

STUDENT COMMENTS

AN ANALYSIS OF THE UNIFORM CONSUMER CREDIT CODE AND THE NATIONAL CONSUMER ACT

INTRODUCTION

Since the end of World War II, the total outstanding consumer credit in the United States has increased from five billion dollars to over one hundred and twenty billion dollars.¹ The staggering nature of this figure reflects the important position credit has assumed for Americans in the purchase of goods and services.² This transformation of America from a "cash and carry" to a "buy now, pay later" society has produced a myriad of legal and social problems.³ Readily available credit has tended to make the purchaser less discriminatory as to what he will buy and the terms to which he will agree.⁴ This has made the consumer vulnerable to deceptive sales practices and unconscionable credit agreements against which there have been few legislative safeguards. Indeed, until the last decade the traditional economic theories of caveat emptor and laissez-faire governed the consumer transaction.⁵ Still another side effect of this credit wave that has swept the country is financial overcommitment by the consumer leading to default, wage garnishment and often bankruptcy.⁶ The quantitative increase in consumer dissatisfaction over this situation has brought into focus the acuteness of the problem and has led to a movement for legislative reform. Two such proposals for legislative consumer protection are the Uniform Consumer Credit Code (U.C.C.C.)⁷ and the National Consumer Act (N.C.A.).⁸

This comment will analyze the provisions of the U.C.C.C. and the N.C.A. with a tripartite purpose. First, the background of both Acts will be traced in order to define their scope and purpose. Second, in the areas common to each proposal, an article by article comparison will be made, with particular emphasis given to those provisions pertaining to consumer credit transactions, insurance, remedies and administration. Third, there will be an exposition of the subjects dealt with by the N.C.A. but not covered by the U.C.C.C. These areas concern principally credit card restrictions, limitations on deceptive sales practices, and regulation of debt collection and credit-reporting

¹ 56 Fed. Res. Bull. A54 (Apr. 1970).

² See B. Curran, *Trends in Consumer Credit Legislation* (1965).

³ See Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 *Ariz. L. Rev.* 372 (1968).

⁴ Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 *B.C. Ind. & Com. L. Rev.* 441, 448-49 (1967).

⁵ See J. Bishop, Jr. & H. Hubbard, *Let the Seller Beware* 4-5, 24, 65 (1969).

⁶ Jordan & Warren, *supra* note 4, at 448.

⁷ Uniform Consumer Credit Code (revised final draft 1969) [hereinafter cited as U.C.C.C.].

⁸ National Consumer Act (first final draft 1969) [hereinafter cited as N.C.A.].

agencies. In examining each of these legislative proposals, assessments will be made as to their merits and shortcomings, and recommendations for improvement will be offered.

I. BACKGROUND

The U.C.C.C. had its genesis in 1957 when the Council of State Governments requested that the National Conference on Uniform State Laws⁹ draft a model retail installment sales act.¹⁰ The National Conference agreed, but after four years and the preparation of several drafts, it realized that a project of such limited scope would satisfy no one.¹¹ Within the credit industry there were differences of opinion as to how far such an act should extend: some groups favored a broad approach which would include such hybrid credit devices as the revolving charge account, while others did not.¹² Consumer interests considered the project too narrow and felt that it should be broadened to include all facets of consumer credit.¹³ As a result of this general dissatisfaction, the National Conference decided upon a more ambitious undertaking.¹⁴ Accordingly, in 1963, the National Conference established a Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury, and charged it with the preparation of a model act.¹⁵ After two years of work the first tentative draft of the U.C.C.C. was submitted to the National Conference at its 1966 meeting.¹⁶

Following this initial effort, six additional working drafts were produced. The discussions and criticisms that shaped these subsequent drafts concerned both the format the code should adopt and the substantive provisions it should contain.¹⁷ An initial controversy focused on the subject of credit sales and loans. Certain factions contended that these two areas should be treated separately as has traditionally

⁹ The National Conference of Commissioners on Uniform State Laws is an organization made up of representatives from each of the states, whose function is to draft model legislation. Provision for the appointment of Commissioners is made by statute in each state, with appointments customarily made by the governor. The organization, established in 1892, has drafted the Uniform Negotiable Instruments Law, the Uniform Sales Act, the Uniform Stock Transfer Act and the Uniform Commercial Code. Malcolm, *The Uniform Consumer Credit Code*, 25 *Bus. Law.* 937 (1970).

¹⁰ Richter, *The Uniform Consumer Credit Code of the National Conference of Commissioners on Uniform State Laws*, 24 *Bus. Law.* 184 (1968).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 185. The Special Committee was composed of practicing attorneys, law school professors, a state legislator and a jurist. This committee appointed an Advisory Committee which represented consumer and creditor interests. Serving on the Advisory Committee were representatives of the Association of Better Business Bureaus, Inc., the National Legal Aid and Defenders Association, the AFL-CIO and the National Association of Consumer Credit Administrators. *Id.* at 186.

¹⁶ *Id.*

¹⁷ See Richter, *supra* note 10.

been the case in state law. Others expressed the opinion that the distinction between credit sales and loans should be eliminated and replaced by a single treatment of the consumer credit transaction.¹⁸ Differences of opinion also arose concerning some fundamental economic assumptions upon which the U.C.C.C. should be based. Some critics advocated close government regulation, such as restricting the entry of financing institutions into the credit field, as a means of affording consumer protection. Others felt that free entry should be allowed so as to provide an environment of vigorous competition among creditors.¹⁹ A related topic of discussion pertained to the adoption of rate ceilings. Those who favored freedom of entry felt that a high rate ceiling would induce additional lenders to offer consumer credit. They felt a broad selection of credit sources would encourage consumers to "shop" for the best credit deal, thereby causing rates to fluctuate accordingly.²⁰ Critics, however, sought a closely regulated pattern of rates to be administered by each state according to its economic needs.²¹

Two years of redrafting were necessary to resolve these questions. Finally, in 1968, the Revised Tentative Final Draft received the approval of the National Conference.²² The following provisions had been incorporated into the Code: first, credit sales and loans were treated in separate sections; second, the freedom of entry view was adopted; and third, a high rate ceiling was chosen, but with elaborate provisions for disclosure of credit rates to the consumer. The American Bar Association (ABA) followed with its approval of the U.C.C.C. in August, 1968.²³

Shortly, after the U.C.C.C. received the blessings of the National Conference and the ABA, it became the subject of widespread controversy.²⁴ Its proponents felt that it embodied a balanced approach to consumer credit legislation, and that the interests of both the credi-

¹⁸ *Id.* at 187. For a more elaborate discussion of the credit sale-loan debate see pp. 894-96 *infra*.

¹⁹ *Id.* at 189. See pp. 896-98 *infra*.

²⁰ *Id.* at 189-90. See Warren, *The Uniform Consumer Credit Code*, 24 *Bus. Law.* 209 (1968). See also pp. 896-98 *infra*.

²¹ See Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 *Bus. Law.* 227, 234-35 (1968).

²² U.C.C.C., Prefatory note.

²³ *Id.*

²⁴ Among those articles favorable to the U.C.C.C. are: Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 *N.Y.U. L. Rev.* 1 (1969); Malcolm, *The Uniform Consumer Credit Code—Possible Legislation in Massachusetts*, 54 *Mass. L. Q.* 34 (1969); Moo, *Consumerism and the UCCC*, 25 *Bus. Law.* 957 (1970); Robertson, *Consumer Protection Under the U.C.C.C.*, 41 *Miss. L.J.* 36 (1969); and Warren, *The Uniform Consumer Credit Code*, 24 *Bus. Law.* 209 (1968). Among those unfavorable to the U.C.C.C. are: James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V and VI*, 57 *Geo. L.J.* 923 (1969); Harper, *The Uniform Consumer Credit Code*, 44 *N.Y.U. L. Rev.* 53 (1969); and Willier, *A Uniform Consumer Creditor's Code*, 54 *Mass. L. Q.* 53 (1969).

tor and consumer were improved.²⁵ Opponents, however, expressed the opinion that the final proposal failed to provide adequate consumer protection.²⁶ They maintained that the compromises which had been made worked mostly to the detriment of the consumer.²⁷ For instance, serious doubt existed as to the validity of the economic arguments advanced in support of the freedom of entry concept.²⁸ An attorney who served as an advisor to the Special Committee summarized this concern by noting that

unbridled entry would promote overselling by some lenders, especially by those without experience in the consumer lending field; many ill-informed or financially irrational borrowers would succumb to the blandishments of easy credit and become overcommitted; duplication of facilities and inefficiency would result; the increased competition would tend to lead to wild credit practices to the detriment of all. . . .²⁹

Criticism was also leveled at the preferential treatment accorded creditors in the section dealing with remedies.³⁰ Neither rescission nor class actions were provided for, and attorney's fees could be collected only in the event of disclosure violations.³¹ As a result, many of the substantive provisions, regulating creditor actions became little more than excess verbiage.³² Conversely, the consumer was still subject to extensive penalties upon his default. Non-judicial repossession was permitted, and wage garnishment, although limited, was still an available collection device.³³ A more general criticism lodged against the U.C.C.C. was that it failed to address itself to the unique problems of the poor, the economic class that needed its protection most.³⁴ Indeed, even some who favored the Code conceded that it provided primarily for the middle-income consumer and left the condition of the poverty-level debtor relatively unimproved.³⁵ In short, it was believed that the U.C.C.C. was simply "too little and too late."³⁶ The state legislatures

²⁵ Miskell, *Commentary*, 24 *Bus. Law.* 221 (1968).

