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SOME REFLECTIONS ON FREE ENTRY AND THE RATE CEILINGS UNDER THE UNIFORM CONSUMER CREDIT CODE

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"CONSUMER protection" in recent years has become one of the great populist concerns, particularly in the area of consumer credit. As one should expect, however, there has been no unanimity as to *who* should be protected from *what*, or from *whom*, nor as to the *means* of providing such protection. Some feel that consumer protection still means "self-protection" in the existing system—let the buyer beware—and view consumer education in a broad sense as perhaps the most important aspect of providing protection. Others view consumer protection as a matter outlawing or regulating abusive practices and giving the consumer more rights. Some emphasize a "litigative" response, and suggest that part of the remedy should make legal representation more available and provide more effective tools such as class actions and small claims courts. Still others suggest that the evils and abuses are not great enough to justify interference with our free market system. In sum, consumer protection appears quite amorphous, taking form depending upon how one perceives the problem. Recent literature such as Caplovitz's *The Poor Pay More* has done much to highlight and document various problems and abuses.[1] However, the title, *The Poor Pay More*, tends to obscure the fact that the problems are not limited to a certain economic strata, *i.e.*, the poor, as well as the fact that the costs are not solely monetary. The problems affect a broad segment of people not equipped or able to deal with the marketplace on its own terms.

At present, the Uniform Consumer Credit Code (UCCC) represents the approach nearest to a consensus on, or at least a tentative definition of, the "problems," and of some solutions for providing more protection in the limited area of consumer sales, consumer loans and credit, and related remedies.[2] However, the UCCC does not purport to cover all of

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1 D. CAPLOVITZ, THE POOR PAY MORE, (1967) [hereinafter cited as CAPLOVITZ].

2 The National Consumer Act, First Final Draft 1969, prepared by the National Consumer Law Center at Boston College Law School, Brighton, Massachusetts is a strong consumer dissent to the UCCC. In general the problem areas covered by the UCCC are dealt with by the National Consumer Act (NCA) although the "solutions"

what might be considered consumer protection; products liability, food and drug regulation and other areas are not within its scope.

The UCCC, controversial in many respects, has drawn criticism from practically every segment of society affected by it. Some think the UCCC goes too far. Others suggest it does not go far enough; that it permits excessive interest rates or too low interest rates; and that it does not offer enough consumer protection.[3] Perhaps the most controversial portion of the UCCC is its proposal regarding what is termed free entry, and the related structure for interest rates or finance charges which may be imposed on consumer loans, consumer credit sales, and revolving or open end charge accounts.

In viewing consumer protection in the field of consumer credit, it

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proposed frequently differ. However, the NCA is more comprehensive and covers many areas not dealt with in the UCCC such as provisions dealing with the use of credit cards, unfair and deceptive trade practices, warranties, consumer credit insurance, debt collection practices, class actions, credit reporting, etc. For discussion of the NCA see Christenson, *An Analysis of the UCCC and the National Consumer Act*, 12 B.C. IND. & COM. L. REV. 889 (1971); Kass, *Uniform Consumer Credit Code and National Consumer Act: Some Objective Comparisons*, 8 SAN DIEGO L. REV. 82 (1971); Comment, *Consumer Protection under the U3C and the NCA—A Comparison and Recommendations*, 12 ARIZ. L. REV. 572 (1971); Comment, *Limitations on Sales Agreements under the Uniform Consumer Credit Code and the National Consumer Act*, 56 IOWA L. REV. 171 (1970). Wisconsin has recently passed a comprehensive substitute to the UCCC based on the NCA. 5 CLEARINGHOUSE REVIEW 215, 739 (1971-72).

[3] For some of the critical treatment of the UCCC see Black, *State Variations of the Uniform Consumer Credit Code: The Case for Legislative Restraint*, 48 DENVER L.J. 239 (1972); Clark, *The Uniform Consumer Credit Code: Assessing Its Impact upon One State and Plugging Its Loopholes*, 18 KAN. L. REV. 277 (1970); Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53 (1969); James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V and VI*, 57 GEO. L.J. 923 (1969); Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968); Littlefield, *The Plight of the Consumer in the Uniform Consumer Credit Code*, 48 DENVER L.J. 1 (1971); Littlefield, *Preserving Consumer Defenses: Plugging the Loopholes in the New UCCC*, 44 N.Y.U.L. REV. 272 (1969); LoPucki, *The Uniform Consumer Credit Code: Consumer's Code—or Lender's Code?*, 22 U. FLA. L. REV. 335 (1970); Miller, *An Alternative Response to the Supposed Direct Loan Loophole in the UCCC*, 24 OKLA. L. REV. 427 (1971); Murphy, *Another Assault Upon the Citadel: Limiting the Use of Negotiable Notes and Waiver of Defense Clauses in Consumer Sales*, 29 OHIO S.L.J. 667 (1968); Spanogle, *Why Does the Proposed UCCC Eschew Private Enforcement?*, 23 BUS. LAW. 1039 (1968); Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO S.L.J. 624 (1968); Stengel, *Should States Adopt the Uniform Consumer Credit Code?*, 60 KY. L.J. 8 (1971); Turner, *The UCCC: A Credit Code for Business*, 60 KY. L.J. 49 (1971); Comment, *Repossession and Deficiency Judgments: Will the Consumer Credit Code Aid the Consumer or the Vendor?*, 2 CONN. L. REV. 202 (1969).

may be helpful initially to take an overview of some of the underlying assumptions and concepts. Greatly simplified, and not without disagreement by some, two basic concepts characterize our consumer credit economy. Frequently with justifiable pride, we point to our (1) free enterprise system and (2) freedom of contract, to which we pay great respect in law. In the great debate on consumer protection, one continually encounters these two concepts and the results of their operation. Vigorous attacks on and equally forceful defenses of the concepts are asserted. However, the tension produced by the operation of the concepts have been shown by both Caplovitz[4] and an economic study by the Federal Trade Commission,[5] and graphically described by the National Advisory Commission on Civil Disorders.[6] It is within this area of freedom and the resultant tension and glaring paradox that the UCCC suggest certain adjustments in the existing balance or, as some would view it, imbalance.

In theory, our system lets consumer demand dictate or determine within very broad limits what goods or credit will be supplied.[7] The

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[4] CAPLOVITZ, *supra* note 1.

[5] The Federal Trade Commission study concluded, in part, "that without exception low-income market retailers had high average markups and prices. On the average, goods purchased for $100 at wholesale sold for $255 in the low income market stores, compared with $159 in general market stores. For every product specified, low income retailers had the highest average gross margin reported. When similar makes and models are compared the differences are striking. For example, the wholesale cost of a portable TV set was about $109 to both a low-income market and a general market retailer. The general market retailer sold the set for $129.95 whereas the low-income market retailer charged $219.95 for the same set. Another example is a dryer, wholesaling at about $115, which was sold for $150 by a general market retailer and for $300 by a low-income retailer. Despite their substantially higher prices, net profits on sales for the low-income market retailers was only slightly higher and net profit return on net worth was considerably lower when compared to general market retailers." F.T.C., ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS, x-xl (1968) [hereinafter cited as FTC REPORT ON RETAIL SALES PRACTICES]. *See also* White, *Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study*, 25 BUS. LAW. 143 (1969 Special Issue); FTC ECONOMIC REPORT ON FOOD CHAIN SELLING PRACTICES IN THE DISTRICT OF COLUMRIA AND SAN FRANCISCO (1969).

[6] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 274-77 (1968 Bantam ed.)

[7] John K. Galbraith challenges this model and asserts that our economic and production system, rather than being non directed is in substantial part a planned economy. "The initiative in deciding what is to be produced comes not from the sovereign consumer who through the market, issues instructions that bend the productive mechanism to his ultimate will. Rather it comes from the great producing organization which

consumer is free to buy whatever goods he may desire, or obtain any amount of credit or loan, if he can find someone willing to sell or lend at the price and on the terms he is willing to pay—perhaps, more accurately, if the buyer is willing to "pay the price" and agree to the terms offered. Generally, the individual is free to buy what he wants, when he wants it, in whatever amounts, and on whatever terms and conditions to which he is willing to agree as long as someone is willing to sell on such terms. Whether there will be someone willing to supply such goods or services depends largely on whether supplying such wants is profitable. In some forms of government, what consumer goods will be available, as well as when they will be available, and in what amounts and on what terms, are determined largely by some central planning agency of the state, not by the individual demands or wishes of the consumer.[8] Our system does not attempt to determine how much of any type of consumer goods is enough, or to specify at what cost or sacrifice one should purchase, or to forbid the purchasing of luxury goods at the expense of denying self or family of necessities. In sum, one is free to contract as one pleases.

It is readily apparent that these two concepts do not exist in their pure form today, if they have ever so existed. The great value of the system is that it lets each individual consumer choose those goods and services he wants, and within his means determine his quality of life, by having a free choice of the goods and services he may consume. However, many are aware of the disaster such freedom can produce in the form of indebtedness, bankruptcy, unwise purchases, and the like. The system does not require that one must forego certain pleasures before going into debt.

In our system, one can choose wisely or unwisely. However, once a consumer makes a purchase, borrows money, or accepts credit, the resulting agreement, terms, or contract will be enforced by the authority and power of the state through the courts. Within very broad limits, the law does not try to determine whether the consumer paid too much,

reaches forward to control the markets that it is presumed to serve and, beyond to bend the customer to its needs." J. GALBRAITH, THE NEW INDUSTRIAL STATE, 18 (1967 paperback ed.). *See generally id.* at 208-28.

[8] Galbraith suggests that the planning in our economy is largely done by the "industrial state" rather than by the government as in the Soviet Union. *Id.* at 33-45.

whether he should have made the purchase in light of his needs or uses of his money or credit, or whether he accepted terms which were too harsh. Only very gross limits are placed on such contracts or their terms.[9]

It is important that one keep in mind that in considering consumer protection in the area covered by the UCCC we are interfering with the system and dealing with the basic concepts of free enterprise and freedom of contract as they now function. However, it is also important that one examine, at least briefly, how the individual consumer functions in this system, and what the law assumes about the individual entering into the market system. The law assumes a model that might be called the "sophisticated consumer"; that is, a consumer who is equipped to deal with the business community in the marketplace on equal terms, thus creating some equality of bargaining position and sophistication which will prevent overreaching. Some have suggested that this "sophisticated consumer" has at least three essential characteristics.[10] First, he knows that he should shop comparatively and he wants to do so. Second, he has has the ability, skill and competence to get the best value for his money. Third, he knows or is aware of his legal rights and liabilities and is prepared and able to invoke them if necessary. As one can readily see, this "sophisticated consumer" model frequently, if not commonly,

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9 The most prominent check has been through the use of "unconscionability." However, the concept has no clear boundaries, is a judicially applied principle and thus for its control effectiveness depends on a case by case application, usually through litigation and its effectiveness or value as a self applying standard to guide day to day transactions in the marketplace is certainly questionable. Indeed the price of "unconscionability" may only be that of being caught infrequently. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. Ct. of App. 1971). For discussion of the concept and the cases, see Braucher, *The Unconscionable Contract or Term,* 31 U. OF PITT. L. REV. 337 (1970); Ellinghaus, *In Defense of Unconscionability,* 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code—Consumers and the Common Law Tradition,* 31 U. OF PITT. L. REV. 349 (1970); Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485 (1967); Murray, *Unconscionability: Unconscionability,* 31 U. OF PITT. L. REV. 1 (1969); Spanogle, *Analyzing Unconscionability Problems,* 117 U. PA. L. REV. 931 (1969); Speidel, *Unconscionability, Assent and Consumer Protection,* 31 U. OF PITT. L. REV. 359 (1970). For a state by state survey see 5 CLEARINGHOUSE REVIEW 61 (1971).

10 Comment, *Consumer Legislation and the Poor,* 76 YALE L.J. 745, 748 (1967) [hereinafter cited as *Consumer Legislation and the Poor*].

is not realistic.[11] Many factors may account for this.[12] Often the experience of the consumer in the marketplace may not have shown the utility of "shopping around," or may have dulled any perception of the utility of such conduct, because experience has taught that prices do not vary. Likewise the consumer's ability to shop for the best buy may be hindered by the fact that he is primarily shopping for "credit" or may be hesistant or unwilling to deal with strangers.[13] Also, the ability to engage in comparative shopping is affected by mobility, time required, inconvenience and other factors such as children or a job which restrict the consumer's ability to shop. Further, assuming the capacity to "shop around," the ability to select the best value is restricted by lack of technical knowledge and information, as well as the difficulty of discerning differences in quality.[14] Lack of awareness of his obligation, *e.g.*, under a conditional sales contract, or of sources of help, also contribute to the inadequacy of the consumer in dealing in the marketplace.[15] The end result, as several have noted,[16] is that prices paid fre-

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[11] There appears to be some recent judicial recognition of this. *Cf.* Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *affirmed*, 405 U.S. 191; Fuentes v. Shevin, 407 U.S. 67 (1972); Berg v. Stromme, 79 Wash. 2d 184, 484 P.2d 380 (1971). There is also legislative awareness. *See* Magnuson, *Federal Developments in Product Warranty Law*, 4 UCC L.J. 279 (1972).

[12] For discussion of these factors, see *Consumer Legislation and the Poor, supra* note 10, at 748-68.

[13] CAPLOVITZ, *supra* note 1, at 50-57.

[14] *Consumer Legislation and the Poor, supra* note 10, at 751-52. Recent developments such as unit pricing are helpful to the consumer in making informed choices. However, unit pricing only provides the price per unit and does not assist the consumer in determining differences in quality. Perhaps developments under the Freedom of Information Act, 5 U.S.C. § 552 (1970) will aid in providing the consumer with technical and test data which frequently would be necessary to make an informed choice. *See, e.g.*, Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971). Recently there seems to be some relaxation by governmental agencies in permitting more technical and test data to be released to the public. *See, e.g.*, 2 CONSUMER NEWS 1 (June 1, 1972, Office of Consumer Affairs Executive Office of the President) noting an announcement by the Food and Drug Administration of a change in policy about informing consumers of data it has on file and releasing such information as safety and effectiveness data, adverse reaction and complaint data, etc.

[15] In recent years, the increased availability of legal services has had a significant effect and much of the push, particularly through litigation, for consumer protection has come through the efforts of OEO-type legal services and similar legal aid.

[16] "Thus the typical low income consumer is not a hardened penny pincher employing all his skill and ingenuity to stretch his meagre income as far as he can. He

quently are higher than those obtainable elsewhere, terms are less favorable or even quite harsh and onerous, quality is lower or poorer, service may be inadequate or non-existent, and warranties may be disclaimed or totally absent. To the extent that the consumer does not fit the model of the sophisticated consumer, he may encounter those who will take advantage of or abuse him.[17] However, as shown by recent cases, there are increasing indications that the balance is beginning to shift from a blind adherence to the sophisticated consumer model. There seems to be growing recognition that however appropriate or well adapted the Uniform Commercial Code may be for truly sophisticated commercial parties, the Code is not completely adequate for consumer transactions in the marketplace.[18]

One must therefore attempt to determine the real abuses and weigh the possible remedies against the costs or diminution of values involved in changes. After identification of the problem, the question of the cost of correcting the problem arises; the central point is made by the question—solutions have costs and there are no simple answers. However, one should realize that the benefits and costs are not easily quantified and thus not easily weighed. As lawyers, we like to recite "magnitude of the risk versus the utility of the conduct," but the formula suggests a quantification not easily measured. Likewise, the benefit of remedying consumer abuse is not so easily weighed against the cost of change in our system of free enterprise and freedom of contract. Many factors must be weighed—it is not all take and no give, or vice versa.

