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# THE FEDERAL CONSUMER CREDIT PROTECTION ACT — A CONSUMER PERSPECTIVE

William E. Boyd\*

## I. Introduction

Passage of the Consumer Credit Protection Act<sup>1</sup> [CCPA] brought cries of anguish from creditors and their representatives everywhere.<sup>2</sup> Discernible amidst complaints of unnecessary federal intervention into an area already adequately regulated at the local level has been a more legitimate concern over the difficulty of compliance.<sup>3</sup> A look at the complex requirements of the statute and the Federal Reserve Board's implementing regulation, regulation Z,<sup>4</sup> quickly reveals that this concern is more than justified.<sup>5</sup> In response, numerous articles,<sup>6</sup> manuals,<sup>7</sup> and seminars<sup>8</sup> designed to guide creditors and counsel in the task of compliance have appeared. It has been generally assumed, in part because of the extensive publicity accompanying passage of the Act,<sup>9</sup> and, in part, perhaps, because of the reaction of creditors, that the benefits to consumers were obvious and would be immediately realized. This article will evaluate that assumption, identify some of the potential benefits that may inure to consumers, and suggest ways in which those benefits might be realized.

A brief outline of the various components of the CCPA will suggest its general scope. Title I, formally labeled "Consumer Credit Cost Disclosure,"

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\* Associate Professor of Law, University of Arizona College of Law. Member of the Michigan and Arizona Bars.

1 Act of May 29, 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified at 15 U.S.C. §§ 1601-77, 18 U.S.C. §§ 891-96 (Supp. IV, 1965-68)).

2 See, e.g., Wall Street Journal, July 11, 1969, at 32, col. 1.

3 See, e.g., Kintner, Henneberger & Neill, *A Primer on Truth In Lending*, 13 St. Louis U.L.J. 501 (1969).

4 34 Fed. Reg. 2002 (1969). The Board has authority to implement Title I by such regulations as it should deem "necessary or proper to effectuate the purposes of" that title. 15 U.S.C. § 1604 (Supp. IV, 1965-68). References to the "Act" or the "CCPA" should be deemed to include the relevant sections of regulation Z.

5 See, e.g., FRB Reg. Z §§ 226.4-6, 34 Fed. Reg. 2004-6 (1969). These sections deal respectively with determining the finance charge, determining the annual percentage rate, and general disclosure requirements, all of which must be mastered before one even attempts to comply with the sections setting forth the specific disclosure requirements for "open end" credit transactions and "other than open end" credit transactions. *Id.* §§ 226.7-8, at 2006-07. In addition, difficulties may be encountered with definitions. See, e.g., §§ 226.2(f), (k), (m)-(n), all of which must be considered in deciding whether a particular creditor and extension of credit are subject to the requirements of Title I.

6 E.g., Bluhm, *Truth In Lending Act Analyzed* (pts. 1-2), 40 Clev. B.J. 28, 60 (1968-1969); Kintner, Henneberger & Neill, *supra* note 3.

7 E.g., FEDERAL RESERVE BOARD, *WHAT YOU OUGHT TO KNOW ABOUT TRUTH IN LENDING* (1969); R. JOHNSON, R. JORDAN, & W. WARREN, *MANUAL ON THE FEDERAL TRUTH-IN-LENDING LAW* (1969) [hereinafter cited as *TRUTH-IN-LENDING MANUAL*].

8 A great number of seminars emphasizing compliance with the Act have been held, including Truth-In-Lending Problems, Arizona Law Institute, Sept. 25 and Oct. 2, 1969; Seminar on Truth-In-Lending, Continuing Legal Education Program of the Arkansas Bar Association and University of Arkansas School of Law, June 27, 1969; Truth-In-Lending, Illinois Institute for Continuing Legal Education, Nov. 1, 7, 8, 1969.

9 E.g., *The Truth about Credit is Coming*, 33 CONSUMER REPORTS 428.

but more popularly known as "truth-in-lending,"<sup>10</sup> requires that creditors<sup>11</sup> in extending consumer credit<sup>12</sup> reveal essential credit terms,<sup>13</sup> especially the cost of credit,<sup>14</sup> before consumer credit is extended.<sup>15</sup> As will be seen, truth-in-lending includes disclosure in advertising<sup>16</sup> as well as in person-to-person dealings. This is a logical inclusion since it may reasonably be assumed that the protection afforded by the disclosure requirements would be significantly diminished if consumers could be lured into the creditor's place of business by advertisements

10 Truth-in-Lending (which is also the official short title of Title I, Consumer Credit Protection Act, Pub. L. No. 90-321, § 101, 82 Stat. 146 (1968)) is the name given in 1963, S. 750, 88th Cong., 1st Sess. (1963), to a bill first introduced in 1960 by Senator Paul H. Douglas of Illinois, S. 2755, 86th Cong., 2d Sess. (1960).

11 "Creditor" as defined in regulation Z means "a person who in the ordinary course of business regularly" extends or offers to extend consumer credit. FRB Reg. Z § 226.2(m), 34 Fed. Reg. 2003 (1969). Thus one who makes only a casual or random extension of consumer credit, such as a person who privately sells his home or automobile, would not be subject to the requirements of Title I. The definition, however, also includes an "arranger of credit," one who provide[s] or offer[s] to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit. *Id.* § 226.2(f).

This inclusion may significantly broaden the class of persons who are required to make disclosures and are otherwise subject to the requirements of Title I. For example, a finance company that knows the terms of credit and participates in preparing the papers would be a creditor; so also would be a retailer who earns a fee by referring a consumer to a particular lender for financing of a sale.

12 "Credit" is defined in the regulation to mean the granting of a right "to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor." *Id.* § 226.2(l). However, only extensions of "consumer credit" are covered by the Act. Credit is consumer credit if (1) it is offered to a "natural person," (2) it is extended "primarily for personal, family, household, or agricultural purposes," and (3) "either a finance charge is or may be imposed or . . . pursuant to an agreement, [the credit] is or may be payable in more than four installments." *Id.* § 226.2(k). It is important to note that the definition in general employs a "consumer" purpose test but that this includes agricultural purposes. Thus, when a farmer buys a tractor for use in plowing his fields and is allowed to defer payment, the transaction may be subject to the Act. *See also Id.* §§ 226.2(c), 226.3(a), at 2002-03. It should also be noted that by this definition of "consumer credit" transactions that appear to involve no charge for credit (for example, certain sales by jewelers and other small retailers) are subject to the Act if *by agreement* the consumer may pay in more than four installments.

13 The disclosure requirements are divided first as between those for "open end" credit, *id.* § 226.7, at 2006, and "other than open end" credit, *id.* § 226.8, at 2007. Open end credit is defined to include standard revolving charge and loan accounts and also credit card arrangements. *Id.* § 226.2(r), at 2003. Other than open end credit is any credit not included within section 226.2(r) and thus would include installment sales and closed end loan arrangements. The disclosure requirements for other than open end credit transactions are set forth generally at *id.* §§ 226.8(a)-(b), at 2007-8, and more specifically at *id.* § 226.8(c) or (d), at 2008, depending, respectively, on whether a sale or a loan is involved.

14 The Act requires as to both open end and other than open end credit, except as to sales of and loans secured by a purchase-money first lien on a dwelling, that the dollar amount of the finance charge and the finance charge stated as an annual percentage rate be disclosed. *Id.* §§ 226.7(b)(4), (6), at 2007 (open end credit); *id.* §§ 226.8(b)(2), (c)(8)(i), (d)(3), at 2008 (other than open end credit).

15 The regulation requires disclosure "[b]efore the first transaction [i.e., loan or purchase] is made on any open end credit account." *Id.* § 226.7(a), at 2006. Except as to the special cases of mail or telephone orders or add-on sales (see *id.* §§ 226.8(g)-(h), at 2009), disclosures as to other than open end credit must be made "before the transaction is consummated," *id.* § 226.8(a) at 2007, which means before a "contractual relationship" arises. *Id.* § 226.2(cc), at 2003. The effect of both is to require disclosure before a binding credit arrangement is entered into, or before credit is extended.

16 15 U.S.C. §§ 1661-65 (Supp. IV, 1965-68); FRB Reg. Z § 226.10, 34 Fed. Reg. 2010 (1969). *See* text accompanying notes 111-31 *infra*.

that misrepresent credit terms and costs.<sup>17</sup> Title I also includes a provision for rescission of consumer credit contracts involving security interests in residences of consumer debtors.<sup>18</sup> Obviously, such a rescission provision is not a necessary component of truth-in-lending protection. Its inclusion in Title I seems to have resulted from an independent determination by the House draftsmen that abuses in the home improvement and second mortgage industry demanded immediate federal action.<sup>19</sup>

Title II,<sup>20</sup> labeled "Extortionate Credit Transactions," and Title III,<sup>21</sup> labeled "Restriction on Garnishment," apparently were added by the House when it became clear that Title I was destined for passage.<sup>22</sup> Title II, according to the statement of findings and purpose, is intended as a blow against organized crime, which derives a substantial part of its income from extortionate credit transactions.<sup>23</sup> The primary targets here are "loan sharks," who extend credit at usurious rates of interest and then use force as a means of collection.<sup>24</sup> While an attack on such illicit credit operations certainly must be included in any complete program of consumer credit protection, the fact that such operations are only a part of the much larger problem of abusive collection practices suggests that Title II ought be viewed in the context of that larger problem.<sup>25</sup> Title III has a dual impact: first, it limits the amount of earnings subject to garnishment by creditors;<sup>26</sup> second, it prohibits an employer from discharging an employee because of one garnishment.<sup>27</sup> As will be seen, this Title represents a compromise between polarized views concerning the legitimacy of garnishment as a collection device.

Title IV establishes a bipartisan National Commission on Consumer Finance which is to investigate the consumer finance industry generally with a view to recommending further reforms in the area of rate regulation and trade practices.<sup>28</sup> The potential impact of this commission, armed with the power of subpoena,<sup>29</sup> is great. Whether that potential is in any way realized will depend

17 H.R. REP. NO. 1040, 90th Cong., 1st Sess. 17 (1967). Many businessmen operate on the assumption that the major task is getting the consumer into their place of business. See TRUTH-IN-LENDING MANUAL 94.

18 15 U.S.C. § 1635 (Supp. IV, 1965-68); FRB Reg. Z § 226.9, 34 Fed. Reg. 2009 (1969).

19 TRUTH-IN-LENDING MANUAL 103; Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 10 n.41 (1969); McLean, *The Federal Consumer Protection Act*, 24 BUS. LAW. 199, 205-6 (1968).

20 18 U.S.C. §§ 891-96 (Supp. IV, 1965-68).

21 15 U.S.C. §§ 1671-77 (Supp. IV, 1965-68).

22 Kripke, *supra* note 19, at 9-10.

23 See 18 U.S.C. § 891 (Supp. IV, 1965-68).

24 The statute defines an "extortionate extension of credit" as

any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person. *Id.* § 891(6).

25 Conceding the need for treatment of organized crime in the credit market, it can only be viewed as unfortunate that the Act does not deal with the problem of abusive collection practices generally. For some discussion of the nature and scope of this problem, see Note, *Mental Distress from Collection Activities*, 17 HASTINGS L.J. 369 (1965); Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572 (1957).

