the effect of the UCCC on the holder in due course
document, see Note, Proposed Uniform Consumer Credit Code for Indiana: Re-
strictions on Negotiability and Waiver of Defenses, 46 IND. L.J. 114 (1970). The
document is criticized, insofar as it applies to consumer credit paper, in Kripke,
Consumer Credit Reform: A Creditor Oriented Viewpoint, 68 COLUM. L. REV. 445,
469-73 (1968).} Under the Uniform Commercial
Code a holder of a negotiable instrument who takes the instru-
mament for value, in good faith and without notice of any infirmity
attaching to the instrument becomes a holder in due course and
thus effectively cuts off most defenses that a debtor could set up against the seller.\textsuperscript{61} For example, when a consumer signs a negotiable instrument in order to purchase a television set and the instrument is negotiated to a holder in due course, a breach of warranty cannot be set up as a defense against the holder in due course. This may leave the debtor in the unenviable position of having a television set that does not work but still being required to pay for it. The Code changes this by providing that in a consumer credit sale or lease (other than a sale for an agricultural purpose) a negotiable instrument, other than a check, may not be used as evidence of the obligation.\textsuperscript{62} Since this prohibition will be well known in the financial community, a transferee of a negotiable instrument arising from a consumer sale usually will not be a holder in due course. However, a second or third taker of the instrument may not know about its consumer origin and, if the other requirements are satisfied, may become a holder in due course.\textsuperscript{63}

An effect similar to that of the holder in due course doctrine may be achieved under the UCC by the use of a clause in a non-negotiable note or contract providing that the buyer or lessee will not assert defenses against an assignee that he might have against the seller or lessor.\textsuperscript{64} With respect to this problem two alternative provisions are provided by the Code. The first is a negation of any agreement which purports to deny the debtor the right to raise his defenses against the assignee.\textsuperscript{65} The second alternative allows such an agreement but limits the right of the assignee to enforce it. The agreement is only enforceable if the assignee is not related to the seller or lessor, acquires the contract in good faith, for value and, most importantly, if the assignee gives notice to the buyer or lessee of the assignment and for a period of three months following the mailing the assignee receives no written notification of any claim or defense on the part of the buyer or lessee. The assignee in his notice to the buyer or lessee must include the fact that, if the assignee does not receive a written notice of any claim or defense within three months, he has a right to enforce

\textsuperscript{61} UCC § 3.305.
\textsuperscript{62} UCCC § 2.403.
\textsuperscript{63} UCCC § 2.403 and Comment.
\textsuperscript{64} UCC § 9.206.
\textsuperscript{65} UCCC § 2.404, Alternative A.
the contract regardless of the right or claim. This provision only relates to a claim or defense arising during the three months after the notice is mailed, and any claim or defense arising after that period is enforceable against the assignee by way of defense or set-off.66

Security in Consumer Credit Transactions

A creditor may seek to protect his claim by acquiring a security interest in property of the debtor. He may, of course, retain a security interest in the goods sold until they are paid for. But, because of his superior bargaining position, the creditor is usually able to acquire a security interest, not only in the goods sold, but also in other property of the debtor. Where the debt is minimal it becomes unfair for the creditor to acquire a security interest in other property and thereby restrict the right of the debtor to the unfettered use of his own property, including the right to dispose of that property if he sees fit to do so. With the exception of cross collateral,67 the Code provides that where the debt is minimal the creditor is limited to a security interest in the goods sold. In this regard minimal means that additional security may not be taken in other goods if the debt is less than $300, or an additional security interest may not be taken in land if the debt is less than $1,000. Where the debt is not minimal the creditor is still limited as to the additional security that he may take. In a sale of goods he may take a security interest in other property only if the goods sold become closely connected with the goods or land in which the security interest is taken. Where the sale is of services a security interest may only be taken in goods or land if the services are performed on the goods or are used to maintain, repair or improve the land. In a sale of land or in a lease situation, no security interest may be taken in other goods or land of the buyer.68 This restriction does not apply to sales of land in which the credit service charge is ten percent or less or to sales and leases for agricultural purposes.69

66 UCCC § 2.404, Alternative B.
67 UCCC § 2.408.
68 UCCC § 2.407 and Comment.
69 UCCC § 2.407 and Comment.
Cross-Collateral

As stated above, the Code allows a debt to be secured by cross-collateral. Under that type of agreement, a seller who makes more than one sale of goods to a buyer on credit may secure each debt by a cross security in the other goods so long as the seller has an existing security interest in the other goods. However, where a seller makes use of a cross-collateral agreement and does not consolidate the two debts, the rate of the credit service charge payable by the debtor is limited to that which could have been made if the debts had been consolidated. This prevents the seller from taking the advantage which cross-collateral provides without also allowing the debtor the lower rates that would result if the debts were consolidated.

Another abuse associated with a cross-collateral agreement, or a consolidated debt secured by the goods from more than one sale, involves the manipulation of payments in which the original debt and succeeding debts are left partially open so that the security accumulates until the entire debt is paid off. The Code prevents this by providing a first-payment-against-first-debt rule. When the first debt is paid, the security interest in those goods terminates.

Balloon Payments

A payment which is substantially greater than the average of prior payments is commonly referred to as a balloon payment. For example, goods may be sold for a price of $2,500 payable in installments of $100 per month for eleven months and a final payment of $1,400. A balloon payment can be used to induce a buyer to enter into an agreement by offering him invitingly small payments. At the end of the payment period, he is confronted with a large payment which he may be unable to pay, thus forcing him to refinance on the creditor's terms or default on the payment. The Code resolves this problem by granting the debtor the right to refinance the amount of the balloon payment on the same terms as the original sale if any payment is more than twice

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70 UCCC § 2.408(1).
71 UCCC § 2.408(2).
73 UCCC § 2.409.
the average of prior scheduled payments. The remedy for a balloon payment is applicable to both sales and loans, but it does not apply to a sale or loan primarily for an agricultural purpose or to payments on revolving charge and loan accounts.