Further, identification of problem areas is quite difficult. Although in some areas the magnitude of the problem has been demonstrated at

is an increasingly frustrated and embittered man, with $10,000 desires, $5,000 essential needs, and $2,000 income, alternately groping for a standard of living he cannot possibly afford and resignedly paying exorbitant prices for his daily essentials." *Consumer Legislation and the Poor, supra* note 10, at 754. Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 396 (1966).

17 It is quite easy at this point to say that the consumer has permitted himself to be taken advantage of and that he should protect himself as that is the way the system works. But can all of the "problems" be so easily dismissed or ignored? Should we permit the system to have such effects and results? In part, these are the questions the UCCC is asking.

18 Fuentes v. Shevin, 407 U.S. 67 (1972); Adams v. Egley, 338 F. Supp. 614 (S.D. Calif. 1972) (repossession by self-help unconstitutional). *But see* Ollen v. Bank of America, 342 F. Supp. 21 (N.D. Calif. 1972) (repossession by self-help not "state action"). *See also* cases cited *supra* note 11.

least in specific localities or populations,[19] must the abuses be ignored until the scope or extent of the problem can be empirically demonstrated? Clearly it would be hard to justify interfering with the system to solve a non-existent problem. However, once areas of abuse are identified, those opposing solutions because the extent or magnitude of the problem has not been established should bear some responsibility for obtaining such necessary evidence. Empirical data would, of course, be of value in weighing the costs and, without rejecting the desirability and value of such data, one should realize that the considerations which must be weighed in consumer protection are not all quantifiable and of necessity must involve some value judgments and guess work. One may easily say that it is not time to consider consumer legislation because the extent of the problem has not yet been established; the "cure should not be worse than the cough." But one must ask, how much abuse must there be in a given area before it hurts too much? Does it become a problem only when it hurts enough of the power structure or other vested interests, or when it affects a certain percentage of the population? The traditional arguments for the values of free enterprise and freedom of contract will be encountered but at some point it seems that society must consider some of the values of paternalism or make some paternalistic judgments that enough is enough. The UCCC has identified some of the problems, and has suggested changes and solutions in these problem areas.

This paper will attempt to examine some of the values, objective data, guesswork, and assumptions which are involved in what is perhaps the most controversial part of the proposed Uniform Consumer Credit Code, the "freedom of entry provisions" and the related interest rate structure. Unfortunately, there has been little critical comment opposing free entry and the related rate structure, as most of the writing has been highly favorable.[20] Yet one cannot help but believe that critical

[19] *See, e.g.*, CAPLOVITZ, *supra* note 1, at 137-54, 155-69 ("Shady" Sales Practices), (consequences of missed payments and repossession); FTC REPORT ON RETAIL SALES PRACTICES, *supra* note 5, at 33-34 (judgments, garnishments and repossession); Project, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968).

[20] *See, e.g.*, Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81 (1967); Warren, *The Uniform Consumer Credit Code*, 24 BUS. LAW. 209 (1968); Benfield, *Interest Ceilings and the Uniform Consumer Credit Code*, 56 A.B.A.J. 946 (1970). Perhaps the most persistent and strongest critic has been Harper *See* Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53 (1969); Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 BUS. LAW. 227 (1968).

treatment would be beneficial. On the other hand, perhaps the unanimity which the proposal has met is indicative of its strength, though many are skeptical of good theories working in practice.

To a large extent, the two camps in consumer protection, *i.e.*, the "business interests" and the "consumer advocates," agree there should be consumer protection and even agree on some of the problems. The areas of difference are largely in the means of remedying these problems. In our system the roles played by the various interest groups are important in arriving at a sound balance and solution.

The UCCC represents a strong consensus on problem areas which exist in the commercial law and practice as it relates to consumer credit. Some of the identified problems exist because of specific sanction given by existing law such as the Uniform Commercial Code; others exist because there is no specific law or regulatory control, or because they are the product of agreement or freedom to contract. In a broad sense much of the UCCC is regulatory or modifies contract law and restricts private contractual arrangements in consumer transactions. It is indicative of a recognition that some practices are not to be left to bargaining between the parties. But beyond this changing of some of the rules, the UCCC suggests some basic changes in the structure of consumer credit itself by providing who should be able to play the game under the new rules. As noted earlier, the most controversial portion of the UCCC is its proposal on free entry and the related interest rate structure for consumer loans and credit sales. It is unfortunate that the debate on this issue, not always informed or enlightened, has tended frequently to obfuscate some of the real merit of the UCCC apart from the free entry concept; there are many important provisions of the UCCC apart from free entry. However, it has been quite easy to oppose the UCCC for various reasons, *e.g.*, that it is too pro-business or too pro-consumer, and to gain fairly wide support in opposition if the argument is cast in terms of free entry and the exorbitant interest rates the UCCC would permit. It is quite convincing to many to note that the UCCC permits interest rates of 36% and to compare this to the 12% or 8%, or whatever may be the apparent limit.[21] Hopefully, a decision to adopt or not adopt the UCCC will not be made on such a basis, but it is such uninformed, simplistic argu-

[21] *Apparent* interest limit is used here as there is a common misconception that the general usury statutes are the interest ceilings for all loans but, in fact, in practically all states much higher rates may be charged on some loans or other credit such as "small loans." See discussion p. 259 *infra*.

ment which frequently appears as a smokescreen. This is not to suggest, however, that one cannot with good reasons oppose adoption of the UCCC, but is merely a plea for informed judgment.

Some of the basic assumptions of the UCCC stated in the prefatory note to the official text merit consideration.[22]

> First, the successful American way of permitting competition to determine prices of non-monopoly commodities and services should also be allowed to apply to the pricing of money and credit;
>
> Second, usury laws imposing inflexible price ceilings on money and credit are historical vestiges of the erroneous supposition that emperors, kings and governments could effectively fix all prices; the need to escape the rigidity of usury laws has led to special laws, which only the expert can find or understand, for most types of credit transactions requiring a charge higher than the usury rate;
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> * * * *
>
> Fourth, for competition effectively to determine the pricing of money and credit requires:
>
> a. for credit grantors, relatively easy entry into the market to avoid monopoly;
>
> b. for knowledgeable and sophisticated credit recipients, eliminating or at least minimizing controls;
>
> c. for the protection of less knowledgeable and less sophisticated credit recipients:
>
> 1. uniform disclosure of the costs and terms of credit to permit informed judgments as to whether or not to use credit, to facilitate "shopping for credit," and to enable the forces of competition to work freely;
>
> 2. ceilings on the price of credit, restrictions on creditors' rights and remedies, and enhancements of debtors' rights and remedies sufficient to prevent overreaching by creditors without unduly limiting the availability of credit;
>
> 3. administrative powers and self-executing judicial remedies ample to assure compliance with statutory requirements;
>
> 4. enough financial resources available to the Administrator to enable him effectively to exercise the powers of his office; and

[22] A not insignificant assumption was that "consumer credit legislation should be contained in one law so that any attorney can quickly and effectively advise his consumer client." Prefatory Note, Official Text of the UCCC. Any attorney who has had to deal with the scattered provisions affecting a consumer transaction and the multiple statutory regulations for various types of loans and credit which prevail in most states, can readily appreciate the merit of unification. Perhaps, too, the attorneys for lenders and creditors would appreciate unification!

5. a broad-gauged Advisory Council to advise the Administrator in the exercise of his powers in the interests of our entire society and economy.

In preparing this draft on these assumptions, the Special Committee has recognized that:

a. A combination of too low ceiling rates, too substantial restrictions on creditors' rights and remedies, or too great enhancement of debtors' rights or remedies, might deprive the less credit-worthy of lawful sources of credit and drive them to "loan sharks" and other illegal credit grantors in whose hands they will enjoy no legal protections; it was to remedy the "loan shark" evil that the Russell Sage Foundation proposed its Uniform Small Loan Laws; and

b. the provisions governing ease of entry into the market, uniform disclosure of costs and terms, rate ceilings, restriction of creditors' rights and remedies, enlargement of debtors' rights and remedies, and powers granted to the Administrator are so inextricably interrelated that any substantial change in one area requires a major review of the balance struck in all other areas.

Examining the first assumption of permitting competition to set the price of money and credit (*i.e.*, interest or finance charge), as is the "American Way" for other commodities such as food and clothing, it becomes clear that the UCCC does not adopt this concept in full and does not propose to allow the forces of competition to set freely the price of money or credit regardless of how high this level may be. The UCCC does set limits on the price of money and credit.[23]

Traditionally, governments have set limits on the price of money for various reasons.[24] The UCCC departs from this tradition to a limited extent, but shrinks from adopting the free pricing of money by retaining ceilings on interest charges. It is important to note that the UCCC does not purport to set interest rates or the price of money and credit, but only to set ceilings.[25] In the view of the economists, deciding where

[23] For discussion of the interest ceilings see p. 259 *infra*. The UCCC has generally parallel provisions for consumer loans and consumer credit sales with Article 2 covering credit sales and Article 3 consumer loans. The National Consumer Act attempts to unify the provisions for both credit sales and consumer loans, eliminating some of the duplication of the UCCC, by bringing both sales and loans under the definition of "consumer credit transaction" in § 1.301(10).

[24] This has been true almost as far back as recorded history goes. *See* ROBINSON & NUGENT, REGULATION OF THE SMALL LOAN BUSINESS, 13-31 (1935).

[25] See UNIFORM COMMERCIAL CODE § 2-201, Comment 1 [hereinafter UNIFORM COMMERCIAL CODE is cited UCC].

to draw the ceiling on the price of money necessarily involves certain segments of borrowers or risks and is, in effect, deciding that those risks, costs of which are above the permissible ceiling, will be eliminated from the legitimate credit market.[26] Thus for those risks or borrowers whose costs are above the ceiling there would be no legitimate source of money or credit; under a completely free credit market, money would be available to that risk or class of risks if such borrowers would be willing to pay the high price. Presumably there would be a lender if a profit could be made. In this respect the UCCC does not actually reject the traditional view that the price of money must be controlled, but merely draws the ceiling at a different level from that which has been traditional.[27] Too, the change may be more apparent than real.[28] The theory of the UCCC is that within the proposed fairly high rate ceilings, competition will determine the price and, hopefully, keep the price of money and credit below the rate ceiling.[29]

To stimulate the competition among lenders which the UCCC contemplates as the primary mechanism to control the price of money, the UCCC suggests several basic changes. First, the UCCC attempts to eliminate the segmentation of the credit market. This segmentation of the supplier market has developed as has the market, itself; as new forms of credit and loans have developed, new piecemeal regulatory legislation has been passed to deal with the new segment.[30] This can be seen in Virginia where varying restrictions and regulations apply to the different types of credit or loans. For example, small loan companies are subject to one pattern of regulation and rates;[31] banks to another;[32] savings and

26 Johnson, *Regulation of Finance Charges on Consumer Instalment Credit*, 66 MICH. L. REV. 81, 106-09 (1967).

27 See p. 259 *infra*.

28 See p. 259 *infra*.

29 See discussion p. 267 *infra*.

30 B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION, 1-4 (1965) [hereinafter cited as CURRAN].

31 *See* Small Loan Act, VA. CODE ANN. §§ 6.1-244 through 6.1-309 (1966). By the Act, small loan companies may make loans not exceeding $1,000, and impose a rate not exceeding 2½ percent per month on the unpaid principal not in excess of $300 and 1½ percent per month on remaining balance to $1,000 or in lieu of this a rate not exceeding $17 per $100 per year on the first $300, $12 per $100 per year on the remaining balance, §§ 6.1-271(1)(2), 6.1-272. The State Corporation Commission has the authority to reduce rates below these ceilings, § 6.1-271.

32 *See* Virginia Banking Act, VA. CODE ANN. §§ 6.1-3 through 6.1-309 (1966). *See also*, Haymes & Phillips, *The Banking Structure of Virginia*, 25 WASH. & LEE L. REV. 20 (1968). Various statutes regulate the interest and finance charges which banks may

loan associations to another;[33] industrial loan companies to another;[34] credit cards to still another,[35] and so on for the various types of credit or loans.[36] Most significant is the fact that the regulation applying to one segment may be more restrictive than that applying to another, or preclude one type of lender from competing with another.[37] The theory behind the UCCC holds that these are artificial barriers to competition among the various vendors of credit that should be removed to enable all sellers of credit and money to compete with each other. For example, a consumer seeking to purchase a refrigerator for $200 should be able, assuming he is fairly credit-worthy, to obtain credit from either the merchant, a small loan company, a finance company, a commercial bank or perhaps a savings and loan association or credit union. The idea is that each vendor of credit[38] should be free from legal requirements and restrictions. These include limits on interest charges he may impose, and limits on the geographical location at which the vendor may operate, limits on the amount, type, and duration of loans that he may make, all of which inhibit the ability to compete with other credit vendors.[39] In theory, each vendor of credit would then be able to compete, perhaps at varying interest rates within the high ceiling set by the UCCC,

impose. *See, e.g.*, VA. CODE ANN. §§ 6.1-320, 6.1-321, 6.1-361, 6.1-319.1 (1966). Banks may also be subject to various federal regulations and restrictions.

[33] *See* Virginia Savings & Loan Act of 1972, VA. CODE ANN. §§ 6.1-195.1 through 6.1-195.76 (Supp. 1972). Various statutes regulate the charges each association may impose. *See* VA. CODE ANN. §§ 6.1-195.13, 6.1-195.17, 6.1-319 (Supp. 1972).

[34] *See* VA. CODE ANN. §§ 6.1-227 through 6.1-242 (1966). The finance charges ceilings are set by §§ 6.1-234, 6.1-234.1.

[35] VA. CODE ANN. § 6.1-362 (Supp. 1972) effective January 1, 1973 provides that a seller or lender under an open end credit plan may, under specified conditions, collect a service charge not exceeding 1½ percent per month on either (1) average daily balance or (2) balance existing on the last day of the fiscal month or any other balance which does not give a charge exceeding that of (1) or (2).

[36] *See, e.g.*, restrictions on charges on insurance premiums, VA. CODE ANN. § 38.1-740 (1950) and on insurance agents for credit on policy premiums, § 38.1-313.1.

[37] For example, small loan companies are generally tightly restricted in the amount and duration of a loan but are permitted relatively higher rates than banks which generally are not as tightly restricted as to amount and duration of consumer loans. NATIONAL CONSUMER FINANCE ASSOCIATION, THE CONSUMER FINANCE INDUSTRY, 28 (1962) [a monograph prepared for the Commission on Money and Credit, hereinafter cited as CONSUMER FINANCE MONOGRAPH].

[38] Vendor of credit as used here includes not only those who sell goods on credit but also those who "extend" credit by making a loan.

[39] For a thorough state by state analysis of legislation regulating lender credit and vendor credit, *see generally* CURRAN, *supra* note 30, at 15-123.

for the particular loan in question whether it is for a $200 refrigerator, a $4,000 car, or other need.

