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Consumer Law--The Supervised Loan in West Virginia

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STUDENT NOTES

Consumer Law—the Supervised Loan in West Virginia

The supervised (small) loan is just one piece in the patchwork of transactions characterized as consumer credit. It is designed to increase the availability of credit for consumers in a form attractive to legitimate lenders who are permitted to issue loans with a low ceiling on the maximum principal amount, and a high ceiling on the permissible rate of interest.1 The other primary feature of the supervised loan, in trade off to its exemption from general usury requirements, is comprehensive regulation. As a result, supervised loan legislation is uniformly characterized by scrupulous licensing and oversight requirements.

The one source perhaps most responsible for the current disposition of the supervised loan industry is the Uniform Small Loan Act.2 The U.S.L.A. was the brainchild of the Russell Sage Foundation which conducted an in depth analysis on why legitimate lenders were unable to successfully compete with illegitimate lenders in the early 1900's.3 The Foundation's work-product, the U.S.L.A., continues to leave its mark on contemporary supervised loan legislation: relaxed usury requirements accompanied by comprehensive

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1 B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION, 16 (1965) [hereinafter cited as B. CURRAN].
2 See R. BARRETT, COMPILATION OF CONSUMER FINANCE LAWS, 675 (1952) [Uniform Small Loan Act hereinafter cited as U.S.L.A.].
3 See NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 93 (1972) [hereinafter cited as NATIONAL COMMISSION ON CONSUMER FINANCE].
regulation. In West Virginia, the U.S.L.A. was adopted with slight modification in 1933. Under the Act, the licensing and supervision of the supervised loan industry was, and continues to be, vested in the Commission on Banking.

Within the past decade the supervised loan industry has come to be viewed as much more than a legislative response to abuses suffered by the small borrower and small lender at the hands of the illegal lender. Supervised loans are now but one member of the overall consumer credit pool. Consequently, the supervised lender is now subject to a body of federal laws applicable to all forms of consumer credit. Many states have, correspondingly, adopted comprehensive laws regarding the availability and marketing of consumer credit. Recent federal and state legislation has, in varying degrees, recognized the consumer as an integral part of the marketplace.

West Virginia followed this trend with the enactment of the West Virginia Consumer Credit and Protection Act in 1974. Article IV of the WVCCPA supersedes the U.S.L.A. in the regulation of the supervised loan industry in West Virginia. Furthermore, the WVCCPA has made substantial changes in the law of West Virginia regarding consumers’ rights following default, the debt

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4 See, e.g., W. VA. CODE § 46A-4-102 (1976 Replacement Vol.) (requirement that applicants promote the convenience and advantage of the community.) For a complete discussion on the licensing scheme incorporated in the U.S.L.A. see J. COLLINS, CONVENIENCE AND ADVANTAGE AND ITS BENEFITS (1957-1958).
7 This is illustrated by the inclusion of supervised loan provisions in both of the major existing model consumer credit acts: The UNIFORM CONSUMER CREDIT CODE § 2.301 (1974 version); The NATIONAL CONSUMER ACT § 1.301(1) (1970). The latter act does away with the traditional delineations made between different forms of consumer credit transactions and treats all nongenerically as “consumer credit transactions”.
9 The West Virginia Consumer Credit and Protection Act was passed by the West Virginia Legislature on March 5, 1974, and became effective on September 1, 1974, although certain provisions did not become effective until September 1, 1975. [Hereinafter cited as WVCCPA].
10 W. VA. CODE § 46A-4-112 (1976 Replacement Vol.).
collection process, and credit terms. It is therefore surprising that such a wholesale revamping of the supervised loan and overall consumer credit laws of the state has been attended with a modicum of interpretive litigation. With this in mind, this Note will draw from the WVCCPA and all relevant federal laws in an attempt to define the legal relationship between the consumer and supervised lender in West Virginia. This analysis will focus on some of the more significant aspects of the prenegotiation, negotiation and postnegotiation stages in the execution of a supervised loan in West Virginia prior to either party's resort to judicial remedies. Moreover, particular emphasis will be placed on the wealth of relevant federal law.

PRENEGOTIATION

a. The Parties

A consumer of a supervised loan in West Virginia is a "natural person" who incurs the debt primarily for a "personal, family, household or agricultural purpose." It should be noted that although the WVCCPA defines "person" as, among other things, an organization, for the purposes of a supervised loan a consumer is a person "other than an organization." In the interest of uniformity, those who receive supervised loans will be referred to only as consumers, although the WVCCPA and the various related federal statutes and regulations identify them by a variety of names.

A supervised lender under the WVCCPA can be either a person or an organization authorized by law to make, or take assignments of, supervised loans. A supervised loan is one in which the principal does not exceed one thousand two hundred dollars and the loan finance charge exceeds eight percent per year. The fun-

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11 The only opportunity the West Virginia Supreme Court of Appeals has had to cite a provision of the WVCCPA was in the case of Dawson v. Canteen Corp., 212 S.E.2d 82 (W. Va. 1975) (requirement of privity of contract abolished in actions based on breach of express or implied warranty).
12 A comprehensive discussion of judicial and post-judgment remedies provided by the WVCCPA in regard to all forms of consumer credit can be found in Cardi, The West Virginia Consumer Credit and Protection Act, 77 W. VA. L. REV. 401, 480 - 515 (1975) [hereinafter cited as Cardi].
14 Id. § 46A-1-102(14)(b).
15 Id. § 46A-1-102(28) and (14)(a).
16 Id. § 46A-1-102(44).
17 Id. § 46A-1-102(45); see also § 46A-4-107(2).
damental licensing criterion facing the applicant hoping to become a supervised lender is that its “financial responsibility, experience, character and fitness . . . are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly and efficiently.” 18 The Commissioner must also find that an applicant has at least two thousand dollars in assets and that granting a license “will promote the convenience and advantage of the community.” 19 Licensees may only make loans in an office or building in which they alone conduct business. 20 Assignees of supervised loans and debt collectors are also subject to this limitation since they must first obtain a license authorizing them to make supervised loans before they can take supervised loans by assignment or undertake the collection of debts. 21

While there have been no reported decisions resulting from a denial, revocation or suspension of a supervised lender license, there is no doubt that the Commissioner can deny or revoke a license based on the subjective licensing criteria in the WVCCPA. 21.1 For example, a lender who has several civil judgments entered against it for violations of the debt collection provisions of the Act can hardly be regarded as “[commanding] the confidence of the community.” 21.2 The WVCCPA makes no provision, however, for the initiation of license revocation or suspension proceedings at the behest of a private citizen. 21.3 In addition, the usefulness of a writ of mandamus to compel the Commissioner to initiate such proceedings is doubtful since the Act frames the Commissioner’s authority to revoke or suspend licenses in discretionary terms. It is, nonetheless, integral for the successful administration of the Act that citizens report suspected or adjudicated abuses by supervised lenders to the Commissioner. Otherwise the afore-mentioned licensing criteria take on little meaning.

