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On Thursday night, May 27, 1970, Congressman James Abourezk of South Dakota attempted to rent a car at the Sioux Falls Airport. He tried to pay cash for the rental but the clerk refused, insisting on a credit card. As a result of the incident Congressman Abourezk asked the Chairman of the House Banking and Currency Committee to determine if and when credit cards replace cash as legal tender.[1]

In that transaction the congressman merely stumbled over a particular manifestation of the increasing omniscience of credit in the daily lives of American citizens. In 1968 the National Conference of Commissioners on Uniform State Laws released the final draft of the Uniform Consumer Credit Code [hereinafter cited as UCCC]. At that time consumers were plunging deeper into debt at the unprecedented rate of $800 million to $900 million *per month.*[2] Between 1959 and 1969 consumer credit outstanding nationally (not including loans on real estate) increased from $51.5 billion to $122.5 billion.[3] For a large number of consumers, credit has become the legal tender for conducting their financial affairs.[4]

Consumer credit has grown in accordance with the laws of states, leading to a complex and often contradictory set of credit patterns both within and between states. Each state has at least four and perhaps as many as ten consumer credit laws, none of

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1 The Washington Post, May 29, 1971, § A, at 12.

2 *A Consumer Credit Code . . . for lenders,* 34 CONSUMER REP. 121 (1969).

3 Federal Reserve Board, *noted in* 1970 FINANCE FACTS YEARBOOK 45.

4 More and more in our modern society credit has become essential for the wage earner to obtain his share of goods and services. Staff memorandum to the drafters of the Uniform Consumer Credit Code, *noted in* CONSUMER REP., *supra* note 2, at 126.

them quite like the credit laws of any other state.[5] This situation is similar to that facing the newly emerging United States when printed bills were the legal tender. At that time state banks printed their own money, each one following a different set of rules. As a result, a "Continental" in New York was not worth the same amount as a "Continental" in Philadelphia. One of the great steps forward for American commerce—though not necessarily for each individual man of commerce—was the development of a national currency. The lesson might well be that credit, the new legal tender in 1971, will best serve the national commerce if administered and regulated on a national basis.

The Consumer Credit Protection Act, better known as the "Truth-in-Lending Act",[6] passed by Congress and effective July 1, 1969, moves credit regulation toward national uniformity. In general, this Act provides for detailed disclosure of information in connection with all retail credit and loan transactions, the same disclosure for advertising of such transactions, translation of all "add-on" charges into a single annual percentage rate, prohibitions against "loan sharking", limitations on garnishment, and, perhaps most importantly, establishes a "National Commission on Consumer Finance", soon due to report to the President of the United States about additional reforms needed in the credit and loan business.

The Act also includes another provision which allows states to adopt substantially similar legislation exempting them from the provisions of the national act. This provision led to the development of the UCCC as an effort, pushed primarily by the credit industry, to keep the regulation of credit on the state level. The UCCC in turn led to the development of the National Consumer Act [hereinafter cited as NCA], a model act for consumer protection, drafted by the National Consumer Law Center, at Boston College Law School. The existence of two such detailed proposed model laws as the UCCC and the NCA has set the framework for the debate on consumer credit reform. In fact, Professor Homer Kripke, editor of a textbook in the field, has said that teaching

[5] Statement by Walter D. Malcolm before Georgia Legislative Study Committee on the Uniform Consumer Credit Code, Sept. 23, 1969.

[6] Consumer Credit Protection Act, 15 U.S.C. §§ 1601-13, 1631-1641, 1661-1665, 1671-1677 and 18 U.S.C. §§ 891-896 (1968).

the subject of consumer credit for the next few years might consist of comparing the provisions of the two acts.[7]

Both model acts are directed at the abuses of current credit practices and the confusion of laws that have allowed them to develop. Both were developed as a result of the provision in the federal act allowing states, under prescribed conditions, to maintain control over credit regulations. As a result, there is little disagreement that the announced objectives of the two acts are essentially the same.

