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THE WEST VIRGINIA CONSUMER CREDIT
AND PROTECTION ACT*

VINCENT PAUL CARDI**

This article discusses the 1974 West Virginia Consumer Credit and Protection Act, hereinafter referred to as WVCCPA.¹ A summary of the Act is undertaken early in the article, detailing for the reader what the Act does. Beyond this summary there is no section by section restatement of the WVCCPA in the article nor is every section or group of sections discussed.² The purpose of the article is to discuss why the WVCCPA was passed and what it attempts to do, and in some areas, to discuss how well the Act accomplishes its purpose.

To place the WVCCPA in its evolutionary context, the article first provides a brief look at traditional common law problems in this area and at early statutes providing consumer protection. The second part of the article details the legislative history of the WVCCPA and contains a statement of its broad purposes and a detailed summary of its contents. A substantial portion of the article analyzes how successfully the Act controls finance charges and how it regulates those engaged in extending small loans for consumer purposes. Finally, a few of the many provisions in the WVCCPA that protect consumer debtors from abusive or unfair

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² The Act contains one hundred and three sections, and fills seventy pages in the West Virginia Code without annotations. Because of the intricacy of many of its provisions, it is expected that the reader will have the Code before him when reading about the more complex sections. The Act can be found in the pocket supplement of volume fourteen of the West Virginia Code, even though that volume contains chapters forty-seven through fifty of the Code and the Act is in chapter 46A. The index to the West Virginia Code contains an index to the “Consumer Credit and Protection Act” found in the pocket supplement in volume nineteen of the West Virginia Code. The index is an invaluable aid in finding provisions in this complex act.
credit practices are examined in detail, such as several of the provisions giving all purchasers of consumer goods, including those who pay cash, protection from and remedies for deceptive selling tactics or defective goods.

The West Virginia Consumer Credit and Protection Act is intended to: (1) increase the availability of consumer credit by raising allowable finance charges (interest rates) and move toward equalization of rates available to consumers whether they borrow the money from a lender or buy the goods on credit from a seller; (2) regulate the rate of finance charges allowed for consumer credit transactions by prescribing rates and rules for computation; (3) regulate those businesses which make small consumer loans and which were formerly regulated by the small loan act; (4) protect consumers who purchase goods or services on credit or through consumer loans from deceptive selling techniques, unconscionable contract terms, and undesirable debt recovery and collection practices; and (5) protect consumers who purchase goods or services for cash or credit from, and to give them remedies for, defective or shoddy goods and services and unfair and deceptive selling practices.

I. HISTORICAL OVERVIEW OF CONSUMER PROTECTION

A. Common Law

An eighteen year old girl and her mother signed a contract with a computer programming school for a year's training at $2400 tuition. The contract contained a clause, in fine print, that allowed the school to keep six hundred dollars, plus seven dollars for every class hour attended including one hundred absences in case the student withdrew from the program. In the school's office the girl and her mother executed a promissory note for $2400 to the lender (a separately incorporated finance agency), received a check for $2400, and endorsed and handed the check back to the school. When the girl later became pregnant and dropped out of school, the lender sued for the amount owed on the note.

The court found that the damage clause in the school's contract was unconscionable and if the school had been the plaintiff, the contract would not have been enforceable. The plaintiff, however, was a separate corporation and the loan contract was technically separate from the computer contract. But what other reason was there to allow the lender to collect on the loan, when in fact the lender was collecting on the contract? None that the court
could see. Noting that the lender made loans only to the students of the school, the court held that the lender and the school were so interwined, that the lender should be responsible for the contract performance of the seller. The court held that the defense of unconscionability to the damage clause which was good against the seller, was also good against the lender.\(^3\)

On the surface this case appeared to involve an ordinary action on a promissory note brought by a lender against the maker to recover the unpaid balance. In such an action the law is clear. If the lender proves that he made and delivered the agreed upon loan and that the time for payment is past, the lender has an enforceable claim for the amount due. It makes no difference that the seller, whose services were purchased with the loan proceeds, breached his contract; the transactions are separate occurrences between separate legal entitles. That is the law of contracts.