Referral Sales

The referral sale is another method of making a high price attractive to an unwary consumer. In a typical referral sale the seller, in order to close the sale at an inflated price, offers to reduce the cost of the item purchased by a certain amount for every person whose name is supplied by the purchaser and who subsequently agrees to buy from the seller. Often times the purchaser believes that this will substantially reduce the amount he will have to pay. Unfortunately for the purchaser, his friends will probably not be as naive as he was, and no additional sales will be made, so that the purchaser is stuck with paying the inflated price.

Because of the pervasive use of this type of arrangement the Code has prohibited referral sales and provided harsh penalties for violations of this provision. A person who is induced to buy goods by the referral sales technique may, at his option, either rescind the agreement or keep the goods or the benefit of any services rendered with no obligation to pay for them.

Home Solicitation Sales

Although high pressure salesmanship can be practiced anywhere, the sale in the home is particularly susceptible to such methods. Since it is impossible to distinguish between high pressure techniques and legitimate sales efforts, the Code allows a limited right of rescission of all sales made in the buyer's home. Where a solicitation for the sale of goods is made at the buyer's residence and the buyer binds himself to the agreement at his

\[^{74}\text{UCCC §§ 2.405 and 3.402.}\]


\[^{76}\text{UCCC § 2.411.}\]
residence,\textsuperscript{77} the Code provides a right to cancel within three business days after the agreement is signed.\textsuperscript{78} The buyer must be apprised of his right to cancel by a statement to that effect included in the sale agreement or offer.\textsuperscript{79} Cancellation is effective upon the buyer's mailing of a written notification to the seller.\textsuperscript{80}

When the buyer cancels a home solicitation sale, the seller must return to him any payment or evidence of indebtedness within ten days after cancellation.\textsuperscript{81} However, the seller is entitled to a cancellation fee of five percent of the cash price, but not exceeding the cash down payment. The seller is not entitled to the cancellation fee if the buyer has other grounds on which to avoid the agreement.\textsuperscript{82} Until the seller has complied with his obligation to return any payment or evidence of indebtedness, the buyer may enforce a lien on property retained by him.\textsuperscript{83} Once the seller has complied, the buyer must, on demand, give up any goods delivered to him, but he is only required to return the property at the place of his residence.\textsuperscript{84} If no demand is made within forty days, the goods become the property of the buyer without obligation to pay for them.\textsuperscript{85}

To protect the seller from possible abuse of this provision by the buyer, a home solicitation sale does not include a sale made pursuant to a pre-existing revolving charge account, or a sale made pursuant to prior negotiations between the parties at the seller's place of business or a sale of farm equipment.\textsuperscript{86} Also excluded is a situation in which the buyer requests the seller to provide goods or services without delay because of an emergency, and the cancellation would cause an unavoidable loss to the seller.\textsuperscript{87}

\textit{Attorney's Fees}

In many jurisdictions, a provision in a sale, lease or loan agreement may allow the creditor an attorney's fee upon the

\textsuperscript{77} UCCC § 2.501.
\textsuperscript{78} UCCC § 2.502(1).
\textsuperscript{79} UCCC § 2.503.
\textsuperscript{80} UCCC § 2.502(3).
\textsuperscript{81} UCCC § 2.504(1).
\textsuperscript{82} UCCC § 2.504(3).
\textsuperscript{83} UCCC § 2.504(4).
\textsuperscript{84} UCCC § 2.505(1).
\textsuperscript{85} Id.
\textsuperscript{86} UCCC § 2.501.
\textsuperscript{87} UCCC § 2.502(5).
debtor's default and referral of the claim to an attorney. The code provides two alternatives with respect to attorney fees. The first alternative prohibits such provisions and makes them unenforceable. Under the second alternative, the parties may provide for a reasonable attorney's fee, which shall not exceed fifteen percent of the unpaid debt after the default; the attorney must not be a salaried employee, lessor or lender, or assignee if the seller. These alternatives reflect the divergent opinions as to whether the cost of collection is a part of the seller's general overhead or an expense which should be borne by the defaulting party.

Wage Assignments

Collection, of course, is a sine qua non of the creditor's business. Without quick and sure methods of meeting a default, the creditor would soon be out of business. However, certain practices have developed which allow the creditor protection against default to the exclusion of the debtor's most basic rights, e.g., his right to a judicial hearing before his property is taken from him. One of the means by which a creditor may circumvent the judicial process is by the use of an irrevocable wage assignment. Ordinarily the assignment is taken as either payment or security for the debt and, because of its irrevocable nature, continues to remain in force despite any defense or right of set-off that the debtor might have against the creditor. Although the debtor's rights are not lost because of the wage assignment, it does force him to initiate a suit to enforce his rights and, while the debtor is availing himself of the judicial process, the creditor is arbitrarily collecting the debtor's wages. To prevent such injustices the Code makes all wage assignments revocable by the debtor; this provision applies to sales and leases as well as to loans.

88 UCCC §§ 2.413 alt. A, 3.404 alt. A.
89 UCCC §§ 2.413 alt. B, 3.404 alt. B.
90 Apparently, some credit unions rely on wage assignments in making loans. Frank Rubel, Executive Secretary of the New York State Credit Union League recently stated: "In fact, 99 percent of the loans that the Municipal Credit Union makes are based on the wage assignment with no co-makers, no security. . . . I believe in it thoroughly." Hearings on H.R. 11601 before the Subcomm. on Consumer Affairs of the House Committee on Banking and Currency, 90th Cong., 1st Sess., pt. 2, at 1204 (1967).
91 UCCC §§ 2.410, 3.403.
Confession of Judgment

The Code prohibits the use of cognovit notes in consumer sales. Under the Code, confession of judgment clauses are void.92 This will free the debtor from the arbitrary entering of a judgment without a true judicial determination.

Consumer Credit Insurance

The phenomenal rise in the amount of consumer credit has necessitated an increased use of credit insurance to protect creditors from hazards which would curtail or preclude a debtor's ability to repay. A corresponding benefit is provided to the debtor, in that any payment made from the insurance satisfies the debtor's obligation to the extent of the payment. But credit insurance is of value to the debtor only when it is limited to the scope of the transaction, and when it exceeds this, as when the period of insurance is longer than the period of the contract, the cost becomes an unnecessary burden on him. In order to allow for the beneficial use of credit insurance while guarding against its abuses, the Code regulates insurance which is provided in relation to a consumer credit sale, lease or loan and where one of the benefits is the satisfaction of the debt in whole or in part. Ordinarily, this takes the form of a policy insuring against the death or disability of the debtor and, to a lesser extent, insuring against the loss of earnings due to loss of employment. However, the code specifically excludes insurance which would indemnify the creditor against loss due to the debtor's default.