To bring about this desired atmosphere of competition, the UCCC proposes several significant changes in the existing consumer credit structure. First, for most creditors extending consumer credit or making consumer loans,[40] the UCCC would eliminate the existing limitations on interest or finance charges and substitute its own ceiling rates.[41] The UCCC would also displace existing limitations on the amount or duration of credit by sellers and most lenders[42] but would impose some restriction on the duration of certain small loans.[43] This would mean basically that each creditor, regardless of whether it is a small loan company, commercial bank, seller of goods or whatever would be subject to the same limitations on interest or finance charges and amount and duration of the loan or extension of credit.[44] For *the same type* of loan or credit, each vendor of credit or lender of money would have the same competitive advantage with respect to the three factors of amount, interest ceiling and duration. Thus some creditors now subject to limitations, for example, as to amount of loan or duration, would be free from such restriction, and under the UCCC would be able to compete in areas that now are foreclosed. A significant aspect of freedom of entry permits *existing* creditors now restricted to a certain segment of the credit or loan market to compete against other creditors in other segments.

40 "Consumer credit sale" is defined in UCCC § 2.104, and a consumer loan is defined in UCCC § 3-104. As noted earlier, there are parallel sections of the UCCC covering consumer credit sales and consumer loans.

41 UCCC § 1-108(1). The UCCC does not apply to extensions of credit to governmental agencies, sales of insurance (other than consumer credit insurance covered by Article 4 of the UCCC), transactions under tariffs of public utilities or common carriers whose rates are regulated or to pawn brokers. § 1-202. For treatment of the exemptions from the coverage of the UCCC, see Miller, *The Basic Exclusions from the UCCC: A Roadmap for Traversing A New World With Oblique Guides,* 43 U. Colo. L. Rev. 269 (1972).

42 UCCC § 1-108(2) and Comment 4. Note however by UCCC § 1-108(4) that for "supervised financial organizations" the UCCC does not displace existing limitations on amount of a loan to a single borrower or the ratio of a loan to the value of the collateral or the duration of a loan secured by realty or other similar restrictions designed to protect depositors. See § 1-108(4), Comment 6. "Supervised financial organizations" are defined by § 1-301(17) and include commercial banks, savings banks, savings and loan associations and credit unions. See Comment to subsection 17.

43 UCCC § 3-511.

44 Whether each lender would be subject to the same interest ceiling would depend upon whether a lender qualifies to make "supervised loans." See discussion *infra* p. 273.

In addition, other sections of the UCCC are designed to permit new lenders and vendors of credit to enter the market by eliminating barriers to entry. Free entry is important to those creditors or lenders who want to expand their operation to other geographic areas or locations or to new creditors who want to begin in a given location. Many states traditionally have restricted entry into the lending business.[45] Generally, these restrictions, aside from requirements as to financial stability and good character, have taken the form of a convenience and advantage requirement.[46] Thus a lender desiring to enter the loan market at a new location has had to establish to the satisfaction of the regulatory agency that the public interest would be served by a license. Virginia has such restrictions.[47] The UCCC would make substantial changes in these requirements, but before examining the UCCC provisions on this, a brief look at the rate structure of the UCCC is helpful.

While the basic interest rate ceiling of the UCCC is 18 percent per year,[48] the UCCC establishes a category of lenders who may make "supervised loans" at rates exceeding 18 percent per year. Under Section 3-508 a "supervised lender" may impose a finance charge not exceeding 36 percent per year on the unpaid balance of $300 or less, 21 percent on the unpaid balance more than $300 but not exceeding $1,000, and 15 percent on the unpaid balance exceeding $1,000. In lieu of this graduated scale, a "supervised lender" may charge 18 percent per year on the unpaid balance of principal.[49] Commercial banks, savings banks, savings and loan associations and credit unions will generally qualify automatically to make "supervised loans" without licensing or regulation additional to that to which they are presently subject.[50] For other

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45 *See* note 135 *infra*.

46 *See* note 135 *infra*.

47 *See, e.g.*, VA. CODE ANN. § 6.1-13 (1966) (Commercial banks—"public need" for banking facilities). By § 6.1-228 industrial loan associations are subject to the same restrictions as commercial banks; §§ 6.1-195.47, 6.1-195.48 (savings & loan associations—"public need," "convenience and advantage"); § 6.1-256 (small loan companies—"convenience and advantage").

48 By UCCC § 3-201 a lender may receive a loan finance charge, calculated according to the actuarial method, not exceeding 18% on the unpaid balance and this may be by way of "add-on," discount or otherwise. Certain minimum fees may be charged as authorized by § 3-201(4)(c). Certain additional charges, in addition to the loan finance charge, are authorized by § 3-202 and delinquency charges, deferral charges, and charges on refinancing or consolidation are also authorized. §§ 3-203, 3-204, 3-205, 3-206.

49 UCCC § 3-508(2)(b).

50 Under UCCC § 1-301(17) such institutions are "supervised financial organizations"

creditors to be authorized to make "supervised loans," they must be licensed by the Administrator, who is established by the UCCC and endowed with certain administrative, quasi-judicial and legislative functions.[51] For an applicant to obtain this license, the Administrator must find that the "financial responsibility," character and fitness of the applicant, and of the members thereof (if the applicant is a co-partnership or association) and of the officers and directors thereof (if the applicant is a corporation), warrant belief that the business will be operated honestly and fairly within the purpose of the UCCC.[52] Thus the basic test for licensing to make supervised loans is "financial responsibility, character and fitness" without the common "convenience and advantage" requirement.[53] One should note that as to credit sales and non-supervised loans, the UCCC establishes no licensing requirements.[54] Beyond this basic test the official UCCC has no other restrictions, such as on geographical location, multiple offices, and transfers. The UCCC would also permit a licensee to conduct another business at the location where he makes supervised loans.[55] For example, a merchant could operate a loan business from the store where he sells goods. Licenses may, of course, be revoked or suspended for repeated and wilful violations of the Act or for grounds which would have justified refusal to

and by § 3-502 are authorized to make "supervised loans." See UCCC § 3-502, Comment 1, and Comment to subsection (17) of 1-301.

[51] UCCC §§ 3-502, 3-503. For provisions dealing with the authority and responsibility of the Administrator, see Article 6 of the UCCC. *See also* Curran, *Administration and Enforcement Under the UCCC*, 33 LAW & CONTEMP. PROB. 737 (1968).

[52] UCCC § 3-503(2).

[53] Elimination of any "convenience and advantage" requirement, along with the disclosure requirements of the UCCC, is designed to stimulate competition and to reduce the likelihood of monopoly. *See* UCCC § 3-503, Comments 1 and 2. These provisions are basic to "free entry" and the concept that competition will set the interest rate. See discussion p. 268 *infra*.

[54] See UCCC § 3-503, Comment 1. At least one writer has suggested that institutions making credit sales should be subject to supervision, although they presently are not regulated, fearing emergence of "sales sharks." *See* Shay, *The Uniform Consumer Credit Code: An Economist's View*, 54 CORNELL L. REV. 491, 499, 516-22 (1968) [hereinafter cited as *Shay*].

[55] UCCC § 3-512. Three of the states which have adopted the UCCC, Oklahoma, Colorado and Idaho, have rejected the official text of § 3-512 and adopted "brickwall" amendments which would prohibit making of supervised loans at the same location a business selling goods is conducted. *See* CCH CONS. CREDIT GUIDE ¶ 5252. One of the fears is of "tie in sales," *i.e.*, compelling the borrower to make purchases, perhaps at inflated prices, of goods to obtain a loan.

grant a license.[56] Licensees under the official UCCC thus appear free to conduct business without restriction as to location, branches, and other such factors.[57] However, one should note that other supervised lenders such as commercial banks, savings and loan associations, credit unions and savings banks may not enjoy this freedom of movement because they are not exempt by the UCCC from the restrictions, such as convenience and advantage, in their existing regulatory framework.[58] The main beneficiaries thus will be small loan companies, perhaps industrial loan companies, merchants and new lenders who want to get into the loan field.

The third significant aspect of free entry under the UCCC is disclosure.[59] Basic to the UCCC approach is the idea that if competition is to work in setting the price of money, then the consumer-borrower must be informed and be free to choose between competing sellers of money or credit. The UCCC adopts the approach that competition works in regulating the price of goods; therefore it requires the seller of money or credit to disclose the price and cost of money and leave the informed borrower to shop and choose the price suitable to his taste. To implement this, the UCCC would require lenders to disclose, before the credit sale or loan is made or the revolving charge account opened, the interest rate and other technical information in standardized terminology.[60] The disclosure requirements of the UCCC generally are the disclosures already required under the Federal Consumer Credit Protection Act's "Truth in Lending" provisions.[61] Of prime importance, the annual percentage rate must be disclosed to the borrower.[62]

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56 UCCC § 3-504. Licensees are also required to file annual financial reports, § 3-505.

57 Several of the states adopting the UCCC have amended § 3-504 to require a license for each place of business. *See* CCH CONS. CREDIT GUIDE, ¶ 5243.

58 UCCC § 1-108 and Comments thereto. *See also supra* note 47 for Virginia restrictions on these organizations.

59 The disclosure provisions for credit sales are found in UCCC §§ 2-301 through 2-313 and for consumer loans are in UCCC §§ 3-301 through 3-312. *See generally*, Jordan and Warren, *Disclosure of Financial Charges: A Rationale*, 64 MICH. L. REV. 1285 (1966).

60 *See, e.g.*, UCCC §§ 2-304, 2-310, 3-304, 3-309, 3-310.

61 The disclosures required by the UCCC are designed to comply with the Truth in Lending requirements and a state adopting the UCCC *may* be able to obtain exemption from most of the federal regulation under § 125 of the Consumer Credit Protection Act, 15 U.S.C.A. § 1633 (1972). *See* CCH CONS. CREDIT GUIDE, ¶ 30,000 (Federal Reserve Board Letter, December 26, 1968). Oklahoma, which has adopted the UCCC, has been granted exemption from most of the requirements of Truth in Lending, CCH CONS. CREDIT GUIDE ¶¶ 2256, 3681.

62 UCCC §§ 2-304, 3-304.

The disclosure requirements are designed to give the consumer the information needed to shop wisely for credit by comparing, and in the case of a credit sale, by comparing the cost of the use of credit with the cost of a cash purchase. Both the UCCC, and the Truth in Lending Act with Regulation Z, contain detailed requirements of what is included in the finance charge, and how the charges, interest, and so forth, are calculated.[63] Although these provisions are quite detailed and technical, they are thought necessary to insure accuracy and to prevent loopholes and resulting evasion of the disclosure requirements.

Although the above changes are the heart of free entry, there is a fourth major area in which the UCCC proposes significant changes in what might be termed Limitations on Creditor's Rights and Remedies. As suggested by the prefatory note to the UCCC, these limitations are "inexorably interrelated" with free entry and the rate structure. To appreciate the balance which the UCCC has struck it is helpful to review briefly the major limitations on creditor's remedies proposed by the UCCC.

In consumer credit sales[64] having a cash price of $1,000 or less, where the seller has retained a security interest in the goods sold, the seller upon default must elect to either (1) repossess or voluntarily accept the goods, in which event the buyer is not liable for the unpaid balance of the debt, or (2) sue on the debt and waive the security.[65] However, the creditor may not do both.[66] Another substantial limitation on creditor remedies appears in Section 5-104 which provides that "prior to entry of judgment in an action against the debtor arising from a consumer credit sale, a consumer lease or a consumer loan, the creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings." Thus, in those states where prejudgment garnishment or like remedy exists, the UCCC would prohibit prejudgment garnishment of wages for a debt arising out of a consumer credit transaction.[67] In addi-

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63 *Id. See generally* Part 3 of Articles 2 and 3 of the UCCC.

64 UCCC § 2-104.

65 UCCC § 5-103 and Comments 3 and 6.

66 *Id.* In some credit sales, the seller may have obtained a security interest in other goods, not the subject of the credit sale, to secure the credit sale. The same election on default would also apply to that security interest, UCCC § 5-103(3)(6). Under subsection (6) obtaining judgment seems to be the election if the creditor sues on the debt.

67 The UCCC *may* be doing no more than is required by Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969). *See* Smith, *Sniadach and Summary Procedures: The Constitution Comes to the Marketplace*, 5 IND. LEGAL F. 300 (1972).

tion, Section 5-105 also places certain restrictions on the post-judgment garnishment of earnings based on a judgment arising from a consumer credit transaction. For example, the amount of disposable earnings which may be subjected to garnishment for a judgment based on a consumer credit sale or loan may not exceed 25 percent or the amount of dispensable earnings in excess of 40 times the minimum hourly wage, whichever is less.[68]

To provide other protections to the consumer, several sections of the UCCC would significantly change the existing law in many states. One of these, Section 2-403, prohibits the seller from taking a negotiable instrument other than a check in a consumer credit sale. This is designed to eliminate the "holder-in-due course problem" which has been much discussed.[69] Briefly, the problem arises out of the frequent merchants' practice of taking a negotiable instrument as evidence of the balance due on a credit sale. The merchant then sells or discounts the note to a bank or finance company to obtain his money promptly. Under the traditional law of negotiable instruments, the bank or finance company takes the note as a holder-in-due course and is free from most defenses and claims the purchaser (maker of the note) might have against the seller. The purchaser is obligated to pay the bank or finance company regardless of whether the seller has performed his contract with the purchaser.[70] For example, a purchaser who buys a used car and later refuses to make payments because it is defective could still be forced to pay the bank the balance due and could not, when sued on the note by the bank, show as a defense to payment that the car was defective or that he had been cheated by the seller.[71] In contrast, under the UCCC

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68 UCCC § 5-105. The minimum wage is calculated under the Federal Fair Labor Standards Act, 29 U.S.C. § 206(a)(1) (1970) which currently is $1.60 per hour. Section 5-105 is based on the wage exemption of the Consumer Credit Protection Act, 15 U.S.C.A. §§ 1672, 1673 (1972) but the exemption is increased to forty times the minimum hourly wage in consumer transactions.

69 *See, e.g.*, Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177, Murphy, *Another Assault on the Citadel: Limiting the Use of Negotiable Notes and Waiver of Defense Clauses in Consumer Sales*, 29 OHIO S. L.J. 667 (1968). Comment, *Judicial & Statutory Limitations on the Rights of a "Holder in Due Course" in Consumer Transactions*, 11 B.C. IND. & COM. L. REV. 90 (1969). Note, *Unico v. Owen: Consumer Finance Companies as Holders in Due Course Under the UCC*, 54 VA. L. REV. 279 (1968); Note, *Holder in Due Course—A Memo to Poverty Lawyers*, 22 RUTGERS L. REV. 281 (1968).