18 Id. § 46A-1-102(2).
19 Id.
20 Id. § 46A-4-110.
21 Id. § 46A-4-101(2).
21.1 See Id. § 46A-4-103.
21.2 Id. § 46A-4-102.
21.3 In addition, there is no express provision in the West Virginia Administrative Procedures Act which would permit private individuals to initiate or intervene in a “contested case” in order to dispute a license award or challenge an existing license. See W. Va. Code § 29A-5-1 to 5 (1976 Replacement Vol.).
b. Advertising

As is true with most consumer directed industries, advertising plays a significant role in the prenegotiation stage of supervised loans in West Virginia. Consequently, regulation of credit advertising originates from the premise that "a substantial portion of consumer[s] . . . are induced by such advertising and that if full disclosure is not made in such advertising, the consumer will be deprived of the opportunity to effectively comparison shop for credit." The sources of law relevant to advertising conducted by West Virginia supervised lenders are twofold: (1) the regulations of the West Virginia Commissioner of Banking, and (2) statutory requirements prescribed by Congress in the Truth in Lending portion of the Federal Consumer Credit Protection Act and the provisions of the Federal Reserve Board's Regulation Z promulgated pursuant to it.

The Commissioner of Banking's Regulations require that, except for mailings to customers already having loans and business cards, supervised lenders must state the twelve hundred dollar loan ceiling in all electronic and printed materials used to solicit business. Supervised lenders are prohibited from referring to supervision by "the State, the Attorney General, the Commissioner of Banking, the Department of Banking or any other State Agency," although they may advertise that they are licensed under Article 4, Chapter 46A of the West Virginia Code. The more inclusive category of licensees (supervised lenders, assignees and debt collectors) are prohibited from advertising that a loan with another licensee "will be paid or increased if the loan is transferred to the advertising licensee." Nor may they advertise in such a way as to confuse their identity with another. As a final matter, all West

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22 H.R. REP.-No. 1040, 90th Cong., 2nd Sess. 1, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1962, 1974. The issue has been raised that regulation of consumer credit advertising has had a "chilling effect" on creditors thereby causing them to advertise without any specificity and leaving the consumer less informed. See B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 42 (1972) [hereinafter cited as B. CLARK & J. FONSECA].
27 Id.
28 Id.
29 Id.
Virginia licensees must retain a copy of all advertising for two years following its use.\textsuperscript{29}

The basic federal definition of credit advertising relevant to the supervised lender is any commercial message made by a lender in any popular medium including radio, television, newspaper, magazine, sign, display, leaflet and mailing.\textsuperscript{30} Federal restrictions on credit advertising employ what has been described as a “floodgate methodology.”\textsuperscript{31} A lender’s advertisement cannot state any specific credit term unless all of the other terms required by the T.I.L.A. are stated concomitantly.\textsuperscript{32} Consequently, if an advertisement states:

"We offer loans of up to $1200 payable in twelve easy installments."
"No downpayment."
"No charge for credit."
"First installment only $10.00."
"No payments until June, 1978."

the floodgate has most likely been opened and the creditor must disclose all required specifics clearly and conspicuously in proper terminology.\textsuperscript{33} The specifics are:

1. The amount of the loan;
2. The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
3. The rate of the finance charge expressed as an annual percentage rate.\textsuperscript{34}

Supervised lenders who do not, as a matter of practice, issue all of their loans on the same basis must set forth one or more examples of typical extensions of credit in order to comply with Regulation Z.\textsuperscript{35}

\textsuperscript{29} Id.
\textsuperscript{30} 12 C.F.R. § 226.2(d)(1977).
\textsuperscript{31} B. Clark & J. Fonseca, supra note 22, § 42.
\textsuperscript{32} 12 C.F.R. § 226.10(c)-10(d) (1977).
\textsuperscript{34} 12 C.F.R. § 226.10(d)(2) (1977).
\textsuperscript{35} Federal Reserve Board Interpretation, 12 C.F.R. 226.1001 (1977).
Violations of the advertising provisions of the T.I.L.A. do not subject the supervised lender to civil liability or penalties. The only express liability-related provision in the credit advertising section concerns the nonliability of the media in which illegal advertising appears. However, if a supervised lender "willfully" and "knowingly" fails to comply with the advertising requirements, the lender is subject to fine of up to $5,000, or one year imprisonment, or both. The portion of the WVCCPA which provides for fixed civil liability for deceptive inducement practices applies only to consumer credit related to the purchase or lease of goods and services and is therefore not applicable to supervised lenders. Despite this absence of statutory remedies, the consumer advocate should consider the legality of a given lender's advertising when basing a claim or defense on the basis of fraudulent inducement or unconscionability.

**NEGOTIATION**

Once the competence of a consumer to receive and a lender to issue and advertise supervised loans is established, one arrives at that portion of the consumer/supervised lender relationship best described as the negotiation phase. "Negotiation," as used herein, contemplates every factor and writing which culminates in a legally binding agreement. Although a comprehensive discussion of the negotiation process is not possible here, four of the more significant features of negotiation will be discussed: (1) limitations on inducement practices other than advertising used by supervised lenders; (2) the limits of lender discretion when denying a loan request; (3) permissible loan terms; and (4) the required format of the instrument evidencing a supervised loan.

**a. Unconscionable Inducement**

The WVCCPA makes two significant changes in the doctrine of contract unconscionability relevant to the negotiation process of a supervised loan. Since the codification of the doctrine in § 2-302...
of the Uniform Commercial Code there has been some question as to whether a court can make a finding of unconscionability solely on the basis of procedural abuses in the bargaining process leading up to the execution of a contract.\textsuperscript{2} Procedural unconscionability is characterized as a lack of "meaningful choice" by one of the parties obligated on a contract because of inequality in the bargaining process, while substantive unconscionability focuses on the validity of a particular contractual clause in regard to public policy.\textsuperscript{3} In the context of a supervised loan, the question presented is whether a finding of unconscionability can be predicated on procedural abuses in the bargaining process between a consumer and a supervised lender alone, or whether the court must also find a substantive abuse in the written contract.\textsuperscript{4}