26 15 U.S.C. § 1673 (Supp. IV, 1965-68).

27 *Id.* § 1674.

28 Consumer Credit Protection Act, Pub. L. No. 90-321, § 404, 82 Stat. 165 (1968).

29 *Id.* § 405(a)(3).

on the vigor and zeal of the individual members and on how seriously the commission regards its mission. Since these must be matters of speculation for the present, evaluation of the impact of Title IV will be reserved for future comment.

## II. Truth-in-Lending

### A. Person-to-Person Disclosure

Title I is essentially a disclosure statute.<sup>30</sup> It technically offers nothing in the way of substantive protection. A creditor is free to impose any charges for credit local law will allow.<sup>31</sup> He is also free to arrange both the extension of credit and repayment of the debt in any manner local law permits.<sup>32</sup> The legislation is not at all concerned with the terms and conditions of the extension of consumer credit, but requires only that the consumer be apprised of these terms and conditions before he signs on the dotted line. It requires, in particular, that all affected creditors<sup>33</sup> disclose the finance charge<sup>34</sup> as both a dollar cost<sup>35</sup> and annual percentage rate.<sup>36</sup>

One basic assumption of the Act is that, because of either the concealment of credit costs or the multivarious ways in which such costs are revealed, consumers have been pretty much in the dark as to what it cost them to borrow or purchase on credit.<sup>37</sup> This assumption cannot fairly be debated. A further basic assumption of the legislation is that if consumers were aware of the true

30 See 15 U.S.C. § 1601 (Supp. IV, 1965-68); see generally Kripke, *supra* note 19, at 2-13; McLean, *supra* note 19, at 199.

31 There are no direct controls of rates in Title I. Some indirect control may result from that part of regulation Z dealing with annual percentage rate disclosure for minimum finance charges. FRB Reg. Z § 226.8(b)(2), 34 Fed. Reg. 2008 (1969). See TRUTH-IN-LENDING MANUAL 24-26. As for local law, substantive rate regulation on loans may be found in a variety of legislation ranging from general usury statutes to small loan laws. As to credit sales, because of the time-price doctrine, finance charges are generally unregulated in the absence of special legislation such as retail installment sales laws. See generally B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 13, 91-123 (1965); Boyd, *Representing Consumers — The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372 (1968); Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441 (1967).

32 Except for some possible indirect impact, such as that which may result from the disclosures required where credit life or health insurance is made a condition of credit, the Act has no effect on the terms of credit. See text accompanying notes 71-74 *infra*. The actual terms and conditions of credit, apart from rate regulation, are largely unregulated by local law as well. See generally materials cited in note 31 *supra*; Helstad, *Consumer-Credit Legislation: Limitations on Contractual Terms*, 8 B.C. IND. & COM. L. REV. 519 (1967). The expanding notion of unconscionability, first statutorily recognized in the UNIFORM COMMERCIAL CODE § 2-302, has perhaps become the greatest single source of control as to terms and conditions in a consumer contract. See Boyd, *supra* note 31, at 383-85; Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

33 See note 11 *supra*.

34 The finance charge is the basic indicator of the cost of credit. Finance charge is defined in FRB Reg. Z § 226.4(a), 34 Fed. Reg. 2004 (1969), to mean essentially any charge (1) imposed by a creditor incident to or as a condition of credit, (2) payable by the consumer or someone else on behalf of the consumer, and (3) not otherwise excluded by some other subsection of the regulation. It includes not only interest and time-price differentials but also special charges such as service or activity charges, loan fees, points, finder's fees, and, unless the creditor meet certain special requirements, charges for insurance.

35 See note 14 *supra*.

36 *Id.* The annual percentage rate is a device for relating a dollar cost of finance charge to the amount financed over a standard period of time, namely, one year. In its simplest terms it is "r" in the elementary formula,  $i = prt$ . See TRUTH-IN-LENDING MANUAL 19.

37 H.R. REP. No. 1040, 90th Cong., 1st Sess. 13 (1967).

costs of credit, they would be more hesitant to borrow money or purchase goods on credit or would at least "shop around" for the best possible deal in terms of credit cost.<sup>38</sup> Clearly, this assumption cannot be so easily accepted without examination.

Most consumers utilize credit because they want items for which they cannot afford to pay cash. Their basic concern is often not the cost of credit, but whether credit is available.<sup>39</sup> At most they may wish to know their monthly payments, a not irrational inquiry for those desiring not to overextend themselves. Moreover, factors other than credit cost, such as the quality or intrinsic appeal of the goods offered, may be of primary importance in a consumer's decision to buy from a given seller.<sup>40</sup> As to loans, there seems to be a rather strong feeling, even on the part of more knowledgeable borrowers, that there is a "going interest rate" that prevails among all reputable lenders.<sup>41</sup> These observations apply particularly to low-income consumers. For a variety of reasons, both economic and sociological, it cannot reasonably be assumed that as a result of disclosure of credit costs such consumers will refrain from incurring credit obligations or even that they will "shop" for optimum credit terms.<sup>42</sup>

A third basic assumption of the legislation, which takes as its starting place the validity of the others, is that the means chosen for accomplishing disclosure will have the desired effect. Unfortunately, even this assumption is subject to doubt. The first "truth-in-lending" bill put before Congress required only disclosure of finance charges in terms of dollar cost and annual percentage rate.<sup>43</sup> The objective was not simply disclosure but uniform disclosure allowing the comparisons necessary for "shopping around."<sup>44</sup> In its final form, the CCPA calls for numerous other disclosures such as "number, amount and due dates or periods of payments," "cash price," "unpaid balance of cash price," "other charges," "unpaid balance," "required deposit balance" and "prepaid finance charge," and "deferred payment price."<sup>45</sup> The burden on the creditor is evident; the negative impact on the overall objective of the disclosure requirement should be obvious.

Even assuming that these additional disclosures, standing alone, could be justified as bestowing on the consumer all the information necessary to a com-

38 *Id.* at 106. See also Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 460 (1968); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 408-9 (1968); McLean, *supra* note 19, at 199.

39 To the extent that common experience does not document this observation, see *Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. 1189-90 (1967); *Loan Costs Don't Stop Consumers*, BUSINESS WEEK, June 25, 1966, at 32.

40 See Jordan & Warren, *supra* note 38, at 409.

41 Again, common experience should be enough to document this observation. There is admittedly some awareness that one may get better rates from banks or credit unions than from finance companies, but does anyone in a position to borrow from a bank ever compare bank rates to get the "best deal"? Cf. McKewen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. IND. & COM. L. REV. 387, 402-6 (1967); Kripke, *supra* note 38, at 464-66. Of course, a widespread belief in the absence of competition may itself help to assure that none exists.

42 Boyd, *supra* note 31, at 377; Kripke, *supra* note 19, at 6-8; Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 747-54 (1967).

43 S. 2755, 86th Cong., 2d Sess. § 3 (1960) (original bill). See Kripke, *supra* note 38, at 455-57; TRUTH-IN-LENDING MANUAL 94.

44 See note 38 *supra*.

45 FRB Reg. Z §§ 226.8(b)(3), (c)(1), (3)-(6), (8)(ii), 34 Fed. Reg. 2008 (1969).

plete picture of the credit arrangement he is about to enter into, in the aggregate, especially when included in a contract or statement that necessarily contains a considerable amount of other information, they only tend to reinforce the already strong likelihood that the consumer will not carefully read the contract so as to focus on those disclosures which in theory are designed to encourage informed use of credit.<sup>46</sup> Moreover, the detail and technicality required by the Act would seem to guarantee the bewilderment of that rare consumer who conscientiously studies the disclosures. Rarely will the average consumer understand all that has been revealed to him.<sup>47</sup> In fact, it is not unfair to conclude that even a lawyer-consumer might well be confused, assuming *he* reads the contract.<sup>48</sup>

Such fundamental objections to the basic assumptions of the CCPA cannot be lightly put aside. They have led some commentators to inquire whether the years of study and debate that went into the legislation are in any way justified by the ultimate product.<sup>49</sup> In fact this writer, anticipating the passage of the CCPA, has strenuously objected to such disclosure-oriented legislation, particularly where it may have the effect of diverting attention from other avenues of needed reform.<sup>50</sup> Although such generalized reactions may be justified, particularly in the context of discussions of the need for broader reforms, a close examination of the Act indicates that it may yet contain some significant benefits for the consumer. Such a particularized consideration of the legislation is incumbent on consumer representatives who must be concerned not only with what ought to be done for the consumer, but with what has been done.

In the first place, there undoubtedly are consumers who will be guided by disclosures of finance charges in dollars and in terms of an annual percentage rate. The actual amount by which an obligation is increased because of the right to defer payment can be quite startling and may well cause the potential buyer or borrower to have second thoughts about whether he wishes to defer payment. The discovery that a finance charge of eight dollars per hundred per year (imposed, for example, by a finance company in connection with the purchase of a new automobile)<sup>51</sup> is close to sixteen percent in terms of simple annual interest<sup>52</sup> may do much to dampen the consumer's enthusiasm for buying

46 One need only reflect on the number of times he has actually read a contract he was about to sign to appreciate the truth of this observation. See Jordan & Warren, *supra* note 38, at 416. Another negative feature of elaborate disclosure is that it will undoubtedly increase the cost of credit. See Kripke, *supra* note 38, at 458-59.

47 Jordan & Warren, *supra* note 38, at 409. Of course, for the low-income consumer the degree of understanding is often markedly less. See Kripke, *supra* note 19, at 5; Note, *supra* note 42, at 749-54.

48 Such difficulties suggest the possibility of oral disclosure-explanations. Of course, regulation Z specifically requires written, rather than oral, disclosures. FRB Reg. Z §§ 226.7(a)-(b), 226.8(a), 34 Fed. Reg. 2006-7 (1969). Aside from the serious burden that would be imposed on creditors by a requirement of oral explanation, it is doubtful that this would result in any increased benefit to consumers. It is difficult to see how creditors could orally explain the effect of all the required disclosures in any way that would increase the understanding of the consumer. Moreover, the potential for distortion would seem to be great and the problem of enforcement even greater.

49 See Kripke, *supra* note 19.

50 Boyd, *supra* note 31, at 377; see also Kripke, *supra* note 19, at 7-12.

51 Installment sales of automobiles are frequently covered by motor vehicle retail installment sales legislation. Such legislation commonly states finance charge ceilings in terms of dollars per hundred per year. See, e.g., ARIZ. REV. STAT. ANN. §§ 44-281(12), -291 (1967).

52 Dollars per hundred is an "add-on" form of finance charge ceiling determined by reference to the initial balance. Simple annual interest, on the other hand, is determined by apply-

"on easy credit terms" or may at least induce him to look for other sources of financing.

Moreover, finance charges determined by the application of a periodic rate<sup>53</sup> or based on the amount financed and maturity date<sup>54</sup> are not all that must be disclosed. Any special charges falling within the definition of a finance charge,<sup>55</sup> which includes essentially any charge imposed on the consumer as a condition of the extension of credit,<sup>56</sup> not only must be disclosed as a finance charge but must also be itemized as to source.<sup>57</sup> Thus, for example, the purchaser of a used automobile from a seller who does not finance his own sales and who refers the consumer to a particular lender, may be surprised, and a little annoyed, to find included in his obligation to the lender a "finder's fee" which the lender paid to the seller for the referral service. Occasionally, the referral may have been a service to the consumer, but frequently the consumer could have located his own source of financing.