70 UCC § 3-305.

71 *Id.* Fraud in the factum would be a real defense against the holder-in-due course but fraud in the inducement is not a real defense. See UCC § 3-305, Comment 7.

the bank or finance company would be subject to defenses or claims the buyer has against the seller to the extent of the buyer's remaining obligation or debt at the time the defense or claim is asserted against the bank or other holder.[72]

The UCCC also provides for certain restrictions on the taking of security in consumer credit transactions. In a consumer credit sale, the seller may take a security interest in the goods sold but only in limited circumstances may the seller take additional security in other property.[73] If the goods sold have become affixed to or closely connected to other property, then a security interest may also be taken in that property if the debt secured is substantial, *i.e.*, $1,000 in the case of a security interest in land and $300 in case of a security interest in other goods.[74] In some situations cross collateral is permitted and the seller may secure the debt in a consumer credit sale by a security interest in other goods if the seller has an *existing* security interest in those other goods. The seller may also contract for a security interest in property sold to secure a previous debt.[75] For supervised loans in which the principal is $1,000 or less, a lender may not contract for an interest in land as security.[76] There are other provisions prohibiting the taking of a wage assignment for payment or as security for payment of a consumer credit loan or credit sale, although revocable payroll deductions would be permitted.[77] Confession of judgment on claims arising out of consumer credit sales or loans also would be prohibited.[78]

An important consumer protection provision is the "cooling off period" in home solicitation sales.[79] In such credit sales, the buyer has

72 UCCC §§ 2-403, 2-404, Alternative A. Alternative B of § 2-404 provides in effect that an assignee, not related to the seller, who gives written notice of the assignment to the buyer, may enforce the waiver of defense clause as to claims and defenses which arise within three months after notice of the assignment is mailed, unless the buyer gives written notice of the claims or defenses within three months of the mailing of the notice of assignment. Claims or defenses arising after the three months apparently may still be asserted against the assignee. See UCCC § 2-404, Comment to Alternative B.

73 UCCC §§ 2-407, 2-408.

74 UCCC § 2-407.

75 UCCC § 2-408. Section 2-409 has important provisions dealing with the application of payments to release security when there is cross collateral and is designed to avoid the problems encountered in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

76 UCCC § 3-510.

77 UCCC §§ 2-410, 3-403.

78 UCCC §§ 2-415, 3-407.

79 UCCC §§ 2-501, 2-502. Note that for the "cooling off" period there must be a

the right to cancel the sale until midnight of the third business day after the buyer signs the agreement or offer to purchase.[80] Upon a timely and proper cancellation, the buyer is entitled to a refund of the cash down payment, and return of any trade-in. However, the seller may retain a cancellation fee of 5 percent of the cash price, but this cannot exceed the amount of the cash down payment.[81] There is also a three-day "cooling off period" under Section 5-204 in a consumer credit sale[82] or consumer loan[83] where the lender or seller acquires or retains a security interest in land used or to be used as the residence of the debtor.[84] This cooling off provision is based on existing law, Section 125 of the Federal Consumer Credit Protection Act, and Regulation Z, Section 226.9.[85]

Another area of concern recognized by the UCCC is the practice of imposing on the debtor the cost of attorneys' fees by contract or agreement. Alternative A provisions of Sections 2-413 and 3-404, in the case of a consumer sale, a consumer lease or a consumer loan, would prohibit an agreement that the debtor or buyer will pay for attorneys' fees.[86] On the other hand, Alternative B provisions of these sections would permit a reasonable attorneys' fee upon default not exceeding 15% of the unpaid debt. The Alternative A provisions embody a policy decision that attorneys' fees, like other collection costs, are part of the seller or lender's cost of doing business, and that the rate ceilings of the UCCC are high enough to justify treating such fees and and costs as part of the general overhead.[87] In many consumer credit transactions this prohibition would be significant because loan agreements or notes frequently contain provisions for attorneys' fees.[88]

"consumer credit sale" as defined in § 2-104(1) and thus a cash sale would not be covered by the "cooling off" provision. For a study on the effect of such "cooling off" periods, see Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969).

80 UCCC § 2-502.

81 UCCC § 2-504.

82 UCCC § 2-104.

83 UCCC § 3-104.

84 Note that this "cooling off" period does not apply in the case of a first lien or security interest securing a purchase money loan. UCCC § 5-204(5).

85 15 U.S.C. § 1635 (1972).

86 *See also* UCCC § 3-514.

87 *See* UCCC § 2-413, Comment to Alternative A.

88 Six states that have adopted the UCCC have adopted Alternative B provisions with modifications. CCH CONS. CREDIT GUIDE ¶¶ 5113, 5224.

In addition, the UCCC provides for limits on delinquency and deferral charges in consumer credit sales[89] and consumer loans[90] and service charges on consolidation or refinancing.[91]

An Appraisal

To appreciate the merit of the UCCC as well as its shortcomings and uncertainties, some of the theory behind it needs to be examined critically. The intent of the UCCC is to remedy or at least alleviate some of the abuses in consumer credit, and it proposes significant steps to accomplish this goal, though some may not agree that all of the areas of its concern involve real abuses requiring such extensive remedy. For example, the holder-in-due course problem, the use of confession of judgment, and waiver of defense clauses all are dealt with by the UCCC, although not necessarily in the fashion all would agree to be best. In these and in other areas, such as the limitations on the taking of security, the use of cross-collateral clauses in credit sales, the restrictions on the use of balloon payments and deficiency judgments and the "cooling off provisions" in home solicitation sales, the UCCC would provide protection to the consumer where before there was generally no regulation or legal control. However, one should note that practically everything proposed in the UCCC has been tried in some state.[92] In still other areas such as disclosure of interest rates and the "cooling off" period where a second lien or mortgage is taken on a residence, the UCCC merely duplicates in large measure the requirements of the Federal Consumer Credit Protection Act.

Thus the UCCC is a broad comprehensive piece of legislation which affects practically every person who buys or sells goods, borrows or lends money, or extends or receives credit. Many Virginians fit into one of these categories occasionally; many more fit into one of them frequently. The intent behind the UCCC, praised and shared by many, is to provide fair protection to consumers while at the same time to be fair to and not unduly burdensome or restrictive on the lender of money and the seller extending credit. In any legislation affecting such a broad spectrum of the population, with segments of diverse and competing interests, the critical question asks how the compromise and balance

89 UCCC §§ 2-203, 2-204. *See also* UCCC § 2-202.

90 UCCC §§ 3-203, 3-204.

91 UCCC §§ 2-205, 2-206, 3-205, 3-206.

92 Warren, *The Uniform Consumer Credit Code*, 24 BUS. LAW. 209 (1968).

between these interests should be made. The means used to arrive at this fair balance are most important. As one should expect in any legislation of this scope, it is difficult to find any group or concerned individual completely satisfied with *all* of the UCCC. Some favor the UCCC because it covers areas and problems not previously covered by other laws, for example, the restrictions on the holder-in-due course doctrine; yet some of these would go further in other areas, such as in lowering the interest ceilings. Others have favored or opposed the UCCC because it offers the possibility of exemption from federal supervision under Truth in Lending. Some suggest that the UCCC goes too far, while others say not far enough, in restricting the rights and remedies of creditors. Still others apparently support the UCCC because they fear an adverse case decision against present practices based on the "time price doctrine" that has recently been successfully challenged in some states.[93] Perhaps some, fearing further massive federal intervention should the states fail to act to control the various existing abusive practices believe that problems should be dealt with on a local or state basis. The many proposals introduced in Congress dealing with consumer protection and credit clearly evidence sentiment that may result in further federal legislation in the area.[94]

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[93] *See, e.g.*, State v. J. C. Penney Co., 48 Wis.2d 125, 179 N.W.2d 641 (1970) (noted in 1971 WIS. L. REV. 296 (1971); 45 TUL. L. REV. 1087 (1971); 21 DRAKE L. REV. 208 (1971); 69 MICH. L. REV. 1368 (1971); 88 BANKING L.J. 989 (1971)); Rollinger v. J. C. Penney Co. – S.D. –, 192 N.W.2d 699 (1971). *See also* Comment, *Service Charges for Revolving Charge Accounts: A Time-Price Exemption or Usury?*, 71 COLUM. L. REV. 905 (1971); Comment, *Usury and Revolving Credit: The Old Law and the New Economics*, 15 S.D. LAW REV. 304 (1970). *Cf.* National Bank of Commerce v. Thomsen, 80 Wash.2d 406, 495 P.2d 332 (1972). In Virginia the "time price doctrine" appears to be firmly established. *See* General Electric Credit Corp. v. Lunsford, 209 Va. 743, 748, 167 S.E.2d 414, 418-19 (1969) (dictum). For earlier cases see *A Comparative Analysis and Study of Existing Virginia Law and the UCCC*, 17 (prepared for the Virginia Retail Merchants Association by the firm of Hunton, Williams, Gay, Powell & Gibson). The author gratefully acknowledges the assistance of this study in preparing portions of this article.

[94] The April 1, 1972 copy of the *Consumer Legislation Monthly Report* (issued by the Office of Consumer Affairs, Executive Office of the President) which lists consumer bills introduced in the 92nd Congress contains approximately 118 pages of listings including such bills as a TRUTH IN ADVERTISING ACT (S. 1461); National Institute of Advertising, Marketing & Society Act (S. 1753); Consumer Protection Act to Create a Federal Consumer Agency (S. 867, S. 1177, S. 1205); Consumer Education Act (S. 404); Consumer Class Action Act (S. 984); Consumer Fraud Prevention Act (H.R. 6315); Fair Credit Billing Act (S. 652); Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971 (S. 986); Wearing Apparel Consumer Protection & Labeling Act (S. 424); Fair Warranty Disclosure Act of 1971 (H.R. 6314).

There is a fair consensus that certain portions of the UCCC are beneficial, *e.g.*, the holder-in-due course provisions, the restrictions on the taking of security and cross collateral, the restrictions on deficiency judgment in certain cases, and the limitation on prejudgment wage garnishment. Many of the adverse critics object that these provisions do not go far enough, but many of these would agree that the UCCC provisions are better than no regulation or protection, the situation which prevails in many states today. Likewise, the one area on which there is substantial disagreement, even among supporters of other sections of the UCCC, is free entry and the related rate structure.

There is an interesting parallel today to the situation that existed in the early stages of the struggle to enact the Russell Sage Uniform Small Loan Act as a measure to deal with the loan shark problem. In some states at that time the high rate lenders opposed to the Uniform Act, enlisted the support of many well-meaning people through the cry of "high interest." [95] Unfortunately, today it appears that the same tactics are again being employed to discredit the UCCC in the eyes of those who do not look behind the "36% interest rate established by the UCCC." [96]

In appraising the UCCC perhaps one should deal initially with one common misconception. The UCCC does not purport to establish *rates*, but rather to set *ceilings* on rates, relying on competition to determine the rates, hopefully below the ceiling. The graduated ceiling for consumer loans of 36%, 21%, 15% or 18%, whichever is higher, appears at first blush quite high, particularly to much of the public accustomed to thinking of interest or usury ceilings in terms of 6%, 8% or perhaps even 10%.[97] These rates typically have been the usury ceilings, and it is doubtful if Truth in Lending disclosures of true interest rates have

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[95] Lenihan, *Progress in Consumer Credit in Kentucky*, 19 LAW & CONTEMP. PROB. 54, 56-61 (1954); ROBINSON & NUGENT, REGULATION OF THE SMALL LOAN BUSINESS 122 (1935) [hereinafter referred to as ROBINSON & NUGENT].

[96] As explained *infra*, this, of course, is not true. The UCCC does not set rates, but *ceilings*, and the 36% is permitted only on certain supervised loans not exceeding $300.

[97] In Virginia the general usury limit is 8%. VA. CODE ANN. § 61-319 (1966). One suspects that many, if they are aware of any ceiling, would believe this to be applicable to all loans when in fact there are a multitude of ceilings, many significantly higher than 8%. *See* notes 31-36 *supra*. *Cf.* WHITE & MUNGER, CONSUMER SENSITIVITY TO INTEREST RATES: AN EMPIRICAL STUDY OF NEW-CAR BUYERS AND AUTO LOANS, 1207, 1222 (1971) [hereinafter cited as WHITE & MUNGER].

significantly affected this general perception.[98] Despite the initial appearance, the ceilings set by the UCCC are not high in comparison to some existing state ceilings,[99] which in some areas exceed those permitted by the UCCC. A substantial number of other states permit rates roughly equal to those of the UCCC, particularly for small loans.[100] Admittedly the 18% overall rate for loans is significantly higher than the general usury limit in most states. Too, in many states, the rates charged on credit cards or revolving charge accounts run in the area of 1½ to 2% per month or approximately 18 to 24% per year, comparable to the rates permitted by the UCCC.[101] Further, the UCCC ceilings on finance charges are comprehensive and include charges and fees which under some existing usury statutes might not be considered interest or included in the calculation of the usury limit. This is one of the real strong points of the UCCC: its tight definition of finance charges

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98 A further factor which tended to obscure the "true interest rate," prior to the disclosures required by Truth in Lending, was the fact that many statutes, particularly small loan acts, spoke in terms of charges of so much per $100, *e.g.*, $17 per $100 per year on the first $300, or $12 per $100 etc. *See, e.g.*, VA. CODE ANN. § 6.1-271(2) (1966). Also, frequently rates were advertised as "8%" when the true interest rate, as calculated under Truth in Lending, would be significantly higher. *See* Phelps, *Monopolistic and Imperfect Competition in Consumer Loans*, 8 J. OF MARKETING 382, 383-84 (1944).

99 *See Shay, supra* note 54, at 495. In South Carolina, The Consumer Finance Act, S. C. CODE ANN. § 8-800.10 (1962), permit a maximum finance charge of $2.50 per month on a loan of up to $150; for a loan in excess of $150 but not exceeding $1,000, a charge of $20 per $100 per year on the first $100; $18 per $100 per year on the next $200 and $9 per $100 per year on the next $700 of the loan. The effective yield under this statute, for example, on a $100 cash advance for 12 months repayable in 12 equal monthly installments would be 51.50%. *See Proposed Uniform Consumer Credit Code, A Comparative Analysis & Study of Existing South Carolina Law, The UCCC and the Federal Truth in Lending Law* 61-62, 119 (1970) (prepared for the South Carolina Retail Council by the firm of Haynsworth, Perry, Bryant, Marion & Johnstone) [hereinafter referred to as *S. C. Retail Council Report*].

100 *Shay, supra* note 54, at 495.

101 Under the UCCC the maximum permissible service charge on a consumer credit sale pursuant to a revolving charge account is 2% per month (24% per annum) on the amount which is $500 or less and 1½% on the amount which is more than $500. UCCC § 2-207(3). The maximum permissible finance charge for non-"supervised" loans pursuant to a revolving loan or charge plan including a lender credit card is 1½% per month (18% per annum). §§ 3-201(4), 3-108, 3-109 and Comments thereto. This compares with 1½% per month on open and credit plans in Virginia and in Washington 1% per month or 12% per annum, RCW § 63.14.130. *See* VA. CODE ANN. § 6.1-362 (1972). However, it should be noted that under § 3-508 "supervised" lenders, which would include commercial banks, may make loans pursuant to a revolving loan account (which would include bank credit cards) at the "high" graduated rate of 36%–21%–15%, or 18%, whichever is greater.

and of the factors included in the calculation of the ceiling. Assuming for the present that it is desirable to set interest ceilings, one weakness and misleading aspect of the 6% or 8% usury statutes has been the failure to define what is interest and to include many additional fees, charges, "points," etc., which significantly increase the return to the lender.[102] In considering whether the UCCC does in fact propose a higher ceiling in any given state it is quite revelant and important to analyze what fees, charges, and so forth are included in the existing definition and interpretation. However, the small loan acts generally do require that fees and charges be included in the interest charge.[103] In one sense the UCCC may be viewed as merely adopting for consumer credit loans the small loan rates generally prevailing today that have been found to be satisfactory after long experience. But the UCCC goes beyond these acts and extends the 18% ceiling to all consumer loans.[104]

It is, of course, basic that for credit or loans to be available, capital must be available, which means that a fair return must be made to attract capital from alternative uses. It is with this in mind that the graduated rate of the UCCC is proposed with the higher rates permitted for smaller loans. Simply stated, "fixed costs" and overhead remain the same whether making a small or large loan; thus, to permit a return on small loans fairly comparable to that of larger ones a higher interest charge must be permitted. If a less favorable return can be made on the smaller loans, there will be an incentive to push larger loans that might overburden the borrower. There is also the danger that if the rate is too high for small loans a lender will be tempted to double up, *i.e.*, rather than make one $500 loan, to make two loans of $250 each to be able to charge the higher interest rate.[105] The UCCC has an express provision prohibiting this type of practice.[106]

Some people in the small loan field have suggested that if the rate ceilings of the UCCC for small loans, particularly those under $300

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[102] *See* CURRAN, *supra* note 30, at 25-29; *S. C. Retail Council Report, supra* note 99, at 36-43. Danforth, *Usury: Applicability to Collateral Fees & Charges,* 16 S. D. L. REV. 52 (1971).