One view of § 2-302 reasons that "merely finding a procedural abuse is insufficient; for the draftsman has indicated that the primary target of the doctrine is the term that is unreasonable or unfair . . . . [t]hus some sort of substantive abuse must also be found."\textsuperscript{5} On the other hand, a more consumer-oriented reading of the U.C.C. unconscionability provision is that "[a] contract or a contract clause that was unconscionable at the time it was made could certainly be so only in the light of the circumstances surrounding its making, which must of necessity include inducement or solicitation practices."\textsuperscript{6} In Ashland Oil, Inc. v. Donahue\textsuperscript{7} the West Virginia Supreme Court of Appeals adopted a third possibility by holding that substantive abuses alone were sufficient to establish unconscionability and that procedural abuses were irrelevant.\textsuperscript{8}

\textsuperscript{2} But see 2 NATIONAL CONSUMER LAW CENTER, CONSUMER LAW HANDBOOK 416-417 (1972) [hereinafter cited as NATIONAL CONSUMER LAW CENTER].
\textsuperscript{7} NATIONAL CONSUMER LAW CENTER, supra note 42, at 416.
\textsuperscript{8} 223 S.E.2d 433 (W. Va. 1976).
\textsuperscript{8}1 [W]e do not find it necessary to base our holding upon a disparity in bargaining power between Ashland and Donahue. In most commer-
The WVCCPA conclusively resolves the questions arising from the procedural and substantive distinction by stating that: "if the court as a matter of law finds . . . [t]he agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement . . . ." This provision, in effect, codifies the proposition that procedural abuses alone are sufficient to establish unconscionability as a matter of law. As such, the court's holding in Donahue has no effect on the unconscionability doctrine as it relates to supervised loans and other consumer transactions which come under the WVCCPA. The WVCCPA unconscionability provision also avoids the interpretive pitfalls of § 2-302 of the U.C.C. by delineating between substantive and procedural unconscionability and permitting actions for either.48

The other change rendered by the WVCCPA in the complex ion of contract unconscionability is that courts hearing cases involving supervised loans and consumer transactions in general must apply the "setting" of the agreement as the standard for determining unconscionability.50 This is significant because under the analogous § 2-302 of the U.C.C. courts are directed to apply the "commercial setting" of the agreement in determining unconscionability as a matter of law.51 This subtle modification has the effect of lessening the legal standard necessary to establish unconscionability by sensibly distinguishing between consumer and commercial transactions.

b. Credit Reports

Credit reports are a primary staple for the supervised lender.52 They provide quick and easy access to, among other things, the consumer's credit history. With the growth of the use of consumer credit, supervised lenders can be expected to increase their reli-

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49 Id. § 46A-2-121(1)(b) (if the court finds any term or part of the agreement to have been unconscionable at the time it was made).
50 Id. § 46A-2-121(2).
51 See id. § 46-2-302(2) (1966).
ANCE ON CREDIT BUREAUS AND CREDIT REPORTING AGENCIES. According to one source, there is a credit file maintained on over one-half of all adult citizens in the United States. In light of the subjective nature of credit reports, their use in determining the availability of credit to an individual is subject to abuse.

For example, in *Millstone v. O'Hanlon Reports, Inc.*, the plaintiff, a "highly respected Assistant Managing Editor of the St. Louis Post Dispatch," had his automobile insurance policy temporarily cancelled when his insurer received a derogatory credit report from the defendant. The report described the plaintiff as a "hippie-type person, with shoulder length hair and with a beard on one occasion... who was strongly suspected of being a drug user... and... was very much disliked by his neighbors." In affirming a lower decision in favor of the plaintiff, the court admonished the defendant for claiming that its report was reasonably promulgated.

> [T]he record... shows that [the defendant's] agent devoted at most 30 minutes in preparing his report. His report was rife with innuendo, misstatement, and slander. Indeed, the recheck of his investigation showed that he depended solely on one biased informant; made no verification of the same despite [the plaintiff's request] that there... be a verification; and, finally it took three days to recheck the original investigation, and every allegation therein was found to be untrue.

*O'Hanlon*, although a case of extreme abuse, is indicative of the broad discretion enjoyed by credit reporting agencies in piecing together a portrait of an individual, unbeknownst to the individual, for credit purposes.

In recognition of the importance of credit reports to those who extend consumer credit, as well as the significant potential for the denial of credit to deserving consumers as the result of arbitrarily drafted reports, regulatory legislation has been forthcoming in recent years. On the state level, fourteen jurisdictions have enacted fair credit reporting legislation to date. Twenty-two other juris-
dictions, including West Virginia, have had credit reporting legislation introduced in their legislatures within the past year. On the federal level, Congress has taken the lead in the regulation of the credit reporting industry with the enactment of the Fair Credit Reporting Act in 1970. The F.C.R.A. was enacted with the express purpose of seeing that credit reporting agencies function "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of . . . information."

Under the F.C.R.A., a consumer report is essentially any communication "by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" used for establishing a consumer's credit eligibility. The F.C.R.A. also specifies to whom an agency may furnish a report, when information becomes obsolete and therefore unreportable, and substantial limitations on the maintenance of investigative consumer reports. Consumers have the right to receive the "nature and substance" of all information contained in a reporting agency's file maintained on them upon request, with the exception of medical information. Consumers also have the right to dispute the accuracy of information in a file and force a reinvestigation of the report. However, it has been held that a credit reporting agency is not required to give a consumer notice that the consumer has a right to challenge or force a reinvestigation of information contained in a report, and the statute is silent on the point.


Id. § 1681a(d). See, e.g., Hoke v. Retail Credit Corp., 521 F.2d 1079 (4th Cir. 1975), cert. denied 423 U.S. 1087 (1976); Rasor v. Retail Credit Co., 554 P.2d 1041 (Wash. 1976).
Id. § 1681b.
Id. § 1681c.
Id. § 1681d.
Id. § 1681h. The rationale for restricting consumers from access to medical information is that "raw medical information should only be tendered with the counsel of a physician or other medically trained personnel." Conf. Rep. No. 91-1587, 91st Cong., 2nd Sess. 7, reprinted in [1974] U.S. Code Cong. & Ad. News 4411, 4414.
The Act provides that a consumer may, in those situations where the
nally, and perhaps most importantly, consumers are entitled to receive notice from the supervised lender whenever a loan is denied or the rate of interest increased because of information contained in a report. This provision is the one most likely to give a consumer notice that a credit file has been collected and maintained on him or her.

Although a comprehensive analysis of the civil liability provisions of the F.C.R.A. is not within the scope of the present discussion, it should at least be noted that such a right of action exists. If a credit reporting agency or a supervised lender willfully fails to comply with any requirement of the F.C.R.A. a consumer may recover actual damages, punitive damages, attorney’s fees and costs. In the instance of negligent noncompliance with any F.C.R.A. provision an action may be maintained for actual damages, attorney’s fees and costs. The existence of these rights of action as well as the other rights granted consumers under the F.C.R.A. provisions discussed earlier should help to make consumers aware of the existence, use and abuse of credit reports as a significant part in the negotiation process of supervised loans.

c. Lender Discretion and Discrimination

One must assume that the successful operation of a supervised lending operation depends upon the freedom of the lender to pick and choose among loan applicants. On the other hand, the growth of consumer credit to a position tantamount to a necessity of life

completeness or accuracy of the report is disputed, prepare and file a brief statement setting forth the nature of the dispute . . . . While it is clearly the better practice for the consumer reporting agency to inform the consumer of his right. . . ., the Act does not place an affirmative duty on the reporting agency to so advise the consumer.

