Case Western Reserve Law Review

Volume 24 | Issue 3 | Article 8

1973

Book Comment: Handling Consumer Credit Cases, by Barkley Clark and John R. Fonseca

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BOOK COMMENT

HANDLING CONSUMER CREDIT CASES, Barkley Clark & John R. Fonseca. The Lawyer's Co-operative Publishing Co., 1972. Pp. xi, 738. $35.00.

As a guidebook for practitioners seeking to explore the complexities of consumer credit litigation, *Handling Consumer Credit Cases*[1] is something of a rip-off. While the book appears to contain 738 pages of relevant material, only 237 of these pages represent the author's own text. The remainder of the volume is devoted to reprinting statutes and model acts, specifically, the Federal Consumer Credit Protection Act (Truth-in-Lending Act)[2] (along with Federal Reserve Board Regulation Z[3] promulgated thereunder), the Uniform Consumer Credit Code (UCCC), the National Consumer Act (NCA), and the National Association of Insurance Commissioners Model Bill to Provide for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance (NAIC Model Bill).[4]

All of these statutes are readily available elsewhere. Any practicing attorney has access to the Consumer Credit Protection Act and regulation Z. And available free from the Federal Reserve Banks is a useful pamphlet entitled "What You Ought to Know About Federal Reserve Regulation Z," which contains most of the text of the CCPA and regulation Z, along with sample forms, tables, and explanatory questions and answers. As to the UCCC and the NAIC Model Bill, in the jurisdictions in which they have been adopted, the version ultimately enacted probably varies somewhat from the official text of the model act.[5] As a result, local practitioners will be forced to consult their own state code even if they own a copy of the Clark and Fonseca book.[6] The NCA is a model

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[1] B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES (1972) [hereinafter cited as CLARK & FONSECA].

[2] 15 U.S.C. §§ 1601-81t (1970).

[3] 12 C.F.R. §§ 226.1-.13 (1973).

[4] The authors' system of reprinting all relevant statutory materials is not only expensive, it is inconvenient as well. The version of the Truth-in-Lending Act reprinted in the book is the U.S.C. compilation, while the discussion in the text consistently refers to section numbers from the uncodified version of the Act, so that cross-referencing is most difficult.

[5] *See, e.g.*, IDAHO CODE § 28-33-201 (Supp. 1972). Under section 28-33-201(4) of the *Idaho Code*, for example, the loan finance charge made pursuant to a revolving loan account is not to exceed 15 percent per year. Under UCCC § 3.201(4), on the other hand, the loan finance charge for such a loan may be as great as 18 percent.

[6] In addition to comprising section 67 of CLARK & FONSECA, the UCCC is printed

consumer credit statute drafted by the National Consumer Law Center as a proconsumer alternative to the UCCC.[7] To date, the NCA as such has not been adopted by any jurisdiction.

It is irksome that publishers of a legal text would artificially inflate the price through the inclusion of unnecessary statutory material. Unfortunately, such practices are not uncommon, and newly fashionable subject areas, such as consumer protection, appear particularly susceptible.[8] The consumer deception and other abuses engaged in by some lawbook publishing houses were pointed out in a 1969 article by Raymond Taylor,[9] and the intensity of reaction to that article dramatizes the scope of the problem.[10]

Fortunately, the remaining 237 pages of *Handling Consumer Credit Cases* (minus the blank pages found at the ends of half of the chapters) provide the reader with something more worth purchasing. In these pages, however few, there is no padding. They contain a thorough textual analysis and comparative study of the reprinted statutes and regulations plus the Uniform Commercial Code (UCC), material which the authors term collectively "The New Consumer Credit Legislation." Curiously, the book contains no discussion nor even reference to the Uniform Consumer Sales Practices Act, a statute which one would have thought to be part of any assemblage of "The New Consumer Credit Legislation."

Those who purchase this book expecting a manual for litigating consumer credit actions will be disappointed. Despite the implications of its title, the book seems more geared to students of consumer credit legislation than to the practitioner, for the authors' primary focus is upon examining and evaluating the various statutory approaches comprising the new consumer credit legislation. Where two statutory schemes overlap, the authors offer their opin-

at 7 UNIFORM LAWS ANNOT. 47 (master ed. 1970) and is available in pamphlet form from West Publishing Co. for $3.50.