Similarly, a consumer who purchases services or goods on an installment basis may be interested to learn his deferred payment price includes the amount of a "discount" imposed when the seller, as frequently happens, assigns the consumer paper to a bank or finance company.<sup>58</sup> In the absence of the disclosure requirements, the consumer could easily be led to believe that the deferred payment price involves no finance charge. A current example would be the health club that represents that the membership fee payable in installments involves no finance charge. The consumer "joins" the club by signing a membership application, which includes a promissory note in the amount of the deferred payment obligation. The note is negotiated to a bank or finance company and the consumer receives from the bank or finance company an installment loan payment book. Not only is the consumer now a borrower indebted to the health club's transferee in the amount of the membership fee<sup>59</sup> (when he had

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ing the monthly interest rate to the declining monthly balance. As a rough approximation it may be said that "add-on" rates would be nearly doubled when translated into simple annual interest rates. See Kripke, *supra* note 38, at 455-56 n.27.

53 For example, a one percent a month charge on the opening balance in an open credit arrangement illustrates the periodic rate.

54 For example, a seven percent a year charge on an amount of \$500 for a period of twenty-four months in a small loan situation.

55 FRB Reg. §§ 226.2(q), 226.4, 34 Fed. Reg. 2003-4 (1969).

56 *Id.*

57 *Id.* §§ 226.7(b)(4), 226.8(c)(8)(i), (d)(3), at 2007-8.

58 "Discounts" are expressly included by the statutory provision dealing with the determination of the finance charge. 15 U.S.C. § 1605(a)(1) (Supp. IV, 1965-68). They are less directly included within the regulation concerned with the determination of finance charges. See FRB Reg. Z § 226.4(a)(8), 34 Fed. Reg. 2004 (1969). In the usual case where a finance charge is included in the deferred payment price and revealed as such, the purchaser of the consumer paper may not impose a discount on the retailer and may in fact pay over some part of the finance charge to the retailer in the form of "dealer participation" because the purchaser is interested in getting the consumer paper and the not insignificant finance charge which it includes. Where a retailer sells goods or services on an installment basis, however, representing that no finance charge is being imposed, and then immediately sells the paper to a finance company or bank, it is only reasonable to assume that the installment price includes a finance charge that is received by the finance company or bank in the form of a "discount." Certainly the finance company or bank is not providing credit to the retailer's customers gratuitously.

59 Under the rules governing negotiable instruments, when the promissory note is transferred to the bank or finance company the consumer becomes indebted to the bank or finance company in the amount of the note irrespective of the contract between the consumer and the health club. Thus, for example, if the health club were to go out of business before the term of membership expired, the consumer would be obligated to the bank or finance company for



no intention of "taking out a loan"), but he ought also be quick to realize that the bank or finance company did not purchase the note for altruistic reasons and that there certainly is a finance charge being imposed.<sup>60</sup> While subject to some debate, the disclosure of this "discount" as a finance charge seems to be required by the Act.<sup>61</sup> Certainly the Act requires the disclosure of other basic information in such a situation.<sup>62</sup>

A less intricate example illustrating the impact of the Act on "hidden" finance charges involves the retailer (for example, a jeweler) who sells on installments with the express representation that there is no finance charge. Because of the definition of a "consumer credit transaction,"<sup>63</sup> every extension of credit where, by agreement, the debtor may pay in more than four installments<sup>64</sup> must be accompanied by the required disclosures.<sup>65</sup> The creditor, of course, may not disclose any finance charge on the ground that this requirement is not applicable. But the Federal Reserve Board's decision to include sales involving more than four installments reflects a conclusion that a finance charge is included as part of the "cash" price.<sup>66</sup> Consequently, the creditor assumes the risk that he will be asked to prove that no finance charge has been imposed<sup>67</sup> — a fact which, realities suggest, he will not often be able to prove.

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the remaining balance of the "membership fee" (note balance) without the benefit of any defense that there has been a failure of consideration. See UNIFORM COMMERCIAL CODE §§ 3-305, -408; Littlefield, *Good Faith Purchaser of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48 (1966). Such problems resulting from the use of negotiable instruments in consumer transactions have resulted in the inclusion in more recent legislative proposals of provisions rendering the assignee of consumer paper "subject to all claims or defenses of the buyer . . . against the seller." See UNIFORM CONSUMER CREDIT CODE § 2.403.

60 See note 58 *supra*.

61 It might be argued by both the health club and bank or finance company that no finance charge was in fact imposed and thus none need be disclosed. Such an argument, however, would seem to be unpersuasive in this context. See note 58 *supra*. A more sophisticated argument would be that, admitting some charge was involved, it need not be disclosed as "a charge imposed by a creditor upon another creditor," FRB Reg. Z § 226.4(a)(8), 34 Fed. Reg. 2004 (1969), because the health club does not fall within the definition of a "creditor." *Id.* § 226.2(m), at 2003. It would seem, however, an easy matter to show that the health club is an "arranger of credit," *id.* § 226.2(f), and therefore a "creditor" under section 226.2(m). Moreover, it could also be shown that, apart from section 226.4(a)(8), the charge was one imposed "indirectly" by a creditor (the bank or finance company), thus falling within the basic meaning of a "finance charge." *Id.* § 226.4(a), at 2004; 15 U.S.C. § 1605(a) (Supp. IV, 1965-68).

62 Whether or not there is a finance charge involved, the agreement allowing repayment in more than four installments would bring the transaction within the scope of the Act. FRB Reg. Z § 226.2(k), 34 Fed. Reg. 2003 (1969). Consequently, the disclosures required for other than open end credit sales must be made. *Id.* §§ 226.8(b)-(c), at 2008. The choice of the health club example was not entirely fortuitous. A colleague of mine on the law faculty was a victim of such a scheme. Responses to letters to the Federal Trade Commission quickly confirmed our belief that a violation of Title I was involved. The practice is currently under investigation by both the Federal Trade Commission and the Arizona Consumer Fraud Bureau.

63 *Id.* § 226.2(k), at 2003. See note 12, *supra*.

64 FRB Reg. Z § 226.2(k), 34 Fed. Reg. 2003 (1969). In this regard it should be noted that it is not payment in more than four installments alone that brings the extension of credit within the Act, the payment in installments must be by agreement. Thus, if a creditor, on an irregular basis, merely acquiesces in payment in installments where it is otherwise understood that a cash transaction was intended, the Act does not apply. On the other hand, if a creditor purporting to do business only on a cash basis regularly permits customers to pay in installments, an agreement might be implied, in which case the Act would apply. Cf. F.R.B. Letter, June 5, 1969, 1 CCH CONSUMER CREDIT GUIDE ¶ 3722 (1969).

65 FRB Reg. Z § 226.8(a)-(c), 34 Fed. Reg. 2007-8 (1969).

66 TRUTH-IN-LENDING MANUAL 6-7.

67 Certainly it is reasonable to assume that an enforcement agency will not be bound by, nor inclined to accept, a creditor's mere representation that no finance charge has been imposed.

A related situation in which the Act may have a beneficial impact is that of automobile and appliance leasing. Leasing has become an important method of marketing "hard" goods. By its definition of "credit sale"<sup>68</sup> the regulation requires disclosures, including disclosure of any finance charge, except where the lease is actually a lease. The intent, of course, is to bring within the coverage of the Act conditional sales disguised as leases. As is the case under the Uniform Commercial Code, the test involves such things as whether the purported lessee has an option to purchase for nominal consideration at the expiration of the "lease."<sup>69</sup> An automobile "lease" which obligates the "lessee" to pay a certain amount (the capitalized value of the automobile) at the end of the lease would seem to fall within the scope of the Act.<sup>70</sup> Again, the creditor is free to deny the existence of a finance charge, but he may properly be put to his proof.

The legislation makes other demands on creditors that may be beneficial to the consumer. In the absence of regulation, such questions as whether a consumer is obligated to purchase insurance from a creditor, whether he is really obligated to purchase insurance at all, and how much insurance costs, have undoubtedly been matters of no little mystery to the consumer.<sup>71</sup> In such circumstances, creditors have not been disinclined to act as brokers in selling insurance, thereby earning a little extra on the transaction.<sup>72</sup> The regulation provides that if a creditor conditions an extension of credit on the purchase of credit life, health, accident, or loss of income insurance, he must include the cost of such insurance in the finance charge.<sup>73</sup> Since the consequent increase in the finance charge must be disclosed both in terms of dollars and as a higher annual percentage rate, many creditors may decide against requiring such insurance. The fact that a creditor requires property or casualty insurance does not force him to include the cost in the finance charge. If, however, the creditor requires that the insurance be purchased from him, the cost becomes part of the finance charge.<sup>74</sup> Again, to avoid the resulting increase in the disclosed finance charge and annual percentage rate, the creditor may well decide to allow the consumer to purchase from the insurer of his choice, the creditor thus giving up any broker's fee he might have earned.

Aside from the impact disclosures as to finance charges may have, there are certain other disclosure requirements that may be of some benefit. As to both loans and sales the creditor must disclose the number, amount, and due date

68 FRB Reg. Z § 226.2(n), 34 Fed. Reg. 2003 (1969), provides:

"Credit sale" means any sale with respect to which consumer credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

69 Compare *id.* with UNIFORM COMMERCIAL CODE § 1-201(37) ('distinguishing a true lease from one "intended for security"'). See F.R.B. Letter, July 28, 1969, 1 CCH CONSUMER CREDIT GUIDE ¶ 3805 (1969).

70 See TRUTH-IN-LENDING MANUAL 2.

71 Cf. *id.* 14-15; Mors, *Consumer Installment Credit Insurance*, 1956 INS. L.J. 299; Comment, *Consumer Credit Insurance*, 55 NW. U.L. REV. 355, 361-63 (1960).

72 Jordan & Warren, *supra* note 38, at 398-400; Mors, *supra* note 71, at 301-2.

73 FRB Reg. Z § 226.4(a)(5), 34 Fed. Reg. 2004 (1969).

74 *Id.* § 226.4(a)(6), at 2004.

for each installment payment.<sup>75</sup> As already indicated, it is this information, the monthly payment obligation, that may be of greatest interest to the average consumer. Since it would be the rare case in which the consumer would not be informed of this periodic payment obligation, the general requirement may offer little in the way of increased benefit to consumers. But the Act also requires that any "balloon payments" be disclosed.<sup>76</sup> Thus, if the creditor, for reasons of convenience or otherwise, provides for one or more payments to be "more than twice the amount of an otherwise regularly scheduled equal payment,"<sup>77</sup> the consumer must be so apprised. Moreover, to the extent that existing local law provides for a right of refinancing should the "balloon payment" prove too much for the consumer when due, this fact also must be disclosed.<sup>78</sup> While mere disclosure is no substitute for some limitation or prohibition on the use of balloon payments<sup>79</sup> (enforced at the very least by a right of refinancing),<sup>80</sup> this requirement does offer some protection against the use of balloon payment arrangements deceptively designed to throw the debtor into default.<sup>81</sup>

A somewhat related provision requires that whenever a security interest will be acquired or retained by the creditor, the type of security interest and the property affected must be identified.<sup>82</sup> Again, since the consumer commonly will be informed on this score, particularly as to consensual security interests, the basic requirement may add little. But because "security interest" is defined very broadly to include nonconsensual liens (such as liens arising by operation of law)<sup>83</sup> the consumer learns at the time of contracting of a security interest he previously might have first encountered when the creditor sought to foreclose the lien. For example, the sale of building materials commonly gives rise to a materialman's lien.<sup>84</sup> A consumer may well be interested in knowing that

75 *Id.* § 226.8(b) (3), at 2008.