²⁶ Willier, *supra* note 24, at 53.

²⁷ *Id.*

²⁸ See Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 *Bus. Law.* 227 (1968).

²⁹ *Id.*

³⁰ See James & Fragomen, *supra* note 24, at 954.

³¹ W. Boyd, *National Consumer Act and the Uniform Commercial Code—A Comparison and Critique*, at 14 (unpublished manuscript on file at the National Consumer Law Center).

³² James & Fragomen, *supra* note 24, at 929-30.

³³ *Id.* at 930 et seq.

³⁴ McLean, *The Federal Consumer Credit Protection Act*, 24 *Bus. Law.* 199, 206-07 (1968).

³⁵ *Id.*

³⁶ See Willier, *supra* note 24, at 61.

apparently agreed because to date the U.C.C.C. has been introduced in forty-seven state legislatures, but has been enacted in only two.³⁷

Dissatisfaction with the U.C.C.C. was generally reaffirmed at a conference on consumer protection co-sponsored by the National Legal Aid and Defenders Association and the National Consumer Law Center³⁸ in June, 1969. The consensus obtained was that the Act was inadequate and needed substantial revision,³⁹ especially in regard to the scope of consumer protection and the availability of private remedies. The National Consumer Law Center was asked to undertake the drafting of a model act which would fill the gaps left by the U.C.C.C.⁴⁰ The Center, with the aid of several experts in the field of consumer law,⁴¹ responded by drafting the N.C.A., the first draft of which was released to the public in February, 1970.⁴²

The approach taken by the N.C.A. is clearly consumer-oriented. It attempts to offset the creditor's superior bargaining position and legal sophistication by strict regulation of advertising and selling, and by limitation of the remedies available upon consumer default. Repossession and collection of debts can only be accomplished by judicial process, and the defaulting debtor is given a reasonable chance to cure his default and redeem repossessed collateral. Also, the remedies available to the consumer upon the seller's breach are clearly defined. Rescission is a weapon made available to the consumer, as are punitive damages and attorney's fees. Finally, the N.C.A. deals with areas ignored by the U.C.C.C. Modern consumer problems of credit cards, credit-reporting agencies and deceptive sales techniques are covered at length in the N.C.A.

³⁷ See Okla. Stat. Ann. tit 14A, § 1-101 et seq. (1969), and Utah Code Ann. tit 70B, § 1-101 et seq. (1969).

³⁸ The National Consumer Law Center was established at Boston College Law School in June of 1969 under the auspices of the Office of Economic Opportunity (OEO). The Center is designed to aid the poor in the United States through study and reform of legal doctrines which work to their detriment. The Center also assists over 2000 legal services attorneys across the country with consumer law problems.

³⁹ N.C.A., Prefatory note.

⁴⁰ *Id.*

⁴¹ The Center, under the direction of Professor William F. Willier, relied heavily upon a special committee of experts, including Erma Angevine, Executive Director, Consumer Federation of America; Berlin, Roisman and Kessler, a Washington law firm serving as counsel to the Consumer Federation of America and to the AFL-UAW; The Honorable George Brunn, Judge, Municipal Court, Berkeley-Albany Judicial District, California; Ann Draper, Economist, AFL-CIO; Richard A. Elbrecht, Director, Legal Services for Santa Clara, California; Maribeth Halloran, Staff Attorney, Legal Services Office for the District of Columbia; Robert J. Klein, Consumers Union; and Philip Schrag, Counsel, NAACP Legal Defense and Educational Fund, Inc., and Special Advisor on Consumer Affairs to Mayor Lindsay. N.C.A., Prefatory note.

⁴² *Id.* The second edition of the First Final Draft was distributed shortly after this article went to press.

II. COMMON AREAS OF THE U.C.C.C. AND N.C.A.

A. *The Consumer Credit Transaction*

The most pervasive subject covered by the U.C.C.C. and N.C.A. is that of the consumer credit transaction. Generally, for both Acts a consumer credit transaction is any transaction where the buyer or debtor is not an organization, and is dealing with a merchant or other person regularly engaged in business. This transaction must be made for some personal, household or farm purpose, and the obligation is payable in installments in which the amount financed does not exceed twenty-five thousand dollars.⁴³ Articles 2 and 3 of the U.C.C.C. deal respectively with consumer credit sales and consumer loans.⁴⁴ The

⁴³ U.C.C.C. § 2.104 states:

(1) Except as provided in subsection (2), "consumer credit sale" is a sale of goods, services, or an interest in land in which

(a) credit is granted by a person who regularly engages as a seller in credit transactions of the same kind,

(b) the buyer is a person other than an organization,

(c) the goods, services, or interest in land are purchased primarily for a personal, family, household or agricultural purpose.

(d) either the debt is payable in installments or a credit service charge is made and

(e) with respect to a sale of goods or services, the amount financed does not exceed \$25,000.

U.C.C.C. § 3.104 states:

(1) Except with respect to a loan primarily secured by an interest in land (Section 3.105), "consumer loan" is a loan made by a person regularly engaged in the business of making loans in which

(a) the debtor is a person other than an organization;

(b) the debt is incurred primarily for a personal, family, household or agricultural purpose;

(c) either the debt is payable in installments or a loan finance charge is made;

(d) either the principal does not exceed \$25,000 or the debt is secured by an interest in land.

N.C.A. § 1.301(10) provides:

"Consumer credit transaction" means a consumer transaction between a merchant and a consumer in which real or personal property, services or money is acquired on credit and the consumer's obligation is payable in installments or for which credit a finance charge is or may be imposed, whether such transaction is pursuant to an open end credit plan or is a transaction involving other than open end credit. The term includes consumer credit sales, consumer loans, consumer leases and transactions pursuant to a seller or lender credit card.

N.C.A. § 1.202 provides:

EXCLUSIONS

This Act does not apply to

(1) extensions of credit to government or governmental agencies or instrumentalities; or

(2) extensions of credit to organizations; or

(3) transactions in which all parties are organizations; or

(4) consumer credit transactions in which the amount financed exceeds \$25,000 or other consumer transactions in which the cash price exceeds \$25,000.

⁴⁴ U.C.C.C. §§ 2.101-605, 3.101-605.

N.C.A., however, abandons the credit sale-loan distinction in favor of a general article covering the "Consumer Credit Transaction."⁴⁵

The credit sale-loan distinction evolved when the courts gave approval to the merchants' practice of selling an item at two different prices—one price for cash customers and another for credit customers.⁴⁶ This so-called "time-price differential" was held by the courts to be part of the product price and not an interest charge.⁴⁷ Consequently, a credit sale could have a much higher effective rate of interest than a loan, and the merchants could evade usury restrictions.⁴⁸ The rationale supporting this judge-made distinction was that a basic difference existed between a borrower seeking a loan and a purchaser participating in a credit sale. The borrower, it was argued, had a dire economic need and, therefore, was susceptible to rapacious lenders. The purchaser, on the other hand, could always refuse to buy an overpriced item, generally without incurring injury.⁴⁹ The underlying premise was that loans were taken only when absolutely necessary whereas the purchase of consumer goods was a non-essential undertaking.

While this distinction might have been tenable at the time it was formulated, it is of doubtful validity in the light of present economic realities.⁵⁰ Credit has become a normal incident to consumer buying, and the small loan is used as readily as the retail installment agreement as a means of financing purchases. Therefore, it no longer seems justifiable to extend statutory protection to the loan and deny it to the credit sale.

The U.C.C.C. adopts this view and eliminates the time-price differential by providing substantively similar rules for both credit sales and loans. The elements comprising the base price or principal upon which a loan is based are the same, and the interest charge is regulated in essentially the same manner.⁵¹ The retention of the credit sale-loan dichotomy is a concession to critics who felt that the distinction was so

⁴⁵ N.C.A. §§ 2.101-605.

⁴⁶ Littlefield, *Parties and Transactions Covered by Consumer Credit Legislation*, 8 B.C. Ind. & Com. L. Rev. 463, 464 (1967).