William D. Warren, reporter for the drafting of UCCC, described the situation faced by consumers in today's credit market:

> Until now most consumer credit legislation has been almost exclusively aimed at the immediate credit aspects of the transactions—that is, rate ceilings, disclosure of terms, and limitations on security, and the like. But there are indications that what might be called the "by-products" of the present credit system are causing the consumer more trouble than are high rates or failure to disclose charges. Competent observers of the credit scene report that particularly in urban areas poverty consumers are being preyed upon by a type of creditor whose operations bear no relation to those of the reputable credit supplier. Fraudulent or near fraudulent schemes are used to induce consumers to buy goods and services that are often absurdly over-priced and of doubtful utility to the purchaser. The consumer paper is immediately assigned to shady finance companies whose collection practices are ruthless. Operators of this kind expect to deal with a consumer only once, but for them once is enough. The embittered, cheated consumer who defaults pays for his folly by enduring a siege of harrassment by bill collectors and finally by suffering garnishment of his pay and possibly loss of his job. Sometimes in frustration he throws a Molotov cocktail and when we read about it in our morning papers we say to our wives that it's a pity people are becoming so disrespectful of law and order. Consumer credit laws can't solve these problems, but there are changes in consumer credit laws that are long overdue, and we must start now to do something about this.[8]

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[7] H. KRIPKE, CONSUMER CREDIT xiii (1970).

[8] Statement, New Approaches to Consumer Credit Protection under the Uni-

(Continued on next page)

This observation by Mr. Warren identifies three general areas of concern to any credit reform effort. First, the problems related to the transaction itself, rate ceilings, disclosure of terms, limitations on security, etc., must be considered. Second, problems such as what constitutes default and against whom, balloon payments, holder in due course, *inter alia* must be redefined. Third, how defaults are to be corrected in lieu of ruthless collection practices, which have included harrassment, garnishment, and forceable repossession from the home, must be clearly spelled out.

The drafters of both the UCCC and NCA have sought to apply three general principles toward the correction of these abuses. First, both strived to improve competition among lenders, leading to a competitive credit market. Second, both sought to create uniformity and widespread coverage in the credit field.[9] Third, both sought an equitable balance between debtor and creditor rights.

From the consumer point of view, the UCCC, measured against these general principles, falls distressingly short as an effort to protect credit consumers. Three classes of weaknesses make it a proposal of little practical value to the consuming public: (1) It covers only a limited number of consumer abuses; (2) Even those abuses it admits and claims to alleviate are narrowly defined and narrowly attacked thus providing little practical value; and (3) Its tools for enforcement make it likely that even the limited number of narrowly defined abuses it claims to circumscribe will go largely uncorrected. The NCA, on the other hand, offers broad, effective, and imaginative ideas for meeting the problems of credit consumers and develops tools that might well lead to a stronger, more uniform commercial system for the nation than will result from the UCCC.

It is important for everyone to understand that neither proposed act was intended by its drafters as the final answer to consumer credit problems. The letter of transmission accompanying the NCA stresses that the drafters intend to "reconsider each of

(Footnote continued from preceding page)
form Consumer Credit Code, by William D. Warren, filed with Subcommittee on Consumer Affairs of the Banking and Currency Committee of the House of Representatives, Feb. 26, 1969.

[9]One UCCC committee staff member wrote of "the advantages of uniformity and of outlawing undesirable credit practices." HARVARD BUSINESS REVIEW, *noted in* CONSUMER REP. *supra* note 2, at 122.

the act's provisions for possible redrafting and additions."[10] The UCCC, according to two of its drafters has been referred to as:

> an intermediate measure, both in point of time and in manner of approach. It comes at the end of the old era of one-shot, closed-end credit in which a consumer might enter into a number of different transactions with scores of different creditors in a single year, and stands at the beginning of a new age in which revolving credit, the credit card, and the computer will enable most consumers to satisfy virtually all of their credit needs through stable, continuing relationships with only a few credit suppliers.[11]

Since the UCCC is meant to be an interim doctrine, its value should be measured by its ability to make meaningful contributions to the universally accepted need for long overdue consumer credit reform. Fortunately the NCA provides a convenient yardstick against which to measure the UCCC.

Generally, the drafters of the UCCC felt that they were undertaking a political as well as a legal job. Therefore, they built into the model a number of compromises specifically to aid the passage of the act. The NCA avoided such tactics. As a result, adoption of the NCA would be a more important interim reform than the adoption of the UCCC.

For example, the UCCC, for admittedly political reasons, maintains the outmoded distinction between a loan and a credit sale, while the NCA provision applies to both kinds of transactions equally. Thus the NCA protects a debtor whether he buys his television on time or secures a loan from a finance company and pays for the TV with the cash from the loan. The protection offered by the provisions of the UCCC applies only to the purchase made on time and not to the loan transaction.