__Id.__ at 646.


In determining the proper amount of punitive damages to be assessed, the court must consider a variety of things; the remedial purpose of the Act, the harm to consumers intended to be avoided or corrected thereby, the manner in which the defendant conducted its business and dealt with the plaintiff, as well as the defendant’s income and net worth.

requires the imposition of public policy on lender discretion. Such necessity is suggested by the Federal Equal Credit Opportunity Act which distinguishes a supervised lender’s discretion in the award or denial of a loan based on bona-fide economic risk reasons, from lender discrimination based on social prejudice. The E.C.O.A. places a general prohibition on prejudice-based lender discrimination—in regard to sex, marital status, race, color, religion, national origin, or on the fact that an applicant receives public assistance—in relation to the extension, renewal or continuation of consumer credit. As originally enacted, the E.C.O.A. prohibited discrimination on the basis of sex or marital status. It was amended by Congress, effective March 23, 1977, so as to extend the prohibition on credit discrimination to the other forms noted. Thus, although the E.C.O.A. is primarily directed at sex-based discrimination, it must be read in light of the general principle that credit discrimination on any prohibited basis which relates to any aspect of a credit transaction is illegal.

Effectuation of the E.C.O.A. is endowed in the Federal Reserve Board which has, pursuant to the E.C.O.A., promulgated Regulation B to circumvent credit discrimination at three stages:

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71 See National Commission on Consumer Finance, supra note 3, at 5 to 21. Consumer credit has been an economic fact of life since Colonial days. The rapid growth of consumer credit in the United States has in large part been a natural accompaniment to the growth of other forms of debt, both public and private. . . . Consumers' use of credit has been encouraged by their rising discretionary income, the urbanization of the population, and the influx of younger consumers into the market.

Id. at 21.


73 The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extension of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Pub. L. 93-495 § 502 (1974) (findings and purpose of the Equal Credit Opportunity Act not made part of the enacted statute).


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(1) the credit application process; (2) the evaluation of the consumer's credit worthiness; and (3) the dissemination of credit information. In regard to the first state - the credit application process - Regulation B prohibits lenders from discouraging applications on the basis of a prohibited criterion and comprehensively lists information which lenders are prohibited from requesting. More specifically, in the case of a secured supervised loan application by an individual, lenders are prohibited from requesting information concerning: whether any of the applicant's income is derived from alimony, child support, or separate maintenance payments unless the lender concomitantly discloses that such information need not be revealed if the consumer so desires; the sex of an applicant; sex designations such as Ms., Miss., Mrs. and Mr. unless it is clearly disclosed that such designations are optional; the applicant's birth control practices, intentions as to bearing children and capability to bear children; and the consumer's race, color, religion or nationality. As a final matter, the application form used by the supervised lender must use sex-neutral terminology.

The second stage - evaluation of the consumer's credit worthiness - is covered by a variety of permissible and prohibited factors a lender may consider. Regulation B adopts the "effects test" enunciated by the United States Supreme Court in Griggs v. Duke Power Co. and Albemarle Paper Co. v. Moody as the basis for the determination of whether a lender has discriminated on a prohibited basis. While both Griggs and Moody involved challenges to employment practices under Title VII of the Equal Employment Opportunity Act, their applicability to the credit area is obvious.

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81 42 Fed. Reg. 1254 (1977) (to be codified in 12 C.F.R. § 202.5(a)).
82 Id. (to be codified in 12 C.F.R. § 202.5(d)(1) to (5)).
83 Id. (to be codified in 12 C.F.R. § 202.5(d)(2)).
85 Id.
86 Id. (to be codified in 12 C.F.R. § 202.5(d)(4)).
87 Id.
88 Id. (to be codified in 12 C.F.R. § 202.5(d)(5)).
89 Id. (to be codified in 12 C.F.R. § 202.5(d)(3)).
90 42 Fed. Reg. 1255, n. 7 (1977) (to be codified in 12 C.F.R. § 202.6): The legislative history of the Act indicates that the Congress intended an 'effects test' concepts as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., . . . and
As the Court stated in *Moody*: "Title VII is not concerned with the employer’s ‘good intent or absence of discriminatory intent’ for ‘Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.’" Thus, discrimination in the evaluation of a supervised loan application should not proceed on the basis of finding a discriminatory intent on the part of the lender. Instead, using the *Griggs-Moody* "effects test" one must pinpoint the discriminatory consequences of the methods or criteria used by the lender in reaching the decision to deny the consumer’s supervised loan application.

The final stage of E.C.O.A. coverage—the dissemination of credit information—focuses on the elimination of the practice whereby creditors build files on the husband alone where both spouses are contractually liable. As a result of this practice, married women have experienced difficulty in establishing credit histories. Under the E.C.O.A., if a supervised loan is such that both spouses are contractually liable, the supervised lender must designate the account to reflect the participation of both spouses. The supervised lender must also use the required designation when furnishing information to consumer reporting agencies so that agencies will have "access to information about the account in the name of each spouse." The E.C.O.A. provides for a mandatory notification procedure for all accounts established prior to June 1, 1977. This permits consumers who executed supervised loan agreements prior to that date to at least have the opportunity to require that their supervised loan be properly designated in accordance with the E.C.O.A. for every currently executory supervised loan agreement in West Virginia.

d. Disclosures

The most significant influence the Truth in Lending portion of the Federal Consumer Credit Protection Act has had on con-
Consumer credit is the institutionalization of uniform disclosures in most consumer credit agreements. The basic theory behind disclosures is that by providing consumers with uniform credit terms the opportunity for effective comparison shopping by consumers will be enhanced. Disclosures also proceed from the recognition that credit agreements are mathematically complex and consequently "[t]he informed use of credit . . . [can only result] . . . from an awareness of the cost thereof by consumers." Thus, while the disclosures required to be in every instrument evidencing a supervised loan in West Virginia do not effect the substance or terms of an agreement, they do indeed structure the format and tenor of the agreement as well as the overall supervised loan market. This discussion on the disclosures required to be incorporated in supervised loan agreements will integrate the loan terms relevant to a precomputed supervised loan mandated by the WVCCPA and the Commissioner of Banking's regulations with the T.I.L.A. disclosures in order to draw a comprehensive picture of the disclosure portion of the negotiation process.