7 A copy of the NCA can be obtained from the National Consumer Law Center, Boston College Law School, for an appropriately modest price.

8 Witness the activities of Ralph Ginsburg, former publisher of *Eros*, who has run into new legal problems peddling his consumer newsletter, *Moneysworth*. *See* N.Y. Times, June 20, 1972, at 26, col. 1 (city ed.). As an occasional reader, I can attest that your *Moneysworth* it is not.

9 Taylor, *Lawbook Consumers Need Protection*, 55 A.B.A.J. 553 (1969).

10 After the article was published, several remedial actions were taken. *See, e.g.*, *American Association of Law Libraries Standards for the Advertising of New Law Publications*, 64 LAW LIBRARY J. 440 (1971).

The attempts at reform have continued to the present. Recently, the Federal Trade Commission issued proposed "Guides for the Law Book Industry." 38 Fed. Reg. 5351 (1973), *reprinted in* 59 A.B.A.J. 425 (1973).

ion as to the preferable legislative solution. While the basic methodology of contrasting the various model acts is both legitimate and worthwhile,[11] seldom do the authors support their preference of statutory solutions with more than conclusional reasoning. And in their critique of the model legislation Clark and Fonseca deal all too superficially with the policies and value judgments underlying the choices made by the draftsmen.

The substance of the book is segmented into 13 chapters (chapter 14 is the reprinted statutory material discussed previously) which cover all significant consumer credit topics of the day. In chapter one, the authors present an overview of the existing law regulating consumer credit and the changes that have been made, or would be made, by the new consumer credit legislation. The authors briefly describe the existing crazy-quilt pattern of state legislation governing retail installment sales, small loans, consumer bankruptcy, and other forms of debt adjustment available to the insolvent or the hard pressed. Though too brief to be useful in itself, this chapter is nonetheless a fitting and provocative beginning.

Chapter two analyzes an array of topic areas connected with credit sales, including warranty disclaimers, deceptive sales practices, door-to-door sales, legislative limits on security clauses, waiver-of-defense clauses, and the cutoff of consumer defenses by the holder-in-due-course doctrine. The authors seem to believe that any breach of warranty gives the consumer the right to cancel his contract.[12] This is true, however, only if the cancellation occurs before acceptance of the goods.[13] In every other respect the authors' short summary of the UCC's provisions on warranties is sound, although here, as throughout much of the book, the citations to case law and other authority are insufficient to be of much use to the practicing lawyer. The substantial limitation on warranty disclaimers contained in the NCA[14] is discussed, but the authors fail to mention the various ef-

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[11] In Professor Kripke's view: "To a large extent, teaching of [consumer credit] for the next several years may consist of contrasting the various provisions of the UCCC and the National Consumer Act." H. KRIPKE, CONSUMER CREDIT at xiii (1970).

[12] CLARK & FONSECA 22.

[13] *See* UCC § 2-601. Once he has accepted, the buyer may revoke his acceptance of a commercial unit only if its "non-conformity substantially impairs its value to him . . . ." UCC § 2-608(1).

[14] NCA § 3.302 provides:

> Notwithstanding any other provisions of law, with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall: (1) exclude, modify or otherwise attempt to

forts in Congress aimed at imposing similar limitations through federal legislation.[15]