⁴⁷ In *Hogg v. Ruffner*, 66 U.S. (1 Black) 115 (1861), the Court offered the following justification:

But it is manifest that if A propose to sell to B a tract of land for \$10,000 in cash, or for \$20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer \$100 in hand to double the sum in expectancy

Id. at 118-19. See, e.g., *Newkirk v. Universal C.I.T. Credit Corp.*, 93 Ga. App. 1, 90 S.E.2d 618 (1955); *Henry v. P. & E. Fin. Co.*, 197 Okla. 676, 174 P.2d 373 (1946).

⁴⁸ Littlefield, *supra* note 46, at 464.

⁴⁹ *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 77-78, 262 S.W. 455, 458 (1924). For a discussion of usury laws and consumer credit see *Limiting Consumer Credit Charges by Reinterpretation of General Usury Laws and by Separate Regulation*, 44 Nw. L. Rev. 303 (1960).

⁵⁰ See Littlefield, *supra* note 46, at 465.

⁵¹ See note 59 *infra*.

deeply rooted in state law that any alteration would necessarily lead to confusion and complication.⁵²

The N.C.A. on the other hand, abandons the credit sale-loan distinction in favor of an across-the-board treatment of the consumer credit transaction.⁵³ The position of the draftsmen of the N.C.A. is that if the time-price differential is to be eliminated, the credit sale-loan dichotomy becomes meaningless.⁵⁴ To retain it, they contend, only involves unnecessary duplication, while the single treatment of the consumer credit transaction leads to a clearer and more distinct understanding of the entire Act.⁵⁵ It is submitted that the elimination of the time-price differential, and the regulation of credit sales as well as loans, represents a significant improvement in consumer protection. However, it seems that the U.C.C.C.'s separation of sections on sales and loans is an unnecessary formal retention of the outmoded distinction. The N.C.A.'s single treatment provides a more convenient and easily understandable format.

Two other instances where the U.C.C.C. and N.C.A. have reached opposite solutions on similar issues concern entry into the credit field and regulation of interest rates. The draftsmen of the U.C.C.C., as was previously stated, opted for freedom of entry coupled with a high rate ceiling.⁵⁶ Their position was this: if restrictions upon entry are minimal and rates on credit are allowed a high ceiling, credit institutions would vie for consumer business and, consequently, these competitive conditions would assure reasonable rates. In embracing this viewpoint, the draftsmen of the U.C.C.C. felt that a broad base of competition would both prevent monopoly in the consumer credit industry and assure an adequate supply of credit.⁵⁷ Indeed, it was argued that too low a rate ceiling, and too many restrictions, might discourage reputable lenders from undertaking the risks incident to consumer transactions, and instead drive the prospective debtor to the "loan shark" or other illegal creditor.⁵⁸

The mechanics of the U.C.C.C. regulation are fairly simple. A lender may utilize either a rate structure ranging from 15 percent to 36 percent on the unpaid balance or, in the alternative, a flat rate of 18 percent.⁵⁹ For example, a creditor choosing the unpaid balance

⁵² U.C.C.C., Prefatory note; see also Richter, *supra* note 10, at 189.

⁵³ N.C.A. Article 2.

⁵⁴ N.C.A. § 1.301(10), Comment.

⁵⁵ *Id.*

⁵⁶ U.C.C.C., Prefatory note. See p. 891 *supra*.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Under U.C.C.C. § 2.201 the maximum rate on a credit sale is 36% per year on that part of the unpaid balance which is \$300 or less, 21% on the unpaid balance of the amount financed which is more than \$300 but does not exceed \$1000, and 15% on that part of the unpaid balance which is more than \$1000. An alternative flat rate of 18% per year may be charged. Under charge accounts, ceiling rates would be 2% per month on the balance up to \$500, and 1½% per month on the remainder, with a minimum of \$.50 per month. On loans under U.C.C.C. § 3.201 the maximum rate would be 18%,

method of computing interest on a sale or loan obligation of \$1,500 could charge 36 percent per year on the first \$300, 21 percent on the next \$700, and 15 percent on the remaining \$500. If this obligation were for one year, the overall rate of interest would be 22 percent. If, however, the amount of the loan were increased to \$11,000, the unpaid balance method would yield only 15.9 percent. If the flat rate alternative were chosen, in both situations the maximum yearly rate that could be charged would be 18 percent. It is clear, then, that in the case of the smaller obligation, the unpaid balance option would permit a higher maximum interest rate.

The draftsmen of the N.C.A. reject in toto the economic reasoning behind these U.C.C.C. provisions. They maintain that unbridled entry will promote overselling by inexperienced lenders and, as a result of the easy credit, overextension by borrowers.⁶⁰ It is also contended that experience has proven the economic concept of *laissez-faire* inapplicable to the creditor-debtor relationship,⁶¹ as credit practices are unaffected by free competition, and in practice the high rate ceilings which the U.C.C.C. postulates will in fact become the floors.⁶²

The N.C.A. chooses to regulate entry by requiring a showing of "convenience and advantage" to a given locality by prospective creditors, and eschews any attempt at structuring rates.⁶³ Instead, the matter of maximum percentage amounts is left to the states' discretion. It is argued that while a definite structure of rates might produce a convenient uniformity among the states, consumer economic environments vary with local conditions, and a true consumer statute must be concerned with regional and state needs.⁶⁴ Hence, under the N.C.A. a metropolitan state such as New York may choose its own rate pattern and ceilings, and will not have to adhere to the same pattern adopted by a midwestern agricultural state such as Kansas. This regulation of rates, together with limitations upon entry, will allow the states through administrative boards to balance carefully the interests of the creditor and consumer, and maintain a close watch on creditors to prevent overreaching.

The position of the N.C.A. is far more realistic than that of the U.C.C.C. The U.C.C.C.'s theory of self-regulating rates due to consumer rate shopping fails to take into account practical experience. More often than not a prospective buyer will think only of the new

except for supervised lenders (those licensed under the U.C.C.C. or qualified to make loans and receive deposits under federal or state law, U.C.C.C. §§ 1.301(16), 3.501), who could charge 36% on the unpaid balance to \$300, 21% on the balance between \$300 and \$1000, and 15% above \$1000. U.C.C.C. § 3.508.

⁶⁰ See Harper, *supra* note 28, at 227.

⁶¹ See Willier, *supra* note 24, at 54.

⁶² *Id.* at 56.

⁶³ N.C.A. § 2.201 suggests an alternative pattern of rates which may be adopted by the states. These are (a) a flat rate ceiling, (b) a graduated set of ceilings based on the amount financed, (c) graduated or flat rates as provided in the U.C.C.C.

⁶⁴ N.C.A. § 1.102, Comment.

car or stereo he is about to purchase and will fail to reflect upon whether or not he can obtain more beneficial credit terms from another dealer. This is especially true of the low-income buyer. As one commentator noted:

An indigent client will too often sign anything, including a document with the legend "I hereby agree to give up my right arm if I don't pay"—in sixteen point and red and gold type.⁶⁵

There is a need to protect the unsophisticated buyer, and the N.C.A.'s entry and rate sections fulfill this need by careful government regulation.

Proceeding from the issues of market entry and rates, the N.C.A. and U.C.C.C. next confront creditor practices designed to evade regulatory legislation, or provide an unfair advantage over the consumer. Once again the N.C.A., reacting to what it considered omissions and inadequacies under the U.C.C.C., responded with unmistakably consumer-oriented provisions.

A device frequently used by creditors in an attempt to evade maximum rate statutes is the inclusion of additional charges in the price of an item rather than in the finance charge. The U.C.C.C. and N.C.A. treat this problem in a similar fashion. Generally, both Acts define the finance charge as including all charges which the consumer must pay because it is a credit rather than a cash transaction.⁶⁶ Therefore, the basic price of an item would be constant regardless of the status of the sale. However, as a concession to creditors, both the U.C.C.C. and the N.C.A. exclude certain items from the finance charge. Official fees, taxes, and certain insurance and real estate charges fall under this exception.⁶⁷ The U.C.C.C., however, makes an additional

⁶⁵ James & Fragomen, *supra* note 24, at 954.

⁶⁶ N.C.A. § 1.301(17); U.C.C.C. §§ 2.109, 3.109. Inflating the base price of a product with items that are more properly finance charges is just one of several deceptive practices that frustrate the consumer in his attempt to use credit knowledgeably. Indeed, such practices became so flagrant in the decade of the sixties that Congress enacted a comprehensive statute known as the Consumer Credit Protection Act (C.C.P.A.), 15 U.S.C. §§ 1601-677 (Supp. IV, 1968), the first chapter of which (Truth in Lending Act) dealt specifically with disclosure. The C.C.P.A. was enacted some two months before the final promulgation of the U.C.C.C. and consequently raised the spectre of federal preemption of disclosure regulations. Section 1633 of the Act provides, however, that a state enacting "substantially similar" requirements may apply for exemption from the federal law, and utilize its own legislation instead. This procedure is advocated by the U.C.C.C. as the preferable solution to the preemption problem. The N.C.A. takes a different approach and incorporates the C.C.P.A. within its provisions by specific reference. N.C.A. § 2.306. By this method, the draftsmen believed they could not only avoid conflicts stemming from preemption, but also benefit the consumer by providing a choice of federal or state forums in which to seek redress for violations. It is beyond the scope of this comment to compare the C.C.P.A. with the U.C.C.C. and N.C.A. There are some differences, but invariably they take the form of more stringent requirements on the part of the U.C.C.C. and the N.C.A. For an interesting and informative treatment of the C.C.P.A. see Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 *Notre Dame Law* 171 (1970).