Yet, here the court made a further law of contracts. The court held that where the lender is related to the seller and knows that the money will be used to purchase services under a defective contract, the lender does not have a right to complete payment. This new rule is an addition to the common law of contracts and becomes part of that body of law which protects consumers.

The development of the common law of consumer protection is more a reaction to particularly onerous factual situations than it is a logical development of jurisprudence. For this reason it is often hard to state principles of consumer protection law in other than broad general terms. In the famous case of Williams v. Walker-Thomas Furniture Co.,\(^4\) the court considered the operation of a cross-collateral agreement. The buyer purchased merchandise valued at $1800 over a period of several years. The contract retained a security interest in the goods purchased and provided that each payment would be applied pro-rata to the outstanding balance of all the goods purchased, so that no item would be fully paid until all items were paid in full. So even though the consumer had paid the store over $1400 and had reduced her obligation to $164 before her final purchase of a $515 stereo, under the contract her default would lead to repossession of everything she had purchased. The court of appeals held that to enforce such a contract clause would be an unconscionable abuse of a consumer and re-


manded the case to the trial court.\footnote{Before the case could be reheard, the seller replaced the repossessed furniture and agreed to give the buyer a not insubstantial further cash settlement. Had the case gone to trial on remand, an adverse decision would have been advice to many other purchasers. During the previous decade the seller had seldom filed less than one hundred writs of replevin per year in the general sessions court. \textit{See} Dostert, \textit{Appellate Restatement of Unconscionability: Civil Legal Aid at Work}, 54 A.B.A.J. 1183 (1968). Pierre E. Dostert was the buyer's attorney in \textit{Williams}.} The court also noted that the buyer was a welfare mother who lived on a $218 per month government stipend and that the seller knew this when he sold her the $515 stereo. Did the court in this case decide that cross-collateral provisions were unenforceable? Or did it decide that a seller cannot knowingly sell a $515 stereo to a welfare buyer who receives only $218 a month and expect to enforce the contract? It is not clear from the opinion, and we must conclude that it probably decided some combination of the above. The resulting legal principle is simply that courts will look with disfavor upon cross-collateral agreements and upon sales to consumers whom the seller knows might not be able to pay and that, in certain circumstances, courts may find such practices unconscionable.

Similarly, some courts have shown that they will refuse to enforce contracts in which the price of the consumer goods greatly exceeds their value. These courts, however, offer no set formula to use in determining when the price is so disproportionately high to be unconscionable. One case held that a price of $842 plus finance charges for a freezer worth $250 was unconscionable.\footnote{Milford Finance Corp. \textit{v.} Lucas, CCH Poverty L. Rep. \textit{\#} 12,962 (Mass. App. 1970). For a discussion of price versus value of the goods as grounds to avoid a contract under the UCC, \textit{see} Note \textit{Unconscionable Sales Prices}, 20 MAINE L. REV. 159 (1968). Although many courts cite section 2-302 of the UOC as their authority in refusing to enforce contracts which they find unconscionable, that code section was not intended to create new substantive rules defining which practices were unconscionable and which were not. It was intended to give courts statutory support for refusing to enforce contract terms which they were already refusing to enforce and to enable them to do so by a simple reference to the statute instead of by a complex manipulation of rules of law and equity.} Other courts have found unconscionable contracts to sell goods worth three hundred dollars for nine hundred dollars,\footnote{Jones \textit{v.} Star Credit Corp., 59 Misc. 2d 189, 198 N.Y.S.2d 264, (Sup. Ct. 1966).} goods worth three hundred dollars for eight hundred dollars,\footnote{Toker \textit{v.} Perl, 103 N.J. Super. 500, 247 A.2d 701 (1968).} goods worth $348 for nine hundred dollars,\footnote{Frostifresh Corp. \textit{v.} Reynoso, 52 Misc. 2d 25, 274 N.Y.S.2d 757 (Dist. Ct. 1966).} and goods worth far less than the selling
price of $1700. Not only do the ratios of value to price vary in these cases, but most cases involved other facts that helped persuade the court to overturn the contract. One buyer could not read the English language contract, another thought he was buying a food plan instead of a freezer, another was known by the seller to be of limited financial resources, and another was not shown a true statement of the finance charges. Thus, it can be concluded from these cases that some courts will look with disfavor upon major consumer purchases where the contract price greatly exceeds the true value of the goods, especially where there are other reasons to find the contract inequitable.