Under the Code's insurance provisions a creditor may require insurance as an incident to the extension of credit, but the debtor is not limited to the insurance provided by the creditor but may use an existing policy or obtain a policy from another source which will comply with the creditor's requirements. However, if the debtor attempts to provide his own insurance, the creditor may reject the insurance provided by the debtor if he has reasonable cause for so doing.93

Where the insurance is provided by the creditor, the Code limits the policy to an amount and period not in excess of what is

92 UCC § 2.415, 3.407.
93 UCC § 4.109.
necessary to protect against the exigencies insured against. The insurance ordinarily commences when the debtor becomes obligated or when he applies for the insurance, whichever is later, and extends no longer than 15 days after the last scheduled due date. At its inception the amount of coverage may not exceed the debt and must be reduced proportionately with the reduction of the debt. In the case of a revolving charge or loan account, since the amount may vary from month to month, the amount of coverage is limited to an amount reasonably commensurate with the amount of debt as it exists from time to time. A creditor may not charge the debtor more for insurance than the premium charged by the insurer.

In addition to the limitations already mentioned, the code provides additional protection to debtors by placing broad supervisory powers in the Commissioner of Insurance. Before a creditor may use a form or a schedule of premium rates or charges the creditor must file with the Commissioner all policies, certificates of insurance, notices of proposed insurance, applications for insurance, endorsements, credits relating to consumer credit insurance and the schedules of premium rates or charges for credit insurance.

Limitations on Creditor's Remedies

Although the Code provides the consumer with a meaningful disclosure of credit terms and safeguards against certain unfair agreements, it cannot protect a person from all of his financial follies. The man who consistently extends his credit beyond his ability or willingness to repay will be with us as long as the freedom of contract exists. Often, however, a prodigal consumer is led to financial ruin by a creditor who willingly underwrites marginal credit risks because of the measure of protection afforded him by the courts. The Code attempts to increase the wariness of creditors toward marginal credit risks by limiting some of the creditors' judicial remedies.

The first of these limitations deals with deficiency judg-
Under the Uniform Commercial Code, whenever a debtor is in default, the secured creditor may repossess the collateral, dispose of it, and after application of the proceeds to the outstanding debt, sue for any amount still owing. The inequity of this situation lies in the fact that usually the security is of little value on the commercial market, even though it may be of considerable value to the debtor and his family. The result is an extreme hardship to the family in exchange for a small monetary realization to the creditor. Although the Code allows a creditor to repossess any collateral, it provides that in a consumer credit sale of goods or services with a sale price of less than $1,000, a seller who repossesses or voluntarily accepts the surrender of his collateral has elected his remedy and the debtor is not liable for any balance left owing after the disposition of the collateral. If the creditor elects to bring an action against the debtor, rather than claiming his goods, he may not repossess the goods or subject them to levy or other judicial proceedings pursuant to the judgment. The creditor must elect to sue for the debt or repossess the goods. He cannot do both. It is important to note that this provision does not apply to a consumer lease or loan situation.

Secondly, the Code restricts the use of garnishment proceedings. It prohibits any garnishment of unpaid wages before judgment is entered. After a judgment is entered, the amount of wages subject to garnishment is limited to the smaller of 25% of disposable earnings or disposable earnings in excess of forty times the minimum wage. These provisions assure a debtor that he will have his day in court and that, even if his wages are garnished, he will retain enough of his earnings to be able to support himself and his dependents. Frequently, as a result of a garnishment or attempted garnishment the debtor may lose his

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101 See Note, Repossession and Deficiency Judgments—Will the Consumer Credit Code Aid the Consumer or Vendor?, 2 Conn. L. Rev. 202 (1969).
102 UCC §§ 9-501 to 9-507.
103 UCC § 5.103(3).
104 UCC § 5.103(6).
105 For a comparison of the present law as to garnishment of wages with the provisions of the UCCC, see Moran, Relief for the Wage Earner: Regulation of Garnishment Under Title III of the Consumer Credit Protection Act, 12 B.C. Ind. & Com. L. Rev. 101 (1970) and Note, Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code, 38 U. Cin. L. Rev. 338 (1969).
107 UCC § 5.105(2).
job and thus further diminish his ability to repay. Since discharge of the employee benefits neither the debtor nor the creditor, the Code prohibits the employer from discharging an employee because of a garnishment or attempted garnishment.\textsuperscript{108} The provisions relating to garnishment are applicable to consumer leases and loans as well as to consumer credit sales.\textsuperscript{109}

In some cases the debtor's failure to pay is due to an onerous agreement which was imposed on him despite the safeguards provided by law. For that eventuality the Code provides a general power in the courts to negate or restrict the application of any unconscionable agreement or any unconscionable clause in an agreement.\textsuperscript{110} The term unconscionable is not defined by the Code, and its generality allows a court to review the underlying facts and circumstances of the situation before deciding whether the clause or agreement is unconscionable.

\textbf{Debtor's Remedies}

Under the UCCC a negotiable instrument, other than a check, may not be used in a consumer credit sale or lease as evidence of the buyer or lessee's indebtedness.\textsuperscript{111} If a seller violates this provision, civil penalties are available. Similarly if a lender violates the provision on schedule of payments or loan terms for regulated loans,\textsuperscript{112} he is liable to civil penalties. In either case the debtor is not obligated to pay the credit service or loan finance charge, and he has a right to recover a penalty in an amount determined by the court which cannot be in excess of three times the amount of the credit service or loan finance charge. Recovery may be had from the person who violates the provision or from his assignee if the assignee undertakes direct collection of payments or enforcement of rights arising from the debt.\textsuperscript{113}

Where a charge is made in excess of that allowed by the Code, the debtor is not obligated to pay the excess charge, and if he has paid it, he has a right to a refund. A refund may be made by direct payment to the debtor or by the reduction of his obli-