76 *Id.*

77 *Id.* The meaning of "balloon payment" under the regulation is unfortunately narrow and may be easily circumvented. It ought to include payments "substantially larger" than other regularly scheduled payments.

78 *Id.*

79 At the very least, "balloon payment" arrangements should be permitted only at the request of the debtor and then only if it is explained that small regular payments must inevitably result in a substantially larger payment somewhere along the way.

80 Any legislation should provide a right of refinancing as opposed to mere disclosure of a right of refinancing where one exists under local law. *See, e.g.,* UNIFORM CONSUMER CREDIT CODE § 2.405.

81 Although "balloon payments" may be used to serve the convenience of the consumer, they have too often been used to force a debtor into default.

82 FRB Reg. Z § 226.8(b) (5), 34 Fed. Reg. 2008 (1969).

83 The regulation defines a security interest as follows:

"Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation. *Id.* § 226.2(z), at 2003.

84 *See, e.g.,* ARIZ. REV. STAT. ANN. § 33-981 (1956), providing that "[e]very person who labors or furnishes materials . . . in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials . . . furnished . . ." Under this statute a materialman's lien has to be "perfected" by recording a claim of lien within sixty days after the completion of construction (or ninety days in the case of an "original contractor") and by serving a copy of the claim on the owner.

the purchase on credit of tile for a back-yard swimming pool gives the seller a security interest in the swimming pool itself and that foreclosure is a possibility if he defaults on the payment obligation. If after-acquired property may be included in the creditor's security interest, the regulation requires the creditor to disclose this fact as well.<sup>85</sup> Thus, the consumer may be surprised to learn that not only is the item he just purchased subject to a security interest, but any other such items he acquires in the future may also be so encumbered.<sup>86</sup>

Less directly, the legislation affects the use of security interests in another way that may be beneficial to the consumer. A common device used by retailers of hard goods, such as appliances and televisions, is the "add-on" purchase contract. Under such a contract the seller may combine purchase obligations by adding together the prices and finance charges of items purchased in a series of sales. If, for example, a consumer purchases first a dryer, then a washer, and then a television, the prices and finance charges on each item may be combined in one deferred payment obligation.<sup>87</sup> The Act, recognizing the widespread use of such contracts, relaxes the disclosure requirements to ease compliance.<sup>88</sup> For this relaxed disclosure requirement the legislation exacts a price. Among other things, payments on the total deferred payment obligation must be applied to the price of particular items sold in the order of purchase, and any security interest in a particular item must be released when the payments equal the price of that particular item.<sup>89</sup> Thus, while a creditor wishing to take advantage of the relaxed disclosure provisions for add-on sales contracts may still employ a cross-collateral security arrangement (by which each item purchased becomes security for each item subsequently purchased), he may

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ARIZ. REV. STAT. ANN. § 33-993 (Supp. 1969). The CCPA will require notice of the lien at the time of contracting. *See* note 15 *supra*. It must be kept in mind, however, that disclosure of the lien would be required only in connection with a "consumer credit transaction." *See* note 12 *supra*. Where a supplier sells directly to the consumer-owner of a residence and allows the owner to defer payment in return for a finance charge (or by agreement allows the owner to pay in more than four installments) disclosure would be required. Where a supplier sells to a contractor who makes improvements on a consumer-owner's residence, it would appear that disclosure of the supplier's lien is not required because the sale by the supplier to the contractor, although it may well be a credit transaction, is not a "consumer credit transaction." *See* note 12 *supra*; FRB Reg. Z § 226.3(a), 34 Fed. Reg. 2003 (1969). Under the Arizona statute, however, the contractor is an agent of the owner for purposes of the purchase of materials and the attachment of the lien. ARIZ. REV. STAT. ANN. § 33-981(B) (1956); *Watson v. Murphey*, 36 Ariz. 377, 285 P. 1037 (1930). The question arises whether this agency relationship has the effect of rendering the otherwise commercial credit transaction a consumer credit transaction, in which case disclosure of the lien and other terms by the supplier would be required. Assuming that a disclosure obligation does arise, a further question would be whether the supplier must disclose directly to the consumer-owner or only to the contractor, who may be considered an agent for the purpose of receiving disclosure. The questions are important because contractors usually do not want owners to know how much materials cost the contractor and ordinarily do not reveal the cost.

85 FRB Reg. Z § 226.8(b)(5), 34 Fed. Reg. 2008 (1969).

86 In this regard, it might be noted that the Uniform Commercial Code does not permit the taking of a security interest in "consumer goods" acquired more than ten days after the creditor has given value. UNIFORM COMMERCIAL CODE § 9-204(4)(b).

87 *See* TRUTH-IN-LENDING MANUAL 89.

88 Where certain conditions are met, disclosure in an add-on sale may be made at any time prior to the date on which the first payment on the add-on sale is due, rather than at the time of the sale of the "added-on" item. FRB Reg. Z § 226.8(h), 34 Fed. Reg. 2009 (1969).

89 *Id.* § 226.8(h)(2). This regulation also requires as a condition of deferred disclosure that there be an agreement to finance on an "add-on" basis, *id.* § 226.8(h), and that the customer give approval in writing to "the annual percentage rate or rates and the method of treating any unearned finance charge on an existing outstanding balance in computing the finance charge or charges." *Id.* § 226.8(h)(1).

not apply payments in such a way as to assure that each item continues as security until the purchase price of every item is paid.<sup>90</sup>

## B. Enforcement

It goes without saying that the extent to which the provisions of the Act are translated into actual benefits to the consumer depends upon the effectiveness of enforcement.<sup>91</sup> Consequently, consideration of the element of enforcement is crucial and will be integrated into the discussion of the benefits to be derived from particular provisions of the CCPA. A few preliminary comments on the general scheme of enforcement adopted by Congress are now in order and should facilitate later consideration of enforcement in connection with particular provisions. These comments will have particular application to the person-to-person disclosure requirements just discussed since every enforcement device provided by the CCPA is available in the case of a violation of these requirements.<sup>92</sup>

Unfortunately it appears that, on the whole, the scheme of enforcement set up by the Act is inadequate. Heavy reliance is placed on public enforcement through criminal prosecutions and administrative proceedings, while to date established public agencies, in general, have had a less than enviable record in furthering the consumer's interest.<sup>93</sup> Certainly the Federal Trade Commission, which carries a heavy responsibility for administrative enforcement of the CCPA,<sup>94</sup> cannot be described as a champion of the consumer's cause;<sup>95</sup> and the criminal sanctions,<sup>96</sup> one may anticipate, will only be applied in cases of flagrant violations.<sup>97</sup> It is true the CCPA wisely provides for private action as

90 The Act does not prohibit the use of a cross-collateral security arrangement. Rather, it only requires that where such an arrangement is employed, payments must be applied on a first-in, first-out basis. This is the treatment given cross-collateral arrangements by such recently proposed consumer legislation as the Uniform Consumer Credit Code. UNIFORM CONSUMER CREDIT CODE §§ 2.408-.409. The assumption seems to be that such cross-collateral arrangements are in general legitimate security devices, and it is only when they are used to tie up all purchases until every item is paid for that such arrangements become objectionable. See generally *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), where such a scheme was attacked as unconscionable.

91 Cf. Spanogle, *The U3C — It May Look Pretty, But Is It Enforceable?* 29 OHIO ST. L.J. 624 (1968).

92 Title I is divided into three chapters, 15 U.S.C. §§ 1601-13, 1631-41, 1661-65 (Supp. IV, 1965-68). As to person-to-person disclosures and the rescission provisions, administrative enforcement, criminal sanctions, and civil damage actions are all available. *Id.* §§ 1607, 1611, 1640. Violations of the advertising provisions do not give rise to liability in a civil action for damages. *Id.* § 1640.

93 See Baum, *The Consumer and the Federal Trade Commission*, 44 J. URBAN L. 71, 78-85 (1966); Baum, *The Federal Trade Commission and the War on Poverty*, 14 U.C.L.A.L. REV. 1071 (1967); Kripke, *supra* note 19, at 41-46; Spanogle, *supra* note 91, at 626-27; Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 424-30 (1966).

94 Except to the extent that administrative enforcement responsibility is committed to a specialized agency (e.g., the Federal Reserve Board as regards compliance by banks, other than national banks, that are members of the Federal Reserve System), responsibility is vested in the Federal Trade Commission. 15 U.S.C. §§ 1607(a), (c) (Supp. IV, 1965-68). This responsibility includes enforcement of compliance by all retailers and finance companies.

95 See materials cited in note 93, *supra*.

96 Offenders are subject to a fine of not more than \$5,000, or imprisonment for not more than one year, or both, for each violation of the Act. 15 U.S.C. § 1611 (Supp. IV, 1965-68).

97 The potential severity of the criminal penalty was cause of special concern to creditors. The criminal penalties, however, can be applied only against those who "willfully and knowing-

a complementary device for enforcement.<sup>98</sup> But there is a serious question whether the prospect of damages equal to twice the finance charge (with a minimum of \$100 and a maximum of \$1,000)<sup>99</sup> provides a sufficient incentive to consumer action. This is true even though the CCPA also allows recovery of attorneys' fees and costs to a successful plaintiff.<sup>100</sup> A more substantial penalty and provision for attorneys' fees in case of settlement appear essential to really effective private enforcement.<sup>101</sup> It may even be that the damages approach is entirely inappropriate in the consumer context and that a right of rescission, with or without a requirement of restitution, is the only effective remedy and consequently the only effective private enforcement device.<sup>102</sup>

ly" violate the Act. 15 U.S.C. § 1611 (Supp. IV, 1965-68). Thus, some element of *scienter* must be shown, and this will make criminal prosecution that much more difficult. In addition, of course, the shortage of manpower characteristic of prosecutors' offices will further tend to assure that only serious violations are actually prosecuted. See Comment, *supra* note 93, at 429.

98 15 U.S.C. § 1640(a) (Supp. IV, 1965-68) provides:

[A]ny creditor who fails . . . to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

A creditor has no liability under this section if within fifteen days of discovery of a violation, and before the consumer notifies him of such error or brings an action based on the violation, the creditor informs the consumer of the violation and makes appropriate adjustments. *Id.* § 1640(b). A creditor may also avoid liability under § 1640(a) by showing that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1640(c).