Nevertheless, while many decisions that protect consumers are made on a case-by-case basis and give only general indications of judges’ opinions of unfair and unenforceable contract practices, the courts have, in a few areas, laid down concrete rules. A number of courts have abolished privity as a requirement in products liability cases. Many have held disclaimers invalid unless conspicuously located in the contract. Some have held confession of judgment clauses invalid. The clarity, scope, and force of a court’s decision must vary with the problem it is approaching. If the problem is a common one and if there is clear agreement on its fairness or unfairness, a clear rule with certain application may follow. Yet

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10 American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964). But see People v. Marks, 12 Mich. App. 690, 163 N.W.2d 506 (1968) (an unstated price of $612 was charged for $25 worth of work done by the seller in seventy-five minutes to a 73 year old buyer in a house to house sale; held not a sale under false pretenses).


17 Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 28; 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966).
some practices are acceptable or only questionable when standing alone and only become unacceptable in the eyes of the law when they are combined with other questionable facts or practices. These must necessarily be handled on a case-by-case basis until the certain combination becomes so common that it becomes recognizable as a particular abusive practice. Then the courts or the legislature can draft and adopt a certain rule abolishing all such practices. So, although courts will at times make large decisions clearly affecting common consumer practices, most judicial control over consumer transactions will involve the primary judicial function of deciding a single dispute between two parties. In this way the judiciary plays a large role in seeking out and defining those commercial practices that victimize consumers and sets the stage for future concrete protection.

B. Statutory Protection

1. The Uniform Commercial Code and Other State Legislation

A Spanish-speaking couple signed a contract requiring them to pay nine hundred dollars plus a $245 credit charge for a refrigerator that cost the seller $348. In making the sale, the seller told the buyers that they would probably not have to pay anything for the refrigerator, however, because he would credit them with a twenty-five dollar commission on every unit subsequently sold to the buyers’ friends and neighbors as a result of seeing their refrigerator. In an action to collect on the debt, the court looked at the $1145 total price for the refrigerator, the buyer’s inability to understand the written contract, and the promise of twenty-five dollar commissions, and found it shocking to the conscience. The court looked to section 2-302 of the Uniform Commercial Code as enacted in New York and stated:

It is normally stated that parties are free to make whatever contracts they please so long as there is no fraud or illegality . . . . However, it is the apparent intent of the Uniform Commercial Code to modify this rule by giving the courts power to police explicitly against the contracts or clauses which they find to be unconscionable.17

The court seemed persuaded that the UCC did more than just codify the common law practice of refusing to enforce unconscionable contracts but that the UCC urged courts to step in and interfere with unconscionable practices.
The UCC\textsuperscript{18} contains a number of provisions that protect consumers: it prescribes what actions will create an express warranty;\textsuperscript{19} prevents disclaimers of express warranties once made;\textsuperscript{20} provides that the sale itself will create a warranty that the goods are merchantable\textsuperscript{21} and that the circumstances of the sale might warrant that the goods are fit for an intended purpose;\textsuperscript{22} requires that disclaimers be conspicuous in order to be effective;\textsuperscript{23} and makes the seller extend to the family and guests of the buyer any warranty he gives to the buyer.\textsuperscript{24} Protection for consumers is given by other sections of the UCC, including remedies given a customer against a bank for wrongful dishonor of his or her check.\textsuperscript{25}

Numerous state laws protect consumers against a variety of unfair practices, including statutes: abolishing referral sales;\textsuperscript{26} abolishing cognovit notes;\textsuperscript{27} providing cooling off periods in home solicitation sales;\textsuperscript{28} regulating deceptive trade practices;\textsuperscript{29} prohibiting disclaimers of implied warranties;\textsuperscript{30} prohibiting pyramid selling schemes;\textsuperscript{31} and modifying the holder in due course protection.\textsuperscript{32}

These statutes are often independent and aimed at a particular abuse or comprise small codes aimed at an area of unfair practices, such as debt collection. They generally do not involve the legislature in a wholesale investigation of consumer problems and seller and creditor abuses. The two recently drafted uniform codes considered below take a different approach and try to deal with many, if not all, of the problems related to consumer purchasing and financing.