100 See NATIONAL COMMISSION ON CONSUMER FINANCE, supra note 3, at 169. Prior to the enactment of the . . . (T.I.L.A.) . . . information given consumers about their credit arrangements ranged from very little to what . . . (T.I.L.A.) . . . now requires. Most consumers were told the amount of their monthly payments and due dates. Provisions for additional information varied widely among credit grantors, types of credit, and states. The greatest lack of uniformity was in the quotation of the amount and rate of the finance charge. Some credit grantors provided neither figure, showing only the number and amount of monthly payments and the dollar sum. While many creditors disclosed the dollar amount of the finance charge or provided enough data so that it could be ascertained, they stated the rate of charge in a variety of ways.

112 See generally Kinter, A Primer on Truth and Lending, 13 ST. LOUIS L.J. 501, 522 (1969); NATIONAL CONSUMER LAW CENTER, 1 TRUTH IN LENDING, 2524 (1971).
103 Other substantive controls adopted by the WVCCPA and the regulations promulgated by the West Virginia Commissioner of Banking which are not part of T.I.L.A. disclosures are worthy of note. West Virginia's long standing policy against the enforcement of cognovit notes, a contractual clause whereby the consumer confesses judgment in lieu of notice or hearing, is incorporated in W. VA. CODE § 46A-2-117 (Replacement Vol. 1976). See also Cardi, supra note 12, at 480-485. Supervised lenders are prohibited from using multiple loan agreements with the intent of obtaining a higher finance charge than otherwise permitted. W. VA. CODE 46A-4-108 (Replacement Vol. 1976). Finally, lenders are required to refrain from refinancing and consolidating supervised loans "where no reasonable gain accrues to the consumer" and may only do so when the resulting principal does not exceed $1,200. 4 CONS. CRED. GUIDE (CCH) ¶ 6526 (1974).
DISCLOSURE STATEMENT OF LOAN (1)

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<th>Borrower:</th>
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<table>
<thead>
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<th>Annual Percentage Rate</th>
<th>Credit Life Insurance Charge</th>
<th>Disability Insurance Charge</th>
<th>Property Insurance Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
<td>$</td>
<td>$</td>
<td>%</td>
<td>$</td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Payable in: Consecutive Monthly Installments (5)</th>
<th>Due Dates of Payments</th>
<th>Amount of Payments</th>
<th>Recording Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>First: Same Day of Each Month</td>
<td>First: Others: Final:</td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

INSURANCE

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below:

(a) The cost for Credit Life Insurance alone will be $________ for the term of the credit.

(b) The cost for Credit Life and Disability Insurance will be $________ for the term of the credit.

I desire Credit Life and Disability Insurance. Life Insurance only. Life or Disability Insurance.

(Date) (Signature) (Date) (Signature) (Date) (Signature)

(9) REBATE FOR PREPAYMENT IN FULL. If the loan contract is prepaid in full by cash, a new loan, refinancing or otherwise before the final installment date, the borrower shall receive a rebate of precomputed interest computed under Rule of 78's.

(7) DEFAULT CHARGE. [The creditor should set forth the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.]

SECURITY (8)

A. ☐ This Loan is Secured By a Security Agreement of Even Date covering...

The Security Agreement will secure future or other indebtedness and will cover after acquired property.

☐ Motor Vehicle(s): Make _______ Serial No.: _______

☐ Household Goods & Appliances of the following description: ...

☐ Other: (Describe) ...

B. ☐ This Loan is Unsecured.

I Acknowledge Receipt of a Copy of this Statement.

Witness: .................. Borrower: ..................

(The bold numerals correspond to the paragraphs which follow.)
1. The disclosures required by the T.I.L.A. to identify the transaction may appear either on the instrument itself or on a separate statement properly identified. The model statement illustrates the latter of the two.

2. The amount financed must be identified and is defined as the sum of the principal amount of the loan to be received by the consumer and any additional charges which the consumer must bear such as the cost of insurance premiums or taxes.

3. The finance charge, in the context of a supervised loan, is the sum of all charges payable directly or indirectly by the consumer to the supervised lender incident to the extension of credit excluding default, delinquency or deferral charges. The methodology employed by the WVCCPA is to regulate supervised loan terms by setting maximum allowable finance charges in the following manner:

   a. 36% per year where the unpaid balance of the principal is $200.00 or less.

   b. 24% per year where the unpaid balance of the principal is between $201.00 and $600.00.

   c. 18% per year where the unpaid balance of the principal is between $600.01 and $1,200.00

   The finance charge is calculated on the assumption that all scheduled payments will be made when due. Moreover, the supervised lender is permitted to "reasonably establish" and use ranges in computing the finance charge so that a single loan finance charge will apply to all principal amounts within a specified range.

4. The annual percentage rate, which must be conspicuously disclosed, is the means by which the rate of interest of the supervised loan must be expressed. It is computed in conjunction with the actuarial method and must be disclosed with an accuracy to

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104 The sample disclosure is taken in part from 1 CONS. CRED. GUIDE (CCH) ¶ 3855 (1978).
106 Id. § 226.2(f) (1977).
107 Id. § 226.4; W. VA. CODE § 46A-1-102(23) (1976 Replacement Vol.)
108 W. VA. CODE § 46A-4-107(2) (1976 Replacement Vol.).
109 Id. § 46A-4-107(3)(a).
110 The use of ranges and the computation of finance charges in the context of a supervised loan are discussed extensively in Cardi, supra note 12, at 401, 438 - 449, 479.
111 12 C.F.R. § 226.2(g) (1977).
the nearest quarter of one percent. Computation of the annual percentage rate is an extremely difficult process. Consequently, supervised lenders often rely on annual percentage rate tables published yearly by the Federal Reserve Board or formulated by a private concern in accordance with Regulation Z.

5. Supervised lenders must disclose the payment schedule which is "the number, amount, and due dates or periods of payments scheduled to repay the indebtedness" and the total of payments. The term total of payments must be included and it constitutes the sum of all payments the consumer is required to make to discharge the indebtedness. The maximum time periods in which the consumer can pay back the loan, in the supervised loan context, is dependent upon the amount of principal financed. Such maximum times are as follows:

<table>
<thead>
<tr>
<th>Amount Financed</th>
<th>Maximum Period of Time to Pay Back</th>
<th>Additional 15-day Grace Period if Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>up to $300.00</td>
<td>24 Months</td>
<td>yes</td>
</tr>
<tr>
<td>$300.01 to $800</td>
<td>30 Months</td>
<td>yes</td>
</tr>
<tr>
<td>$800.01 to $1,200</td>
<td>36 Months</td>
<td>yes</td>
</tr>
</tbody>
</table>

It is important to note that "balloon payments," payments which are greater than twice the amount of any other scheduled payment, cannot be incorporated in the payment schedule of a supervised loan.