It should be noted that although the Act seems to limit an assignee's liability to violations connected with credit transactions "involving a security interest in real property," *id.* § 1640(d), an assignee, especially by virtue of the inclusion of an "arranger of credit" within the definition of a creditor, may himself be a creditor with disclosure obligations. Thus, a finance company that purchases consumer paper and that has participated in the drawing of the installment contract and note (a not infrequent situation) may be considered the real creditor. In this case the retailer would be an "arranger of credit," or the finance company may qualify as the one who has "arranged" for an extension. See FRB Reg. Z § 226.2(f), (m), 34 Fed. Reg. 2003 (1969); TRUTH-IN-LENDING MANUAL 45-46.

99 15 U.S.C. § 1640(a)(1) (Supp. IV, 1965-68).

100 *Id.* § 1640(a)(2).

101 It must be kept in mind that the private remedy does not involve a right of rescission, and the consumer continues to be obligated on the basic contract. In a great many cases an amount equal to twice the finance charge will not be very much, and a minimum recovery of \$100 often will not even cover the costs of bringing an action, let alone providing some reward for doing so. The award of attorney's fees and costs will make the basic damage award more appealing. But this award can be made only where the action is successful — a risk the consumer takes when he brings his action. Moreover, recovery of attorney's fees is provided only in the event of litigation. Where settlement results from private action, attorney's fees will be recovered only as part of the settlement. See Spanogle, *supra* note 91, at 664.

102 Clearly, if a consumer were permitted to rescind every transaction involving a violation of Title I, private action in general would be more likely and consequently more effective. Some difficulties would still exist where the consumer in connection with the rescission sought to recover a down payment or other payments made to the creditor. In such cases court action might well be necessary. Still, the prospect of putting an end to the arrangement, a result that is not part of the present enforcement scheme, may be more of an incentive than some artificial damage remedy alone. If more incentive is necessary, a penalty might be imposed in addition to allowing rescission. The penalty could be damages or might take the form of a provision to the effect that the consumer could retain the benefit of any property delivered or services rendered prior to rescission without any payment obligation. Neither the idea of rescission nor the suggested penalties are unprecedented in the consumer context. See, e.g., *Lloyd v. Gutsell*, 175 Neb. 775, 124 N.W.2d 198 (1963). It has also been persuasively argued that a consumer ought to be able to enjoin a violation of protective legislation. One difficulty with this approach is that, due to problems of standing, the injunctive remedy will not ordinarily be available through a class action. See Spanogle, *supra* note 91, at 636, 650 n.110.

The lackluster performance of the FTC in the past has probably been, in significant part, a result of some confusion about its role.<sup>103</sup> The commission has now been given an unequivocal Congressional mandate to enforce the CCPA, and indications are that it has understood that order.<sup>104</sup> Moreover, the effectiveness of private enforcement may very well be enhanced by the availability of class actions.<sup>105</sup> Although the class action as a device of consumer protection is still in its formative stages, its legitimacy and effectiveness in this context have been increasingly recognized.<sup>106</sup> Such actions would seem especially appropriate

103 The confusion seems to have arisen both because of questions as to the scope of the commission's jurisdiction and because it entertained a rather narrow view of its task. Thus, as to jurisdiction, the Supreme Court gave the phrase "in commerce" (found in Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1964)), a literal meaning rather than the broader meaning of that which "affects commerce." *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 355 (1941). The effect of this decision has been to limit FTC involvement to deceptive practices in interstate commerce and in Washington, D.C. See Kripke, *supra* note 19, at 42-43. As to the commission's conception of its role, it seems to have thought that it could aid consumers only to the extent that its efforts against unfair competition between businesses resulted in benefits to consumers. See Baum, *The Consumer and the Federal Trade Commission*, 44 J. URBAN L. 71, 78-79 (1966). More generally, it has been recommended that

[t]he Commission should concentrate its efforts upon plans to eliminate deceptive practices which have national significance and, particularly, to police the national media of advertising. It should enlist the Attorneys General of the states and other state and local law enforcement agencies in the campaign to eliminate deceptive practices which do not have national import. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 516 (1964).

104 15 U.S.C. § 1607(c) (Supp. IV, 1965-68) states:

[A] violation of any requirement imposed under this subchapter [Title I] shall be deemed a violation of a requirement imposed under [the Federal Trade Commission Act]. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person . . . , irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

This authorization by Congress ought resolve any doubts about jurisdiction and ought at the same time operate as an order from Congress that the FTC is to utilize its full powers, including "cease and desist" orders, to enforce compliance with the CCPA wherever applicable. The FTC has vigorously supported passage of Title I and ought be responsive to this order from Congress. See Kripke, *supra* note 19, at 5 & n.14. The FTC is presently considering action against the country's largest jeweler, Zale Corporation. 2 CCH CONSUMER CREDIT GUIDE ¶ 99,865 (1969). Cf. Baum, *The Federal Trade Commission and the War on Poverty*, 14 U.C.L.A.L. REV. 1071, 1078-87 (1967). Of course, clearing up the jurisdictional and role disputes will not take care of the problems of inadequate staff and vulnerability to political pressure that afflict the FTC.

105 Private action by consumers has been limited by the facts that the costs of legal action are high and the possible recovery, outside the personal injury area, is low. Class actions could permit consumers who are the victims of similar violations to join in a single suit under the direction of one or more of the victims. Such joinder increases the likelihood and effectiveness of private action in a number of ways. For example, it would compensate for the fact that few victims are sufficiently motivated on their own to bring an action. Moreover, although individual recovery is basically unchanged, the members of the class may share attorney's fees and costs, thus diminishing the financial risk should the action prove unsuccessful. Because the aggregate recovery possible is potentially very great, attorneys who would be reluctant to undertake a suit on behalf of an individual victim might be attracted to an action on behalf of a class. As mentioned in the text, the threat of class actions may serve as a strong deterrent against violations. In addition, class actions would also encourage settlements. See Dole, *Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 112-13 (1969); cf. Dole, *Consumer Class Actions under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101, 1102-4; see generally Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

106 Outside the federal courts (until relatively recently there was no substantive federal law on which to base a consumer action), there have been obstacles in the form of the absence of provision for class actions in the state rules of procedure and the reluctance of some judges to recognize the validity of, and need for, class actions by consumers. See Spanogle, *supra* note 91, at 636. On the other hand, it has been increasingly recognized that if private action is to fill its proper role in the area of consumer credit protection, ready availability of the class

as a device for enforcing the CCPA.<sup>107</sup> No doubt the mere threat of class actions will have some deterrent effect.

It might be added that although there is no provision for redress of private injury as an adjunct of administrative action<sup>108</sup> (a fact that not only renders administrative action an incomplete remedy but also tends to diminish its effectiveness because violations are less often reported),<sup>109</sup> administrative action may be used to support private action. Once the FTC, or any other agency, has determined that a particular practice violates the Act, private parties ought to be able to utilize this determination, particularly at the negotiating stage, in independent actions against creditors engaging in such practices.<sup>110</sup>

action is essential. Consequently, the proposed Uniform Consumer Credit Code has been criticized because it does not provide explicitly for class actions. *See Dole, Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80. (1969); Spanogle, *supra* note 91, at 650-51. A code drafted by the National Consumer Law Center at Boston College and entitled the National Consumer Act provides for both private class actions and administrative actions brought on behalf of all consumers similarly situated. NATIONAL CONSUMER ACT, § 6.111 (1st Final Draft, 1969). There are presently pending before Congress several bills intended to amend section five of the Federal Trade Commission Act, 15 U.S.C. § 45 (1964), so as to permit private action in case of "unfair or deceptive trade practices" within the meaning of that Act. One of these bills would also permit private action in the federal district courts in case of violations of any state statutory or decisional law benefitting consumers. This same bill explicitly provides for class actions in the federal district courts without regard to the amount in controversy. H.R. 14,627, 91st Cong., 1st Sess. (1969). Another of these bills, apparently supported by the Nixon administration, does not provide for private actions based on violations of state law; nor does it explicitly provide for class actions, although such actions likely would be available under FED. R. CIV. P. 23. More importantly, this bill would permit private action only *after* a public agency charged with enforcement has taken successful action. H.R. 14,931, 91st Cong., 1st Sess. (1969). This is most unfortunate. It is one thing to recognize that public action may encourage and assist private actions. *See* text accompanying note 110 *infra*. It is another thing entirely to condition private action on public action. Private actions are provided because public action can never be entirely adequate. Moreover, the potential for abuse resulting from political and economic pressure on public agencies designed to discourage action ought be obvious.

107 Suppose a retailer utilizes in 50,000 sales a standard form that violates the Act. A civil liability action may be brought in any federal district court, without regard to the amount in controversy or diversity of citizenship. 15 U.S.C. § 1640(e) (Supp. IV, 1965-68). The Federal Rules of Civil Procedure have recently been significantly liberalized to permit a class action in such a case. FED. R. CIV. P. 23. *Cf. Dole, Consumer Class Actions under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101, 1117-30; *Dole, Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 109-14 (1969). The question of law is identical as to each consumer. The method of fixing damages will be the same for all the consumers, and only the amount will differ. All prerequisites of rule 23(a) are met, and the judge may find under rule 23(b)(3) "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Thus, one of the consumers could bring an action on behalf of all. *See TRUTH-IN-LENDING MANUAL* 129.

108 Basically, the enforcement devices available to the FTC are simply designed to allow the commission to stop violations of legislation it is responsible for enforcing. These devices include informal consent orders, guides or advisory opinions designed to secure industry-wide compliance, and "cease and desist" orders enforceable by imposition of civil penalties or contempt proceedings. *See generally Auerbach, supra* note 103, at 424-514.

109 The public agency ought be able to include private redress as part of its order. Otherwise, although the creditor is ordered to "cease and desist" in the future, only those past victims who take the initiative to bring a private action or become members of a class in a class action will in any way be compensated for their losses. *Cf. Spanogle, supra* note 91, at 631, 647, 661; *Boyd, supra* note 31, at 378 & n.40.

110 A ruling by or an opinion of an agency that a particular practice violates the CCPA could be a useful weapon in the hands of a consumer who is seeking to rescind a contract with a creditor who has engaged in the condemned practice. In the health club example used earlier, the bank which had taken the promissory note ("membership application") and issued an installment loan book in the entire amount of the note ("membership fee") promptly cancelled the note and loan when the law professor involved informed the bank of the letter from



## C. Disclosures in Advertising

So far our concern has centered primarily on the benefits to be derived from particular person-to-person disclosure requirements. It is quite clear, however, that misleading representations to consumers generally, through advertisements, would, if permitted, seriously limit whatever beneficial effect the person-to-person disclosures might have. Consequently, the draftsmen of the CCPA added a chapter dealing exclusively with advertising.<sup>111</sup> The provisions of this chapter have a twofold effect. First, a creditor may not advertise appealing financing arrangements that are not "usually and customarily" available.<sup>112</sup> No longer may a seller represent that items may be purchased for "no money down and two dollars a week" unless sales are in fact regularly made on such terms. To this extent the CCPA provisions are intended to prohibit what may be aptly described as "bait advertising" of credit. Such advertising undoubtedly has been as effective in luring unwary, bargain-hunting consumers as its more widely recognized, and now more widely condemned, counterpart, "bait advertising" of goods.<sup>113</sup>

Second, and what has undoubtedly been more upsetting to creditors, the provisions of this chapter insist upon "all or nothing" advertising.<sup>114</sup> If a creditor chooses to advertise any important credit term (other than the finance charge expressed as an annual percentage rate in other than open end credit transactions)<sup>115</sup> he must disclose every other term necessary to give a complete picture of the overall credit arrangement.<sup>116</sup> This means that such advertising must set forth virtually every credit term required in the person-to-person disclosures.<sup>117</sup> As with the person-to-person disclosures, there is a serious question whether such detailed disclosure will not confuse more than enlighten. On the other hand, because of the expense and inconvenience of compliance, the effect may be that creditors will refrain from exploiting credit advertising as a device for inducing customers to enter their places of business.<sup>118</sup>

It might be argued that this effect is at cross-purposes with the special objectives of the legislation — to induce competition. On the other hand, that a

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the FTC confirming the law professor's argument that the bank had violated the CCPA. Notice that the threat of private and public action for violation of the CCPA in effect resulted in rescission.