[103] CURRAN, *supra* note 30, at 25.

[104] UCCC § 3-201. As discussed p. 273 *infra* "supervised loans" may exceed the 18% ceiling.

[105] *See* SIMPSON, AMERICA'S SMALL LOAN PROBLEM WITH SPECIAL REFERENCE TO THE SOUTH 56-57 (1963) [hereinafter cited as SIMPSON].

[106] UCCC § 3-509. For credit sales see § 2-402.

that constitute a large portion of the business of some small loan companies, are lower than existing rates, the availability of credit could suffer adverse consequences. It is urged that the higher permissible rates under present provisions are necessary to service these small loans; otherwise lenders might be forced out of the small loan business or compelled to restrict severely their loan risk,[107] forcing some borrowers to turn to the only alterntative available: the loan shark. If the segment of the loan industry now servicing the small loan borrower cannot operate under the rate structure of the UCCC, from where will the "legitimate lender" come?[108] Will more "efficient" lenders move in? If the costs of the small lenders presently operating in the small loan field indicate that they cannot make a fair return under the UCCC, one may conclude that either these present lenders will not continue to operate or they will restrict the risk area in which they lend to better risks and higher returns. Whether other lenders will move into the deserted risk segment is open to speculation. Some, of course, might view this restriction of credit as desirable. But can one ignore the demand for loans?

Another possibility foreseen by some under the UCCC is that with free entry other new lenders, attracted by the higher ceilings, will move into the "above $300" area and "skim off" the better risks and more profitable larger loans from the existing small loan companies, thus depriving them of the larger loans and better risks needed to cushion the high risk-high fixed cost small loans.[109] The effect of this "skimming"

107 This argument was made in South Carolina by some of the small loan operators where the UCCC would mean lower rates for small loans, particularly those under $150, see note 99 *supra*. There is abundant evidence that lowering the rate for any given type or range of loan does have the effect of decreasing the availability of that type loan. See discussion p. 260 *infra* and particularly the excellent article by Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81, 106-13 (1967) [hereinafter cited as *Regulation of Finance Charges*].

108 Shay has also suggested that the rates permitted by the UCCC for small loans are too low and predicts the appearance of more "sales sharks." *Shay, supra* note 54, at 498-99.

109 Professor Robbins in his study of consumer installment loans showed that commercial banks, as expected, are attracting the better risks. For example, the monthly income of borrowers from commercial banks was substantially larger than that of borrowers of comparable size loans from consumer finance companies. W. D. ROBBINS, CONSUMER INSTALLMENT LOANS, 65-68 (1955) [hereinafter cited as ROBBINS]. Robbins, however, suggested that the separation is not as distinct as many have suggested. *Id.* at 104. Another study stated:

> Although very little published information is available about the characteristics of bank borrowers, it is a generally held fact that they tend to be in higher income

or spreading around the larger loans, coupled with the lowered rate for small loans, could drive some existing small loan companies out of business or leave them to struggle in high cost-high risk areas. Even if the rates under the UCCC are not lower, the "skimming" and reduction in volume could push up the lender's costs. In considering this aspect of the UCCC, the experience in any given state is certainly relevant. If experience indicates that higher rates are necessary for credit on small loans to be made available, surely this should be considered. Ceiling levels may not need to be uniform, and individual state characteristics and cost factors should be considered.[110]

Is there justification for the higher rates permitted on open end credit sales?[111] It would seem that the fixed costs for making a small credit sale would be the same as they would for a larger one, and the UCCC does propose a graduated rate ceiling with higher rates for smaller credit sales and lower ceilings for larger ones.[112] There is evidence in some cases that the service or finance charges on credit sales are less than the costs of such credit.[113] If this is true, there is justification for permitting

> classes than borrowers from consumer finance companies. They tend also to be in different occupational groups. This situation tends to exist even in those states (for example, Missouri and Rhode Island) where banks are permitted to charge rates on consumer loans comparable to those under which consumer finance companies operate.

CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 30. See also White, *Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study*, 25 BUS. LAW. 143, 145 (1969 Special Issue).

110 ROBINSON & NUGENT, *supra* note 95, at 266. The National Consumer Act takes the position that "[c]eilings [rates] are left to each adopting state, rather than being fixed by this model act. This recognizes the fact that there are local and regional economic differences which may call for different ceilings. A uniform set of rates for the entire country is unfeasible." National Consumer Law Center, *Synopsis of the National Consumer Act* 1, (Boston College Law School). For an analysis of the sources of funds for consumer finance companies see CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 34-53.

111 The UCCC rate would be higher only in some states, *e.g.*, Virginia and Washington. *See* note 101 *supra*.

112 *See* note 101 *supra*.

113 In support of the Code ceilings, a careful and objective study of department store credit costs completed in 1969 by the accounting firm of Touche, Ross, Bailey & Smart found that the cost of all types of credit extended by stores substantially exceeded service charge revenue received for this credit. Expressed in one way, on a per active customer account basis, the cost to stores of credit extended was $11.35 whereas the service charge revenue was $7.40 *or a loss of $3.95 per customer per year*. On the basis of these figures, which are clearly the most recent, accurate and complete of any available, the current average rate of department stores of 18% per annum on revolving accounts produces revenues substantially less than the actual cost of operating these revolving accounts. Conse-

higher credit charges if open end or revolving sales credit is to be available. Otherwise cash sales would help in part to subsidize credit purchases.[114] If ceilings on finance charges on credit sales are too restrictive, there may be a tendency to restrict the availability of sales credit or to disguise the costs of credit in the sales price, thus forcing borrowers to resort to direct loans or closed end credit.[115] One response to setting ceilings on finance charges for sales credit alleges that from a practical standpoint, this accomplishes little because costs of credit and interest can be hidden in the sales price.[116] Although this may be true, it is not necessarily an undesirable result because the most prominent comparison factor (if any comparative shopping at all is done) is most likely price. There is some indication that for many consumers the interest charged or the annual percentage rate is not a significant factor

quently, the permitted ceilings under the Code of 24% per annum for amounts in excess of $500 are almost minimal ceilings to reflect actual costs of credit and avoid the charging of deficiencies to the cost of goods sold, which practice is obviously taking place at the present time. Malcolm, *The New Maximum Ceilings on Interest and Finance Charges*, 37 (Conference on Personal Finance Law, N.Y.). *See also* CLARK & FONSECA, HANDLING CONSUMER CREDIT CASES 128 (1972); Gordon, Wheatley, Gaedeke, Hallag, & McNabb, *The Impact of a Consumer Credit Interest Limitation Law—Washington State: Initiative 245*, 37-41 (1970) [hereinafter cited as *Gordon & Wheatley*]. An edited version is reprinted as Wheatley & Gordon, *Regulating the Price of Consumer Credit*, 35 J. OF MARKETING 21 (1971).

114 This assumes the merchant wants to maintain the same profit margin on his total sales. However, the seller might be willing to have less margin of profit on his credit sales to gain the additional profit from the volume of credit sales he might otherwise not gain by not offering credit.

115 In Washington state in 1968, by an initiative, the interest rate or service charge ceiling was reduced from 18% to 12% per year, computed monthly at a rate of 1% per month, on consumer installment plans, revolving credit plans and credit cards for both retailers and financial institutions. Among the effects of the reduction was that consumers frequently had to resort to direct loans, rather than sales credit, to purchase goods. *Gordon & Wheatley, supra* note 113, at 21. If this is the result, the effect of direct loan credits in place of sales credit may re-introduce the holder-in-due-course problem, *i.e.*, the direct lender, absent close ties with the seller, would not be subject to defenses or claims the purchaser might have against the seller. This "loophole" of the UCCC has been noted. *See* Miller, *An Alternative Response to the Supposed Direct Loan Loophole in the UCCC*, 24 OKLA. L. REV. 427 (1971); Note, *Direct Loan Financing of Consumer Purchases*, 85 HARV. L. REV. 1409 (1972). Forcing consumers to resort to direct loans, rather than open end sales credit, would likely mean that such loans would be at higher rates as "supervised loans" or perhaps might be closed end credit sales at higher rates. *See* UCCC §§ 2-201, 3-508.

116 The reduction in Washington state of the service charges which could be imposed, see *supra* note 115, resulted in higher prices for merchandise, and fees were instituted for services which prior to the reduction were provided free to the customer. *Gordon & Wheatley, supra* note 113, at 24-25.

in shopping; the price of the goods may be a more important factor.[117] Many consumers apparently assume that all interest rates are the same.[118] Also, if the interest level is too low and price competition prevents sellers from disguising or including credit costs in the purchase price, other shifts in credit patterns may develop and credit purchases may be made through more efficient methods such as the increasingly efficient bank credit card systems.[119] Thus, to prevent giving any competitive advantage to either the retailer or the bankcharge system, the rate ceiling should be the same for both. This the UCCC has not done.[120] Perhaps competitive economics will tend to force a business decision in favor of the more efficient system.

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117 White and Munger, based on their study, stated:

> If it were somehow possible to provide money-cost information to all prospective new-car buyers before they arranged a purchase and loan, what would be the result? Nothing in our data indicates that such knowledge would have significantly changed the behavior of our respondents, and much in our data suggests that such knowledge would not have altered their behavior. The majority of the borrowers in our sample were ignorant of the interest rate they were actually paying. All but a small minority bought credit with the car and did not shop. Most borrowed near home and stated reasons quite unrelated to rates as a basis for their borrowing behavior. Finally, and most disheartening is the substantial minority who actually knew of an institution lending at lower rates than they enjoyed but did not stir themselves to borrow at the lower rate. WHITE & MUNGER, *supra* note 97, at 1227-28 (footnotes omitted).

118 *Cf.* WHITE & MUNGER, *supra* note 97, at 1222-28.

119 As noted earlier, note 115 *supra*, a reduction of the ceiling on service charges from 18% to 12% in Washington state led to increased direct lending. Faced with a reduction in service charges or revenue, businessmen and financial institutions sought to reduce costs in the handling of small loans (*e.g.*, under $500) and commercial banks turned to making such loans through their credit card system whenever possible because of lower cost of handling loans of that size in this manner. *Gordon & Wheatley*, *supra* note 113, at 56. In some areas bank credit card systems, because of their relatively high efficiency and lower handling costs, are bidding to take over the credit department and credit card systems of major department stores and reportedly at a lower cost to the merchant than their existing operations. *See* Helmick, *Plastic Credit in the Pacific Northwest*—(unpublished paper on file in the Law Library, University of Washington, Seattle, 1969). It must be recognized, however, that some retailers, despite a lower cost for a bank credit card system, might prefer to retain their own credit to maintain "store identity," through their own card, and to retain control of their credit risk. *Id.*

120 As indicated, note 101 *supra*, for a consumer credit sale pursuant to a revolving charge account the ceiling is 2% per month for $500 or less (§ 2-207), while for a loan pursuant to revolving loan or lender credit card the ceiling is 18% (§ 3-208). Thus there appears to be a discrimination in favor of the revolving charge account. It should be noted, however, that the discount generally charged to the merchant by the bank on credit card sales drafts or tickets which are accepted, is not considered a part of the loan finance charge. *See* UCCC § 3-109, Comment 2. However, as noted in note 101 *supra*, supervised lenders may charge more than 18% interest on revolving loan accounts, including bank credit cards.

In viewing the UCCC rate ceilings and the availability of money, the rate should be high and flexible enough to accommodate the fluctuations in the money market. Experience in many states, including Virginia, has shown in the home mortgage area that if interest ceilings are too low in times of high rates in the commercial market, there can be a severe restriction of the supply of money and perhaps even a flow of it to areas permitting higher interest rates.[121] Although for many consumer finance companies there has been a trend to move to long term debt in an attempt to stabilize the cost of money,[122] it seems clear that availability of consumer credit and loans is affected by monetary and fiscal policy.[123] There also appear to be regional differences in the cost of money,[124] and some have urged that rates, rather than being uniform throughout the country, should vary from state to state.[125]

Other factors under the UCCC which speak in favor of higher ceilings are the restrictions on remedies and on the taking of security. In a sense these are trade-offs or compromises of the UCCC, but perhaps they are justified. The preface to the UCCC, quoted above, suggests that the rates are interrelated to other provisions such as the restrictions on remedies. It is difficult, of course, to assess the effect of these changes on the cost factors of loans and credit sales, but such unknown factors would seem to indicate a need for flexibility in the ceiling. Otherwise there may be a risk of serious reduction in the availability of credit and loans. On the other hand one could argue that if the ceilings are set too

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121 The mortgage loan area well illustrates the result, and perhaps even the futility, of setting interest ceilings too low, particularly if what is included as "interest" is not well defined. Lenders are forced, in order to realize the return necessary to attract funds, to use such devices as loan fees, placement fees, points, deposits, etc., to appreciably increase their return above the nominal interest ceiling. This also points out the need for flexibility in ceilings to accommodate changes in fiscal and monetary policy and other factors which affect the supply of money. Professor Johnson has pointed out that the same exodus of capital can occur in the consumer credit area. *See Regulation of Finance Charges*, *supra* note 107, at 103.

122 CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 39-40.

123 *See generally id.* at 87-119.

124 The smaller loan companies seem more dependent upon local or regional sources of funds than do the larger loan companies who have access to all the major financial markets. *Id.* at 44.

125 *See* note 110 *supra*. Another factor indicating the need for a flexible or fairly high ceiling is the fairly inclusive definition of finance charge under the UCCC, (§ 3-109). Professor Robert Johnson has pointed out "[w]hatever the definition of the finance charge, it is apparent that the more all-inclusive the definition, the higher must be the rate ceiling in order to accommodate the same group of consumers." REGULATION OF FINANCE CHARGES, *supra* note 107, at 105.

low, they could be raised later. Clearly the provisions proscribing the imposition of the cost of attorney's fees on the borrower will have a definite cost, but as the comments indicate, it is felt that this should be absorbed as an expense of doing business.[126] The restrictions on garnishment, although only expressing restrictions now imposed by constitutional safeguards,[127] perhaps may impose significant costs even though the chief loss is in terms of leverage. The same is true of eliminating the use of confession of judgment clauses, although how widespread the practical effect of this would be may be doubted, as such clauses appear not to have been widely used except in a few states. Perhaps more apparent in its effect on cost would be the restriction in credit sales on deficiency judgments after repossession,[128] which may reduce the collection leverage and make collection more costly or difficult. Yet this cost is not as significant as it seems, because overly harsh collection practices may be bad business anyway.[129] Moreover, the restrictions on the taking of cross collateral would have much the same result. In summary, a reasonable case can be made that higher, more flexible ceilings should be permitted to compensate for some of the reduced remedies and increased restrictions which may have real but uncalculated costs.