⁶⁷ N.C.A. § 2.202; U.C.C.C. § 2.202.

exclusion from the finance charge of "other benefits to the buyer or debtor."⁶⁸ The N.C.A. omits this phrase because it is considered too vague and could be used as a loophole to obviate the benefits which the provisions concerning finance charges were meant to secure.

Another technique employed by creditors to deceive would-be buyers is the expression of interest rates in monthly or quarterly percentages. For instance, the interest rate is advertised at 1½ percent per month instead of 18 percent per annum. Debtors often fail to make the mental computation of the annual rate and, consequently, take on obligations greater than they can afford. The poorly educated, low-income consumer is especially susceptible to this practice and, therefore, is likely to sign an agreement without realizing its full import. The U.C.C.C. and N.C.A. attempt to remedy this situation by providing for comprehensible disclosure of the finance charge to the consumer.

Both the U.C.C.C. and the N.C.A. require that disclosure be made clearly and conspicuously and in writing.⁶⁹ These legislative proposals also provide that in regard to a precomputable credit sale or loan, the creditor must disclose to the debtor the amount financed expressed as a dollar amount, the finance charge expressed as a dollar amount, and as an annual percentage rate, the number of payments to be made, the due date of the first payment, and the interval between any subsequent payments.⁷⁰ Under the U.C.C.C., however, the requirement for expressing the finance charge as an annual percentage rate is dropped if the amount of the service charge is less than \$5 when the amount financed is less than \$75, or less than \$7.50 when the amount financed exceeds \$75.⁷¹ The N.C.A. does not contain such a minimum rate exception.⁷²

The N.C.A. also provides that every consumer credit transaction must be evidenced by a single writing signed by both parties.⁷³ This writing must be set in eight-point type, and must contain a notice to the consumer in twelve-point boldface type that he should not sign the agreement if there are contained in it any blank spaces, that he is entitled to a copy of the agreement, and that he has a right to pre-pay and receive a partial refund of the service charge.⁷⁴ The reason for these provisions is to prevent confusion of the debtor through the use of multiple writings and small print.⁷⁵

It is submitted that the disclosure provisions in these proposed Acts are admirable advances in consumer protection. However, they

⁶⁸ U.C.C.C. §§ 2.202(c), 3.202(c).

⁶⁹ N.C.A. § 2.301(1)(a)(b); U.C.C.C. 2.302(a)(b).

⁷⁰ N.C.A. § 2.306 incorporated the C.C.P.A. by specific reference. See 15 U.S.C. § 1638 (Supp. IV, 1968); U.C.C.C. §§ 2.306, 3.306.

⁷¹ U.C.C.C. §§ 2.306(2)(k), 3.306(h).

⁷² N.C.A. § 2.307.

⁷³ N.C.A. § 2.302(1).

⁷⁴ N.C.A. § 2.302(3).

⁷⁵ N.C.A. § 2.302, Comment.

apply principally to the prudent credit purchaser who will understand and act wisely upon disclosed information. This group of debtors includes primarily the middle and upper class. The position of the poverty-level debtor is unlikely to be changed as a result of elaborate disclosure. This type of consumer does not usually discriminate between rates, and is less likely to act rationally upon disclosed information.

Still another method widely employed by unscrupulous creditors to avoid existing consumer safeguards is the insertion of clauses into sales and loan agreements which give the creditor an unfair advantage. This practice is usually defended on the ground that the buyer deals with the merchant on a voluntary basis and is free to accept or reject the terms of the sale. While it is conceded that this argument may have had validity when the buyer and seller stood on equal ground, it becomes untenable when viewed in the light of present bargaining positions. The consumer often assumes an inferior place to the large-scale seller or lender who is sophisticated in the legal implications of such bargainings. Consequently, both the N.C.A. and the U.C.C.C. forbid certain practices which allow creditors to obtain an unfair advantage over the consumer. For instance, the use of multiple agreements, either for the purpose of obtaining a higher credit charge than would otherwise be allowed or evading disclosure requirements, is prohibited.⁷⁶ Similarly, both legislative proposals ban the assignment of the consumer's earnings to the creditor⁷⁷ and the use of confession of judgment agreements,⁷⁸ two methods used to deprive the buyer of judicial process in the realm of debt collection.

Another creditors' device limited by the U.C.C.C. and the N.C.A. is the use of "balloon payments." This is a practice which limits the first few installments of a time-payment agreement to a minimal amount. The bulk of the obligation becomes due later in considerably larger payments. Consumers find the arrangement attractive because they can easily meet the initial payments, and feel that somehow they will be able to take care of the later payments. Too often, however, when the larger installments become due, the debtor lacks the funds to meet them and is forced to default. Under the U.C.C.C., subsequent payments are limited to no more than twice the average of earlier payments.⁷⁹ Therefore, if the first six payments are for \$10, and the next six are for \$12, the thirteenth may not exceed \$22. The N.C.A. is more restrictive and forbids installments which are not "substantially equal" in time interval and amount to the average earlier payment.⁸⁰

The use of negotiable instruments as indicia of indebtedness is yet another technique utilized by creditors to enhance their position

⁷⁶ N.C.A. § 2.413; U.C.C.C. §§ 2.402, 3.409.

⁷⁷ N.C.A. § 2.403; U.C.C.C. §§ 2.410, 3.403.

⁷⁸ N.C.A. § 2.404; U.C.C.C. §§ 2.415, 3.407.

⁷⁹ U.C.C.C. §§ 2.405, 3.402.

⁸⁰ N.C.A. § 2.402.

at the expense of the consumer. Under the Uniform Commercial Code a person who in good faith acquires a negotiable instrument for value and without notice of claims to it or defenses against it becomes a "holder in due course,"⁸¹ and takes the instrument free of any personal defenses the maker may have had against the seller.⁸² This limitation has allowed merchants to discount instruments taken in consumer transactions to financial institutions and thereby avoid the possibility of non-payment motivated by breach of warranty or other omissions on their part.⁸³ This often leaves the merchant with the money, the bank with "an enforceable obligation," and the buyer with faulty merchandise. In response to this situation, both the U.C.C.C. and N.C.A. contain sections limiting the use of negotiable instruments in consumer credit transactions.⁸⁴ The U.C.C.C. states that

[i]n a consumer credit sale or consumer lease, other than a sale or lease for an agricultural purpose, the seller or lessor may not take a negotiable instrument other than a check as evidence of the obligation of the buyer or lessee. A holder is not in good faith if he takes a negotiable instrument *with notice* that it is issued in violation of this section.⁸⁵ (Emphasis added.)

The purpose of this provision is to make it difficult for a disreputable merchant to negotiate an instrument taken in conjunction with a consumer sale. In effect, any negotiable instrument related to a consumer credit sale is in violation of the section. Established financing companies, once aware that they no longer have the immunity associated with holder in due course status, will cease doing business with merchants who fail to fulfill their obligations to customers. But there remains the possibility of a negotiable instrument derived from a consumer transaction coming into the hands of a holder *without notice* of its origins, and, therefore, making him a holder in due course and free from the personal defenses of the maker.⁸⁶ However, the drafters considered such a possibility sufficiently remote so as to preclude a more complete retraction of the policy which favors negotiability.⁸⁷

Still another loophole in this approach, through which unwary buyers may be victimized, is its restriction to credit sales.⁸⁸ The U.C.C.C. treats consumer loans separately, and thus permits a merchant to make an arrangement in which potential credit customers are

⁸¹ U.C.C. § 3-302.

⁸² U.C.C. § 3-305.

⁸³ See generally Judicial and Statutory Limitations of a "Holder in Due Course" in Consumer Transactions, 11 B.C. Ind. & Com. L. Rev. 90 (1969).

⁸⁴ N.C.A. § 2.405; U.C.C.C. § 2.403.

⁸⁵ U.C.C.C. § 2.403.

⁸⁶ See Littlefield, Preserving Consumer Defenses; Plugging the Loophole in the New U.C.C.C., 44 N.Y.U. L. Rev. 272 (1969).

⁸⁷ U.C.C.C. § 2.403, Comment.