6. Credit Life and disability insurance are common ingredients in supervised loans. They provide supervised lenders with the added security of the benefits of an insurance policy in case of the fortuitous death or injury of the consumer, as well as additional profit from the sale of the policy. The form of disclosure of insurance charges hinges on whether the insurance is voluntarily pur-

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112 Id. § 226.5(b)(1) - (2) (1977).
114 Id. § 226.5(c) (1977).
115 Id. § 226.5(c). If a lender wishes to incorporate an extended due date for the first scheduled payment into the payment schedule of a precomputed supervised loan, the extended period can not be longer than one month and fifteen days. See [1974] 4 CONS. CRED. GUIDE (CCH) W. Va. ¶ 6530.
117 Id.
118 See generally C. HUBBARD, CONSUMER CREDIT LIFE AND DISABILITY INSURANCE (1973); NATIONAL COMMISSION ON CONSUMER FINANCE, supra note 3, at 83-90.
chased by the consumer and therefore not a condition of the loan agreement, or the insurance is required by the supervised lender as incident to and in connection with the extension of credit.

If the consumer voluntarily decides to purchase a *credit life* or *disability* policy, the consumer must affirmatively indicate so by a dated signature solely for that purpose.\(^{119}\) When the purchase is voluntary the lender must clearly and conspicuously disclose that the purchase of insurance is not required and must also disclose the cost of the insurance.\(^{120}\) When the purchase of insurance is a prerequisite to and is purchased in connection with the extension of credit, the premium must be included in the *finance charge*.\(^{121}\) The cost of insurance for the full period of coverage must also be disclosed.\(^{122}\)

7. *Deferral, delinquency* and similar charges must be disclosed by either their amount or method of computation.\(^{123}\)

8. The most common form of security in a supervised loan is the consumer’s household furniture. A security interest in household furniture may only be taken if the security interest is identified in writing and signed, in person, by the consumer and the consumer’s spouse.\(^{124}\) The WVCCPA fails to define household fur-

\(^{120}\) Id.
\(^{121}\) Id. § 226.4(a)(5).
\(^{122}\) Id. See also W. VA. CODE §§ 46-A-3-109 (1976 Replacement Vol.) (insurance as related to allowable additional charges).
\(^{123}\) 12 C.F.R. § 226.8(b)(4) (1977). In West Virginia delinquency charges on precomputed supervised loans can be formulated by way of two alternative methods. One places a ceiling of $5.00 or 5% of the amount of each delinquent installment due for more than ten days. The other method bases the delinquency charge on the formula provided for the computation of deferral charges:

\[
\text{Amount of loan finance charge attributable to the delinquent installment.} \times \frac{\text{Number of months in the deferral period.}}{\text{Delinquency charge.}}
\]

Where the loan is payable in unequal or irregular installments the deferral charge is calculated in accordance with the Rule of 78's. See W. VA. CODE § 46A-3-112 (1976 Replacement Vol.) (delinquency charges on precomputed loans); W. VA. CODE § 46A-3-113 (1976 Replacement Vol.) (delinquency charges on nonprecomputed loans); W. VA. CODE § 46A-3-114 (Replacement Vol. 1976) (deferral charges); [1974] 4 CONS. CRED. GUIDE (CCH) W. Va. ¶ 6514-6515.

\(^{124}\) W. VA. CODE § 46A-4-109(3) (1976 Replacement Vol.). For disclosure purposes property which is designated as security must be clearly identified. See 12 C.F.R. § 226.8(b)(5) (1977).
niture so it is not clear whether such items as kitchen appliances are includable in this requirement.\textsuperscript{125} The WVCCPA places a blanket prohibition on the use of land or an assignment of wages as security for a supervised loan.\textsuperscript{126}

9. Consumers have a right to prepay in full the unpaid balance of a supervised loan without penalty.\textsuperscript{127} Prepayment in full also entitles the consumer to rebate of that portion of the finance charge "attributable to the prepaid monthly installments" according to the Rule of 78's.\textsuperscript{128} This too must be disclosed.

**POSTNEGOTIATION**

In the postnegotiation phase of a supervised loan the obligation is still executory and the consumer is presumably making periodic payment. The supervised lender, on the other hand, is still obligated on the loan and, in addition, may be required to fulfill or comply with certain statutorily created duties. This discussion will focus on three of the more significant duties still owed the consumer by the lender: the duty to properly bill the consumer and respond to consumer inquiries, the lender's duty to notify the consumer's right to cure when in default, and the

\textsuperscript{125} W. VA. CODE § 46A-4-109(3) (Replacement Vol. 1976).
\textsuperscript{126} Id. § 46A-4-109(1)(2).
\textsuperscript{127} Id. § 46A-3-110.
\textsuperscript{128} Id. § 46A-3-111(2).

The degree to which the amount of each scheduled installment includes the finance charge is dependent on a shrinking scale; the earlier the installment while the agreement is executory, the greater it contributes to the payment of the finance charge. Consequently, the WVCCPA imposes the Rule of 78's in order to determine the amount the finance charge relates to each installment. This is computed with the following formula for a one year loan:

\[
\frac{\text{Number of Installments}}{78} = \text{The portion of the finance charge to be applied to the most recent installment owing.}
\]

If a consumer was to prepay in full on the date the seventh installment was due in a twelve installment supervised loan, the rebate would be computed by adding:

\begin{align*}
5/78 & \quad \text{(8th installment)} \\
4/78 & \quad \text{(9th installment)} \\
3/78 & \quad \text{(10th installment)} \\
2/78 & \quad \text{(11th installment)} \\
1/78 & \quad \text{(12th installment)} \\
15/78 & \quad \text{portion of the total finance charge which must be rebated to the consumer.}
\end{align*}

See generally B. CURRAN, supra note 1, at 23.
lender’s obligation to refrain from abusive debt collection practices.

a. Supervised Lender Billings

The Fair Credit Billing Act, 15 as part of the Federal Consumer Credit Protection Act, provides uniform procedures for requiring extenders of consumer credit to respond to and, if required, correct billing errors alleged by consumers. The F.C.B.A. is primarily designed to deal with instances of computerized billing errors incident to a revolving credit agreement such as a credit card. In the context of the West Virginia supervised loan, the F.C.B.A. is not likely to come into operation as often as in the revolving credit situation because lenders generally provide consumers with payment booklets which do not require periodic billings. However, supervised lenders can be expected to: (1) address correspondence to consumers, (2) deliver written receipts to the consumer when payment is made with currency, and (3) respond to consumer inquiries when the principal owing on a supervised loan is in dispute. In such a situation the F.C.B.A. is potentially applicable and will guarantee the consumer a right to challenge alleged billing errors and require that affirmative responsive action be taken by supervised lenders. 132