\textsuperscript{18} Drafted jointly by the National Conference Commissioners on Uniform State Laws and the American Law Institute, the UCC has been enacted in all the states except Louisiana in the last two decades.

\textsuperscript{19} W. VA. CODE ANN. § 46-2-313 (1966).

\textsuperscript{20} Id. § 46-2-314.

\textsuperscript{21} Id. § 46-2-315.

\textsuperscript{22} Id. § 46-2-316.

\textsuperscript{23} Id. § 46-2-318.

\textsuperscript{24} Id. § 46-4-402.


\textsuperscript{26} MD. ANN. CODE art. 83, § 130(b) (1975).


\textsuperscript{28} MASS. ANN. LAWS ch.93A, § 2(a) (Cum. Supp. 1975).


\textsuperscript{31} HAWAI\textsuperscript{I} REV. STAT. §§ 476-18 (1968).
2. The Uniform Consumer Credit Code and the National Consumer Act

In 1957 the Council of State Governments asked the National Conference on Uniform State Laws to draft a model retail installment sales act. Some in the credit industry thought that the effort should be extended to cover all types of extensions of consumer credit. Consumer interests felt that the effort should be expanded even further to cover all types of credit abuses in consumer transactions. A special committee began work on all of these areas and presented the first draft of the Uniform Consumer Credit Code (hereinafter referred to as the UCCC) to the National Conference of Uniform State Laws in 1966.33

After two years of redrafting, the Revised Tentative Final Draft was approved by the National Conference in 1968. Within three years the UCCC was adopted by Oklahoma (1969), Utah (1969), Colorado (1971), Idaho (1971), Indiana (1971), and Wyoming (1971). The state of Kansas adopted the UCCC in 1973. While many favored the UCCC as a balance between lending interests and consumer interests,34 others felt either that it did not represent the creditor's interests or that it did not adequately protect consumers.35

The belief that the UCCC did not concern itself enough with the problems of the poor, early spawned a second uniform consumer code. Approximately fifty-five consumer experts from all over the country attended a conference in Washington on June 20, 1969, which was co-sponsored by the National Consumer Law Center36 and the National Legal Aid and Defender Association, and

36 The National Consumer Law Center was established at Boston College Law School in June of 1969 under the auspices of the Office of Economic Opportunity (OEO). The Center is designed to aid the poor in the United States through study and reform of legal doctrine which work to their detriment. The Center also assists over 2000 legal services attorneys across the country with consumer law problems. 12 B.C. IND. & COM. L. REV. 889, 893n.38 (1971).
agreed that the UCCC was inadequate and required substantial revision. The National Consumer Law Center was asked to undertake the task of revision with the aid of those experts willing to participate in the drafting.\textsuperscript{37} The result of their efforts was the National Consumer Act\textsuperscript{38} (NCA) published in 1970.

Both of the uniform codes are attempts at legal reform and both are currently being promoted in state legislatures for adoption. There has been a good deal of commentary comparing the two acts.\textsuperscript{39} As indicated by the nature of its drafters, the NCA includes more provisions intended to protect the consumer than its model, the UCCC, and it abolishes, instead of just regulating, some abusive credit practices. The UCCC is more balanced or regressive than the NCA, depending upon one's viewpoint. That the UCCC is more acceptable is evidenced by its adoption in seven states; while the NCA has not been adopted as a whole in any state. A basic assumption of the UCCC is that a high interest rate ceiling will benefit creditors and consumers alike by leaving the availability of credit and the interest rate to the fluctuations of the market. The drafters of the NCA were more optimistic about the present supply of credit and less sanguine about the effects on consumers of raising the rate ceiling. While the merits of the two codes can best be judged by comparing their corresponding provisions\textsuperscript{40} and by reading the authoritative commentaries, it is clear that their existence is changing the nature of the legal response to consumer problems.