111 15 U.S.C. §§ 1661-65 (Supp. IV, 1965-68); see FRB Reg. Z § 226.10, 34 Fed. Reg. 2010 (1969).

112 FRB Reg. Z § 226.10(a)(1), 34 Fed. Reg. 2010 (1969); TRUTH-IN-LENDING MANUAL 96-97.

113 "Bait advertising" of goods characteristically involves the use of an advertisement that describes a bargain "too good to pass up." The customer is lured into a store where he is first told that the stock has been exhausted or that the article advertised is not really a very good buy and is then induced to buy some other, higher-priced item. See H. BLACK, *BUY NOW, PAY LATER* 140-42 (1961); D. CAPLOVITZ, *THE POOR PAY MORE* 143-46 (1967); Comment, *supra* note 93, at 398-99; Note, *supra* note 42, at 759. Such advertising is now restricted in a number of states, e.g., ARIZ. REV. STAT. ANN. § 44-1464 (1967); N.Y. GEN. BUS. LAW § 396 (McKinney 1968), and by the FTC. See 16 C.F.R. § 238 (1969) (FTC guides against bait advertising).

114 See FRB Reg. Z §§ 226.10(c)-(d), 34 Fed. Reg. 2011 (1969); H.R. REP. NO. 1397, 90th Cong., 2d Sess. 27 (1968); TRUTH-IN-LENDING MANUAL 97-101.

115 FRB Reg. Z § 226.10(d)(1), 34 Fed. Reg. 2011 (1969).

116 *Id.* §§ 226.10(c)-(d).

117 Compare *id.* with *id.* §§ 226.7(a)-(b), at 2006-7, and *id.* §§ 226.8(a)-(d), at 2007-8. See TRUTH-IN-LENDING MANUAL 97-101.

118 See TRUTH-IN-LENDING MANUAL 101.

creditor need represent anything more than that financing is available is doubtful. It will be a rare case where the precise terms of the financing available, rather than the quality of the goods or the cash price, are sufficiently favorable to justify the untoward emphasis on credit terms that has characterized advertising in the past. In short, what the consumer loses in terms of being denied a lead to that rare case of genuinely advantageous financing, he gains in not being bombarded with misleading representations of easy credit.<sup>119</sup>

To minimize the possibilities of circumvention, the term "advertisement" is broadly defined.<sup>120</sup> It includes window displays and price tags as well as newspaper and magazine messages.<sup>121</sup> Moreover, not only written but also oral representations made by television, radio, or even public address systems are covered.<sup>122</sup> The statements of sales personnel seem not to be included,<sup>123</sup> but misrepresentations at this point are perhaps not as readily condemned as misleading advertising generally, especially since they may be immediately contradicted by written disclosures. Less easily justified is the fact that the regulation does not expressly include telephone solicitations. Such "personal contact" advertising has become increasingly common.<sup>124</sup> Aside from the fact that the persistence of such uninvited callers is downright annoying, the potential for abuse inherent in such solicitations is great. It has been suggested that the legislation might be interpreted to reach such telephone advertising.<sup>125</sup> If nothing else, perhaps this is a real enough possibility that the quick-thinking consumer can discourage the telephone intruder by merely suggesting he is violating federal law.

The real effect of these advertising regulations depends, of course, upon the vigor with which they are enforced. A special problem in this regard is that there is no provision for private action in the event of violation.<sup>126</sup> Presumably, this exclusion results from a conclusion that since advertising is aimed at consumers in general, no particular consumer has standing to complain of a violation.<sup>127</sup> Although this conclusion is not entirely unreasonable, it fails to consider the fact that, at least insofar as "bait advertising" is concerned, a particular consumer may well be able to prove detrimental reliance and resulting injury.<sup>128</sup> It also may reflect an overly narrow view of the standing question. Perhaps *every* consumer, by virtue of the fact that he is a consumer,

119 H.R. REP. NO. 1040, 90th Cong., 1st Sess. 129 (1967).

120 FRB Reg. Z § 226.2(b), 34 Fed. Reg. 2002 (1969).

121 *Id.*

122 *Id.*

123 *Id.*; see TRUTH-IN-LENDING MANUAL 94.

124 See TRUTH-IN-LENDING MANUAL 94.

125 *Id.* at 94-95.

126 The civil liability section, 15 U.S.C. § 1640 (Supp. IV, 1965-68), provides that an action is available with respect to disclosures "required under this part," that is, under sections 1631-41. Since disclosures as to advertising are governed by another "part," namely, sections 1661-65, it must be concluded that private actions are not available to redress advertising violations. See TRUTH-IN-LENDING MANUAL 95.

127 H.R. REP. NO. 1040, 90th Cong., 1st Sess. 19 (1967).

128 The mere inconvenience involved in answering a bait advertisement ought be considered a compensable injury. If a consumer is induced to purchase on terms less favorable than those offered elsewhere, or to buy on such terms items that otherwise would not have been purchased, perhaps this also ought be viewed as a compensable injury.

ought have standing to act in behalf of consumers generally.<sup>129</sup> This is supported by the observation that the CCPA, in providing for private action as to other provisions, has implicitly recognized that public enforcement is not sufficient in itself. On the other hand, advertising violations, as opposed to person-to-person disclosure violations, may be more readily amenable to public enforcement.<sup>130</sup> In any event, a comparison of pre-CCPA advertising and post-CCPA advertising suggests that creditors view the threat of enforcement as real.<sup>131</sup>

### III. Rescission as of Right in Certain Secured Transactions

Included within Title I is a right to rescind without cause certain transactions involving security interests in residences of consumer-debtors.<sup>132</sup> As has been indicated, the rescission provisions seem to have been a response by Congress to abuses in the home improvement and second mortgage industry and have no particular relation to truth-in-lending, the basic concern of Title I. For this reason these provisions are conveniently discussed separately.

The conditions under which the right of rescission is available may be easily described. A consumer-debtor is given three days to rescind without cause any consumer credit transaction<sup>133</sup> involving a "security interest" in his principal residence.<sup>134</sup> Statutes allowing buyers such a "cooling-off" period, under various conditions, have become increasingly common.<sup>135</sup> In general, their objective is to relieve consumers who, as a result of high-pressure tactics by door-to-door salesmen, have incurred obligations they otherwise would have avoided.<sup>136</sup> The CCPA is directed primarily at sales, door-to-door and otherwise, that result in the creation of a security interest in the residence of the consumer. As such,

129 At the least, a consumer ought be able to bring an injunctive action on behalf of consumers generally. See note 102 *supra*; Spanogle, *supra* note 91, at 636.

130 By their very nature, advertisements and their contents are directed to the public generally, including members of public enforcement agencies. Thus, the need to rely on complaints by individual consumers is somewhat diminished.

131 One need only recall the contents of newspaper, radio, and television advertisements prior to the effective date of the CCPA, July 1, 1969, and contrast them with the contents of advertisements since then to see that the Act is having effect in this area. This observation that the content of advertising has changed markedly, especially in response to the "all or nothing" mandate of the Act, was confirmed by Mr. Mike Ryan, an advertising salesman for the Tucson *Daily Citizen*. According to Mr. Ryan (although newspapers are not potentially liable, 15 U.S.C. § 1665 (Supp. IV, 1965-68)), the *Citizen* advises clients of the requirements of the Act and suggests compliance. In at least one case of which Mr. Ryan has personal knowledge, the FTC contacted a client and informed it that the advertisement, "100% financing" violated the Act. The advertisement was then changed to read "Financing Available." Interview with Mike Ryan of the Tucson *Daily Citizen*, in Tucson, Dec. 11, 1969.

132 15 U.S.C. § 1635 (Supp. IV, 1965-68); see FRB Reg. Z § 226.9, 34 Fed. Reg. 2009 (1969).

133 According to regulation Z, the right of rescission may exist in "any credit transaction" meeting the proper conditions. FRB Reg. Z § 226.9(a), 34 Fed. Reg. 2010 (1969). As used here, however, "credit" means "consumer credit" and "transaction" means "consumer credit transaction." *Id.* § 226.2(bb), at 2003.

134 *Id.* §§ 226.2(z), 226.9(a), at 2003, 2009.

135 E.g., ILL. ANN. STAT. ch. 121½, § 262B (Smith-Hurd Supp. 1969); MASS. ANN. LAWS ch. 255D, § 14 (1968); MICH. COMP. LAWS § 445.1202(c) (1967). See also UNIFORM CONSUMER CREDIT CODE §§ 2.501-05, 5.204.

136 See *Hearings on the Federal Trade Commission Report on Credit Practices Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 20 (1968) (statement of Betty Furness); Sher, *The "Cooling-Off" Period in Door-to-Door Sales* 15 U.C.L.A.L. REV. 717 (1968); Note, 16 DE PAUL L. REV. 194, 197-202 (1967).

the Act provides a degree of much needed protection against those sellers of home improvements whose tactics have frequently resulted in virtually unconscionable bargains.<sup>137</sup>

Because of this special objective, the rescission right does not generally apply to consumer credit transactions involving purchase-money first liens. Thus the sale of a dwelling, the price of which is secured by a first mortgage on the dwelling, does not give rise to a right of rescission.<sup>138</sup> Similarly, a first mortgage loan to finance the purchase or construction of a dwelling would not involve a right of rescission.<sup>139</sup>

It must also be noted that not every credit transaction secured by an interest in the consumer's residence is covered. There must first be a *consumer* credit transaction, and that requires that there be a creditor — one regularly engaged in extending consumer credit.<sup>140</sup> Extensions of credit by noncreditors, for example, sales of residences by private parties partly financed by a second mortgage, give rise to no rescission rights. Moreover, it is not a security interest in any real property which invokes the right of rescission. The security interest must be in the "principal residence" of the debtor.<sup>141</sup> But because "residence" is more broadly defined than "dwelling," certain transactions not technically within the special objective of the legislation are included. "Residence" means "any real property in which the customer resides or expects to reside," and "includes a parcel of land on which the customer resides or expects to reside."<sup>142</sup> "Dwelling," on the other hand, means "a residential-type structure which is real property."<sup>143</sup> Consequently, if a vacant lot is sold to be used for residential purposes and financing is secured by a purchase-money first lien, the transaction is covered.<sup>144</sup> Such coverage, whether intentional or not, may offer some relief to consumers who find themselves victims of high-pressure promotional schemes for the sale of "exotic" real estate.<sup>145</sup>

As indicated earlier, the definition of "security interest" includes a variety of nonconsensual liens arising essentially by operation of law, as well as consensual liens such as the common real estate mortgage.<sup>146</sup> Thus, for example, the rescission provisions will offer protection against creditors who rely on a mechanic's or materialman's lien, rather than an outright mortgage, in pro-

137 See, e.g., *Royal Constr. Co.*, 3 TRADE REG. REP. ¶ 17,969 (1967); *Matthews v. Aluminum Acceptance Corp.*, 1 Mich. App. 570, 137 N.W.2d 280 (1965); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).