The discussion of restrictions placed upon the use of cross-collateral agreements and other security arrangements imposed by sellers and lenders[16] provides an example of the authors' superficial treatment of important policy considerations. Professors Clark and Fonseca are eager to outline various abusive practices in connection with collateral selling agreements and installment selling. But they reach their conclusion that these practices are abusive and should be remedied without ever addressing directly the threshold question — is there anything wrong with the seller or lender obtaining as much security as possible? One cannot discuss the problem of excessive security adequately without first considering the possible impact that restricting security interests might have on the availability or cost of credit for the marginal credit risk. I have often wondered whether the relatively low prevailing interest rates for new and used automobile financing (nearly always substantially below the legal maximum)[17] might not result, at least in part, from the value of automobiles as security. Admittedly, the value of a security interest in appliances and household furniture is much less than the value of one in automobiles. Consequently, it might be possible to restrict security interests in goods other than automobiles without affecting the availability or cost of credit. The more sensible approach to the excessive security problem may therefore be to place restrictions upon the types of collateral that can be pledged, as the NCA does with respect to non-purchase-money security interests. At any rate, the interrelationship between restricted collateral and the cost of credit requires careful consideration. The authors appear to operate under the assumption that any limitations upon the sort of security arrangement a seller may invoke are necessarily beneficial to the consumer. A closer analysis might show that the price ultimately paid for this protection is more than its worth.

The authors' treatment of the holder-in-due-course doctrine and waiver-of-defenses clauses is adequate, though not sufficiently docu-

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limit any warranty, expressed or implied by law, including the warranties of merchantability and fitness for particular purpose; or (2) exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied.

15 *See, e.g.*, S. 986, 92d Cong., 1st Sess. (1971).

16 CLARK & FONSECA § 11.

17 *See* Shay, *A Portrait of the Consumer Credit Market*, 26 BUS. LAWYER 761, 771 (1971).

mented by case citation.[18] Further, no attention is paid to existing state legislation that seeks to ease the hardship which these principles of debtor-creditor law work on the ordinary consumer.[19] My principal criticism, however, is of the authors' failure to differentiate between two critical problems that the holder-in-due-course doctrine presents to the consumer. The authors discuss *Unico v. Owen*[20] and *Norman v. World Wide Distributors, Inc.*,[21] both of which involved an assignment of the buyer's debt to a holder in due course followed by a failure of consideration. The consumer was left with a worthless remedy against the insolvent seller and a debt owing to the seller's assignee. In such a situation, where the assignee is a holder in due course, the consumer is left with neither the cake nor the eating. But more common is the case where there has been a breach of warranty and the consumer has been unable to obtain satisfaction from the merchant. Were it not for the holder-in-due-course doctrine or a waiver-of-defenses clause, the consumer could simply stop paying until the merchant made good on the warranty. Without the leverage of withholding payment the consumer's bargaining position is weak. The New Jersey Supreme Court in *Unico* suggested that these two situations might be treated differently.[22] But neither the authors nor any of the new consumer credit legislation has chosen to make the distinction.

The authors next present an examination of unconscionability under the UCC, the UCCC, and the NCA. While there has developed a considerable body of case law applying the unconscionability doctrine, the law review articles probably still outnumber the cases. However, unconscionability may well prove more important as a practical matter than the number of cases indicates. My personal impression is that many creditor's attorneys as well as some

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[18] There is one significant problem in this discussion. The authors' suggestion that the assignee's knowledge of a truth-in-lending violation might authorize the consumer to cancel his contract, CLARK & FONSECA 42, is, I believe, just plain wrong. There might be an argument, however, that the consumer's counterclaim for statutory damages constitutes a "defense against [the instrument]" that can prevent the assignee with notice of the violation from becoming a holder in due course. In this regard, the authors' citation of Matthews v. Aluminum Acceptance Corp., 1 Mich. App. 570, 137 N.W.2d 280 (1965), is well taken.

[19] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 255, § 12C (Supp. 1973) (prohibiting the use of negotiable notes in consumer transactions); CAL. CIV. CODE § 1804.1(a) (West 1973) (forbidding clauses that require a consumer to waive all defenses against a seller or his assignee).

[20] 50 N.J. 101, 232 A.2d 405 (1967).

[21] 202 Pa. Super. 53, 195 A.2d 115 (1963).