3. Federal Consumer Statutes

The federal government has taken the lead in creating laws that recognize and protect the interests of the retail consumer. From the early statutes making it a crime to defraud a buyer through the mails\textsuperscript{41} and regulating passenger rates on interstate

\textsuperscript{37} Prefatory Note to the First Final Draft of the National Consumer Act (1970).

\textsuperscript{38} Id.


\textsuperscript{40} See the table providing cross references between the UCCC and the NCA found in the Appendix located at the end of this article.

\textsuperscript{41} Act of March 1, 1909, ch. 321, § 215, 35 Stat. 1131.

Probably the most important legislation was the Federal Trade Commission Act,\footnote{Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (1971) (originally enacted as Act of Sept. 26, 1914, ch. 311, 38 Stat. 717.)} which was enacted in 1914. This Act established the Federal Trade Commission and prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce. The Federal Trade Commission is empowered to prevent unfair methods of competition, to prevent deceptive advertisement of food, drugs, and therapeutic devices, and to prevent other deceptive practices. Through delegation by later statutes, the Commission has the duty to regulate packaging and labeling of certain consumer commodities, to achieve true credit cost disclosure to consumers, and to protect consumers from inaccurate or obsolete credit reports.

Also in 1914, the Unfair Advertising Act\footnote{15 U.S.C. § 52-58 (1971) (originally enacted as Act of Sept. 26, 1914, ch. 311, § 12, as added Mar. 21, 1938, ch. 49, § 4, 52 Stat. 114.)} made it unlawful to disseminate any false advertisement which is likely to induce the purchase of food, drugs, devices, or cosmetics.

Recently, Congress has enacted a spate of laws which contain sections protecting the consumer and a number of broad acts directed specifically at consumer protection. The Fair Packaging and Labeling Act\footnote{15 U.S.C. §§ 1451-61 (1971).} of 1966 was intended to enable consumers to obtain accurate information regarding the quantity and contents of goods and to facilitate value comparisons through the regulation of packages and their labels.

The Interstate Land Sales Full Disclosure Act\footnote{15 U.S.C. §§ 1701-20 (1971).} of 1968 requires a seller of land divided into fifty lots or more, offered as a common plan, to file with the Secretary of Housing and Urban Development a statement containing certain facts about the property and to give similar information to buyers.
The Consumer Product Safety Act attempts to protect consumers from unreasonable risk of injury resulting from consumer products by developing uniform safety standards and promoting research in the prevention of product related injuries. This law should assist some consumers in evaluating the comparative safety of consumer products.

Finally the Consumer Credit Protection Act was enacted to protect the credit buyer in all phases of his credit life. The act is divided into three parts. The first part, commonly known as the Truth in Lending Act, is intended to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and to avoid the uninformed use of credit. The second part of the Consumer Credit Protection Act places some restrictions on garnishments. The third part, known as the Fair Credit Reporting Act, is designed to protect the individual from inaccurate information contained in credit reporting agency files; this Act gives the individual a right to see the information on file and the right to challenge its accuracy and its misuse.

II. THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT

A. Background

Along with other state legislative bodies, the West Virginia Legislature began to take some minor action in the consumer area in the late 1960's. In 1969 and 1970 several small bills were introduced to remedy specific consumer problems, including a bill to abolish holders in due course in consumer transactions. In 1971, a draft of the UCCC was introduced but did not pass; even so in that year pyramid selling schemes were outlawed. Whether the banning of pyramid sales practices was part of a consumer protection movement or a part of the nationwide reaction to Glenn Turner's "Dare to Be Great" endeavors is not clear.