⁸⁸ Littlefield, *supra* note 86, at 292.

referred to a finance company for the purpose of obtaining such a loan. The finance company, as the independent third party, enjoys the same immunity from personal defenses accorded to a holder in due course. Once again the merchant has the money, the creditor immunity, and the consumer the bag.

The N.C.A. plugged these loopholes by providing that: (1) no negotiable instrument may be used in a consumer credit transaction; (2) any subsequent holder is subject to whatever defenses the consumer has against the seller;⁸⁹ and (3) a creditor who makes a consumer loan and is "connected with" or "participated in" the credit sale or lease for which the loan was obtained is susceptible to any defenses the consumer might have against the seller.⁹⁰ This section prohibits the dealer from accomplishing indirectly what it could not do directly. Hence, a bank or finance agency which regularly does business with a dealer cannot escape liability for defenses which could be used against the dealer when a consumer loan has been taken for a transaction with the dealer.

It is submitted that in regard to limitations on the use of balloon payments and negotiable instruments, the N.C.A. represents a considerable improvement over the U.C.C.C. The writers of the U.C.C.C. drafted inadequate sections containing loopholes through which creditors could circumvent the protections these provisions were meant to afford the debtor. The N.C.A., through careful use of language and stricter limitations, accomplished the purpose which the U.C.C.C. unsuccessfully sought to attain.

Another major limitation imposed on credit transactions pertains to the use of security agreements. These are interests in goods or land which are taken in conjunction with a consumer credit sale or loan. In the event that the debtor fails to fulfill his obligation, the creditor can enforce these interests by repossessing and disposing of the collateral. Although secured transactions are covered by Article 9 of the Uniform Commercial Code, the note on the scope and policy of Article 9 clearly indicates that it is not intended to usurp the areas of small loans and consumer credit purchases.⁹¹ Accordingly, the U.C.C.C. and the N.C.A. found it necessary to include sections on secured interests taken in conjunction with the consumer credit sale or loan.

Generally, in a consumer credit sale the U.C.C.C. permits a seller

⁸⁹ N.C.A. §§ 2.405, 2.406.

⁹⁰ N.C.A. § 2.407.

⁹¹ U.C.C. § 9-102, Note states:

This article primarily sets out rules defining the rights of a secured party against persons dealing with the debtor; it does not prescribe regulations and controls which may be necessary to curb abuses arising in the small loan business or in the financing of consumer purchases on credit. Accordingly, there is no repeal of existing regulatory acts in those fields. . . .

to retain a purchase money security interest⁹² in goods sold. In addition:

[he] may take a security interest in goods upon which services are performed or in which goods sold are installed or to which they are annexed, or in land to which the goods are affixed or which is maintained, repaired or improved as a result of the sale of the goods or services, if in the case of a security interest in the land the debt secured is \$1000 or more, or in the case of a security interest in goods the debt secured is \$300 or more. The seller may also take a security interest in any property of the buyer to secure the debt arising from a consumer credit sale primarily for an agricultural purpose⁹³

The U.C.C.C. also provides a triggering mechanism for adjusting the dollar amounts specified above to reflect changes in the Consumer Price Index. The adjustment would take place on even numbered years in the event of a ten percent or greater fluctuation.⁹⁴ Security agreements obtained in contravention of those provisions are void.⁹⁵

The N.C.A., like the U.C.C.C., permits a security interest in the goods sold.⁹⁶ However, when dealing with goods upon which services have been performed, or land upon which improvements have been made, the required debt obligation has been raised to \$500 or more for a security interest in goods and \$3000 or more for a security interest in land.⁹⁷ The N.C.A. further provides that no security interest, other than the purchase money security interest, may be taken with respect to household furnishings, appliances and clothing of the consumer or his dependents.⁹⁸ This provision protects the consumer's personal and family necessities from being used as collateral for a transaction which covers the purchase of goods other than these household items.

The higher dollar amounts required by the N.C.A. in order to justify retention of a security interest in goods reflect the predilection of its draftsmen toward consumer interests. Surprisingly, however, there is no self-triggering device for adjusting these amounts to reflect inflation. Apparently, however, the Administrator of the N.C.A. may make adjustments according to a state's particular needs.⁹⁹ It is submitted that the U.C.C.C.'s automatic adjustment is preferable to the discretionary approach of the N.C.A.

⁹² The U.C.C. defines a "purchase money security interest" as one a seller may retain in the goods actually sold, or one a lender may acquire in goods purchased by the loan.

⁹³ U.C.C.C. § 2.407(1).

⁹⁴ U.C.C.C. § 1.106.

⁹⁵ U.C.C.C. § 2.407(3).

⁹⁶ N.C.A. § 2.416(1).

⁹⁷ N.C.A. § 3.416(5).

⁹⁸ N.C.A. § 2.416(2).

⁹⁹ N.C.A. § 6.104(1)(g).

In regard to a consumer loan, the security interest which may be taken on goods is unlimited under the U.C.C.C. A security interest in land pursuant to a consumer loan may be taken if the loan exceeds \$1000, or if the loan is less than \$1000 and the rate charged is 18 percent or less.¹⁰⁰ The N.C.A. provides that a consumer loan may only be secured by an interest in goods up to one and one-half times the amount of the principal, and in land if the obligation incurred is \$3000 or more.¹⁰¹

In the case of security interests, the retention of the credit sale-loan distinction by the U.C.C.C. makes a practical difference.¹⁰² In regard to a credit sale, the seller is limited to taking a security interest in goods only if the obligation is \$300 or more, and in land if the obligation is \$1000 or more. On a loan, the lender can be secured by an unlimited interest in goods, and, if the transaction has an 18 percent or less rate, or is over \$1000, by an unlimited interest in land. Hence, as one critic has pointed out, under the U.C.C.C. a seller of a used car for \$600 in a credit transaction could not take an interest in the buyer's land, whereas a finance company making an 18 percent loan which was used to buy a \$600 automobile could.¹⁰³

A novel area of limitation on credit sales which is included in both the U.C.C.C. and the N.C.A. pertains to home solicitation sales, or what the N.C.A. calls "consumer approval transactions." The home solicitation sale sections of the U.C.C.C.¹⁰⁴ were drafted in response to consumer complaints about the high pressure tactics of door-to-door salesmen.¹⁰⁵ The U.C.C.C. provides for a "cooling-off" period during which the buyer of goods sold on credit by personal solicitation at the consumer's residence has the right to cancel the sale.¹⁰⁶ The buyer in such a transaction may cancel the sale by written notice to the seller within three days after the sale.¹⁰⁷ Upon cancellation the buyer's only obligation is the lesser of either a cancellation fee of five percent of the purchase price or forfeiture of the down payment.¹⁰⁸

The N.C.A., on the other hand, speaks of "outside" and "inside" consumer approval transactions.¹⁰⁹ "An 'outside consumer approval

¹⁰⁰ U.C.C.C. § 3.510. For instance, the U.C.C.C. would allow a creditor extending a \$100 loan to acquire a security interest in all of the debtors household goods, his car, and whatever other personal property he might have.

¹⁰¹ N.C.A. § 2.416(3). Under the N.C.A. the creditor extending the \$100 consumer loan would, in effect, be required to appraise the consumer's personal property and restrict his security interests to goods having a total fair market value of \$150 or less.

¹⁰² See pp. 894-96 *supra*.

¹⁰³ See W. Boyd, *National Consumer Act and the Uniform Consumer Credit Code: A Comparison and Critique* (unpublished manuscript available at the National Consumer Law Center).

¹⁰⁴ U.C.C.C. §§ 2.501-505.

¹⁰⁵ U.C.C.C. § 2.501, Comment 1. See generally Littlefield, *The Home Solicitation Act of 1967*, 42 Conn. B.J. 426 (1968).

¹⁰⁶ U.C.C.C. § 2.502.

¹⁰⁷ *Id.*

¹⁰⁸ U.C.C.C. § 2.504.

¹⁰⁹ N.C.A. §§ 2.501-505.

transaction' means a consumer transaction which is initiated or consummated personally by a merchant at a place other than this merchant's place of business."¹¹⁰ The outside consumer approval transaction is not a binding contract unless the consumer affirms in writing within a three-day period after he has been notified of the manner of affirmation. During this three-day period the seller may not change the terms of the transaction.¹¹¹ If there is no affirmation, there arises no contractual obligation on the part of either party.¹¹²

The proposition that a transaction is void until subsequently reaffirmed marks a radical departure from existing law regarding the ability to contract in a face-to-face manner. The dealings with the merchant in the "outside transaction" would have to be construed as an offer to contract which is irrevocable for the three-day period following solicitation. The role of the door-to-door salesman will be altered in that he will lose the ability to consummate agreements, and instead become one who presents or offers goods. The consumer, then, takes the subsequent and conclusive part by affirming. In effect, the freedom to contract spontaneously is severely limited outside the merchant's place of business.