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\textsuperscript{108} UCCC § 5.106.
\textsuperscript{109} UCCC § 5.104.
\textsuperscript{110} UCCC § 5.108.
\textsuperscript{111} UCCC § 2.403.
\textsuperscript{112} UCCC § 3.511.
\textsuperscript{113} UCCC § 5.202(1).
gation, but if the refund is not made within a reasonable time after demand, the debtor may recover a penalty in an amount determined by a court which shall not exceed the greater of either the amount of the credit service or loan finance charge or ten times the amount of the excess charge. Again the debtor may recover against the person who violates the provision or from an assignee of his rights who undertakes direct collection of payments or enforcement of rights arising from the debt. An additional penalty provision is added to deal with a creditor who deliberately makes excess charges and attempts to avoid a penalty by making a prompt refund if he is caught. The Code provides that the penalty for failure to refund may be levied against a creditor, even if the excess charge has been refunded, if the excess charge was made in deliberate violation, or in reckless disregard of these provisions.

If a creditor makes a supervised loan, that is a loan at interest in excess of eighteen percent in violation of the provision applicable to supervised loans, the loan is void and the debtor is not obligated to pay either the principal or the loan finance charge. If he has paid any part of the principal or of the loan finance charge, he has a right to recover the payment from the person violating the provision or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt.

A creditor may, however, relieve himself of the liability imposed by all of the aforementioned remedies and penalties, except those concerning the negation and right to a refund of excess charges, if he establishes by a preponderance of evidence that the violation was unintentional or was the result of a bona fide error.

Other remedies and penalties provided by this article deal with discharge from employment due to garnishment and violation of the disclosure provisions. Under the garnishment provisions an employee may not be discharged by his employer be-

114 UCCC § 5.202(3).
115 UCCC § 5.202(4).
116 UCCC § 5.202(3).
117 UCCC § 5.202(4).
118 UCCC § 3.502.
119 UCCC § 5.202(2).
120 UCCC § 5.202(7).
cause a creditor of the employee subjected or attempted to subject the employee's unpaid wages to garnishment or like proceeding.\textsuperscript{121} If an employer discharges a person in violation of this provision, he is liable to the employee for lost wages, not to exceed six weeks, and may be ordered to reinstate the employee.\textsuperscript{122}

Where a creditor, in violation of the disclosure provisions, other than provisions relating to advertising,\textsuperscript{123} fails to disclose information to a person entitled to the information, he is liable to that person for the sum of twice the credit service or loan finance charge, but not less than $100 nor more than $1,000, and the costs of the action and reasonable attorney's fees.\textsuperscript{124} However, a creditor has no liability for failure to disclose if, within fifteen days after discovering an error, and prior to the institution of an action under this provision or the receipt of written notice of the error, the creditor notifies the debtor of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay a credit service or loan finance charge in excess of the amount or percentage rate actually disclosed.\textsuperscript{125} In any case, no liability will attach if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.\textsuperscript{126}

\textbf{Criminal Penalties}

Where the conduct of a creditor is in willful violation of certain provisions of the UCCC, a criminal penalty may be imposed in addition to any applicable civil remedy. The conduct subject to this section includes three specific violations, viz., licensing violations,\textsuperscript{127} excessive charges\textsuperscript{128} and disclosure violations.\textsuperscript{129} The first occurs when a person willfully engages in the making of supervised loans without a license to make such loans,\

\begin{footnotesize}
\begin{itemize}
\item 121 UCCC § 5.106.
\item 122 UCCC § 5.202(6).
\item 123 UCCC §§ 2.313 and 3.312.
\item 124 UCCC § 5.203(1).
\item 125 UCCC § 5.203(2).
\item 126 UCCC § 5.203(3).
\item 127 UCCC § 5.301(2) and (3).
\item 128 UCCC § 5.301(1).
\item 129 UCCC § 5.302.
\end{itemize}
\end{footnotesize}
and the lender is liable to a fine or imprisonment not exceeding one year, or both.\textsuperscript{130} Where a person willfully engages in the business of making consumer credit sales, consumer leases or consumer loans, or of taking an assignment of rights arising from these transactions, and undertakes direct collection or enforcement without notifying the Administrator or without paying the applicable fees, he is liable for a fine not exceeding $100.\textsuperscript{131} A supervised lender who willfully makes charges in excess of those permitted by the supervised loan provisions of the Code, is liable for a fine or imprisonment not exceeding one year, or both.\textsuperscript{132} And a person who willfully and knowingly fails to comply with any requirement of the Code concerning disclosure may be sentenced to pay a fine not exceeding $5,000 or to imprisonment not exceeding one year, or both.\textsuperscript{133} Specifically prohibited misconduct includes giving false or inaccurate information, failure to provide required information,\textsuperscript{134} or the use of an authorized rate table or chart in a manner which consistently understates the annual percentage rate.\textsuperscript{135}

\textit{Administration}

Although many novel ideas are embodied in the UCCC, one of the most interesting, and perhaps the most far-reaching, is the creation of the Office of Administrator to enforce the Code and aid consumers. Although the Administrator's powers are meant to compliment the civil and criminal remedies available to the consumer, in a larger sense they offer a new concept to consumer protection by providing a state officer to institute actions to enforce the Code. Often a debtor who has a civil remedy does not avail himself of it because of lack of knowledge or insufficiency of funds with which to bring an action. Criminal remedies often fail to provide effective control over abusive credit transactions because of the limited scope of cases to which criminal penalties apply and the necessity of proving willfulness.\textsuperscript{136} Thus, the Code's

\begin{itemize}
\item \textsuperscript{130} UCCC § 5.301(2).
\item \textsuperscript{131} UCCC § 5.301(3).
\item \textsuperscript{132} UCCC § 5.301(1).
\item \textsuperscript{133} UCCC § 5.302.
\item \textsuperscript{134} UCCC § 5.302(1).
\item \textsuperscript{135} UCCC § 5.302(2).
\item \textsuperscript{136} See McCaffrey, \textit{Administrative Enforcement Under the Oklahoma Version of the Uniform Consumer Credit Code}, \textit{28 Brief Case} 267 (1970).\end{itemize}
addition of an Administrator, whose function is to protect the consumer, creates a powerful ally for the beleaguered consumer.