In 1972, banks and other lending institutions began to notice that usury prosecutions were increasing across the country. Disturbed by this and bothered by the unfairness of laws that allowed high finance charges for installment purchases and revolving

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charges of consumer goods but required low finance charges for small cash loans used to pay for these same consumer goods, these lending institutions turned to the UCCC. The lending institutions saw in the UCCC the protection and simplicity of one uniform financing law and the opportunity to raise finance charges for consumer loans which would concomittantly result in expansion of the credit market for consumers. These banking interests\(^5\) sought consumer support for the UCCC and a draft of this uniform code was introduced. The bill was killed in the House Judiciary Committee after much work by one of its subcommittees.\(^6\)

In 1973, consumer interests\(^5\) wanted a new bill and they drafted a short concise statute\(^6\) containing a variety of consumer protection provisions. This bill and the UCCC draft\(^7\) in substantially its 1972 form were both introduced. After a great deal of committee work, both bills were combined and modified, and the resulting consumer credit and protection bill was passed by both houses of the Legislature. A clerical oversight, however, had left some of the intended provisions out of the bill as passed and the committee persuaded the Governor to veto the bill.\(^8\)

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\(^5\) These interests were represented largely by the West Virginia Bankers Association. This association is controlled by the large banks who handled lender credit cards (Bankamericard, Master Charge, etc.) charging 18\% when the legal interest rate was 8\%. The small banks were not particularly concerned, and on occasion even lobbied against the UCCC and in particular against the restrictions on the rights of holders in due course, assignees, and interlocking lenders. This difference, and the emerging dispute over branch banking, has led to the formation of the West Virginia Industrial Banking Association.


\(^7\) Many people worked hard to enact strong consumer protection legislation. Chief among these was an attorney, William Field, Esq., then a Republican delegate from Kanawha County. It appears that his knowledge of consumer problems and consumer legislation, his ability to explain the proposals to other legislators, and his ceaseless efforts over a three year period were largely responsible for the inclusion in the Act of much of the consumer protection provisions. The legislative skill of Cleo Jones, then a Republican delegate from Kanawha county, was also very important in the passage of the Act.


\(^10\) The Governor then put a request for this legislation in his call for a special session of the Legislature. It was passed by both houses as H.B. 203 and S.B. 51 but then inexplicitly vetoed by the Governor.
In 1974, there was an agreement between the sponsors of the bill in both houses that it would be passed in its 1973 form. Nevertheless, when it emerged from legislative services, banking oriented changes had been made in the bill. Rule of 78 rebating had replaced pro-rata rebating in the provision providing rebates for prepayment. Furthermore, allowance of some assignment of some earnings had replaced a prohibition of all assignment of earnings. As a result, the bill went back to committee, and further changes were made. The sections dealing with holders in due course, assignees, and interlocking lenders formerly contained nominal limitations or the absolute prohibition of the holders defenses; the new versions went on to seemingly grant, in other language, what they had just taken away. In other action, consumer interests successfully amended the bill to include sections prohibiting disclaimers and abolishing horizontal privity, two extremely important provisions not in the 1973 version. The legislature passed the bill on March 5, 1974, and it went into effect on September 1, 1974.

B. Purposes and Scope

The WVCCPA has a number of purposes. It sets ceilings on the rate of finance charges (interest rate) and then further regulates the rate of finance charges for certain kinds of credit. To this end the Act defines different kinds of finance charges such as credit card fees, insurance fees, delinquency charges, and deferral charges and specifies where in the rate determining formula these charges shall be placed for computational purposes. To achieve all of this, the WVCCPA contains a code, a systematic comprehensive, inter-related set of laws, that constitutes article three of the Act.

The Act authorizes, licenses, and regulates those lenders called "supervised lenders," persons or companies who engage in the business of making some loans with a principle of up to $1200 to natural persons for a personal (non-business) or agricultural purpose with a finance charge exceeding eight percent as deter-
mined by an actuarial method and who are not a bank or other "supervised financial organization" organized or chartered under other federal or West Virginia laws. The Act does this by a statutory scheme set out in article four of the Act.

The WVCCPA regulates a variety of credit extension practices, credit agreement terms, credit payment processes, and debt collection practices in consumer transactions. It does this in a number of largely independent statutory sections gathered chiefly in article two of the Act.

The Act regulates commercial trade practices and methods of competition in a few statutory sections in article six and by administrative regulation through articles six and seven.

It provides some rights, remedies, and other protection to both consumers who buy on credit or who purchase on a cash basis. It does this in generally independent statutory sections in articles six, five, and seven.

The WVCCPA protects consumers and regulates credit practices and commercial trade practices by setting up a regulatory agency under the Attorney General. It does this by a comprehensive scheme set out in article seven of the Act.