The UCCC provisions apply only to credit transactions of the time buying type. As a result, the UCCC provides some important restrictions on the security collateral practices in time buying but not on loans. Limits are set as to when a security interest is allowed in collateral which is not a part of a current sale. Thus, a seller of an appliance on time could not secure the

[10] Letter from William F. Willier to all recipients of drafts of the National Consumer Act, Jan. 1970.

[11] Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 444 (1968).

sale by taking a mortgage on the buyer's home, while a finance company loaning cash for the purchase could secure the buyer's home for the transaction. This distinction does not exist under the NCA.

Another very marked difference of approach is that the UCCC relies heavily upon disclosure provisions to provide major protection for consumers. It does this by attempting to adopt the types of disclosure required by the federal government. The NCA, on the other hand, incorporates entirely the federal provision from the Truth-in-Lending Act and adds a few of its own. Specifically it requires disclosure of percentage rates and dollar finance charges even where they are at the statutory minimum. The Federal Law exempts disclosure of such charges at the statutory minimum. The NCA requires a writing of the substantive rights and duties of the parties which is technically exempted under the Federal Act. The NCA also requires that the transaction be a single writing to avoid confusion, requires a warning to the consumer that there are to be no blanks on the paper he signs, requires each payment date and amount to be spelled out, and requires a warning about the existence of "balloon payments" permitted for persons with seasonal incomes.

The difference between the disclosure provisions of the two acts is of great importance. The intent of the UCCC drafters was to copy as closely as possible the Federal provisions for the purpose of gaining an exemption from the federal law for those states adopting the code. However, the drafters of the NCA assert that "It is highly doubtful that such an exemption could ever be granted since there are many inconsistencies between the Credit Code and the Federal Act. . . ."[12] The NCA tactic of incorporating completely the disclosure provisions of the Federal Act would seem to overcome this weakness which has been perceived even by supporters of the UCCC and stronger state control. The Beneficial Finance Company testified on this point before the 1970 Ohio Legislative Commission Committee to Study Consumer Problems and Protection:

> There was some reason for the disclosure provisions in the early drafts of the Code since the Federal Government

[12] NATIONAL CONSUMER ACT [hereinafter cited as NCA] § 2.301, Comment No. 1 (Draft No. 1, Jan. 1970).

had not acted and there was no universal disclosure requirement on the state level, but now with the enactment of the Federal Consumer Credit Protection Act (Truth-in-Lending) the same provisions in the Code only make for duplication and confusion. It is true that exemptions from the federal requirements may be granted if the state law requirements are deemed adequate by the Federal Reserve Board, and it may be possible to amend the Code so as to obtain exemption. However, without such exemption, the credit grantor must comply with the federal requirements, and also with the requirements of existing state law, which will require double disclosures. In many cases these will conflict and create considerable confusion—the exact opposite of the intent of the laws. With the exemption this problem is eliminated, but only temporarily, for as the federal law or regulations change, so must the exemptions. Beneficial certainly would prefer state regulation on this subject, but recognizes that the federal law does exist now. Therefore, its basic provisions must be complied with by all, regardless of whether it is administered by the federal or state authority. In view of federal preemption of the field and the fact that compliance with the federal law will accomplish exactly the same purpose, the most sensible approach by far would seem to be to leave it to the federal law.[13]

Another major difference between the Acts occurs because of the broad definition of consumer, "the most important definition in the entire Act",[14] according to the drafters, of the NCA. The definition in the NCA reads: " 'Consumer' means a person other than an organization who seeks or acquires business equipment for use in his business, or real or personal property, services, money or credit for personal, family, household or agricultural purposes."[15] This definition is crucial to the currently developing consumer movement. The UCCC sticks to what has traditionally been known as the "purposes" test for the definition of consumer. Consumer purposes are usually restricted to personal, family or household purposes, exclusive of commercial or business purposes. One commentator points out that "were it

[13] OHIO LEGISLATIVE SERVICE COMMISSION CONSUMER CREDIT PROBLEMS AND THE UNIFORM CONSUMER CREDIT CODE, at 52 (Nov. 30, 1970).
[14] NCA, *supra* note 12, § 1.301(8).
[15] NCA, § 1.301(8) (Draft No. 1, Jan. 1970).

not that the NCA definition is limited to equipment purchases, it would appear that the NCA was moving away from a 'purposes test' to a test based upon the relative bargaining power of the parties."[16]

The shift of definition reflects the growing awareness of the so called consumer movement that the small to middle sized business, particularly the retailer, is often a victim of the same unfortunate business practice that individual consumers have to some degree complained of. In fact many consumer advocates now speak of alliances with small and medium sized retailers against the concentrated power of giant corporate interests. Such a shift in perception could carry major consequences for the future development of economic power within the free market system. As retailers begin to perceive their interests as being more closely related to those of consumers than to the giant corporations—a change already taking place—economic power will begin to change hands.