[22] 50 N.J. at 123, 232 A.2d at 417.

judges are frightened by the unconscionability doctrine, and it therefore serves as a goad to settlements favorable to the consumer. The authors make a proper distinction between procedural and substantive unconscionability but seem undecided as to whether both must be present for a clause or an agreement to be voided.[23] The frequent failure of the courts to look into the "commercial setting, purpose and effect"[24] of the allegedly unconscionable contract term, particularly with respect to price unconscionability, is given proper attention by the authors. Both the NCA and the UCCC seem to present no significant substantive alterations in the doctrine of "unconscionability" other than to lay down some guidelines for the factors to be considered. The NCA would make unconscionability a jury issue and would use the Federal Trade Commission and other agency regulations and guidelines in making the determination.[25] Further, the NCA would give the Consumer Credit Administrator power to issue additional guidelines,[26] an idea worthy of discussion. Eventually the NCA approach could result in agencies prescribing most of the boilerplate to be contained in consumer credit agreements, as is done to some extent today in insurance contracts.

Chapter four, on loans, I found to be one of the most useful parts of the book. It presents a good explanation of such technical matters as rebates of finance charges upon prepayment, refinancing and consolidation of loans, and delinquency and deferral charges. This chapter should prove quite valuable to anyone seeking to understand the computation of finance charges and such accounting complexities as the "Rule of 78's."[27] The only potential drawback to the material is that it is not sufficiently detailed to enable one to make some of the more complicated computations; for this one still needs to use regulation Z and the tables supplied by the Federal Reserve Board. The chapter's short section on Federal Housing Administration title I home improvement loans is a welcome addi-

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[23] CLARK & FONSECA 50. At one point the authors state that both are necessary, but they subsequently suggest that procedural unconscionability exists in nearly all consumer credit transactions so that a dual requirement is virtually meaningless.

[24] UCC § 2-302(2). *See, e.g.*, Control Budget Corp. v. Sanchez, 53 Misc. 2d 628, 279 N.Y.S.2d 391 (Civ. Ct. 1967); American Home Improvement v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

[25] NCA § 5.107(3)(i).

[26] NCA § 5.107(2).

[27] The "Rule of 78's" is a method of calculating the unearned finance charges to be rebated upon prepayment of a consumer loan. Under UCCC § 3.209, the consumer has the right to prepay the unpaid balance of his loan in full at any time without penalty.

tion; the topic has been too seldom treated in other writings on consumer credit.

The authors are properly critical of the unnecessary complexity of the UCCC's rebate provisions and the duplication created by the UCCC's separate treatment of credit sales and loans. This situation has been considerably improved by a committee of the National Conference of Commissioners on Uniform State Laws in Working Redraft Number 4 of the UCCC.

Chapters five and six deal with what the authors term the "consumer's chain of disaster" — default, repossession, foreclosure, deficiency judgment, and garnishment — and cover many other problems of collection such as cognovit notes and waivers of jurisdiction and venue. The cruel manner in which the UCC's provisions on these topics often operate in consumer transactions is fully described and critically compared to the reforms that would be produced by the UCCC and the NCA. Here again, the authors too frequently indicate their preferred solutions without much explanation of their reasons for deciding upon them. Nonetheless, I would agree with their judgment that the UCC says too little and the NCA does too much, particularly with respect to default and cure.[28] These chapters also contain a discussion of the Supreme Court's decision in *Sniadach v. Family Finance Co.*[29] and its impact upon default procedure. The timely problem of the constitutionality of self-help repossession under article 9 of the UCC is raised but is far from resolved.

One problem in this discussion is the authors' implicit assumption that there is something inherently evil about the large percent-

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[28] Professor Clark has dealt extensively with the questions of default and cure on a previous occasion. Clark, *Default, Repossession, Foreclosure, and Deficiency; A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972).