138 FRB Reg. Z § 226.9(g)(1), 34 Fed. Reg. 2010 (1969).

139 *Id.* §§ 226.9(g)(1)-(2).

140 See note 11 *supra*.

141 FRB Reg. Z § 226.9(a), 34 Fed. Reg. 2009 (1969).

142 *Id.* § 226.2(y), at 2003.

143 *Id.* § 226.2(p).

144 See TRUTH-IN-LENDING MANUAL 106.

145 Such promotional schemes have occasionally resulted in official action. In one of the more widely publicized cases, the license of a large Florida land development corporation was suspended for engaging in "deceptive tactics," such as allowing or causing salesmen to deceive buyers about resale values and the type of improvements planned and switching lot numbers after lots were sold. *HOUSE & HOME*, Dec. 1967, at 20; *THE ECONOMIST*, Jan. 13, 1968, at 48. In another case, a land development company was indicted in California for advertising "No assessments" and "Utilities in and paid for." Buyers later learned that there would be assessments or they would have to pay for a one-million-dollar water treatment plant. *ADVERTISING AGE*, July 10, 1967, at 96.

146 See note 83 *supra*.

viding materials or services for home improvement. Again, it must be noted that the right of rescission is available only in connection with a consumer credit transaction. Consequently, while a nonconsensual lien may arise where a cash sale is contemplated, the right of rescission will arise only in transactions where a finance charge is imposed or payment may be made, by agreement, in more than four installments.<sup>147</sup>

Although the rescission provisions have little necessary connection to the general disclosure objectives of Title I, there is an important interrelationship between the disclosure requirements and the exercise of the right of rescission. The regulation provides:

[T]he customer shall have the right to rescind . . . until midnight of the third business day, following the date of consummation . . . or the date of delivery of the disclosures required under this section *and all other material disclosures required under this part, whichever is later* . . . .<sup>148</sup>

This means the three-day "cooling-off" period within which the consumer may rescind without cause does not run unless and until the creditor gives those disclosures otherwise required by Title I,<sup>149</sup> as well as notice of the right to rescind itself.<sup>150</sup> The effect is that for every day the creditor delays giving the rescission notice or making the other disclosures, the consumer is given another day within which to rescind the contract.

There is another important, but perhaps less obvious, effect that may be brought about by this condition on the running of the three-day period. Under the regulation, a creditor is prohibited from entering upon most kinds of performance until the "cooling-off" period expires and the creditor "has reasonably satisfied himself that the customer has not exercised his right of rescission."<sup>151</sup> If, before the period expires, the creditor decides to "[m]ake any physical changes in the property," "[p]erform any work or service," or "[m]ake any deliveries" where he has retained or will acquire a consensual lien,<sup>152</sup> the effect may be twofold. First, the creditor has violated the Act and is subject to criminal and administrative sanctions.<sup>153</sup> Second, until the period in fact expires, the consumer may rescind and have the benefit of any services performed by the

<sup>147</sup> See note 12 *supra*.

<sup>148</sup> FRB Reg. Z § 226.9(a), 34 Fed. Reg. 2010 (1969) (emphasis added) (footnote omitted).

<sup>149</sup> The reference to "material" disclosures in section 226.9(a) is troublesome. See text accompanying note 148 *supra*. It might literally mean only those disclosures otherwise required which are somehow essential. It would seem more likely, however, that "material" in this context simply means "relevant" or "otherwise required," depending on the nature of the transaction in which a security interest in the debtor's residence has arisen. See TRUTH-IN-LENDING MANUAL 111.

<sup>150</sup> Section 226.9(b) not only demands that notice of the right to rescind be given but also spells out the required content of that notice. Among other things, the notice must reveal the consequences of rescission and include an indication that the consumer may rescind merely by signing and dating the notice and mailing it to the creditor. FRB Reg. Z § 226.9(b), 34 Fed. Reg. 2010 (1969).

<sup>151</sup> *Id.* § 226.9(c).

<sup>152</sup> *Id.* §§ 226.9(c)(2)-(4).

<sup>153</sup> There apparently would be no liability in a private action, which is available only in cases where the creditor has failed to make the required disclosures. 15 U.S.C. § 1640 (Supp. IV, 1965-68). Of course, if the three-day period has not expired because of the creditor's failure to give the required notice or other material disclosures at the time of the agreement, then civil liability would also attach. See notes 15 & 98 *supra*.

creditor without charge.<sup>154</sup> If the creditor returns any down payment within ten days after he receives notice of rescission, the consumer must tender any property delivered by the creditor; if the creditor does not take possession of the property as tendered within ten days, ownership vests in the consumer without any obligation to pay for it.<sup>155</sup>

Perhaps an example of the operation of the rescission provisions is in order. Suppose that on June first *C* persuades *O* to purchase fourteen combination windows and one storm door to be installed by *C* for \$1,759. *O* pays *C* a down payment of \$200 and signs an installment contract obligating him to pay \$37.48 a month for sixty months. The deferred payment price of \$2,248.80 is to be secured by a mortgage on *O*'s home. *C* delivers to *O* a notice of right to rescind as required by the Act.<sup>156</sup> The installment contract, however, does not disclose the required information concerning the terms of credit.<sup>157</sup> These disclosures are later made by mail in a separate statement delivered to *O* three days later. On the fourth day *C* installs eight of the combination windows.

Given these facts, the Act would bring about the following consequences. Since the three-day period does not begin to run until the consumer receives *both* the notice of a right to rescind *and* other material disclosures required by the Act, *O* would have until midnight of the sixth day following the signing of the installment contract to rescind. For the same reason, although *C* did not begin performance until after the third day of the signing of the contract, he has violated the Act by commencing performance before the end of the statutory "cooling-off" period.<sup>158</sup> *C*, of course, has also violated the Act by failing to make the required disclosures prior to the consummation of the agreement.<sup>159</sup> *C*, thus, would be subject to criminal and administrative sanctions and to a suit for damages by *O*. Should *O* choose to rescind, *C* has ten days in which to return *O*'s cash down payment of \$200.<sup>160</sup> On return of the down payment, *O* must tender any property received from *C*, which in this case seemingly would mean that *O* must allow *C* to remove the combination windows that have been installed.<sup>161</sup> If *C* does not take possession of the windows within ten days, ownership vests in *O* without further obligation.<sup>162</sup> The mortgage on *O*'s home, of course, is void; and *O* is liable for no charge under the contract.<sup>163</sup> Any costs incurred by *C* in installing the windows (and in this case in removing them) are *C*'s loss.<sup>164</sup>

Several points may be emphasized. Satisfaction of the basic disclosure

154 Upon timely exercise of his right to rescind, the customer "is not liable for any finance or other charge." FRB Reg. Z § 226.9(d), 34 Fed. Reg. 2010 (1969).

155 *Id.*

156 *Id.* § 226.9(b).

157 The transaction in this example would be an "other than open end" credit transaction requiring disclosures under section 226.8. See note 13 *supra*.

158 FRB Reg. Z § 226.9(c), 34 Fed. Reg. 2010 (1969).

159 See note 15 *supra*.

160 FRB Reg. Z § 226.9(d), 34 Fed. Reg. 2010 (1969).

161 The regulation states that "[t]ender shall be made at the location of the property or at the residence of the customer, at the option of the customer." *Id.* It would seem unreasonable to construe "tender" to mean that the consumer must remove the windows.

162 *Id.*

163 *Id.*

164 The only obligation of the consumer upon rescission is to tender *property*, or its "reasonable value" where return in kind would be "impracticable or inequitable." *Id.*

requirements of the Act, as well as the giving of notice of the right to rescind, is a condition to the running of the three-day "cooling-off" period. A creditor who fails to make these disclosures extends the period during which the consumer may rescind and violates the Act in failing to make disclosure before the agreement is consummated. A creditor who begins performance before the "cooling-off" period has expired also violates the Act, regardless of whether he has made the required disclosures. If the consumer rescinds within the "cooling-off" period, the contract and security interest are at an end. The creditor must return any down payment within ten days after receipt of the customer's notice of rescission; unless and until he does so, the consumer has no obligation to return any property he may have received. Even if the down payment is returned, unless the creditor also takes possession of the property within ten days after it is tendered to him, ownership will vest in the consumer without obligation to pay. The consumer has no obligation whatsoever as to the costs of any services performed prior to the rescission.

#### IV. Limitations on Garnishment

There is a continuing debate over the legitimacy of garnishment of wages as a collection device.<sup>165</sup> Some observers have taken the position that the harsh consequences often brought about by wage garnishments necessitate total abolition of the device.<sup>166</sup> Others insist that the case against garnishment is based on fallacious assumptions and data and that, in any event, since a worker's earning potential is the only real security a creditor has, to prohibit garnishment might result in a devastating diminution in available credit.<sup>167</sup> Whatever the validity of these opposing views, there is much less disagreement that unlimited garnishments may have disastrous consequences. Congress has opted for a middle position and has chosen to impose limitations on garnishment as a matter of federal law.<sup>168</sup>

Under Title III of the CCPA, creditors may garnish only twenty-five percent of a person's disposable earnings for the week, or the amount by which his disposable weekly earnings exceed thirty times the federal minimum hourly wage, whichever is less.<sup>169</sup> Although most states already provide for some restriction on garnishment,<sup>170</sup> the twenty-five percent limitation seems, in general, more restrictive.<sup>171</sup> Moreover, the multiple-of-the-minimum-wage measure may be of further benefit to that not insignificant number of consumers earning less than

165 See Kripke, *supra* note 19, at 29-32.

166 At least one commentator has insisted that garnishment has resulted in an inordinate number of personal bankruptcies. Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1234-38 (1965). See also Note, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759, 761-62.

167 See Kripke, *supra* note 19, at 28-32.

168 See H.R. REP. NO. 1040, 90th Cong., 1st Sess. 20-21 (1967).

169 15 U.S.C. § 1673(a) (Supp. IV, 1965-68). The twenty-five percent measure is the basic limitation. The multiple of the minimum wage measure seems designed for special situations, e.g., where the consumer garnished is earning less than the minimum wage.