The jurisdiction of the Administrator extends to persons who make or solicit consumer credit sales, consumer leases, consumer loans, consumer related sales and consumer related loans, or any person who directly collects payments from or enforces rights against a debtor arising from such sales, leases or loans.\textsuperscript{137} As can be seen, this is a broad jurisdiction which covers any transaction subject to the Code's regulation. The Administrator's powers and duties include consumer counseling and education,\textsuperscript{138} supervision of certain loans,\textsuperscript{139} investigatory powers\textsuperscript{140} and enforcement.\textsuperscript{141}

The various disclosure rules, rate limitations and other provisions designed to protect the consumer can only be effective if the consumer is aware of them and understands his rights. For that reason, an essential part of the Administrator's job is to counsel persons and groups as to their rights and duties under the Code; to establish programs for the education of consumers with respect to credit practices and problems; and to make studies appropriate to effectuate the purposes and policies of the Code and make the results available to the public.\textsuperscript{142}

The Administrator's power over regulated and supervised lenders has already been mentioned in the section dealing with licensing. With regard to supervised lenders his power goes beyond mere licensing and includes the authority to investigate a licensee\textsuperscript{143} and suspend or revoke a license.\textsuperscript{144} A supervised lender is required to maintain records in such a manner as to enable the Administrator to determine whether the licensee is complying with the Code's provision.\textsuperscript{145} The Administrator has access to the records of lenders, and he is required to examine the loans, business, and records of every licensee at intervals which he deems appropriate.\textsuperscript{146} In order to augment the general power to examine and investigate, the Administrator is empowered to administer oaths,
subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation.\textsuperscript{147} If a person fails to obey a subpoena or to give testimony, without a lawful excuse, the Administrator may apply to the courts for an order compelling compliance with his orders.\textsuperscript{148}

After notice and a hearing the Administrator may, upon proper cause, revoke or suspend a license for a period not in excess of six months. A license may be revoked or suspended if the licensee has repeatedly and willfully violated the provisions of the Code or any rule or order lawfully made pursuant to the Code, or, if facts or conditions exist which would clearly have justified the Administrator in refusing to grant a license if they had been known to exist at the time the application for the license was made.\textsuperscript{149} With respect to a regulated financial organization, the powers of investigation and administrative enforcement shall be exercised by the agency to whose supervision it is subject, but such organizations are subject to all other powers of the Administrator.\textsuperscript{150}

With respect to investigations of creditors other than supervised lenders, the Administrator’s power to investigate is limited to situations in which he has probable cause to believe that a person has violated a provision of the Code which is subject to action by him.\textsuperscript{151} Where probable cause exists, he may use the same means of discovering evidence as in investigations of supervised lenders.\textsuperscript{152}

In order to prevent conduct which is in violation of the Code’s provisions, the Administrator may seek voluntary compliance.\textsuperscript{153} If voluntary compliance fails, he may either issue a cease and desist order (after notice and a hearing),\textsuperscript{154} or he may bring a civil suit to restrain the violation.\textsuperscript{155} Where a cease and desist order is issued, it is not enforceable against the person until a judicial enforcement order is secured by the Administrator. However, if no appeal is made within thirty days after receipt of the

\begin{footnotes}
\item[147] UCCC § 3.506(3).
\item[148] UCCC § 3.506(4).
\item[149] UCCC § 3.504(1).
\item[150] UCCC § 6.105(1).
\item[151] UCCC § 6.105(1).
\item[152] Id.
\item[153] UCCC § 6.104(1)(a).
\item[154] UCCC § 6.108(1).
\item[155] UCCC § 6.110.
\end{footnotes}
order, it becomes final. To obtain judicial enforcement of the final order the Administrator need only show the issuance of the order in compliance with the Code's provisions, a failure to appeal by the person against whom the order is directed, and jurisdiction of the court. The Administrator does not, in this situation, have to support his findings by substantial evidence.\textsuperscript{156} Ordinarily the Administrator may choose between his administrative or civil remedy except in a situation involving an unconscionable agreement or fraudulent or unconscionable conduct. In that case he is limited to his civil remedy.\textsuperscript{157} Also, if the Administrator wants temporary relief pending final determination of the issue, he must seek it by his civil remedy.\textsuperscript{158}

One of the most important of the Administrator's remedies is the injunction against unconscionable agreements or unconscionable or fraudulent conduct. Although it can only be procured by means of a civil suit, this remedy provides the Administrator with needed flexibility and allows him to deal with new patterns of fraudulent or unconscionable conduct which have not been foreseen by the Code's draftsmen.\textsuperscript{159} These provisions cover three areas of fraudulent or unconscionable conduct which may be restrained: (1) the making or enforcing of unconscionable contract terms; (2) fraudulent or unconscionable conduct in inducing consumers to enter into a consumer credit transaction; and (3) fraudulent or unconscionable conduct in the collection of consumer credit debts.\textsuperscript{160} To give some guidance in these three areas, the Code provides a five factor analysis which is to be considered when applying the provisions on unconscionability and fraud.\textsuperscript{161} For example, one factor to be considered is the knowledge of the seller at the time of the sale of the inability of the buyer to receive substantial benefit from the property sold.\textsuperscript{162} In this way the word "unconscionable" gains added meaning while still retaining the flexibility which may be necessary to challenge new methods of credit abuse in the future.