[29] 395 U.S. 337 (1969). *Sniadach* held that prejudgment garnishment of wages, without a prior hearing on the merits, violated the due process clause. Clark and Fonseca suggested that the decision in the *Sniadach* case might invalidate such creditor's remedies as prejudgment replevin and confession of judgment pursuant to a cognovit provision. CLARK & FONSECA 105-07 & nn. 40, 42-43. The Supreme Court subsequently decided these issues, apparently too late for inclusion in this book. In the companion cases of D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), and Swarb v. Lennox, 405 U.S. 191 (1972), the Court held that cognovit provisions were not unconstitutional per se, and that, contrary to the prediction of the authors, the cognovit debtor may be held, under appropriate circumstances, to have effectively waived his rights to prejudgment notice and hearing. As to prejudgment replevin, on the other hand, the Court was willing to follow the extension of *Sniadach* discussed by the authors. In Fuentes v. Shevin, 407 U.S. 67 (1972), it decided that state statutes permitting a seller to replevy the purchased chattels without a hearing or prior notice to the consumer worked a deprivation of property without due process of law.

age of default judgments in consumer credit cases. At one point they comment that the "courts . . . are more often used as the creditor's rubber stamp than as a forum for determining the legitimacy of disputed claims."[30] This attitude manifests a misunderstanding of the role of the courts in consumer credit collection cases. Typically, the courts act only as a temporary buffer between creditor and consumer. They permit, but do not require, the consumer-defendant to have his say before the coercive power of the state is wielded against him. As desirable as it might be for the courts to carefully review the pleadings and documents before entering a default judgment, to determine whether they reveal any valid defenses, this procedure will simply not aid the typical defaulting debtor who has no reason other than his poverty for not paying. The truth of the matter is that most creditor claims are legitimate, and there is little point in lamenting the consumer's failure to defend the indefensible.[31]

The economic complexities and uncertainties surrounding the effect of rate ceilings, discussed by the authors in chapter seven, are beyond the scope of this comment and to some extent beyond that of the book itself. The authors describe the policy behind the UCCC draftsmen's decision to fix relatively high rate ceilings and thereby utilize ceilings only in the most egregious cases of creditor overreaching. To keep rates at an appropriate level, the draftsmen principally chose to rely upon the forces of the increased competition which the UCCC seeks to encourage.[32] To the extent that this philosophy for holding down rates assumes that lenders will attempt to compete for consumer business by offering lower rates, it may be unsound. A recent study indicates that consumers are quite insensitive to the variations in rates available from different types of lending institutions.[33]

The ceiling selected by the UCCC for revolving charge account rates is 18 percent. Since this figure represents the prevailing rate

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[30] CLARK & FONSECA 116.

[31] A recent study of default judgments indicates that only a small, though quite significant, percentage of defaulting debtors have any defense. 1 D. CAPLOVITZ, DEBTORS IN DEFAULT 4-12 (1971).

[32] The comments to the UCCC point out that the Code was designed to generate more effective competition between lenders in a number of ways, including by making possible greater freedom of entry into the credit market. UCCC § 2.201, comment 1. For example, UCCC § 3.503(2) provides that financial responsibility, character, and fitness are the only requirements for obtaining the license necessary to make supervised loans.

[33] *See generally* White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New-Car Buyers and Auto Loans*, 69 MICH. L. REV. 1207 (1971).

throughout most of the country, the UCCC draftsmen have in effect pegged the charge account rate instead of setting an outer limit. The soundness of this 18-percent limit is questionable for other reasons as well. Many observers feel that even a top limit of 36 percent is too low to make the truly small loan of $200 or less economically feasible. And, as the authors point out, there is little reason why revolving charge accounts should be allowed to operate at a flat maximum rate of 18 percent when all other consumer credit is subject to stepped rates ranging from 36 percent to 15 percent depending upon the amount of the unpaid balance. The NCA takes no position on what the level of rate ceilings should be. Its draftsmen recognize that the availability of credit is closely tied to the maximum legal finance rates, but state that "no available data adequately supports the need for the high rate ceilings proposed in the Uniform Consumer Credit Code . . . ."[34]

The authors understandably skirt the ultimate and unanswerable question, "how much credit is enough?" But a possible restriction of the availability of consumer credit is one of the factors that must be considered in assessing the wisdom of the various legislative proposals that would reduce or modify creditors' remedies and would therefore affect the cost structure of the consumer credit industry. The UCCC's ceiling rates, while high, are not so high as to guarantee the continuing availability of consumer credit to the marginal credit risk.