170 See B. CURRAN, *supra* note 31, at 129, 338-41.

171 *Id.* at 338-41.

the minimum wage.<sup>172</sup> Thus, assuming a forty-hour workweek, the twenty-five percent measure and the multiple-of-the-minimum-wage measure will be equal as to consumers being paid the minimum wage.<sup>173</sup> As to consumers being paid less than the minimum wage, the multiple-of-the-minimum-wage measure will restrict the amount subject to garnishment even more than the twenty-five percent measure. Thus, again assuming a forty-hour week, a consumer earning \$1.50 per hour will earn \$60 per week. Twenty-five percent of this is \$15. If the federal minimum wage is \$2.00 per hour, the amount by which \$60 exceeds thirty times the minimum wage (\$60.00) is zero. In short, the CCPA assures that a consumer-debtor will always have a certain minimum amount of his weekly wages, namely, thirty times the federal minimum hourly wage, free from garnishment.<sup>174</sup> Of course, the amount thus protected is miserably small and the increase in dollar protection to the consumer-debtor (\$15 in the example) is not great. On the other hand, \$15 to a person earning only \$60 per week is not insubstantial, and the amount exempt from garnishment will increase should the federal minimum wage be raised.

It is not just the direct impact of garnishment on the take-home pay of the consumer-debtor that has been cause for concern. The mechanics of the garnishment remedy are such that a significant burden falls upon the consumer-debtor's employer who is named as garnishee.<sup>175</sup> Not surprisingly, many employers, particularly in those cases where the employee-debtor is unskilled and therefore expendable, have chosen to discharge the employee rather than suffer the burdens resulting from the garnishment proceeding.<sup>176</sup> Congress decided "garnishment-firings" had become such a severe problem that in Title III it prohibits an employer from firing an employee because of one garnishment.<sup>177</sup> The difficulty with the protection offered by this provision, apart from the fact that it may be too conservative in not prohibiting discharge in the event of more than one garnishment,<sup>178</sup> is that it will frequently be difficult to show that a discharge was the result of a garnishment action.<sup>179</sup> This may prove particu-

172 In 1966, investigations revealed that out of 60 million wage and salary workers in the United States, including 9.5 million public employees, less than half were subject to the minimum wage legislation. H.R. REP. NO. 1366, 89th Cong., 2d Sess. 7 (1966); S. REP. NO. 1487, 89th Cong., 2d Sess. 2 (1966). The 1966 amendments to the Fair Labor Standards Act, 29 U.S.C. §§ 203-18 (Supp. II, 1965-66), amending 29 U.S.C. §§ 201-19 (1964), were expected to offer protection to an additional 5.8 million private employees and 1.4 million public employees. S. REP. NO. 1487 *supra* at 2.

173 For example, assuming a federal minimum wage of two dollars per hour, weekly earnings would be eighty dollars. Twenty-five percent of this is twenty dollars. The excess over thirty times the minimum wage is also twenty dollars.

174 This special protective effect of the CCPA is a result of the fact that not all employers are required to pay the minimum wage while, presumably, every creditor seeking to garnish wages is limited by the CCPA. Except for certain statutory exemptions, 15 U.S.C. § 1673(b) (Supp. IV, 1965-68), the Act does not attempt to limit the application of its garnishment restrictions, and there is little doubt today that the legislation may constitutionally have such an unlimited application.

175 See, e.g., ARIZ. REV. STAT. ANN. §§ 12-1571 to -1586 (1956).

176 See Jordan & Warren, *supra* note 31, at 458; Note, *Instalment Sales: Plight of the Low-Income Buyer*, 2 COLUM. J. L. & SOCIAL PROB. 1, 14 (1966).

177 15 U.S.C. § 1674 (Supp. IV, 1965-68).

178 The Uniform Consumer Credit Code does not so restrict the protection of the garnishment-firing provision. UNIFORM CONSUMER CREDIT CODE § 5.106.

179 "Garnishment-firing" prohibitions have been attempted elsewhere and appear to have suffered as a result of the problem of proof. See Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 565 (1967).



larly true in the case of unskilled laborers, those most prone to garnishment actions.<sup>180</sup> Whether the Secretary of Labor, who is charged with enforcement of this Title,<sup>181</sup> will be able to devise a scheme of enforcement that will ameliorate this difficulty remains to be seen. Perhaps the Secretary could introduce by regulation a presumption of "garnishment-firing" wherever a discharge occurs so soon after a garnishment as to create the suspicion of wrongful motive.<sup>182</sup> This would have the effect of putting the burden of proof of rightful motive on the employer. In any event, the "garnishment-firing" prohibition will certainly cause employers to think twice before discharging an employee merely because they deem it easier to do that than to respond in a garnishment action. The limitation on earnings subject to garnishment will be immediately effective since no court may permit garnishment in excess of that allowed by the Act.<sup>183</sup>

The CCPA failed, however, to impose another much needed limitation on garnishment. Contrary to the statutes of many states, garnishment ought never be permitted prior to judgment.<sup>184</sup> Given the harshness of the remedy and its potentially severe consequences, it is only reasonable to demand that a creditor first prove the existence of a debt.<sup>185</sup>

This omission may be remedied, at least in part, by the recent decision of the United States Supreme Court in *Sniadach v. Family Finance Corp.*<sup>186</sup> There the Court struck down as violating "due process" the provisions of a Wisconsin statute<sup>187</sup> allowing garnishment before judgment. The full impact of *Sniadach*, however, remains to be seen. It is not at all clear that prejudgment garnishment always violates "due process." A provision for some kind of limited notice and hearing short of that leading to a judgment might be held sufficient.<sup>188</sup> This would prove unfortunate, however, in that such a procedure would not fully assure that debtors, particularly low-income debtors, get their "day in court."<sup>189</sup> It is also possible that statutes requiring the plaintiff-creditor to post a bond in connection with a prejudgment garnishment proceeding would be

180 It would seem doubly difficult to show that an unskilled worker, as opposed to a professional, was discharged by reason of garnishment and not for reasons of incompetence or because one who could do the job better became available.

181 15 U.S.C. § 1676 (Supp. IV, 1965-68).

182 Such evidentiary presumptions have been introduced elsewhere in the CCPA. See 18 U.S.C. §§ 892(c), 894(c) (Supp. IV, 1965-68), dealing with proof of the making of an extortionate extension of credit and collection by extortionate means.

183 15 U.S.C. § 1673(c) (Supp. IV, 1965-68).

184 See Note, *supra* note 166, at 768-69.

185 There is general agreement among the commentators on this point. See Jordan & Warren, *supra* note 38, at 438-39; Kripke, *supra* note 38, at 475. The Uniform Consumer Credit Code prohibits the use of garnishments before judgment in the case of debts "arising from a consumer credit sale, a consumer lease, or a consumer loan." UNIFORM CONSUMER CREDIT CODE § 5.104.

186 395 U.S. 337 (1969).

187 WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1969).

188 The petitioner in *Sniadach* contended only that the Wisconsin procedure violated due process "in that notice and an opportunity to be heard are not given before the *in rem* seizure of the wages." *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338 (1969). The Court agreed. *Id.* at 342.

189 The combination of ignorance and suspicion on the part of the low-income consumer, together with the phenomenon of "sewer-service," has resulted in an unconscionable number of default judgments. Kripke, *supra* note 19, at 37-38; Note, *Abuse of Process: Sewer Service*, 3 COLUM. J. L. & SOCIAL PROB. 17 (1967); Note, *supra* note 176, at 9-12. Consequently, that notice of some specialized prejudgment garnishment hearing would impart any real "due process" protection to such consumers is very doubtful.

upheld against a *Sniadach* attack.<sup>190</sup> Congress could have resolved such difficulties simply by prohibiting prejudgment garnishment in the CCPA.

## V. Conclusion

There undoubtedly are those who will react to this article as a rather naive attempt "to bring good out of evil." Unquestionably there is much that is wrong with the CCPA as an attempt to improve the unhappy position of today's consumer. The legislation falls far short of coming to grips with many of the problems that must be solved. Such substantive issues as permissible rate ceilings and the terms under which credit may be extended are left essentially untouched by the CCPA. Moreover, the very notion of disclosure as a protective device, the purported heart of Title I, may be misconceived. In short, it is not unfair to conclude that on the whole, the CCPA does not represent any major advance in the movement for increased consumer protection. In this sense, the CCPA is indeed a "put-on" of sorts.<sup>191</sup> Certainly the legislation is no cause for complacency.<sup>192</sup>

On the other hand, to conclude that the CCPA in general is no cause for rejoicing does not preclude the possibility that important benefits may be derived from the legislation. Careful examination of the Act reveals that this is so. There undoubtedly are consumers who will profit from disclosure itself. Accurate information as to the cost of credit in terms of simple annual interest may very well influence consumer behavior. The discovery of "hidden" finance charges may have an even greater impact. Less directly, disclosure requirements as to the cost of insurance, "balloon payments," "add-on" contracts (particularly to the extent they may involve cross-collateral arrangements), and security interests of all kinds, may prove beneficial. Outside of Title I, the provision for rescission in transactions involving security interests in residences and the limitations on garnishment of wages, while clearly last-minute in origin and illustrative of the general failure of the CCPA to go far enough, nevertheless offer the promise of relief as to certain substantive abuses that have developed in the consumer credit field.

As has been emphasized, whether any of the potential benefits of the CCPA are actually realized depends upon how effectively the Act can be enforced. There is provision for public enforcement, both criminal and administrative. It is likely that the criminal sanctions will be sparingly applied. The provisions for administrative action, while not complete, are sufficient to permit meaningful

190 An argument that the present Arizona statute, which imposes such a bond requirement, ARIZ. REV. STAT. ANN. § 12-1572 (1956), continued to be valid after *Sniadach* was made before the Arizona Supreme Court in the recent case of *Termplan Inc. v. Superior Court*, — Ariz. —, 463 P.2d 68 (1969). Although the Arizona court rejected the argument, there is no assurance that the courts of other states would come to the same conclusion. Incidentally, the Arizona Supreme Court read *Sniadach* to be concerned only with wage garnishment and expressly limited its decision to the prejudgment garnishment of wages. Such a limitation suggests that the requirement of judgment prior to garnishment would not apply to garnishment of a bank account consisting of wages just paid and deposited. If so, a serious loophole in the protection offered by *Sniadach* will have been created.

191 See Kripke, *supra* note 19, at 2.

192 See generally H.R. Doc. No. 91-188, 91st Cong., 1st Sess. (1969) (message from President Nixon).

public enforcement. Much depends upon the response of the agencies themselves, especially the FTC. Provision for private enforcement, while again seriously incomplete, has been made. The effectiveness of such enforcement depends greatly upon the resourcefulness of attorneys and the receptivity of the courts. Adept utilization of class actions would seem to be essential.

It should be kept in mind that the CCPA may be a source of relief from ills that go beyond the purported objectives of the Act. Thus, violations of the Act, especially when confirmed by an administrative agency, may provide leverage in negotiations aimed at freeing a consumer from the obligations of an oppressive bargain, the really reprehensible aspects of which are not clearly "illegal" under the governing law. The health club membership transaction referred to earlier is an example.<sup>193</sup>

All in all, while it is certainly not the panacea its supporters may have assumed, and admitting that its benefits may be often tangential to its purported objectives, the CCPA may still constitute a useful contribution to the growing body of consumer credit protection legislation.

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193 See notes 59-62 *supra* and accompanying text; note 110 *supra*.