Where a debtor is due a refund from his creditor because of

\textsuperscript{156} UCCC § 6.108(1) comment 1.
\textsuperscript{157} UCCC § 6.111.
\textsuperscript{158} UCCC § 6.112.
\textsuperscript{159} UCCC § 6.111 comment 2.
\textsuperscript{160} UCCC § 6.111(1).
\textsuperscript{161} UCCC § 6.111(3).
\textsuperscript{162} UCCC § 6.111(3)(b).
the making or collecting of excessive charges, the Administrator may, after demand, bring a civil action to enforce the debtor's rights. This action may also include recovery of penalties which have accrued because of the refusal to refund within a reasonable time after demand or because the excess charges were made in deliberate violation or reckless disregard of the provisions relating to finance charge limitations. An action by the Administrator may relate to transactions with more than one debtor.\textsuperscript{163}

\textit{Laws Repealed by the Code}

The Uniform Consumer Credit Code is a comprehensive statute designed to regulate most aspects of consumer credit charges and interest rates in general. It covers credit sales of consumer goods and services, consumer loans, some home financing credit and some agricultural credit.\textsuperscript{164} Consequently, any state that adopts the Code will have to repeal or amend several of its existing statutes. For example, all usury laws and other statutes limiting interest rates, except those pertaining to pawnbrokers, must be repealed. Other statutes that must be repealed or amended include small loan acts and acts licensing personal lenders, sales finance companies and consumer finance companies installment sales acts for motor vehicles and other goods; statutes with regard to revolving charge accounts and credit cards; state truth-in-lending acts; statutes pertaining to home solicitation sales and referral sales; home improvement sales and loan acts; and insurance premium financing acts.\textsuperscript{165}

Obviously, the drafting of a repealer clause for any state will require a detailed study. Consequently, any state contemplating adoption of the Uniform Consumer Credit Code should employ a competent person or persons to determine which of its present laws should be repealed or amended when the Code is adopted. In many states the draftsmen of the repealer clause will be greatly aided by studies that have already been made,\textsuperscript{166} some of which are quite thorough.

\textsuperscript{163} UCCC § 6.113(1).
\textsuperscript{164} Note to UCCC § 9.103.
\textsuperscript{165} Id.

(Continued on next page)
In most states the principal statutes that must be repealed or amended, upon adoption of the UCCC, will be quite obvious. For example, in Kentucky the list will include the statutes on interest and usury, installment sales contracts, the Motor Vehicle Installment Sales Act, the statutes on credit life and credit health insurance, some of the provisions with respect to credit unions, the exemption from garnishment, and the “chain” Merchandising Act. Only one section of the Uniform Commercial Code will need to be amended, viz., section 9-203, which gives priority to certain other laws over the Uniform Commercial Code. The section must be amended by adding the Uniform Consumer Credit Code to the list of such statutes and deleting the statutes which are repealed by the UCCC.

In addition to the above laws, the entire statutes of a state should be examined when the UCCC is adopted to make sure that all conflicting statutes are repealed or amended to conform to the code.

The UCCC does not have a general repealer clause, such as the one in the Uniform Commercial Code, which repeals all acts and part of acts which are inconsistent with it. With only a specific repealer clause, the draftsman must exercise even more care in ascertaining the statutes to be repealed. Perhaps a general

(Footnote continued from preceding page)


167 KRS § 360 et seq.
168 KRS § 288 et seq.
169 KRS §§ 371.210 to 371.990.
170 KRS §§ 190.090 to 190.140.
171 KRS § 301 Subtitle 19.
172 KRS § 290.001 et seq.
173 KRS § 427.010.
174 KRS § 436.360.
175 KRS § 355.9-203.
176 UCC § 10-103.
repealer clause should be added. That is done in the National Consumer Act.¹⁷⁷

CRITICISM OF THE CODE AND PROPOSED AMENDMENTS

The drafting of the Uniform Consumer Credit Code was financed for the most part by lenders. The advisory committee represented the American Bankers Association, finance companies, retailers associations, house-to-house salesmen, credit card companies and Better Business Bureaus. Several professors who presumably were neutral, also participated in the drafting. There was little or no representation of consumers when the Code was drafted. Nevertheless, the Code provides many more benefits for consumer debtors than for creditors. There are only a few provisions that would enhance creditor's rights.

Some creditors would benefit from a repeal of the usury laws. Under the Code anyone could lend money at up to eighteen percent interest without a license. Supervised lenders could loan money at much higher rates, with no limit placed on the number of such lenders. Retailers could sell on credit at high interest rates without obtaining licenses. The Code would enable multi-state sellers and lenders to standardize credit forms. It also is designed to provide an escape from federal enforcement of the Truth-in-Lending Act.

On the other hand, several consumer abuses would be abated or mitigated by the UCCC. For example, wage assignments, cognovit notes and referral sales would be prohibited. The holder in due course doctrine would be greatly limited in its application to consumer debtors. Consumer debtor abuses caused by garnishment of wages would be greatly reduced by increasing the debtor’s exemption and prohibiting his employer from firing him. Sales by door-to-door salesmen would be regulated, and the buyer given a three-day right of cancellation. The Code would prohibit “add-on” contracts under which payments are allocated proportionally to all items financed, so that none of them are paid for until the entire account is paid. A deficiency judgment could not be obtained after repossession of goods by a creditor if the goods were sold for $1,000 or less. Debtors are also protected from balloon contracts as the Code requires the lender

¹⁷⁷ NCA § 9.103.
to refinance such contracts on terms that are at least as favorable to the debtor as the original loan. In addition to the above provision and others for the benefit of consumer debtors, the Code creates the office of Administrator to aid in its enforcement.

In view of its consumer benefits, one might expect the Code to be enthusiastically welcomed by consumer advocates. At first, it appeared that it would. Shortly after it was promulgated the Code was endorsed by President Johnson's consumer advisory council and by Miss Betty Furness, the President's Special Assistant for Consumer Affairs. A "Position Statement on the UCCC" by the President's Committee on Consumer Interests (dated December 3, 1968) gave it an exceptionally strong endorsement. The Code was also endorsed by the National Legal Aid and Defenders Association. The AFL-CIO was lukewarm about the Code and told its local affiliates to make up their own minds about it.

After their initial approval of the UCCC, consumer groups began having more and more misgivings about it. Municipal Judge George Brunn of California severely criticised it and pointed out that it was less favorable to consumer creditors, in many respects, than the existing California law. The Consumers Advisory Council of the Department of Consumer Affairs of New York City also criticised the Code and urged that it not be adopted in New York. Consumers Union published an article entitled "Consumer Credit Code for Lenders" that was extremely critical of the UCCC. It concluded: "We don't think any state, no matter how bad its existing credit laws, should adopt the UCCC without extensive amendments in favor of consumers."

Since then, opposition to the Code has been led by the Consumer Federation of America, which is an alliance of 136 local and national consumer minded organizations.