One other general difference of major proportions between the UCCC and the NCA is the inclusion in the latter of a ban on a large number of deceptive sales practices. In its effort to be a consumer protection act the NCA bans a number of consumer deceptions which are not directly related to credit buying, such as bait and switch, false advertising, and many other methods of creating confusion in the marketplace for the consumer. It also strengthens the consumer's warranty protection. Leaving these strengths and prohibitions out of the UCCC could be justified since they are not directly related to consumer credit. Discussion of them serves primarily as an illustration of the much broader scope of the NCA.

This broad scope carries over to the provisions of the act designed to combat abuse of the credit consumer. Comparing these provisions in the two acts shows that the NCA provides more consumer protection than the UCCC. As pointed out above, the abuses of the credit consumer fall into three phases: 1) the initial transaction; 2) the definition of default; and 3) collection. In each area the NCA attempts imaginative and far

[16] W. Boyd, National Consumer Act and the Uniform Credit Code—a Comparison and Critique (unpublished). Professor Boyd, Professor of Law, University of Arizona, first drew to the attention of the Arizona Legislature several of the distinctions between the acts pointed out here.

reaching reform, while the UCCC tends to be a political compromise.

Concerning the rates that can be charged for consumer credit the NCA seeks ceilings comparable to those currently in existence in the state enacting the law. The UCCC, on the other hand, moves toward elimination of rate ceilings by setting high ceilings on the grounds that market competition will keep rates reasonable. The NCA sets uniform rate ceilings for all kinds of credit while the UCCC sets special rate ceilings for open ended sales credit. The position taken by the NCA commentators is that uniform ceilings of an amount comparable to that currently in force should be provided. Their reasoning appears to be that lack of uniformity is a more important problem than the size of any particular ceiling. The possible existence of credit monopolies, particularly in urban center city communities, should be a major warning against the contention that no ceilings are necessary. As pointed out, the NCA provisions on disclosure and limitations on collateral provide more protection than the UCCC.

In the second phase of the credit transaction the NCA also provides more protection. The NCA has significantly limited the traditional power of the creditor to define the terms of default. This power included the right to accelerate payment on the vague but good faith belief that payment might not be made. It did this by specifically defining default in the act as

> the failure without justification under any provision of law of the consumer to pay (a) three successive installments within the period of time allowable by this act, or (b) any remaining balance within three months after the due date of the final installment or (c) an amount resulting from the total of unpaid delinquent installments constituting 30 per cent of the amount financed.[17]

The UCCC on the other hand leaves the definition to the power of the contracting parties. The NCA position is that to carry over such an arrangement from commercial bargaining where the parties stand on roughly equal footing is unrealistic. In practice, the consumer does not bargain for the definition of default, rather he is told what constitutes default and must take

[17] NCA, *supra* note 15, § 5.103(1).

it or leave it. If he does not agree, he does not get credit.

Once a default has taken place under NCA, the creditor can either enforce his security interest or pursue the remedies provided in the case of default. He can not, as the UCCC would allow, do both. This means that he can either seek a judgment equal to the defaulted debt or seek control of the collateral for the loan through judicial process.

Once there has been an alleged default, the consumer under the NCA, has the right to cure the default within 15 days after being notified of the default. The cure consists of paying the amount in arrears. No such provision exists in the UCCC. If a consumer cannot cure the default, he is given the opportunity to surrender the collateral, thereby fulfilling the security interest of the creditor and discharging the obligation. If the consumer wishes to contest the allegation that there has been a default, he is allowed to do so by requesting a hearing on the matter within five days after there has been a complaint of default. This entire procedure provides a process that can weigh the reasonableness of the conflicting positions of the parties and also provides a mechanism of resolution which is private, though under court scrutiny. The UCCC provides none of these opportunities for resolution.