The chapter on truth in lending provides a good general explanation of the statute and regulation Z, provisions which are simple in principle yet extraordinarily complex in their operation. The authors present a good case to support their view that the chief weaknesses in the Act are its failure to cover sales talk and the fact that disclosure can legally be delayed until the time the contract is signed, which is often well after the consumer has made up his mind and has informally, although not legally, committed himself. Another problem is that the required disclosure may favor the credit seller who is frequently able to hide his "true" finance charge in the cash price. Moreover, the value of compelling disclosure of finance charges is open to serious question in view of the evidence that, even where disclosure is given in advance, not many consumers will make much effort to shop for the most favorable terms.[35]

Nonetheless, truth in lending has been beneficial in that it has

[34] NCA § 2.201, comment 2.

[35] The authors cite several studies of the Massachusetts experience with a truth-in-

permitted the ordinary consumer to comparison shop for interest rates, an opportunity that was previously available only to those who were endowed with substantial mathematical acumen. And, even if most consumers do not comparison shop for credit (just as many do not comparison shop for goods and services), the mere prospect of comparison shopping by a significant portion of the consumer populace should pose a healthy restraining influence on those involved in setting the price of credit.

The UCCC disclosure provisions are nearly identical in effect to those of the Federal Truth-in-Lending Act. As a result, the states adopting the UCCC will be totally or partially exempted from the requirements of the Federal Act.[36] Clark and Fonseca describe this opportunity for exemption from federal disclosure requirements as the UCCC'S "most significant contribution."[37] While this feature might be a significant selling point for the UCCC, I fail to see why it amounts to the "states' righters dream" that the authors claim[38] or even why it is desirable. In order to qualify for exemption a state must not only adopt the statutory provisions of the Federal Truth-in-Lending Act but must also adopt regulations virtually identical to regulation Z and must update these regulations from time to time to correspond with amendments to regulation Z by the Federal Reserve Board. Furthermore, the state must provide for adequate enforcement and must document this enforcement by submitting periodic reports to the Board.[39] Not only is this procedure a far cry from states' rights, it is hardly necessary. The only real advantage in having almost identical state and federal laws on the same subject is that both political entities are able to exercise enforcement

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lending statute (MASS. GEN. LAWS ANN. ch. 140C, §§ 1-13 (Supp. 1973)) similar to the 1967 Federal Act. *E.g.*, F. JUSTER & R. SHAY, CONSUMER SENSITIVITY TO FINANCE RATES: AN EMPIRICAL AND ANALYTICAL INVESTIGATION (NBER Occasional Paper No. 88, 1964); R. PULLEN, THE IMPACT OF TRUTH-IN-LENDING LEGISLATION: THE MASSACHUSETTS EXPERIENCE (Fed. Reserve Bd. Research Rep. No. 43, 1968); White & Munger, *supra* note 33; Note, *A Survey of Experience Under the Massachusetts Retail Installment Sales Act*, 9 B.C. IND. & COM. L. REV. 1020 (1968). Curiously, Clark and Fonseca make no reference to the Federal Reserve Board's own efforts to determine the impact of the Truth-in-Lending Act upon consumer awareness of interest rates. *See, e.g.*, FED. RESERVE SYS. BD. OF GOVERNORS, ANN. REP. TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1969 (1970).

36 Truth-in-Lending Act § 123, 15 U.S.C. § 1633 (1970), permits the Federal Reserve Board to exempt from the disclosure requirements of the Truth-in-Lending Act states whose laws require substantially similar disclosures.

37 CLARK & FONSECA 153.

38 *Id.* at 154.