However, many seriously question whether the "good theory" of the UCCC will work in practice, and suggest that the ceilings will become the going rate, resulting in many cases in higher interest rates. Opponents of free entry argue that historically governments have found that it was necessary to regulate money lenders and the rates they could

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126 See UCCC § 2-413, Comment to Alternative A.

127 *See* note 67 *supra*.

128 *See* notes 64-66 *supra* and accompanying text.

129 Professor Robbins in his study of consumer installment loans stated:

> After it is demonstrated that a very small percentage of accounts is charged off as loss, the explanation is sometimes given by those uninitiated to the consumer credit field that consumer installment lenders 'hound the poor borrower to death' to collect the account and that explains the small losses. Again, this is contrary to the facts. It is believed that only two institutions included in this study follow a collection policy which is probably too strict for the best interests of the borrower. From the experience of other consumer installment lenders it is obvious that too strict a collection policy is unnecessary and also works to the disadvantage of the lender. The necessity of maintaining community goodwill makes possession and sale of chattels a hazardous policy. The low resale value of chattels, especially household goods, also causes the lender to avoid foreclosure whenever possible. ROBBINS, *supra* note 109, at 98-99.

See also CAPLOVITZ, *supra* note 1, at 21.

charge.[130] Advocates of this position maintain that to protect the public interest there must be regulation of who can lend money and what rates they can charge. Otherwise they foresee duplication of facilities; a reduction in volume per loan office and in operating efficiency; overselling by some lenders, particularly the inexperienced; and wild, abusive credit practices and ill-informed or financially irrational borrowers.[131]

In support of this, these opponents of free entry point to the well-documented problem that formerly existed in many states in the area of small loans: the loan shark. The Russell Sage Foundation Study highlighted the widespread abuse in this area, which abuse was curtailed subsequently in most states by small loan legislation regulating lenders and their rates.[132] Some opponents of free entry and the high rate structure, and the almost unlimited lending authority of lenders under the UCCC, foresee too many lenders in the field, thus leading to unsound loans to people who should not be given loan or credit, resulting in hardship to the borrower, and a great increase in consumer bankruptcy and personal insolvency. The increase in consumer bankruptcy that has accompanied the widespread increase in consumer credit during the past

130 *See, e.g.*, Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 BUS. LAW. 227 (1968) [hereinafter cited as *Harper*]. For an excellent work on the development of lending, particularly the small loan field, in the United States see ROBINSON & NUGENT, REGULATION OF THE SMALL LOAN BUSINESS (1935).

131 *Harper*, *supra* note 130, at 227-28. Harper suggests that by adopting the concept of free entry the UCCC has gone back to a philosophy tried and abandoned as far back as the 19th century and "that economic theory & philosophy does not support the concept of freedom of entry." *Id.* "In the period 1837 to 1863 free banking was common and as our history shows, credit was overexpanded; competition was intense; credit restraints disappeared; banks collapsed; panic and depression occurred frequently. Gradually we came to the realization that limits on freedom of entry were an absolute necessity." *Id.* at 229.

132 *See, e.g.*, SIMPSON, *supra* note 105; Lenihan, *Progress in Consumer Credit in Kentucky*, 19 LAW & CONTEMP. PROB. 54 (1954); Burnquist, *A Regulatory Small Loan Law Solves Loan Shark Problems*, 19 LAW & CONTEMP. PROB. 29 (1954). *But see* REPORT BY THE PRESIDENT'S COMMITTEE ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (U.S. Government Printing Office 1967).

> In the view of most law enforcement officials loan sharking, the lending of money at higher rates than the legally prescribed limit, is the second largest source of revenue for organized crime. Gambling profits provide the initial capital for loan shark operations. . . . . Gamblers borrow to pay gambling losses; narcotics users borrow to purchase heroin. Some small businessmen borrow from loan sharks when legitimate credit channels are closed. . . . Interest rates vary from 1 to 150 percent a week, according to the relationship between the lender and borrower, the intended use of the money, the size of the loan, and the repayment

decade or so has been noted.[133] They foresee more lenders attracted by abolition of convenience and advantage and the ceilings which could lead to an artificial stimulation of demand for loans or credit, and result in unsound loans.

To consider these arguments, examination of the assumed role or function of the convenience and advantage requirement, and the possible consequences of its elimination as proposed by the UCCC, may be helpful. What was the requirement designed to accomplish?[134] The initial drafts of the Uniform Small Loan Law did not contain a convenience and advantage requirement, but added one in 1932.[135] One of the prime purposes behind the requirement was to restrict the number of lenders to encourage offices with higher loan volume in the expectation that this efficiency would be passed on to the borrower in the form of lower interest rates.[136] Other objectives were to prevent overlending and the evils of excessive competition.[137] However, the legislation in most states does not attempt to specify what will promote convenience and advantages[138] or the factors to be considered, and although a large majority of states having some form of consumer finance law have had such a restriction,[139] its application has varied from state to state.[140]

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potential. The classic "6 for 5" loan, 20 percent a week is common with small borrowers. Payments may be due by a certain hour on a certain day and even a few minutes' default may result in a rise in interest rates. The lender is more interested in perpetrating interest payments than collecting principal, and force, or threats of force of the most brutal kind, are used to effect interest collection, eliminate protests when interest rates are raised, and prevent the beleaguered borrower from reporting the activity to enforcement officials.

133 STANLEY & GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 24-27 (1971).

134 HUBACHEK, ANNOTATION ON SMALL LOAN LAWS 193, 53-54 (1938); SIMPSON, *supra* note 105, at 90.

135 For more detailed discussion of the convenience and advantage requirement see Sartoris, *The Convenience and Advantage Clause in Small Loan Legislation—Pro and Con*, 27 BUS. LAW. 349 (1971) [hereinafter cited as *Sartoris*]; Stokes, *Convenience and Advantages in Small Loan Licensing, A Workable Standard*, 2 B. C. COMM. & IND. L. REV. 93 (1960). *See also* SIMPSON, *supra* note 105, at 90-92; CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 16-19; *Harper*, *supra* note 130, at 232, in a strong argument for retention of the convenience and advantage requirement, points out that in 1968, 34 states had such a requirement in their small loan statutes and several states had such a requirement for industrial loan companies.

136 *Sartoris*, *supra* note 135, at 350, 355-60.

137 *Id.* at 351-55.

138 *Id.* at 350; CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 18.

139 *See Harper*, *supra* note 130.

140 CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 18-19. Virginia has been characterized as "tight" in permitting entry under convenience and advantage for small loan

Sartoris has concluded that "on balance, the objective evidence does support the contention of the convenience and advantage advocates. The unit cost of making a small loan does vary with the size of loan office as measured by the number of loans." [141] However, he expresses doubt as to whether in practice convenience and advantage requirements can assure that units will operate at minimum costs or peak efficiency because business tends to operate on a scale determined both by cost considerations and revenue considerations, *i.e.*, at a level which equates marginal revenue with marginal costs.[142] Whether regulatory agencies will or even can promote this optimum or near optimum size and efficiency by licensing is certainly open to serious doubt.[143]

The variation in state application and even within a given state makes it difficult to assess the effectiveness and usefulness of the convenience and advantage requirement, and one can draw no definite conclusions as to their merit.[144] However, the proposal of the UCCC to eliminate such requirements runs into very strong political considerations. In some states, commercial banking interests have objected to permitting small loan and consumer finance companies, retailers, stores and others to go freely into business at any location while commercial banks remain restricted by convenience and advantage requirements.[145] The banks fear that they will face a competitive disadvantage with these other unrestricted lenders. This argument has some merit,[146] but there are several factors

companies. See CHAPMAN & SHAY, THE CONSUMER FINANCE INDUSTRY, ITS COSTS AND REGULATION, 113 (1967) [hereinafter cited as CHAPMAN & SHAY]. Chapman & Shay's work contains a study of convenience and advantage clauses in relation to loan service in various states. *Id.* at 112-14.

141 *Sartoris*, *supra* note 135, at 357; CHAPMAN & SHAY, *supra* note 140, at 80-84.

142 *Sartoris*, *supra* note 135, at 358.

143 *Id.* at 358-59. Even if a regulatory agency could determine a near optimum operating point for consumer finance lenders in a given location, it would seem there would be no assurance there would be an applicant where one might be needed or that once a lender is licensed that near optimal efficiency would be attained.

144 *See* CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 18-19. *Sartoris*, *supra* note 135, at 360 concluded:

> In considering the possible inclusion of C and A licensing in the adoption of the UCCC, it is necessary to ask the following questions: (1) Is it desirable to attempt to limit by government regulation the number of people served by legal lenders? (2) Can the extra-legal market for loans be eliminated? (3) Will any benefits from larger (and presumably more efficient) lenders be passed on to the public? Only if all three of these questions can definitely be answered affirmatively should the use of a C and A clause be considered. *Id.* at 360.

145 *See* note 58 *supra* and accompanying text.

146 It seems clear that location and "convenience" play an important role in credit shopping patterns. In the White and Munger study, of those borrowers who know of

which should be considered. Banks have advantages others do not have. Banks, unlike small loan and consumer finance companies and retailers that might want to go into the loan business, can accept deposits from customers and in turn, with certain restrictions, lend this money. This means that commercial banks generally can obtain money at lower costs than can the small loan companies, because a significant portion of the money used by small loan companies is obtained by borrowing from commercial banks.[147] One of the purposes behind the restrictions placed on banks is to protect depositors against reckless use of their funds and overexpansion which might endanger their deposits. Thus, for the privilige of receiving deposits as a relatively inexpensive source of funds, banks must pay a price to protect the depositors. Failure of a bank affects thousands of depositors; failure of a loan creditor affects only its shareholders and perhaps its creditors. It is appropriate to ask whether the banks, if they believe they would be put in an unfair position by the UCCC elimination of convenience and advantage, should not directly attack the restrictions under which they operate rather than seek similarly to restrict competing institutions. Are, for example, the restrictions on banks justified to protect depositors? Banks foresee that they would be competing with loan companies on every corner, and with many retail stores offering cash loans in addition to credit sales. In a very real sense, many banks through credit card systems such as Master Charge and BankAmericard, are *now* making loans through thousands of stores and service establishments. And yet as a practical matter these bank card systems, because of the amendments to Truth in Lending prohibiting the unsolicited mailing of credit cards, are effectively insulated against new major credit card competition.[148]

In addition, the UCCC offers opportunities to banks, particularly to those in rural and less populated areas. Those banks which are already established, with the higher ceilings available, would have opportunities to expand into consumer loans. But as a practical matter they may not be faced with new competition because there will be insufficient volume

a lower cost lender for automobile loans but did not seek a lower cost loan, 44% gave "convenience" as a reason for not seeking a lower cost loan. WHITE & MUNGER, *supra* note 97, at 1227. Although the response of "convenience" was apparently undefined and somewhat ambiguous, the study did indicate that proximity to a low cost lender was a primary factor in a buyer's decision to borrow from that lender. *Id.* at 1237.

147 CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 39-47.

148 Truth in Lending Act, 82 Stat. 146 *as amended* by adding new Section 132 by Public Law 91-508, Section 502(a).

to support a new operation, whereas the existing banks may, without any increase in overhead, spread these costs over a larger loan volume. To borrowers, this may mean, of course, that in such areas consumer credit may be more available.[149]

A further political reality relative to convenience and advantage is the vested interest of other existing lenders. They, much like banks, may not want new entries. This has been true in some states among the small loan companies.[150] There are several reasons for this opposition to the UCCC and free entry.

One significant factor which may account for some opposition is that while authority to operate is limited by licensing requirements and convenience and advantage, the license itself may be of substantial value apart from the going business. This would be particularly true where the license is underutilized, or is located in a growing area where a limited number of licenses are available or the licensing authority is particularly tight in granting new entries.[151] Also, some of the smaller independent loan companies fear that the "chain small loan companies" as well as chain retailers will encroach. There is some economic foundation for this fear because the chain loan companies, and perhaps the chain retailers as well, with their better access to the money market, would have a significant advantage, and would likely be able to obtain money at lower costs and thus enjoy a significant advantage should real competition develop. Retailers using existing facilities would not have substantial increases in fixed costs due to expansion into the loan field. Also, chains have the ability to shift money from low return

[149] The UCCC may mean that other existing businesses, *e.g.*, retailers in rural or less populated areas, will go into the loan business with little additional overhead by use of existing facilities and personnel. If so, they could provide more competition. A big question of course, would be whether these retailers would have the resources to go into the loan business. One of the factors in the success of bank credit cards has been the fact that through credit cards many merchants without credit facilities and resources could in effect make credit sales but yet not have their capital tied up in accounts receivable.

[150] This is based on a conversation of the writer with some small loan officials in South Carolina. The strength of the support or opposition to the UCCC by all of the vested interests appears to vary from state to state. In some states, for example, banks or small loan companies have supported the UCCC and in others have opposed it or at least not given active support. No doubt this is in part due to their perception of how the UCCC will affect them in any given state relative to existing conditions.

[151] This argument seems to assume that the license may be transferred or sold. Virginia has been classified as "tight" in permitting entry under the "convenience and advantage" requirement for small loan companies. See note 140 *supra*.

areas to higher return areas, which could also threaten existing lenders of reduced volume with a consequent increase in cost per loan unit. For these reasons some small loan companies see a significant threat to their stability, even their survival, and point out that the regulated lenders, under small loan legislation, have been a stabilizing, beneficial influence meeting important needs and demands. From this they argue that this segment of responsible lenders should not be crowded out by newcomers of unknown responsibility and reliability. Is there implicit in this argument an apprehension that competition really might work with the most efficient surviving? Will it be the right kind of competition? Is there some vested interest which should be protected?

Whether elimination of the convenience and advantage requirement will bring about these events is of course not clear.[152] Whether new

[152] A preliminary report from Utah, which enacted the UCCC effective July 1, 1969, indicated that in the first months of operation there were no significant changes.