After this consumer opposition developed, the UCCC lost some of the endorsements that it had received initially. The National Legal Aid and Defenders Association in effect withdrew

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179 For criticism by various persons and organizations (including those mentioned in the text) see Consumer Research Foundation, Consumer Viewpoints: Critique of the Uniform Consumer Credit Code (2 vols.).
its endorsement and left the matter to its local organizations. Mrs. Virginia Knauer, who succeeded Miss Betty Furness as the President's Special Assistant for Consumer Affairs under the Nixon Administration, withdrew her predecessor's approval of the UCCC. That left the Code without any strong, organized consumer support.

On June 20, 1969, a conference of fifty-five consumer experts was held in Washington, D.C. The conference was co-sponsored by the National Consumer Law Center of the Boston College Law School and the National Legal Aid and Defender Association. The conference concluded that the UCCC was inadequate to protect consumer interests and required substantial revision. Consequently, the National Consumer Law Center was asked to draft an alternative to the UCCC. The project was funded by a grant from the Office of Economic Opportunity.

Among the numerous objections to the UCCC, the most frequent was its high interest rates. The maximum rates under the UCCC are twenty-four percent on revolving charge accounts and thirty-six percent on small loans (up to $300) and bank credit cards. Although those rates are much higher than are permitted in most states under present laws, the critics of the UCCC greatly exaggerated their importance when they urged rejection of the Code simply because of them. In the first place, the rates were intended merely as ceilings. Competition created by the freedom of entry doctrine was expected to result in lower rates. That may well be. Under the present system the net effect of the usury laws is to give a monopoly on high rate loans to licensed lenders, such as small loan companies. Those rates may be reduced by the competition provided by freedom of entry. In the second place, if the interest ceilings under the Code are too high, the legislatures of the adopting states should reduce them. The entire Code should not be rejected simply because its interest rates are too high.

The provisions of the UCCC with respect to the holder in due course doctrine have also received a great deal of criticism. Critics say the holder in due course doctrine should be banned from all consumer credit transactions. The Code prohibits the use of negotiable instruments except checks in consumer sales
contracts, but does not proscribe their use in consumer loans.\textsuperscript{181} Even if the section is violated, a transferee may be a holder in due course and recover on the instrument.

Critics are also dissatisfied with the UCCC provision with regard to garnishment of wages. Many of the critics think that garnishment of wages should be completely abolished. The UCCC is only slightly more favorable to a wage earner than the Federal Consumer Credit Protection Act. It increases the exemption from thirty times the minimum hourly wage to forty times.\textsuperscript{182} The Code also prohibits an employer from discharging a person because his wages are garnished, but critics say that employers will merely give other reasons for firing him.

There has also been dissatisfaction with the Code's provisions regarding secured creditors. Many of the critics say that no security interests should be allowed except in the goods financed. The UCCC permits the taking of real estate as collateral for home improvement debts of $1,000 or more\textsuperscript{183} and permits cross-collateral.\textsuperscript{184} Critics also would like some provisions in the Code imposing heavy penalties on creditors for forced entry to repossess goods upon default. In addition, they think secured creditors should have to elect between repossession of the collateral and a suit on the debt. Under the Code, a deficiency judgment may be obtained after repossession if the goods were sold for more than $1,000. If goods sold for less than $1,000 are repossessed and sold for more than the debt, the creditor is allowed to keep all of the proceeds.

Several critics of the Code have berated its failure to create new causes of action for consumer debtors and stronger remedies for its enforcement.\textsuperscript{185} The Code gives the debtor a few new rights of action but his new remedies are chiefly defensive. Critics say that debtors should be given additional rights of cancellation and rescission, that class actions should be authorized, and that a creditor who has been guilty of oppressive collection

\textsuperscript{181} UCCC § 2.403.
\textsuperscript{182} UCCC § 5.105.
\textsuperscript{183} UCCC § 2.407.
\textsuperscript{184} UCCC § 2.408.
practices should be liable for damages and attorney fees to the debtor in a tort action.

Probably the most cogent objection that has been made to the UCCC is its poor draftsmanship. For no more than what the UCCC does, it is much too prolix. It is also lacking in clarity. Its prolixity and lack of clarity appear to be caused largely by a multitude of minor exceptions that resulted from various compromises. At any rate, this writer is inclined to agree with the Association of California Consumers statement that, "Even in a world where hard-to-understand laws abound, the draft of the Uniform Consumer Credit Code should win an award for unintelligibility." 186

The National Consumer Act was drafted to meet the above objections. In drafting that act, the National Consumer Law Center relied heavily upon a special committee consisting of persons who had been most critical of the UCCC.

The National Consumer Act [hereinafter NCA] amends many of the provisions of the UCCC and regulates several matters of consumer law that the UCCC does not cover. 187 The NCA also has fewer exclusions than the UCCC. For example, transactions with pawnbrokers and utilities and sales of insurance are covered by the NCA but not by the UCCC. 188

The NCA avoids much of the duplexity of the UCCC by eliminating the separate treatment of sale and loan credit. The UCCC covers credit sales in Article 2 and loans in Article 3. The NCA covers both types of consumer credit transactions in Article 2.

The NCA permits even more freedom of entry with regard to consumer financing than the UCCC. That is accomplished by allowing any creditor to charge the maximum rates, rather than only the supervised lenders. 189 The NCA submits three alternative provisions prescribing maximum finance charges. 190 Each of the

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188 NCA § 1.202; UCCC § 1.202.
189 NCA § 2.201.
190 Id.
alternatives leaves blanks for insertion of interest rates. Although some of its draftsmen have been very critical of the high rates permitted by the UCCC, they now take no position on what the rate ceilings should be.\textsuperscript{191} Apparently, they have learned from the experience with the UCCC that it is not advisable to become involved in arguments over rate ceilings.