The N.C.A. further states that in an "inside consumer approval transaction," that is, a transaction which is initiated in the merchant's place of business and in which the dollar amount exceeds \$50,¹¹³ the consumer has three days in which he can cancel without obligation.¹¹⁴ This stipulation by the N.C.A. in the "inside transaction" resembles that of the U.C.C.C. with regard to home solicitation sales.

Again, to adopt these provisions would involve a substantial revision of contract concepts.¹¹⁵ These provisions of the U.C.C.C. and N.C.A. would also encounter much opposition by businessmen concerned with the loss of business due to such restrictions.¹¹⁶ The businesses which depend upon the door-to-door sale of a large volume of small items such as cosmetics might suffer substantially under these limitations. It is submitted that the U.C.C.C.'s treatment of home solicitation sales represents a more realistic and balanced view of merchant and consumer rights than that of the N.C.A. With regard to the N.C.A.'s section on inside consumer approval transactions, it is suggested that the dollar amount be raised to \$100 to make it more acceptable to creditor interests.

B. Insurance

The subject of insurance, although an independent area of law in itself, becomes related to the consumer transaction as a legitimate

¹¹⁰ N.C.A. § 2.501(2).

¹¹¹ N.C.A. § 2.502(2).

¹¹² N.C.A. § 2.502(1).

¹¹³ N.C.A. § 2.501(1).

¹¹⁴ N.C.A. § 2.505.

¹¹⁵ See W. Boyd, *supra* note 103.

¹¹⁶ *Id.*

and convenient means of guaranteeing payment to the creditor in the event of unforeseen circumstances such as the debtor's death or destruction of the collateral. Like other consumer-creditor transactions, the insurance requirements have been handled in ways that work to the disadvantage of the purchaser. Unfair rates due to collusion and kickbacks between insurance companies and dealers have been detrimental to the consumer. Articles 4 of both the N.C.A. and U.C.C.C. deal with insurance. The U.C.C.C. allows the creditor to charge separately for accident, health and life insurance and certain property insurance which he provides or requires in connection with a consumer credit transaction.¹¹⁷ The U.C.C.C., however, requires that certain disclosure requirements must be adhered to in regard to insurance. The creditor must inform the consumer of the cost of the insurance, as well as the consumer's option to procure insurance from an outside source.¹¹⁸ The N.C.A. provides that accident, health and life insurance coverage may be charged separately only if they are taken by the consumer on a voluntary basis.¹¹⁹ If the creditor requires insurance, this cost must be computed in the finance charge.¹²⁰ Hence, under the U.C.C.C. the creditor can require insurance and charge the consumer for it apart from the finance charge, while under the N.C.A., if insurance is mandatory, the amount of the premiums must be considered as part of the finance charge which itself is subject to maximum rate restrictions.

Both the N.C.A. and the U.C.C.C. delegate the regulation of permissible rates to the Commissioners of Insurance in the individual states.¹²¹ The N.C.A. does provide, however, rather specific guidelines for the Commissioners to follow.¹²²

The N.C.A. also provides that a creditor supplying insurance shall not receive any fee or commission either directly or indirectly as a result of his procurement of such insurance.¹²³ Thus, a "kickback" from an insurance company with whom the creditor deals would be prohibited.

C. Remedies and Penalties

Although the availability of effective means of redress is essential to the protection of the creditor and the assurance of the debtor's performance, the question has been raised as to whether or not the multiplicity of remedies available to the creditor might not produce unjust and undesirable results in many cases.¹²⁴ Both the U.C.C.C. and

¹¹⁷ U.C.C.C. §§ 2.202, 3.202, 4.104, 4.301.

¹¹⁸ U.C.C.C. § 2.202(a).

¹¹⁹ N.C.A. § 4.104(1).

¹²⁰ N.C.A. §§ 4.104, 2.202, Comment 1.

¹²¹ N.C.A. § 4.204; U.C.C.C. § 4.112.

¹²² N.C.A. § 4.204(3).

¹²³ N.C.A. § 4.110.

¹²⁴ See generally Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. Ind. & Com. L. Rev. 535 (1967).

the N.C.A. answer this question in the affirmative and limit the remedies traditionally used by the creditor.

The U.C.C.C. prohibits the creditor's use of a deficiency judgment in an installment sale if the cash price of the transaction is \$1000 or less and the creditor has repossessed or accepted the collateral as a result of the consumer's default.¹²⁵ The U.C.C.C. also bans the use of pre-judgment wage garnishment,¹²⁶ limits its use after judgment,¹²⁷ and declares that no employer may discharge an employee because he has been subjected to garnishment.¹²⁸ In addition, threats of physical harm by a creditor to enforce an agreement render that agreement void under the U.C.C.C.¹²⁹ Furthermore, if a court finds any agreement or part of an agreement unconscionable as a matter of law, that agreement or part thereof becomes unenforceable.¹³⁰

The N.C.A. is far more restrictive than the U.C.C.C. upon creditors' use of remedies. To begin with, the consumer's default is very narrowly defined under the N.C.A. This represents a change from the existing laws where the parties to a transaction provide their own definition of default in the agreement. The N.C.A. defines consumer default as the non-payment by the consumer of: (1) three successive installments; (2) any remaining balance within three months after the due date of the final installment; or (3) an amount resulting from the total of unpaid delinquent installments constituting 30 percent of the amount financed.¹³¹ No cause of action shall accrue to the creditor except upon a consumer default.¹³²

When a proper cause of action does accrue, the N.C.A. prescribes the manner in which the creditor may assert his rights. Attachment of the consumer's property before judgment is prohibited,¹³³ as is wage

¹²⁵ U.C.C.C. § 5.103.

¹²⁶ U.C.C.C. § 5.104; See also Prejudgment Wage Garnishment: Notice and Hearing Requirements Under *Sniadach v. Family Finance Corp.*, 11 B.C. Ind. & Com. L. Rev. 462 (1970).

¹²⁷ U.C.C.C. § 5.105.

(2) The maximum part of aggregate disposable earnings of an individual for a work week which is subjected to garnishment to enforce payment of a judgment arising from a consumer credit sale, consumer lease, or loan may not exceed the lesser of

(a) 25 percent of his disposable earnings for that week, or

(b) the amount by which his disposable earnings for that week exceed forty times the Federal minimum hourly wage prescribed by Section 6(a)(1) of the Fair Labor Standards Act of 1938, U.S.C. tit. 29, 206(a)(1) in effect at the time the earnings are payable.

(c) In the case of earnings for a pay period other than a week, the Administrator shall prescribe by rule a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (b).

¹²⁸ U.C.C.C. § 5.106.

¹²⁹ U.C.C.C. § 5.107.

¹³⁰ U.C.C.C. § 5.108.

¹³¹ N.C.A. § 5.103(1).

¹³² N.C.A. § 5.103(2).

¹³³ N.C.A. § 5.105.

garnishment in any form.¹⁸⁴ Satisfaction of judgment through attachment is permitted, but sale of the consumer's household furnishings, residence or other necessities is forbidden.¹⁸⁵ The N.C.A. follows the U.C.C.C. in making unconscionable agreements unenforceable, but in so doing it makes unconscionability a matter of fact rather than law, and spells out the determining criteria.¹⁸⁶ Extortionate enforcement of agreements render them void under the N.C.A., and severe civil penalties are levied upon those who engage in such practices.¹⁸⁷

The N.C.A. continues by restricting the creditors' enforcement of security interests. Upon default the creditor may either waive his security interest and seek a judgment, or proceed against the security interest.¹⁸⁸ Although non-judicial enforcement of security interests is

¹⁸⁴ N.C.A. § 5.106, Comment 1.

¹⁸⁵ N.C.A. § 5.106.

¹⁸⁶ N.C.A. § 5.107.

(3) Without limiting the scope of Subsection (1), the trier of fact shall be entitled to consider, among other things, the following as pertinent to the issue of unconscionability:

(a) The degree to which the practice unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of consumers;

(b) Knowledge by those engaging in the practice of the inability of consumers to receive benefits properly anticipated from the goods or services involved;

(c) Gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other consumers, or by other tests of true value;

(d) The fact that the practice may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;

(e) The degree to which terms of the transaction require consumers to waive legal rights;

(f) The degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction;

(g) The degree to which the natural effect of the practice is to cause or aid in causing consumers to misunderstand the true nature of the transaction or their rights and duties thereunder;

(h) The extent or degree to which the writing purporting to evidence the obligation of the consumer in the transaction contains terms or provisions or authorizes practices prohibited by law; and

(i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies in this state or elsewhere.

¹⁸⁷ N.C.A. § 5.108(1) provides that aggrieved consumers may recover triple the damages provided in § 5.304 which provides:

A consumer may recover from the person violating this Act actual and punitive damages, thirty percent of the transaction total, if applicable, or \$300, whichever is greater

¹⁸⁸ N.C.A. § 5.203(2).