The holder in due course doctrine is treated differently by each of the model acts. In general this doctrine allows the recipient, for value of a check, draft, certificate of deposit or promissory note, protection against a debtor who seeks to withhold payment because of a wrongful act of the original creditor. The UCCC would prohibit the original seller from taking a negotiable instrument (other than a check) from the purchaser. However, an assignee of a negotiable instrument could become a holder in due course if in good faith he took the instrument without the knowledge that it had been accepted illegally. The seller is prohibited from collecting on the negotiable instrument, but anyone to whom he transfers the instrument is not. The drafters of the NCA objected to this kind of limitation as ineffective because it depends on the ability of the maker to prove notice or bad faith of the holder. As a result of this objection, the NCA merely makes each subsequent holder or assignee subject to the defenses which the buyer had against the seller.

Concerning collection procedures the UCCC leaves a number of problems unanswered. For example, self-enforcement or private collection is permitted as long as there is no breach of the peace. The NCA, on the other hand, prohibits all self-enforcement, requiring all collection to be made pursuant to legal process. The NCA offers more protection to the consumer if collateral is taken by the creditor and sold to satisfy debts. The UCCC requires the seller, if the sale was $1000 or less, to choose between sueing for the price or repossession of the goods. If the seller repossesses the item, he may sell the item and require the debtor to continue repaying the charges for the lost item, plus repossession charges less the amount received on resale. If the debtor has paid 60 per cent of the original price then the creditor must sell the item.

The difficulty with this provision is that the procedure in reality actually provides very little relief for the debtor. Usually the creditor is the only bidder on the resale of the item which generally results in the sale of the item at a price less than its true value, thus providing little relief for the debtor. In fact the provision tends to maintain the actual problems of the current situation. The NCA approaches the problem from a different aspect. It allows deficiency judgments on sales for which default takes place at a time when there is an *unpaid balance* of more than $2000. Repossession of the items for which a balance of less than $2000 is unpaid constitutes discharge of the debt.

With regard to garnishment the UCCC allows 25 per cent of the disposable earnings for one week to be garnished. The drafters of the NCA abolish garnishment altogether saying, "The several states which exempt earnings altogether [from garnishment] enjoy the lowest per capita rates of bankruptcy in the country."[18]

The UCCC does not include any section on credit information, one of the most rapidly expanding areas of consumer credit abuse. The NCA details controls for the reporting of credit information. There are a number of other provisions of the UCCC which, when compared to the NCA turn out to be, at best palliatives in the protection of the consumer.

[18] NCA §§ 5.105 and 5.106, Comment (Draft No. 1, Jan. 70).

Perhaps the most striking contrast between the two acts comes in the area of enforcement. The UCCC fails "to appreciate the interdependence of public and private action."[19] For example there is no provision for restitution to a consumer injured by credit actions enjoined by enforcers of the UCCC. This means that the needed incentive to bring violative action to the attention of authorities is lacking. Also, there are no provisions for recouping the cost of a successful action against a violator. Provisions for private injunction are also lacking in cases of unconscionable conduct (except as a defense to enforcement of the debt) and there are no provisions for attorney fees. These deficiencies of the UCCC throw enforcement of the act largely on the shoulders of public authorities, eliminating the possibility of much needed court-supervised private enforcement.

The NCA tried to correct these weaknesses by providing for class action, restitution to consumers as an adjunct to public injunctive actions, and civil liability. In addition, any transaction conducted in violation of the Act is void, thus allowing the consumer to keep the goods, service or money and to recover any payments made to the violating creditor. There is also a provision for attorney's fees for any consumer prevailing in action to enforce his rights.

CONCLUSION

It is impossible in one short article to compare in detail these two new massive codes created as models for credit regulation in the various states. The UCCC is a detailed 127 page proposed statute and the NCA is an equally detailed 180 pages. The limited comparison above suggests that the UCCC is not a consumer protection statute. Consumers Union summed up consumer reaction to the UCCC by saying, "[T]he Uniform Consumer Credit Code seems dedicated to perpetuating current unhealthy practices. The influence of the credit industry comes through in section after section."[20]

The weaknesses of the UCCC as a means of consumer protection stems in a large part from the fact that its drafters under-

[19] W. Boyd, *supra* note 16.
[20] CONSUMER REP., *supra* note 2, at 126.

estimated the speed with which old notions could become politically irrelevant. Therefore, many of the compromises they thought essential in 1968 have become obsolete if not objectionable in 1971. Much of this change in attitude is due to the drafting of the NCA which did avoid political compromises and developed a consumer protection statute which, if enacted, could strengthen the commercial system.