> Freedom-of-entry as permitted by the Code, has not resulted in a rush for new consumer finance licenses in Utah. Prior to the enactment of the Code, this department supervised small loan companies with lending limits up to $600, and industrial loan corporations, which were permitted to lend up to $5,000, at special rates. When the Utah Legislature enacted the Code as of July 1, 1969, the Small Loan Act was repealed. On June 30, 1969, we had 150 small loan licensees. On July 1, 1969, most of these small loan companies became supervised lenders under the Code and on December 31, 1969, we showed 115 supervised lenders licensed with 25 additional offices.
>
> As of March 21, 1972, we show 112 supervised lenders with 35 additional offices. This includes 14 restricted licenses issued to collection agencies who accept the assignment of supervised loans for collection purposes.
>
> On June 30, 1969, we had 128 industrial loan corporations licensed with 53 branches. When the Code was enacted many of these surrendered the industrial loan license and became supervised lenders. Our records now show 57 industrial loan licensees with 20 branches as of March 21, 1972.
>
> Since July 1, 1969, we have granted 26 new supervised lender licenses and two additional office licenses. This includes the 14 restricted licenses issued to collection agencies. Restriction prohibits these licensees from making supervised loans and such license permits only the acceptance by assignment of supervised loans for collection.
>
> In regard to your question as to whether or not competition will keep interest rates below ceilings, we have seen no evidence of any change from procedures in the past in this respect. Finance companies have traditionally charged the maximum rates on loans up to $1,000 and we feel this will continue although we do have some indication of deviation when a borrower is inclined to shop around. Credit unions are all holding at 12% per annum, and although an attempt to increase this rate was made by two credit unions about a year ago, this was immediately disapproved by the other credit unions as well as the League and such increase was discontinued. Banks and building and loan institutions still operate very similar to the manner in which they operated prior to the enactment of the Code as far as interest rates are concerned. Letter of William C. Wideman, Deputy Administrator, Consumer Credit, Utah State Department of Financial Institutions, to the author, March 28, 1972.

competitors will be attracted is also uncertain and will depend upon many factors such as the number of lenders already in an area and perhaps more important, on the return on the investment compared to other uses to which it might be applied. The mere fact that high interest rates will be permitted does not necessarily mean that there will be correspondingly high profits. In fact, the past experience of consumer finance companies, even with numbers so limited as to suggest monopoly and relatively high rates compared to banks, shows that their return on invested capital is generally in line with other businesses.[153] These studies indicate, contrary to some popular opinion, that consumer finance companies do not make exorbitant profits.

Professor Robert W. Johnson, one of the consultants on the UCCC, has pointed out that costs tend to follow the interest rate ceiling,[154] basing his opinion on studies in consumer credit. "Higher rate ceilings permit those credit grantors lending at the margin to assume greater risks or in other words to incur the higher cost necessarily involved in serving more marginal customers." [155] As the interest is raised, costs tend to increase as lenders to *maximize* profits (rather to minimize losses) tend to take greater risks. If this is true, it would suggest that should interest rates move higher under the UCCC than the existing ceilings, higher risk loans might increase as a likely consequence, as might also unsound loans, defaults and related financial difficulties. It also means there may be wider availability of credit, assuming that the competitive forces upon which the UCCC relies permit the going rate to rise above the present levels. Whether competition will work to keep the going rate below the ceiling rate is, of course, one of the central imponderables. For example, on "supervised loans" by banks and other lenders where the ceiling is raised to 18%,[156] should competition permit the rate to

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153 CHAPMAN & SHAY, *supra* note 140, at 143, Table 36. *See also id.*, at 50, Table 16.

154 *Regulation of Finance Charges*, *supra* note 107, at 106-07. CHAPMAN & SHAY, *supra* note 140, concluded:

> There is considerable evidence in the preceding chapters to support the hypothesis that costs follow rate ceilings, rather than that costs determine these ceilings. For example, the study of the nine largest consumer finance companies show that 'the two companies with the highest charge . . . also had the highest operating costs in that the higher costs offset the earning potential of the higher charges.' Analysis of the broader sample of the forty-eight companies reveals that "when gross income per $100 of loans outstanding is high, operating costs per $100 of loans is high and vice versa." *Id.* at 143.

155 *Id.* at 106.

156 UCCC § 3-508.

rise above present levels, there might be an increase in unsound loans from a borrower perspective, although from a lender viewpoint, the greater risk may be worthwhile.[157] Thus it would seem that by raising the interest ceiling the UCCC may make credit available to higher risk or marginal borrowers who presently are unable to obtain credit. Implicit in this is the assumption (1) that there are persons who now are unable to obtain credit (also an assumption based upon judgment); (2) that an opportunity to obtain credit should be made available to *some* who presently are not able to obtain credit; and (3) that such persons are able to manage credit or that their failure or inability to handle it properly is one of the social costs of making credit available to higher risk borrowers. The first assumption is undoubtedly true, but does it lead to the conclusion that credit should be available to them at the high cost permitted by the UCCC? Who are those unable to obtain credit?[158] What is the extent of their need? What are their purposes? Is this the only way these needs can be met? In sum, is there a need for more consumer credit or consumer loans? If one of the main purposes of free entry and the high rate structure is to provide a wider source of legitimate lenders, albeit at a higher interest rate, should the burden fall upon those advocating such a change to demonstrate the need for additional availability of credit?[159] Is there a need in Virginia for more consumer credit? Are good risks unable to obtain loans or credit? One measure of the need for additional legitimate sources of credit is the extent of the loan shark problem. If there is a substantial loan shark problem, this would indicate that the interest rate is too low.[160] Some indication of the perceived need can also be gleaned from

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[157] "It is a generally accepted axiom that companies should not attempt to minimize costs, but rather should aspire to maximize profits." CHAPMAN & SHAY, *supra* note 140, at 63. *See also Sartoris, supra* note 135, at 358.

[158] One obvious group which might be helped by the UCCC are borrowers in rural or thinly populated areas. See discussion p. 270 *supra*. Even the best administered "convenience and advantage" provision cannot assure that applications for licenses are made for the place of need; *existing* banks, retailers, freed from "artificial" restrictions may enter the consumer credit field without the necessity of new facilities.

[159] Free entry and higher rates do not mean that automatically there will be greater availability of credit. As important as fair return there must be funds available and the funds available to consumer lenders are not unlimited and must compete with other uses and are affected by fiscal and monetary policy. *See generally*, CHAPMAN & SHAY, *supra* note 140, at 34-52, 87-119.

[160] The basic premise behind the Russell Sage Uniform Small Loan Act was that to eliminate the loan shark, the rates must be high enough to permit legitimate lenders and if the rate is too low, the loan sharks will flourish.

the rejection rate of consumer loans or small loans. One study, indicating that roughly 40% of loan applications were rejected by small loan companies,[161] suggests the existence of a fairly substantial pool of potential borrowers who might be aided by higher interest ceilings. Are the other characteristics of the potential borrowers important? Do they fit the pattern of the typical small loan borrower—"young, married, blue collar, semi-skilled?" [162] One could probably surmise that they are near the lower end of the economic scale. Are the needs or purposes for which the credit or loan is sought legitimate? For luxuries or necessities?[163] Who determines what needs are legitimate? Can or should society determine absolutely what is too much consumer credit or should this be left to the individual? Does the UCCC really decide whether there is enough consumer credit by opting for freedom of choice, and permitting the individual to determine the cost and pay 36% to obtain an absolute necessity such as food, or the most frivolous of luxuries? Does not the UCCC fail to consider whether society should effectively force its disadvantaged members to pay higher interest rates than its more affluent members,[164] even for necessities, or whether society should eliminate this disparity through public assistance and welfare to its

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161 See FTC REPORT ON RETAIL SALES, *supra* note 5.

162 This characterization is not completely accurate but more of a composite description, as the various studies show somewhat different characteristics and even differences from state to state. See CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 63-69; ROBBINS, *supra* note 109, at 57-79, 126-37.

163 Robbins' study indicated that the *intended use* of 18.91% of the consumer installment loans was for "medical, hospital, dental, funeral"; 10.18% for "clothing, food, rent, fuel, moving," 27.24% to consolidate overdue bills, 5.80% for "taxes, mortgage, interest, insurance," 2.69% for "home furnishings and appliances," 7.71% for "home repair and improvement," 3.95% for "automobile expense." ROBBINS, *supra* note 109, at 87. The National Consumer Finance Association study indicated that in 1958 the intended uses were 39.5% for consolidation of overdue bills, 7.9% for "medical, dental, hospital, and funeral," 7.2% for "clothing, food, rent, fuel and moving," 4.7% for "home furnishing and appliances," 7.6% for "taxes, payments on real estate loans, insurance," 5.1% for household repairs, 5.5% for automobile purchases or repairs. CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 62. For other studies of intended use of consumer loans see SIMPSON, *supra* note 105 at 132; Pennsi, *A Bird's Eye View of the Loan Shark Problem from the Offices of the Legal Aid Society in Atlanta*, Georgia, 19 LAW & CONTEMP. PROB. 81, 91 (1964).

164 "Poor" as used here includes not only those poor in a monetary or credit rating sense, but also those who are not equipped to deal with the loan market on its own terms, *i.e.*, do not fit the model of the "sophisticated consumer" and hence pay more than they otherwise *might* have to pay.

disadvantaged members?[165] To obtain the means for basic necessities should one be forced or permitted to borrow or purchase at too high a cost, or should he be provided with a basic sustenance level?

Confronting this problem in the early Russell Sage days, many realized that the denial of legitimate sources of credit to consumers frequently forced consumers into the grasp of the loan sharks who exacted an enormous cost.[166] Inherent in this recognition is the premise that for perceived needs, consumers are willing to pay extremely high costs, a situation that may not be socially desirable. The question then is what should be done. One approach would supply the need by welfare or a minimum income level. Another would permit fairly high rates that would create legitimate sources of credit, but would set a limit on the interest exacted. This was the principle behind the Russell Sage approach, adopted by the UCCC and extended not only to small loans, but also to the whole area of consumer credit and loans as defined by the UCCC. A third approach, which would maximize the availability of credit as well as the bad aspects of too much credit and debt, would remove the limits on interest charges. The UCCC rejected this unlimited approach and imposed a ceiling on the price of money. Whether the line has been drawn at the right point is of course debatable.[167]

If existing ceilings on small loans are above the comparable UCCC ceilings, and the going rate is also at the ceiling rate which frequently is the case[168] then several questions arise. Does this indicate that the

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165 In the small loan, high rate loan area, is it really a situation where the "good" high risk borrowers are subsidizing the borrowing of the "bad" high risk lenders? Are the "poor" subsidizing the "poor"? Are indirectly these costs being borne by the segment of the population which should be bearing the burden if it is to be borne by society? Should the subsidizing be done directly so that the true costs are more evident?

166 ROBINSON & NUGENT, *supra* note 95, at 58 reported that in 1914 in Richmond, Virginia, the rate of interest charged by some lenders was 120% a year.

167 At least one economist has argued that the 36% ceiling is too low for small loans.

> The UCCC fully recognizes the dangers of driving borrowers to loan sharks, but it succumbed to the thirty-six percent rate ceilings which will make loans to $100 or less virtually unobtainable.... Yet, to be consistent with the UCCC philosophy to set ceilings and not to fix rates, a more desirable step would have been to raise the rate ceiling on loans of $300 or less: perhaps to forty-eight percent on loans of $100 or less, and forty-two percent on loans between $100 and $300. *Shay, supra* note 54, at 496-97.

168 This was true in 1970-71 in South Carolina where the ceiling for small loans under $150, which also generally was the going rate, was substantially above the UCCC rate. *See* note 99 *supra*. *Shay, supra* note 54, at 496 stated: "Of those states with small loan

present rate ceiling is equilibrium or lower than that point at which competition would set the going rate; or does it indicate that presently the type of competition espoused by the UCCC is not setting a competitive rate below the ceiling? In other words, does the present rate reflect lack of competition or does it reflect that the ceiling has been set at or below the point it would be set by competition?

Considering the above, one should logically examine how the UCCC will foster and stimulate competition hopefully keeping interest rates below the ceilings. If there presently is ineffective rate competition, what will the UCCC do to make competition more effective? Is there presently lack of lender competition? Is competition only a matter of numbers as is suggested by the assumption that free entry would foster competition? Why do not the present substantial number of lenders really compete, or do they? Is each satisfied with its present share of the market? Will the UCCC upset this complacency? On the other hand, if borrowers or buyers are not selective and do not shop for better interest rates, one of the most vital ingredients to competition will be missing. For over two years Truth in Lending with its disclosure requirements has been in effect, affording borrowers the information necessary to shop for the best credit terms among lenders. Yet there is increasing evidence that Truth in Lending disclosures have a minimal effect on increasing interest rate competition. Few appear to make use of the required disclosures.[169] Despite the UCCC theory in which price competition is relied on to keep the interest rate below the ceiling, it is clear today that in many areas the going rate for credit sales and consumer loans is also the ceiling rate. If this is true, particularly in a state

laws fifteen would find some segment of the UCCC rate below current ceilings." Virginia is not one of those listed by Shay as having higher ceilings than the UCCC.

169 Many lenders, sellers, and officials involved with the enforcement of Truth in Lending have indicated they believe the Act has had a minimal effect. To a large extent the consumer remains more concerned with whether he can obtain the loan or receive credit and with the payments than with the annual percentage rate and the finance charges. Before the federal Truth in Lending Act was passed, Massachusetts had passed a state Truth in Lending Law and a report on that act indicated little beneficial impact on consumers. "What, then, has been the Massachusetts experience to date with respect to consumer response to annual rate disclosure? In brief, the anticipated consumer reaction simply has not occurred, nor has there been any significant increase in the amount of comparison shopping by consumers. This conclusion is supported overwhelmingly by reports from virtually every source contacted in this survey—financial institutions, retailers, consumer organizations and government agencies." Pullen, *The Impact of Truth in Lending Legislation, The Massachusetts Experience*, 7 (Research Report No. 43, Federal Reserve Bank of Boston 1968).

where the present ceiling under the Small Loan Act is higher for loans under $300,[170] one may possibly conclude that either (1) the present level of competition does not work to keep the price below the ceiling level; (2) the existing ceiling rate has been set at an unrealistic level below the market level; or (3) a mixture of these factors exist, *i.e.*, too much competition and too low a ceiling. Will the quantum of competition offered by the UCCC make much difference? Using Virginia as an example, it is difficult to say that there is presently no competition among small loan companies or other lenders. At the very least, conditions for some competition do exist. Thus, if one accepts the fact that presently there is some competition in the consumer loan or credit area, and that competition will in fact work, will the competition introduced by the UCCC effectively control the interest level? The reaction of many non-economists is great skepticism. The UCCC appears to rely on two critical factors for more competition: (1) Truth in Lending-type disclosures to inform borrowers, and (2) more lenders.

The main thrust of the UCCC deals with competition from the supply side by permitting more lenders to stimulate more competition, and by providing rates to insure that money is available to lend at a reasonable return. It has been suggested that the approach of the UCCC deals too much with the question of consumer credit as a problem of supply rather than of demand, and ignores the nature of the demand. One feels that the UCCC does little to affect the demand side of the problem.[171] One of the great difficulties is, of course, the nature of the demand for consumer credit and loans. In classical terms, although fairly difficult to document definitively,[172] apparently the demand is fairly inelastic;

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[170] *See* note 168 *supra*.

[171] Professor Johnson in *Regulation of Finance Charges, supra* note 107, at 89 has listed the elements of a perfectly competitive market:

1. A commodity or service whose uniform type and quality is recognized by buyers and sellers;
2. A large number of buyers and sellers, making offers to buy and sell independently;
3. Buyers and sellers who are fully informed as to prices; and
4. Buyers and sellers who are free to enter or to leave the market.