¹⁸⁹ N.C.A. § 5.204; See also Non-Judicial Repossession—Reprisal in Need of Reform, 11 B.C. Ind. & Com. L. Rev. 435 (1970).

forbidden,¹⁴⁰ voluntary surrender of the collateral by the debtor constitutes legitimate repossession.¹⁴⁰

In order to proceed against a security interest the creditor must issue a complaint to which is attached a copy of the agreement evidencing the consumer's obligation. He is then required to wait fifteen days after service of process to proceed against the collateral.¹⁴¹ The consumer, during that time, may request a hearing on the issue of repossession or may cure his default.¹⁴² If the consumer chooses to cure his default by paying his current obligation, the complaint against him must be dismissed.¹⁴³ If collateral is successfully taken by the creditor, the consumer may redeem that collateral up to thirty days after service of process. Redemption is accomplished by the consumer's payment of his current obligation, together with the creditor's court costs and a performance deposit of one-third of the total obligation but not greater than three installments.¹⁴⁴

If the creditor obtains judgment for the security interests he is not entitled to a deficiency judgment unless the unpaid balance was \$2000 or more at the time of the default.¹⁴⁵ The deficiency will be determined by the difference between the fair market value of the collateral and the unpaid obligation.¹⁴⁶ This position is stricter than the U.C.C.C. which, as has been stated, allows a deficiency judgment if the cash price of the transaction exceeds \$1000.

The N.C.A., then, is far more restrictive on creditor's rights and remedies than the U.C.C.C. Garnishment, while limited by the U.C.C.C., is abolished by the N.C.A. The enforcement of security interests is a detailed process under the N.C.A., while it receives little mention by the U.C.C.C. Non-judicial repossession is still available to the creditor under the U.C.C.C., and the issues of a debtor curing his default and redemption of collateral are untreated. Nevertheless, it has been suggested that the N.C.A. approach is not necessarily more beneficial to the consumer. It has been argued that too many restrictions on creditors' rights could very possibly lead to an unconscionable reduction in the availability of consumer credit.¹⁴⁷ Of particular concern has been the elimination of wage garnishment, possibly the singularly most important collection device available to creditors.¹⁴⁸

It is submitted that these prohibitions of the N.C.A., together with the provisions on deficiency judgments, would lead to a situation in which the creditor would have high risks of non-collection upon con-

¹⁴⁰ N.C.A. § 5.205.

¹⁴¹ N.C.A. § 5.206.

¹⁴² N.C.A. § 5.207(1).

¹⁴³ N.C.A. § 5.207(3).

¹⁴⁴ N.C.A. § 5.209.

¹⁴⁵ N.C.A. § 5.211(1).

¹⁴⁶ N.C.A. § 5.212(1).

¹⁴⁷ See W. Boyd, *supra* note 103.

¹⁴⁸ *Id.*

sumer default. While this might lead him to be more careful in examining a person's credit worthiness before extending credit, it might also produce a condition in which the cost of these higher risks would be passed off to the buyer in the form of increased prices.

As creditors' remedies have traditionally been detailed and sophisticated, so conversely have consumers' remedies been vague and difficult to enforce.¹⁴⁹ In response, the U.C.C.C. and N.C.A. have drafted sections which attempt to deal with this problem. The U.C.C.C. is, again, less expansive than the N.C.A. in this regard.

The U.C.C.C. provides that in the event of the violation of certain of its provisions, such as those concerning negotiable instruments, the consumer will be free from liability for the service or finance charge, and may recover a penalty up to three times the amount of such charge.¹⁵⁰ Furthermore, the debtor is not liable for any amount charged in excess of the maximum rates.¹⁵¹ Also, when a financial institution makes a loan which exceeds 18 percent, and is unauthorized to do so according to the U.C.C.C. licensing provisions,¹⁵² the loan is void and the debtor is not obligated to pay either the principal or the finance charge.¹⁵³ Finally, for violation of disclosure requirements, a civil penalty and reasonable attorney's fees may be recovered.¹⁵⁴

The U.C.C.C. approach to consumer remedies has been criticized because it does not provide incentive for the individual to bring actions against unlawful creditors.¹⁵⁵ There is limited recovery of attorney's fees and no specific right of class action provided for.¹⁵⁶ Both of these would provide encouragement to the consumer that a suit against an unscrupulous creditor might be worthwhile.

Under the N.C.A. "any charge, practice, term, clause, provision, security interest or other action or conduct" in violation of the N.C.A. makes the transaction in question unenforceable.¹⁵⁷ An aggrieved consumer may also recover up to 30 percent of the total transaction amount as damages for violation of certain of the N.C.A.'s provisions.¹⁵⁸ Consumers may also recover attorney's fees¹⁵⁹ and institute class actions.¹⁶⁰ In addition, when the creditor engages in transactions which are void under the N.C.A., the consumer is allowed to retain any goods purchased without further obligation.¹⁶¹ The concept that

¹⁴⁹ See Felsenfeld, *supra* note 124, at 537.

¹⁵⁰ U.C.C.C. § 5.202(1).

¹⁵¹ U.C.C.C. § 5.202(3).

¹⁵² U.C.C.C. § 3.502.

¹⁵³ U.C.C.C. § 5.202(2).

¹⁵⁴ U.C.C.C. § 5.203. The civil penalty is twice the amount of the charge, but not less than \$100 nor more than \$1000.

¹⁵⁵ See W. Boyd, *supra* note 103.

¹⁵⁶ *Id.*

¹⁵⁷ N.C.A. § 5.305. See, e.g., N.C.A. § 5.108 which pertains to extortionate practices.

¹⁵⁸ N.C.A. § 5.304.

¹⁵⁹ N.C.A. § 5.307.

¹⁶⁰ N.C.A. § 5.308.

¹⁶¹ N.C.A. § 5.305.

the consumer may, in certain situations, retain the goods in addition to any other available remedies is perhaps the N.C.A.'s most radical departure from existing law. Under ordinary contract law, when a breach of contract occurs, one normally sues for expectancy or rescission. The attempt is to put the party in as good of a position as he would have been if the contract had been fulfilled, or, alternatively, to return him to the status quo. Under the N.C.A.'s provision permitting retention of the goods without obligation for a violation of the Act, the buyer not only may rescind the contract but, in addition, may receive his expectancy. This penalty would appear to be the most severe one imposed by the N.C.A.

It is contended that in reacting to what they considered inadequate consumer remedies under the U.C.C.C., the draftsmen of the N.C.A. went too far. The multiplicity of types of consumer recovery and, conversely, the limitation of creditor enforcement of debtor obligations, tend to swing the pendulum of protection too far toward the consumers. Again, the result might be the abandonment of small loans by legitimate financial institutions, or at least an increase in the price of consumer goods due to the higher credit risks. It is recommended that the N.C.A.'s section which allows the retention of the goods in addition to all other available consumer remedies be eliminated. This, it is felt, would not destroy the effectiveness of the proposed Act, and would make it more palatable to state legislatures considering its enactment.

D. Administration

Articles 6 of both the U.C.C.C. and N.C.A. provide for the appointment of an Administrator to enforce the provisions of each Act. This official's function under each proposed Act includes the conducting of investigations,¹⁰² the issuing of injunctions against violations of the Act or unconscionable practices,¹⁰³ and the procedural authority to administer the Act.¹⁰⁴ The N.C.A. Administrator, in addition, has the power to initiate class actions on behalf of consumers.¹⁰⁵ Finally, both the U.C.C.C. and N.C.A. provide for the establishment of a Council on Consumer Affairs to be appointed by the governor for the purpose of serving as an advisory board to the Administrator.¹⁰⁶

III. NEW AREAS COVERED BY THE N.C.A.

Since the U.C.C.C. is primarily legislation on consumer credit, it leaves many areas affecting the consumer untreated. The N.C.A., in response to this deficiency, attempts to span the full range of consumer protection. The most notable areas which are treated solely by the

¹⁰² N.C.A. § 6.106; U.C.C.C. § 6.104.

¹⁰³ N.C.A. §§ 6.108, 6.110; U.C.C.C. § 6.111.

¹⁰⁴ N.C.A. § 6.104; U.C.C.C. § 6.104.

¹⁰⁵ N.C.A. § 6.111.

¹⁰⁶ N.C.A. § 6.301; U.C.C.C. § 6.301.

N.C.A. are consumer credit cards, deceptive sales practices, debt collection and credit-reporting agencies.

A. Credit Card Restrictions

The vastly expanded use of credit cards has led to many legal and social problems.¹⁶⁷ In the past decade, consumers have been inundated by unsolicited credit cards through the use of the mail. Often, there has been little or no investigation into the credit responsibility of the would-be users. The result is that frequently there is injudicious use of the unrequested cards giving rise to large credit obligations that otherwise would not have been incurred. Another serious problem is assessing liability for the unauthorized use of credit cards. Many consumers who have failed to notify the issuer of a lost credit card have found themselves liable for large amounts charged by unknown persons. Since this area so profoundly affects consumers, the draftsmen of the N.C.A. felt that the rights and liabilities of the parties to credit card transactions should be defined.