131 Those provisions of the Federal Reserve Board’s Regulation Z which implement the F.C.B.A., as presently written and interpreted, do not govern all West Virginia supervised loans. Regulation Z contains the additional requirement that a billing statement be “periodic” in order to be governed by the fair credit billing provisions. 12 C.F.R. § 226.2(j) (1977). In addition, the staff of the Federal Reserve Board has interpreted the F.C.B.A. as applicable only in those situations in which “a creditor is extending open-end credit or is extending credit by use of a credit card.” [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,286. This interpretation is, however, subject to challenge. While the F.C.B.A.’s legislative history does suggest that it was prompted by billing abuses “brought on by the rapid increase in revolving or open-end credit plans which bill consumers on a monthly basis,” there is no suggestion that it was limited to such situations. S. REP. No. 278, 93rd Cong., 1st Sess. 3 (1973). The F.C.B.A. speaks simply of “creditors” which, by definition, includes supervised lenders who extend credit payable in more than four installments. See 15 U.S.C. § 1666(a) (1978 Supp.) Thus, any “statement” reflecting the status of a credit agreement, whether issued periodically or not, should come under the F.C.B.A. regardless of how it is characterized. See also W. VA. CODE § 46A-2-114 (1976 Replacement Vol.) (provides for nondiscretionary issuance of receipts, statements of account and evidence of payment in specified situations applicable to supervised lenders).
The F.C.B.A. establishes four "billing errors," relevant to supervised loans, with which a consumer may invoke its protections: (1) a statement of an extension of credit either not made or in the wrong amount; (2) a bill's failure to properly reflect a payment or credit attributable to the consumer; (3) an error in computation or accounting; and (4) where a consumer simply wants clarification of a statement with the possible inclusion of documentary evidence. A consumer, having discovered one of the aforementioned errors, must then notify the supervised lender in writing within sixty days from when the bill was mailed. The consumer's notice must meet several criteria in order to be effective. The writing must be independent of a payment medium supplied by the supervised lender. It must set forth the consumer's name, account number, an allegation of the billing error and the reasons for the consumer's belief that there is, in fact, a billing error.

If the consumer manages to meet all of the criteria, the supervised lender is now obligated to acknowledge acceptance of the consumer's notice within thirty days of receipt. The lender must then comply with one of two alternatives within two of the loan's billing cycles. If the lender agrees with the consumer, the lender must correct the errors and notify the consumer with an explanation of the correction. If the lender disagrees with the consumer, an investigation must be conducted by the lender and a written response explaining the reasons why the lender believes the bill to be accurate must be sent to the consumer.

The safeguards implemented by the F.C.B.A. are obvious: to institutionalize uniform procedures for consumers to dispute bills.

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133 Id.
134 Id.
137 15 U.S.C. § 1666(a)(3)(B)(ii) (Cum. Supp. 1977). The consumer's original notice has the effect of barring the lender from reporting or threatening to report the consumer's challenge to any third party if it would affect the consumer's credit rating. Even if the lender has completed the requirements of the second alternative described, and the consumer renews his or her complaint, the lender may only report the delinquency in payment to a third party if it is concomitantly reported that the amount is in dispute. In addition, the consumer must be supplied the name and address of each party who is notified of the delinquency. Lenders are also required to report the subsequent resolution of disputed bills to all of those who received notice of delinquency. See 15 U.S.C. § 1666(a), (b), (c) (Cum. Supp. 1977).
and to prevent unscrupulous lenders from threatening the credit rating of a consumer in order to discourage consumer complaints. Lenders risk forfeiting the right to collect the disputed installment (but not in excess of fifty dollars) for failing to comply with the F.C.B.A. The principal failure of the F.C.B.A. is that consumers are only afforded its protections if they meet its stringent notice requirements. Consequently, if a consumer disputes a bill over the telephone, the consumer will not be protected by the F.C.B.A.

A more realistic approach would be to require supervised lenders to disclose the notice requirement for challenging a bill as part of the initial agreement and each subsequent bill.

b. Default

There are a multiplicity of reasons why consumers default on credit agreements. Those most often cited are illness and unemployment. Others range from such fortuitous events as a breakdown in domestic relations to the intentional use of nonpayment as the only available method to dispute a bill. Basically, a consumer is considered to be in default on a supervised loan in West Virginia when the consumer has failed to make payments for more than five days after a scheduled payment is due. Default has the effect of triggering the WVCCPA notice requirements which are intended to cut down on the disproportionally high number of default judgments in consumer credit transactions.

Before a West Virginia supervised lender pursues either judicial or extra-judicial remedies following a default, the WVCCPA provides that the lender "may" give the consumer written notice by delivering or mailing it to the consumer’s last known address. This notice must conspicuously identify the creditor, transaction and the consumer’s right to cure default and how the cure may be

140 Id. § 1666(e).
141 Id. § 1666(a)(1) - (3).
142 NATIONAL COMMISSION ON CONSUMER FINANCE, supra note 3, at 43; D. Caplovitz, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1973).
144 However, this consideration can only be determined by implication from a reading of W. VA. CODE § 46A-2-106 (Replacement Vol. 1976).
146 W. VA. CODE § 46A-2-106.
accomplished. A literal reading of the provision may lead one to believe that the notice of the consumer's right to cure is discretionary with the supervised lender because of the word "may." However, the section further provides that

a creditor may not accelerate maturity of the unpaid balance of the obligation, commence any action or demand or take possession of collateral on account of default until ten days after notice has been given to the consumer of his right to cure such default.147

Unless a supervised lender wishes to forego all rights following a default, the lender must give the consumer notice of the right to cure.