The holder in due course doctrine is abolished by the NCA with respect to consumer transactions. The NCA prohibits a merchant from taking a negotiable instrument in a consumer credit transaction, and it makes any holder of such an instrument subject to all claims and defenses of the consumer.\textsuperscript{192} The Act also invalidates provisions in sales contracts under which consumers waive their defenses against assignees.\textsuperscript{193}

The NCA goes farther than the UCCC in several other respects in limiting creditors' practices and remedies. For example, it prohibits balloon payments\textsuperscript{194} and exempts all wages from garnishment.\textsuperscript{195} It also imposes additional restrictions on the creation and enforcement of security interests.\textsuperscript{196} No deficiency judgment may be obtained unless the unpaid balance of the debt is $2,000 or more at the time of default.\textsuperscript{197} When a deficiency judgment is obtained, it must be computed by subtracting the fair market value of the collateral from the balance due on the debt.\textsuperscript{198} The Act also provides more affirmative remedies for the debtor and authorizes class actions.\textsuperscript{199}

Although the NCA does not define "unconscionability," it does list a number of factors to be taken into consideration as pertinent to that issue.\textsuperscript{200} It would appear those provisions are of little value, but they should do no harm.

In addition to the changes which the NCA would make in the UCCC, the NCA regulates several matters that the UCCC does not deal with. These include provisions as to credit cards;\textsuperscript{201}

\textsuperscript{191} Id. at Comment 2.
\textsuperscript{192} NCA § 2.405.
\textsuperscript{193} NCA § 2.406.
\textsuperscript{194} NCA § 2.402.
\textsuperscript{195} NCA § 5.106.
\textsuperscript{196} NCA § 2.416.
\textsuperscript{197} NCA § 5.211.
\textsuperscript{198} NCA § 5.212.
\textsuperscript{199} NCA §§ 5.301-309.
\textsuperscript{200} NCA §§ 5.107, 6.109.
\textsuperscript{201} NCA §§ 2.601-605.
an article on sales practices, which deals with warranties and false, misleading or deceptive advertising;\textsuperscript{202} and articles on debt collection\textsuperscript{203} and credit reporting agencies.\textsuperscript{204}

All of the changes which the NCA would make in the UCCC are for the benefit of consumers. There would be no diminution of the rights and remedies provided for consumers by the UCCC. Despite the fact that it was drafted by some of the UCCC's severest critics, the NCA is not a radical departure from the UCCC.

\textbf{STATE AND FEDERAL ROLES IN CONSUMER CREDIT LAW}

While the UCCC was being drafted, Congress enacted the Consumer Credit Protection Act [hereinafter CCPA]. Title I of the CCPA is commonly known as the Truth in Lending Act. Section 123 of that Act\textsuperscript{205} directs the Federal Reserve Board to exempt any class of credit transactions within any state from the requirements of Chapter 2 of the Truth in Lending Act if the board finds that the state law imposes substantially similar requirements with adequate provision for enforcement. The UCCC has disclosure requirements with respect to consumer credit transactions that are substantially similar to those of the Truth in Lending Act. The NCA requires a creditor to meet the disclosure requirements of the Truth in Lending Act and to meet additional requirements.\textsuperscript{206}

Many proponents of the UCCC have grasped the states' rights clause of the Truth in Lending Act as an argument for adoption of the UCCC. They say that creditors will prefer to deal with a state administrator rather than a federal agency. That seems to be a poor argument. In the first place, the creditor would only be exempted from the credit transactions provisions of the Truth in Lending Act. He would not be exempted from its advertising provisions\textsuperscript{207} or the remainder of the Consumer Credit Protection Act. Moreover, the same forms should satisfy either the state or federal requirements. It seems that some states might prefer to eliminate the disclosure requirements from either the UCCC or

\textsuperscript{202} NCA Art. 3.
\textsuperscript{203} NCA Art. 7.
\textsuperscript{204} NCA Art. 8.
\textsuperscript{206} NCA \S\S 2.306, 2.307.
\textsuperscript{207} Chapter 2 of the Act, 15 U.S.C. \S\S 1661-1665 (1968).
the NCA and leave those matters to federal regulation. The
federal government has already entered the field, and the Federal
Reserve Board has issued regulations and provided machinery for
their enforcement.\footnote{See Felsenfeld, Competing State and Federal Roles in Consumer Credit Law, 45 N.Y.U. L. Rev. 487 (1970).} Duplication of state and federal regulations
should be avoided. It seems to make little difference whether the
disclosure provisions are enforced by state or federal authority.

**Conclusion**

Nearly everyone would agree that some kind of consumer
credit legislation is needed in most states. The Uniform Consumer
Credit Code contains many provisions that are favorable to con-
sumers. It was drafted from the creditor's viewpoint and depicts
the consumer debtor legislation that creditor groups are willing
to see adopted. On the other hand, the National Consumer Act
was drafted by representatives of consumer groups and depicts
the type of legislation that they want. An examination of the
two proposed statutes reveals that the debtor and creditor groups
are not as far apart as might have been expected. There should
now be a study of the UCCC and the NCA by a neutral group to
resolve their differences. In many cases, alternative provisions
could be submitted.

It may be a long time, however, before a generally acceptable
uniform act on consumer credit can be drafted. After all, this is a
new field of law in which there are many conflicting ideas, (most
of the uniform laws that have been widely adopted have been on
areas of the law that were well crystalized). Consequently, states
that are in need of consumer legislation should not wait for a uni-
versally acceptable uniform act. The UCC was adopted in Utah
and Oklahoma in 1969. It seems to be working fairly well in

States that want to adopt new consumer legislation should give
prime consideration to the National Consumer Act. I think it
is superior to the UCCC in many respects. It has better drafting
and combines the treatment of loans and credit sales in one article.
It contains all of the consumer benefits that are provided by the
UCCC and others that are desired by consumer groups. If the
legislature finds that consumer groups have demanded too much
in some instances, it can delete or amend those provisions of the NCA.

Some states may want to adopt some consumer credit legislation but eschew the enactment of a comprehensive code such as the UCCC or the NCA. If so, they will find many ideas and well drafted provisions in either the UCCC or NCA. For example, a state could enact the provisions of either of those acts with respect to the holder in due course doctrine, balloon payments, confession of judgment, assignment of wages, garnishment of wages, referral sales, home solicitation sales, deficiency judgments and many other matters. One of the most basic concepts of the UCCC, viz., freedom of entry, can be achieved simply by repealing the usury laws. Or, if rate ceilings are desired, the usury laws can be amended so as to permit all creditors to charge the high rates of interest now reserved for small loan companies. That would restore competition among creditors in the consumer credit field.