39 FED. RESERVE SYS. BD. OF GOVERNORS, ANN. REP. TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1970, at 6 (1971).

powers. This could be done in a much more direct manner without cluttering the statute books with superfluous words.[40]

An entire chapter of the book is devoted to that financing phenomenon of the 1960's, the bank credit card, a most welcome discussion, given the relative scarcity of other writing on the subject. The authors point out many of the problems created by this highly popular device which fails to fit smoothly into any of the traditional categories of consumer credit agreements. The decision whether the bank credit card transaction is ultimately to be classified as a loan, an assignment of an account or a note, a letter of credit, or some new sui generis three-party agreement is often critical for the purposes of applying state usury laws, consumer credit statutes, and article 9 of the UCC. For example, it might determine whether the consumer who buys a "lemon" using his bank credit card can withhold payment from the card issuer until he has received satisfaction from the merchant. Under the UCCC, which characterizes the transaction as a consumer loan instead of a credit sale,[41] the bank can require that the cardholder agree to make all payments regardless of any dispute he may have with the merchant, since the UCCC prohibition against cutoff clauses does not extend to loans.[42] The NCA, on the other hand, expressly provides that the card issuer is subject to all claims and defenses that the consumer has against the merchant.[43]

The NCA policy of putting the responsibility for the merchant's performance on the credit card issuer creates a number of practical problems. As the authors note, the policy would accomplish little in the way of remedying consumer abuses, since it would be almost impossible for the credit card issuer to police the numerous merchants who are part of its system. Furthermore, many of the purchases made with these cards are for small-good items or services, in which the credit card is used essentially as a substitute for cash or a check.[44] While the authors' suggestion of a dollar limitation be-

[40] The NCA incorporates by reference the federal truth-in-lending requirements in section 2.306 and adds additional disclosure requirements in sections 2.306 and 2.307. The UCCC, in comparison, states merely that any disclosure that satisfies the federal law will also satisfy the UCCC. UCCC §§ 2.301(2)-(3) & comment 3. This provision recognizes the need for national, as opposed to local, tsandards of disclosure to avoid overburdening interstate credit transactions.

[41] UCCC § 3.106.

[42] UCCC § 2.404.

[43] NCA §§ 2.407(1), (2)(g).

[44] *See, e.g.*, Brandel & Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 MICH. L. REV. 1033, 1049-51 (1971).

low which defenses cannot be asserted against the card issuer is a sensible one and would solve some of the problems, there are additional reasons for insulating the card issuer from claims against the merchants, which this solution would not accommodate. One is geographical. Since the typical bank credit card can be used all over the country, indeed to some extent all over the world, policing all the participating merchants would be impossible no matter how small the number of transactions involved. Additionally, many new businesses need access to an efficient, extended credit system such as the one provided by the bank cards. If the banks were required to do a thorough job of policing, they might limit their card use to the established and larger businesses and thus reduce competition in a significant way.

All these problems with making the card issuer responsible for the merchant's performance are rendered less serious if, as the authors state, it is the general practice of banks to retain the right to charge back against the merchant any transactions in which the consumer has a dispute. To a considerable extent, the bank's right to charge back alleviates the need to police participating merchants. But the same geographical problems that impair the bank's ability to carry out a thorough policing effort may make the efficient exercise of this charge-back right quite difficult.

In their chapter on bank credit cards the authors also discuss the law relating to lost or stolen cards, a problem largely made moot by the 1970 amendments to the Consumer Credit Protection Act. These provisions set forth various explicit requirements that must be satisfied before a cardholder may be held liable for the unauthorized use of his card, limit that liability to $50, and place the burden of proof in establishing liability upon the card issuer.[45] The chapter also treats the application of the Truth-in-Lending Act to bank credit cards and other "open end credit plans."

Chapter 10 on credit bureaus is a useful summary of the problems created by these institutions, accompanied by a discussion of the provisions of the Fair Credit Reporting Act[46] (now part of the Consumer Credit Protection Act), designed to regulate their activities. While the subject of credit reporting bureaus was ignored by the UCCC, it was addressed directly by the NCA. The draftsmanship of the NCA sections dealing with this problem is quite sloppy. The

[45] 15 U.S.C. § 1643 (1970).

[46] 15 U.S.C. §§ 1681-81t (1970).

sections contain several oversights and mistakes,[47] only some of which are pointed out by Professors Clark and Fonseca. My chief criticism, though, is the authors' failure to discuss the problems that have arisen in the administration of the Fair Credit Reporting Act. For instance, the Act does not permit the consumer to see his credit file, but requires only that its "nature and substance" be disclosed. It would be fairly easy for a credit bureau to maintain dual files, one for the consumer and one for its own use, or to temporarily remove matters to which the consumer might object. Even if the bureau decided to remove the objectionable matter permanently before disclosing the contents of the file to the consumer, in most instances the damage will already have been done. My personal experience with several cases suggests that many of these abusive practices may actually be occurring at present.