Johnson points out, however, that "[t]he perfect market is a limiting case found only in theory. Consequently, all markets are imperfect to some extent." *Id.* It is quite important to note that in this model "free exit" or "freedom to stay out of the market" is just as important an element as is "free entry." It is at this point that the UCCC seems weakest—is the demand for consumer credit such that borrowers have "freedom" to stay out of the market? Compare the purposes for which people borrow from small loan companies, note 167 *supra*.

[172] The writer's research abilities are perhaps the limiting factor here.

as the price (*i.e.*, interest rate or finance charge) goes up, the demand remains fairly constant.[173] To an extent this view of the inelasticity of the demand is supported by studies showing why people borrow from small loan or consumer finance companies. Nearly all of the studies examined indicate that substantially all such loans are for emergencies or what might be considered necessities.[174] To the extent that these are necessities or appear to be such (whether they are necessary in any absolute sense may not be as important insofar as demand goes), the demand will tend to be inelastic and fairly constant regardless of the price.[175] In other words, the borrowers will tend to pay the price charged. To a large segment of the population credit and loans are necessary to enable them to purchase many consumer items. The consumer is daily bombarded by television, newspapers and other advertising media, urging him to become one of the consumers.[176] One significant phenomenon which has encouraged the tremendous expansion of consumer credit in the past decades has been the hard sell, persuading many to consume items supposedly needed for the "good life." For others, consumer credit enables them to procure items they otherwise would not have and which they are persuaded by the media they cannot do without. "Compensatory consumption" also may play a role.[177] That

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173 "A substantial proportion of the loans made by consumer finance companies are for urgent personal needs or emergencies and are not sensitive to changes in terms that accompany selective controls." CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 115. *See also Shay, supra* note 54, at 513. *Regulation of Finance Charges, supra* note 107, at 98-99 n.46.

174 *See* note 167 *supra.*

175 Is not this the real basis for the existence of the loan shark?

176 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 274-275 (1968) had this to say:

> Various cultural factors generate constant pressure on low income families to buy many relatively expensive durable goods and display them in their homes. This pressure comes in part from continuous exposure to commercial advertising, especially on television. . . . Most low-income families are uneducated concerning the nature of credit purchase contracts, the legal rights and obligations of both buyer and seller, sources of advice for consumers who are having difficulties with merchants and the operation of the courts with these matters. . . . In most states, the laws governing relations between consumers and merchants in effect offer protection only to informed, sophisticated parties with understanding of each other's rights and obligations. Consequently, these laws are little suited to protect the rights of most low-income consumers."

177 Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROB. 641, 647 (1968). Caplovitz states:

> Since the poor have little prospect of greatly improving their low social standing through occupational mobility, they are apt to turn to consumption as at least one sphere in which they can make some progress toward the American dream

the demand is quite inelastic is indicated by the common recognition that what is important is not the price or cost of a loan or credit but whether the small loan will be made or credit extended. Is it not also shown by the harsh terms and contracts of adhesion imposed on consumers, and the well-documented problems arising in the use of credit insurance because of the captive market?[178] A Michigan study reinforced this view, indicating that even for substantial, non-necessity loans such as a car loan, for a large percent of the sample, interest rates were not a significant factor in obtaining a loan.[179]

If, because of an overriding necessity or desire to obtain a loan at any cost or lack of concern or inattention to finance charges as a shopping factor, borrowers will pay the proffered rate to the most convenient lender without comparative shopping, then would the UCCC really change this pattern? Why is competition not working now? Is it due to lack of the right consumer input, or demand promoting competition among lenders? To make lenders compete, will consumers by their conduct have to insist that they compete? The one factor which the UCCC and Truth in Lending have introduced which may improve the quality of consumer demand is the disclosure requirements. However, indications are far from clear that these disclosure provisions will have or are having a significant impact on consumers or that they are using disclosures to shop for the best rates. Preliminary reports concerning the awareness of consumers relative to the disclosures have been disappointing.[180] Further, compliance with the Truth in Lending disclosure requirements has presented problems and has not been outstanding.[181]

> of success. If the upper strata observed by Veblen engaged in conspicuous consumption to demonstrate their social superiority, it might be said that today's poor are apt to engage in *compensatory* consumption. Appliances, automobiles, and the dream of a home of their own can become compensation for blocked social mobility. *Id.* at 647.

See also CAPLOVITZ, The Poor Pay More, *supra* note 1, at 13-14 and p. xxv of preface to the 1967 edition.

178 *See, e.g.*, Shuckman, *Consumer Credit by Adhesion Contracts II*, 35 TEMP. L.Q. 281, 302 (1962); Davis, Etter, Blythe & Freund, *The Regulation of Consumer Credit Insurance*, 33 LAW & CONTEMP. PROB. 718 (1968); Note, *Consumer Credit Insurance—A Need for Regulation in Kentucky*, 56 KY. L.J. 668 (1968).

179 *See* WHITE & MUNGER, *supra* note 97.

180 Note 169 *supra*.

181 *See* FTC, REPORT ON SURVEYS OF CREDITOR COMPLIANCE WITH THE TRUTH IN LENDING ACT (1971). The report indicates that for Region B, which covered a portion of the east coast states including Virginia, of the sample studied for compliance of disclosure terminology, 12% of the automobile dealers, 24% of the television and appliance dealers, 30% of the home improvement businesses, 20% of the jewelry stores and 25% of the

Today, many working in the consumer credit field, including lenders, sellers, and those having enforcement responsibility under Truth in Lending, agree that even with the required disclosures which make comparative shopping theoretically possible, consumers are not concerned with the price of credit. Whether consumer education will change this remains to be seen. However, to the extent that the cost of credit is not important the demand for consumer credit is inelastic with regard to price, and does not force suppliers to compete price-wise.

Tending to mitigate the consumer's not shopping for the lowest interest rate is the fact that in small purchases and loans the slight competitive differences, if any, will simply not appear to merit any comparative shopping among loan companies.[182] Also, the difficulties incurred in comparing both the price of goods and credit further reduce the likelihood of any meaningful comparison of anything but the price of the goods.[183]

Thus, if the demand for small loans is fairly inelastic and there is no price competition, additional lenders in the market may not reduce the price or cost of money. Moreover, if the price of money is not a relevant consideration to the borrower, price competition may not be effective, and there may be no competitive check on the lender's effort to maximize his profit, particularly in the high cost-high risk small loan area and in credit sales. Competition may appear in non-price aspects such as the amount or type of loan, terms, length, convenience, and friendliness. If this results, what justification exists for permitting or encouraging more lenders in the consumer credit field and allowing them to locate practically at will? Certainly there is the danger of more lenders generating more loans, perhaps many of them unwise, leading to financial disaster for these borrowers.

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furniture stores were in "non-compliance." *Id.* at 49. The average percentage of Annual Percentage Rate (APR) accurately disclosed was approximately 75% for automobile dealers, 59% for television and appliance dealers, 61% for home improvement businesses, 48% for jewelry stores and 69% for furniture stores. *Id.* at 50.

182 The demand for credit is derived from the demand for goods and services financed. Since the finance charge is a relatively small portion of the total time price and monthly payment, consumers are probably not as sensitive to changes in the price of credit as they are to changes in the cash price of goods or services financed. In economic terminology, the demand for credit is probably less elastic than is the demand for the goods or services. *Regulation of Finance Charges, supra* note 107, at 99-100, n.46.

183 This information is required to be given by the disclosure provisions of Truth in Lending and such a comparison could be made if there is a perceptive, "sophisticated" consumer.

Competition among existing lenders under the present ceilings, due at least in part to the inelastic demand and the captive market, has not brought the price below the ceiling in many areas. Are consumer loans available below the ceiling rates? If so, is this due to a state of equilibrium or lack of competitive forces including selective customers? Is there real competition today on price? Do banks, small loan companies, industrial loan companies, and finance companies really compete pricewise by advertising their prices as do grocery stores? Do lenders try to attract business by offering lower interest rates? Would the UCCC really bring about a change? The fluctuations in the interest rates available in such cases as car loans and home mortgages are sometimes offered as proof that competition will work to keep the going rate below the ceiling. Yet, is not the demand for these of a different type, and does it not generally involve a more sophisticated consumer?[184] In large part one suspects that the availability of money, and fiscal policy have more to do with these fluctuations in interest rates than does competition.

One should also consider whether the UCCC would encourage existing lenders, such as commercial banks, to enter the small loan and consumer credit field to add perhaps more price competition. As suggested earlier, unless the cost factors are low enough to permit a fair return under the applicable UCCC rates, there will be no real incentive for existing lenders to make such loans. Can banks operate at a lower cost in the small loan field than do existing loan companies? As noted earlier the cost of money obtained through depositors is lower than that of loan companies obtained through commercial banks, and is probably lower than it is for many retailers. Likewise, by expanding more into consumer credit loans, banks would not increase significantly their fixed costs and perhaps could use their existing facilities more efficiently. If they could operate at lower cost, would the relative ine-

184 White and Munger's study certainly casts serious doubt on the question of whether, even with a substantial loan such as an automobile loan, consumers are sophisticated in the sense of shopping for the best car loan even though the saving might be quite substantial. Their study indicated that many who borrowed from a higher rate lender at a $6.00 per $100 could have obtained a loan of $4.50 per $100, or ⅓ lower and a difference in cost of $135 on a $3,000 loan for three years. Their study disclosed that the lower rate lender "would have made at least the same loan as the higher priced lenders made or would have required less than $100 additional down payment in 45% of the GMAC (higher rate lender) cases and in 39% of the AAB (higher rate lender) cases. . . . If GMAC and AAB borrowers could have come up with an additional $250 down payment, then more than 60% of them could have qualified for a $4.50/100 loan at HVNB (lower rate lender)." WHITE & MUNGER, *supra* note 97, at 1218.

lasticity of borrower demand keep the going rate below the ceiling rate for consumer loans? One may question the underlying assumption that commercial banks want to further involve themselves in the small loan and consumer credit field.[185] Some banks may prefer not to engage extensively in the small loan field regardless of the return, or may prefere to skim the better risks and loans. Internal competition for bank loan money will continue to dictate that money be placed in areas of highest return and be used to service regular customers, corporations, and commercial borrowers.

Another aspect of the UCCC which one must consider is that for most loans, except possibly in the small loan area,[186] it would raise the existing ceiling. For example, under the UCCC the general ceiling is 18%,[187] while in Virginia the present ceiling is only 8%.[188] Unless competition does in fact keep the price at present levels, for the majority of borrowers the UCCC may mean an increase in the cost of loans. The one who may get a lower rate is the small loan borrower in those states where the ceiling is lowered. However, as pointed out earlier, this decrease may well mean fewer lenders or loans at this rate.

The defenders of the UCCC maintain that with the relatively high ceiling, competition will set the rates. Does this theory assume that there will be a segmentation of loan rates, for the high risk–high cost loan, the going rate will be higher, and for the low risk-low cost loans, the going rate will be lower? Does the UCCC assume, for example, that some high risk lenders would loan at or near the ceiling rates, others at lower rates, some at the present rates, and perhaps others at or below present rates? This assumption would apparently indicate that a strati-

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185 Banks, of course, do not have unlimited funds and internal competition for funds will be affected by the relative return from various departments or types of loans made.

> [Banks] recognize that sound operating policies required diversification of assets. This principle places a limitation upon the proportion of its assets which a bank can invest in any one field. Second, when bank reserves are under pressure, the responsibility to serve all areas of loan demand in their community limits their ability to expand consumer loans. Third, banks, due to the fact that they generally make much larger consumer loans, must be more selective than consumer finance companies. Ninety percent or more of the funds of a commercial bank are in the form of demand deposits which bear no interest. Its primary responsibility is to its depositors. . . . The consumer finance company can take a considerably greater degree of risk, because its creditors are different and its ownership equity is higher. CONSUMER FINANCE MONOGRAPH, *supra* note 37, at 31.

186 *See* note 99 *supra.*

187 *See* note 48 *supra.*

188 *See* note 97 *supra.*

fication of borrowers or lending rates could and would be developed. Can there be a more precise system of rating borrower risk than presently exists? Will a given lender, for example, lend at various rates depending upon his evaluation of the individual risk? Some lenders, stating that the lending risk cannot be refined so precisely, note presently that in the small loan field there is essentially a uniform, one rate system—at best a two rate system—where very good risks or "reputable citizens" may obtain loans at rates lower than the rate used for the general class of borrowers. It is unclear how this variation in rate would operate. If, as the present situation seems to be in many small loans, there is a uniform rate across the board, it would seem that again the case of the "poor pay more" will prevail; the "high raters" would continue to operate in the higher risk, captive market areas. This seems to be the most likely result under the UCCC. Although there may be less segmentation between lenders in the various types of consumer credit and loans, the segmentation of rates will continue and perhaps even increase. Indeed, it would seem that the UCCC would bring more high or ceiling rate lenders, more non-price competition, and wider availability of consumer credit to high or marginal risks, and even more competition for the better than marginal risks. Yet for those who remain marginal, high risks, or in a captive market because of the intensity of the demand, lack of sophistication, or the many other factors which affect borrower's ability to shop comparatively or withhold demand, there will be no relief. Below the high-risk, ceiling level of lenders and borrowers, perhaps the UCCC offers more promise. Free entry may provide needed price-of-money competition, but it will benefit only those who will "play the game" by the rules, and are sophisticated borrowers. It will take the right ingredients on the consumer demand side, however, to reap the benefit which may be available. The UCCC remains strong in its position that freedom in the marketplace also includes the freedom to make mistakes. It does not take a paternalistic view by determining what constitutes unwise borrowing, what is too much credit, or, short of its ceilings, when a cost is too high. Perhaps the opposition of some consumer spokesmen to free entry and the high rate structure is valid if based upon the theory that the UCCC does not protect the marginal, low income consumer from himself. This the UCCC does not do. In this sense, it is middle class or, more accurately, sophisticated consumer legislation. It seems most important to realize that the UCCC is not self-executing in the sense that it ensures that each consumer will get more credit at lower prices because of added competition. Passage of the UCCC does not finish consumer protection. It is up to the consumer and those concerned with his welfare to see that free entry is successful. Clearly, a certain number of people have always been unable to protect themselves, and this will remain even after passage of the UCCC. The need for consumer education is and will continue very real. Efforts and resources to remove those factors which prevent the consumer from becoming the sophisticated consumer who can play by the rules of the marketplace are sorely needed.

Conclusion

In one sense free entry and the high rate structure do not break with tradition, but in the American way, permit free competition to determine the price of money and credit. The UCCC's free entry and rate structure continues our concept of freedom by permitting wider choice and individual determination of the "cost" of wants and demands. It also continues the freedom to make mistakes or unwise decisions. The greater freedom and perhaps greater availability of consumer credit may cause increased social costs resulting from unwise individual free choices. Perhaps the UCCC offers little hope for the marginal, high risk, low income borrower, from a cost of money position, and does not protect him from himself. The need to attack this problem by consumer education and other means will remain. Although free entry and the rate structure of the UCCC are controversial, sound reasoning and theory appear to be behind the concept of the UCCC and substantial evidence and data support it. Yet many remain skeptical that the good theory will work in practice, particularly for those who already do not fare well in the system—the poor. Whether the UCCC will increase this problem is not clear. However, one point should not be obscured by the rhetoric about free entry, high ceilings and rates, and convenience and advantages: the UCCC offers in its other provisions great advances in consumer protection, wholly apart from free entry and the rate structure.