A significant issue raised by the right to cure provision is whether the notice requirement constitutes a jurisdictional condition precedent. Furthermore, must compliance with the provision be pleaded in order for a West Virginia circuit court to maintain subject matter jurisdiction of a supervised lender's action for a default judgment? Barring judicial interpretation, neither of these issues can be answered with assurance. Nonetheless, it must be noted that the circuit courts' general subject matter jurisdiction is modified by "such other jurisdiction . . . as is or may be prescribed by law."148 Moreover, the Supreme Court of Appeals has held in other contexts that when the procedure for instituting an action is clearly prescribed by statute, "the failure to observe even a substantial compliance . . . [is] of such nature as to render judgment void for lack of jurisdiction."149

Treating a notice of default and right to cure as a jurisdictional condition precedent was a concept incorporated in the provisions of the most recent version of the Uniform Consumer Credit Code.150 The U.C.C.C. expressly prescribes that fulfillment of the

147 Id.
148 W. VA. CONSt. art. VIII § 12.
150 The Uniform Consumer Credit Code was originally approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in the summer of 1968. The most recent version of the U.C.C.C. was adopted by the National Conference of Commissioners on Uniform State Laws in 1974, and by the American Bar Association in 1975. It was one of the principal sources upon which the WVCCPA was drafted.
CONSUMER LAW

notice requirement be specifically pled\(^{151}\) so that "the consumer [receives] enough information to understand his predicament and to encourage him to take appropriate steps to alleviate it."\(^{152}\) The inclusion of a notice of default and right to cure provision in the WVCCPA suggests that it implicitly adopts the U.C.C.C.'s rationale that such mandatory notice, prior to the commencement of any creditor action, is an effective means of squelching the large number of default judgments awarded in consumer credit situations. Its elevation to the status of a notice requirement, complementary to the notice provided by service of process, which is necessary for the maintenance of subject matter jurisdiction in a circuit court, is totally consistent with this delineation.\(^{153}\)

c. Debt Collection

The debt collection process is traditionally regarded as one of the areas of consumer credit most subject to abuse. Congress has stated that

[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.\(^{154}\)

Debt collection is one of the areas of consumer credit, in relation


\(^{152}\) U.C.C.C. § 5.110 (Comment 1) (1974 version).

Studies that have been performed of consumers who have legal action brought against them show a high rate of judgments taken by default, in excess of 90 per cent in some urban areas. Modern rules of procedure that require a complaint to contain only the barest of facts contemplate contested litigation. In the event judgment is taken by default there is not enough information in the pleadings to enable the court to enter an accurate award.

Id. § 5.114 (Comment).

\(^{153}\) Indeed, in interpreting an Iowa Code provision similar to West Virginia's, the Iowa Attorney General stated that

[t]he cure notice requirements do not affect a person's right in the contract but merely have to do with the procedure that the creditor uses in enforcing his rights. The creditor has the same basic cause of action that he had before the credit code was passed, but there is a certain procedure now which must be followed which did not exist previously.


to supervised lenders, most comprehensively addressed by the WVCCPA. As previously noted, anyone undertaking the direct collection of payments from a consumer in default pursuant to a supervised loan must first be licensed as a supervised lender with the Commissioner of Banking. Thus, only after having been licensed as a supervised lender, may a corporation or individual undertake the collection of debts subject to the following prohibited practices: (1) the practice of law by debt collectors; (2) the use of threats or coercion by debt collectors; (3) the use of the telephone and the use of obscene language by debt collectors; (4) unreasonable publicity of the consumers by debt collectors; (5) fraudulent and deceptive representations by debt collectors; (6) the use of unfair and unconscionable means in debt collection; and (7) misuse of the mails.

Independent collection agencies who contract with supervised lenders are also subject to regulation and potential liability under the recently enacted Fair Debt Collection Practices Act. The F.D.C.P.A. contains a comprehensive “laundry list” of prohibited debt collection practices. The scope of the F.D.C.P.A. is regulation of those who engage in “any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed . . . another.” Consequently, the direct in-house collection practices of West Virginia supervised lenders are not regulated by the F.D.C.P.A.

One of the more innovative provisions of the F.D.C.P.A. is a notice mechanism which provides consumers with the opportunity to dispute the validity of a debt. Debt collectors must, within five days of their initial communication with the consumer, send the consumer written notice containing the amount of the debt, the

145 “Debt Collection” is defined as “any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due to a creditor by a consumer”. W. Va. Code § 4A-2-122 (1976 Replacement Vol.).
148 Id. § 46A-2-124.
149 Id. § 46A-2-125.
150 Id. § 46A-2-126.
151 § 46A-2-127.
152 § 46A-2-128.
153 § 46A-2-129.
155 Id. § 803(6).
name of the creditor and a statement that the collector will assume the debt to be valid unless the consumer disputes it within thirty days of receipt. The notice must also inform the consumer that by disputing the bill within the thirty-day period the debt collector will provide the consumer with a verification of the debt or copy of the judgment, and that the consumer has a right to request and receive the name and address of the original creditor. A written response by a consumer has the effect of barring the collection of the debt until the debt collector complies with the notice requirement.

CONCLUSION

The evolution of the supervised (small) loan appears to have gone full circle. It was created in the early 1900's as a means of making small quantities of cash credit commercially feasible for the legitimate lender. With roots in the seminal recommendations of the Russell Sage Foundation, the supervised loan was exempted from general usury requirements in order to increase its availability to consumers in a more competitive market. Today, the West Virginia supervised loan is but one part of a comprehensive consumer credit and protection code which is supplemented by a variety of federal laws. If any trend is to be identified from the multifarious forms of regulation discussed in this Note, it must be that, if not at the present, then surely in the near future every significant aspect of the consumer/supervised lender relationship will be regulated. Furthermore, such regulation is markedly designed to place consumers in a more equal bargaining position with lenders.

It is difficult to conclusively determine what impact comprehensive regulation will have on the supervised loan market. In 1977 supervised lenders reported $75,930,000 in net loans outstanding as opposed to $60,274,000 in 1967. However this increase must be considered in light of the passage of the WVCCPA in 1974 which increased the allowable maximum principal amount of supervised loans from $800.00 to $1,200.00. On the other hand, figures on the number of supervised lenders in West Virginia are more telling. In

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164 Id. § 809(a).
167 Id.
169 Id. § 809(b).
1977 there were approximately 155 licensed supervised lenders as opposed to 210 in 1967. This 26% decrease in the number of supervised lenders, without any noticeable decrease in the volume of money lent, bolsters the view that intensive regulation results in a less competitive market with fewer lenders and reduced availability.

The determination of whether, in the long run, comprehensive protective regulation actually hurts consumers by reducing the availability of credit will require further experience. In the meantime, it is safe to conclude that the West Virginia consumer who walks through the door of a supervised loan office is likely to be better equipped, have a greater store of legal rights, and less subject to lender abuse as a result of the WVCCPA and the wealth of relevant federal consumer credit protection law than ever before.

Jon David Levy

1 Telephone conversations, supra note 169.
2 This position was adopted in the Report of the National Commission on Consumer Finance in 1972:

In general, any kind of market imperfection—any restriction which tends to inhibit the free interactions of potential borrowers and suppliers of credit—can have a potential effect on credit availability. Such market imperfections include legal constraints, regardless of intent, as well as noncompetitive behavior of suppliers. Legal factors of most potential significance are rate ceilings, restrictions on other credit terms such as loan size and maturity, limitations on creditors' remedies, and legal constraints on the entry of new firms.

National Commission on Consumer Finance, supra note 3, at 113.