In keeping with its consumer-oriented approach, the N.C.A. minimizes the cardholder's liability. Credit cards, to be "accepted" under the N.C.A., must be requested in writing by the consumer.¹⁶⁸ The effect of this provision is to prohibit unsolicited credit cards. In addition, a credit card holder is liable for the unauthorized use of his card only if (1) he accepted the card, (2) he was given notice of his potential liability, (3) the issuer had a procedure of notification upon loss, and (4) the card had a means of identifying the owner.¹⁶⁹ In any event, the liability of a consumer for the unauthorized use of his credit card is limited to fifty dollars.¹⁷⁰ The effect of these N.C.A. provisions is to shift the bulk of the loss due to the unauthorized use of credit cards from the consumer to the issuer.

It is submitted that these provisions represent an improvement. The card issuers are usually large-scale operations and are in a better position to bear the financial losses incurred from such wrongful use. However, there also arises a possibility of collusion by cardholders and third parties to defraud the issuers through the falsely-claimed loss of credit cards.

B. Limitations on Deceptive Sales Practices

The thrust of Article 3 of the N.C.A. is the prohibition of eighteen specific trade practices employed by merchants, which the drafters considered unfair and deceptive.¹⁷¹ These range from outlaw-

¹⁶⁷ See generally Bergsten, *Credit Cards—A Prelude to the Cashless Society*, 8 B.C. Ind. & Com. L. Rev. 485 (1967).

¹⁶⁸ N.C.A. § 2.601(3).

¹⁶⁹ N.C.A. § 2.603(1).

¹⁷⁰ *Id.*

¹⁷¹ N.C.A. § 3.201 states:

(1) The following unfair methods of competition and unfair or deceptive

ing the disparaging of the business of another, to the banning of false and misleading statements concerning the reasons a merchant is reducing his prices.¹⁷² The effect of these provisions is to spell out what practices of sellers are unfair and deceptive and, therefore, what would constitute actionable violations of the N.C.A. No longer can sellers defend these tactics on the ground that they are "clever advertising" or that "everyone does them." Under the N.C.A., sellers would be

acts or practices undertaken by a merchant are hereby declared to be unlawful and prohibited:

- (a) Passing off goods or services as those of another;
- (b) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
- (c) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
- (d) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (f) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (g) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;
- (h) Disparaging the goods, services, or business of another by false or misleading representation of fact;
- (i) Advertising goods or services with intent not to sell them as advertised;
- (j) Advertising goods or services with intent not to supply reasonably expectable public demand unless the advertisement disclosed a limitation of quantity;
- (k) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions;
- (l) Representing that the consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law;
- (m) Representing that a part, replacement or repair service is needed when it is not;
- (n) Representing that the subject of a consumer transaction has been supplied in accordance with a previous representation when it has not;
- (o) Representing that the consumer will receive a rebate discount or other economic benefit as an inducement for entering into a consumer transaction if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.
- (p) Causing likelihood of confusion or of misunderstanding with respect to the authority of a salesman, representative or agent to negotiate the final terms of a transaction with a consumer;
- (q) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or
- (r) Engaging in any act or practice which is unfair or deceptive to the consumer.

¹⁷² N.C.A. § 3.201. For an interesting discussion of the unfair and deceptive practices employed by unscrupulous merchants see A. Mowbray, *The Thumb on the Scale or The Supermarket Shell Game* (1967).

fully aware of what type of activity would be considered deceptive, and consumers would be able to recover punitive damages of 30 percent of the transaction total or \$300 for the employment by sellers of such practices.¹⁷³

Article 3 of the N.C.A. also provides that a seller of goods may not limit or exclude warranties implied by law such as one of merchantability or fitness for a particular purpose.¹⁷⁴ Also a seller may not disclaim the warranties provided for by the Uniform Commercial Code.¹⁷⁵ This is contrary to the "unless otherwise agreed" freedom of contract approach of the Uniform Commercial Code.¹⁷⁶

C. Debt Collection

The N.C.A. devotes Article 7 to debt collection. The drafting of this section stems from the devious methods employed by some creditors to put pressure upon delinquent debtors. Under this article the following practices are prohibited in the process of debt collection: (1) conduct constituting the illegal practice of law, such as the use of an attorney's name or stationery;¹⁷⁷ (2) threats or coercion as to physical violence or destruction of credit;¹⁷⁸ (3) harassment and abuse, such as the use of profane language or the repeated use of anonymous phone calls;¹⁷⁹ (4) unreasonable publication of facts about the consumer to his employer, family or to the general public;¹⁸⁰ (5) misrepresentation or fraud in the collection of a debt;¹⁸¹ and (6) any other unconscionable means employed to assert a claim against the debtor.¹⁸² The consumer who has been wronged by the creditor through methods prohibited under Article 7 of the N.C.A. can cancel the underlying obligation and be awarded compensatory as well as punitive damages.¹⁸³

It is felt that this section also represents a considerable advance in consumer protection. The specific civil remedies available to an aggrieved consumer provide incentive for instituting actions against unscrupulous collectors. Moreover, the possibility of such severe liability might very well act as a deterrent against the implementation of such practices.

D. Credit-Reporting Agencies

The problems arising from the dissemination of information by credit-reporting agencies are particularly acute in regard to the con-

¹⁷³ N.C.A. §§ 3.203, 5.304.

¹⁷⁴ N.C.A. § 3.302.

¹⁷⁵ U.C.C. §§ 2-313, 2-314, 2-315; N.C.A. §§ 3.301, 3.302.

¹⁷⁶ U.C.C. §§ 1-102(3), 2-314.

¹⁷⁷ N.C.A. § 7.201.

¹⁷⁸ N.C.A. § 7.202.

¹⁷⁹ N.C.A. § 7.203.

¹⁸⁰ N.C.A. § 7.204.

¹⁸¹ N.C.A. § 7.205.

¹⁸² N.C.A. § 7.206.

¹⁸³ N.C.A. §§ 7.302, 7.303.

sumer.¹⁸⁴ The consumer applying for credit generally has no knowledge of the sources of information the creditor has relied upon in deciding whether or not to extend credit. Usually the consumer has no opportunity to question the accuracy of such information, while at the same time this information is easily accessible to potential creditors.¹⁸⁵

Article 8 of the N.C.A. covers this area, and defines consumer-reporting agencies as those which report data concerning consumers for the purpose of establishing the consumer's eligibility for credit, insurance or employment.¹⁸⁶ Under the N.C.A., the consumer must be informed of and consent to reports which are made about him, and any person denying credit to a consumer must notify him as to the reason and details, if the information causing this denial was obtained from a credit-reporting agency.¹⁸⁷ The consumer may also have access to the files on him kept by a reporting agency, for the purpose of examination and correction whenever necessary.¹⁸⁸

If any reporting agency or user of information gathered or disseminated by such an agency violates the N.C.A. requirements, the consumer may recover actual damages incurred and attorney's fees.¹⁸⁹ In addition, if the consumer's reputation has been injured through the negligent reporting of false information, an action for defamation may be brought.¹⁹⁰

CONCLUSION

State legislation in the area of consumer protection has been gradual and incomplete. Hence, there is need for reform through uniform or model legislation. While the U.C.C.C. and the N.C.A. attempt to fulfill this desire, neither, as presently constituted, is satisfactory. Although the U.C.C.C. contains many admirable provisions, such as that on home solicitation sales, it is inadequate in regard to consumers' remedies and contains loopholes by which creditors can circumvent its provisions. The N.C.A. provides a far more comprehensive treatment of consumer problems. However, its main flaw is its own overzealousness. In attempting to fortify the consumer against unscrupulous creditors, it has put too many restrictions on the legitimate lender. The result of such limitations might well be the discontinuance of consumer loans by such institutions. Therefore, the consumer would be left without the readily available sources of credit he now enjoys. It is submitted that through the elimination or revision of those sections of the N.C.A. which unduly restrict creditors, the N.C.A. could become a

¹⁸⁴ See generally *Credit Investigations and the Right to Privacy: Quest for Remedy*, 57 *Geo. L. J.* 509 (1969).

¹⁸⁵ *Id.* at 512.

¹⁸⁶ N.C.A. § 8.103.

¹⁸⁷ N.C.A. § 8.201.

¹⁸⁸ N.C.A. §§ 8.202, 8.203.

¹⁸⁹ N.C.A. § 8.301.

¹⁹⁰ N.C.A. § 8.303.

thorough and balanced piece of legislation. As such it would be suitable for enactment by any state government and a long awaited consumer reform.

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