The book's three final chapters cover credit insurance, the Federal Trade Commission, and public and private enforcement of consumer credit statutes. I found the first of these chapters personally useful since it presents a topic too seldom treated in legal journals. Two important problems noted here are the unduly high premium rates charged for credit insurance and the kickbacks paid by the insurer to the credit grantor. The kickback and excessive rate problems are far from solved by the UCCC, but the NCA proposals might produce some healthy reforms.[48] Still troublesome, however, are the possible changes in the cost or availability of credit that might result if creditors are denied their customary share of the profits from credit insurance, a share which the authors suggest may amount to as much as one-third of the annual profit of consumer finance companies.[49]

The chapter on the Federal Trade Commission is too short to be of value. It was probably included merely to round out the picture of consumer credit regulation.

The subject of remedies and enforcement, on the other hand, is one requiring close study in any thorough discussion of the consumer credit field, for it is this topic which provides the key to effective consumer protection. The UCCC has been strongly criticized for

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[47] These problems are understandable, however, in a document clearly labeled "tentative draft."

[48] *See, e.g.*, NCA § 4.110 (prohibiting the creditor from receiving any compensation whatsoever relating to the issuance of credit insurance).

[49] CLARK & FONSECA 206.

its rejection of viable private enforcement,[50] and many authorities fear that enforcement by the administrative agency that the statute creates will be ineffective. Some see a solution in the much discussed class action device, to which the authors devote only five pages. While they suggest many of the potential dangers and rewards to be had in a consumer class action, the discussion is all too brief and deals with so few of the important recent cases that it is of little practical benefit to the student, the scholar, or the practitioner.

This brings me to some more general observations about the purpose and utility of the book under review. While it is promoted as a guide for the practicing attorney, the book will probably prove to be of little use as such. Since it is largely a comparison of two model acts plus the existing Federal Consumer Credit Protection Act, the book is not likely to satisfy the needs of a practitioner seeking specific answers to specific questions about the law of a particular jurisdiction. Because consumer credit law is largely statutory, it is of little help to a practitioner in Illinois, for example, to learn that most states have a retail installment sales statute which limits the allowable finance charge, and that the amount of this limit varies from state to state.

With a price of $35, the book will not appeal to many law students. This is unfortunate, since the book's close textual comparisons of the NCA and the UCCC would be most useful to those studying consumer protection or consumer credit. In any event, students would be better off using Professor Kripke's fine casebook on consumer credit,[51] supplemented by some of the many worthwhile law review articles that have been written in the field. The book's citation of cases and articles is far too sparse to serve as a stepping-off point for future research by either the student or the practitioner. The book may well be found useful by those in the legislatures and in policy-making positions who are interested in the development of consumer credit legislation. Even its usefulness for this purpose is questionable, though, since the discussion of the policies involved in consumer credit legislation is often too brief to be meaningful. All would have been better off had the publisher substituted more

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[50] *See, e.g.*, Spanogle, *Why Does the Uniform Consumer Credit Code Eschew Private Enforcement?*, 23 BUS. LAWYER 1039 (1968).

[51] H. KRIPKE, CONSUMER CREDIT (1970).

textual analysis for the statutory material and left it to the reader to procure the necessary statutes on his own.

This is not to say that *Handling Consumer Credit Cases* is a useless book, for it does contain a good generalized treatment of a large number of very complicated topics. The authors have performed a valuable function in bringing together within one volume the many related issues of consumer credit regulation. The book does give a detailed and careful comparison of the two principal model consumer credit codes. The authors' judgments are generally sound, the writing, while far from eloquent, is for the most part clear, and the typographical and other mistakes are no greater than would be expected. Still, I wonder who will buy this book? At the price, I can recommend it only to the more well-heeled among legal bibliophiles.

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