In assembling the WVCCPA, the Legislature borrowed heavily from the UCCC, especially in the sections relating to finance charges, supervised lenders, and consumer credit protection. It also borrowed heavily from the NCA, especially in the sections relating to general consumer (cash or credit purchases) protection. Many sections were continued from the existing West Virginia law and sections were borrowed elsewhere or created by drafters and sponsors of the bill.

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44 Id. § 46A-1-102 (43).
45 Id. §§ 46A-1-102(44), (45), (14).
46 An easily overlooked provision declares: "This chapter also prescribes in articles six . . . and seven . . . protective measures for consumers in transactions not necessarily involving consumer credit." Id. § 46A-1-103(3). "Consumer," for purposes of article six, was defined by a 1975 amendment to the Act as a natural person to whom a sale is made in a consumer transaction, and a "consumer transaction" as a sale to a natural person or persons for a personal, family, household, or agricultural purpose. H.B. 1421, § 102(b), 62d W. Va. Legis. Reg. Sess. (1975).
47 A comparison of the West Virginia Consumer Credit and Protection Act with the UCCC and the NCA appears in the table of parallel citations in the Appendix to this article.
Some general rules and peculiarities of the WVCCPA should be noted. Generally, the Act only applies to loans for, or credit sales of, goods, services, or interests in land, made to natural persons for primarily personal or agricultural purposes, where the debt is less than $25,000 and is payable in installments or is subject to a finance charge. There are, however, some exceptions to this rule. Many sections apply to cash sales. Many sections apply to leases. Some sections apparently apply to transactions for non-personal (business) purposes. Some sections do not apply to loans or credit sales for agricultural purposes. Some sections do not apply to credit transactions made pursuant to lender credit cards.

Finally, excluded from coverage of the Act are extensions of credit to governmental agencies, most sales of insurance, some transactions regulated by governmental public utility or common carrier tariffs, licensed pawnbrokers, and secondary mortgage lenders licensed under article seventeen, chapter thirty-one of the West Virginia Code.

C. Summary of WVCCPA Provisions

Although the content of the West Virginia Consumer Credit and Protection Act will not be detailed in this article, it is summarized here in order to show the reader just what consumer and consumer credit problems are treated in the Act.

1. REGULATION OF LENDING INSTITUTIONS AND PRACTICES

a. LENDING INSTITUTIONS

The Act regulates the lending operations of supervised lenders (formally small loan companies) making consumer loans under $1200, and sets forth licensing and renewal procedures.
for these lenders. Use of multiple loan agreements by supervised lenders to obtain higher finance charges is prohibited. The Act proscribes the taking of assignments of earnings or interests in land as security and restricts the taking of a security interest in household furniture. Renegotiation by a supervised lender of loans discharged in bankruptcy is also restricted by the WVCCPA. The Act also restricts the conduct of business other than making small loans by supervised lenders.

Every person engaged in making consumer credit sales or loans or who takes assignments and collects payments of such sales or loans, except sellers extending credit only by seller credit card, is required under the WVCCPA to file notice of the same with the State Tax Department.

b. REGULATION OF CREDIT TERMS AND PRACTICES

The WVCCPA also attempts to regulate finance charge rates on consumer loans and consumer credit purchases made by sellers and lenders other than supervised lenders. The Act regulates rebates upon prepayment, refinancing, and consolidation of consumer debts, and other charges in the form of delinquency, deferral, permissible additional, insurance, or advances to perform covenants.
RECEIPTS AND ACCOUNT INFORMATION
A creditor of a consumer credit sale or loan is required by the WVCCPA to deliver periodic statements to the consumer showing payments received and to deliver other information when requested by the consumer.  

ASSIGNMENTS OF DEBT
A debtor is permitted to pay the original creditor of a consumer sale or consumer loan until he receives sufficient notice of an assignment reasonably identifying the rights assigned and instructing the debtor to pay the assignee.

BALLOON PAYMENTS
In any consumer credit sale or loan which contains a scheduled payment that is twice as large as the smallest of the earlier scheduled payments, a form notice must be given under the Act warning the consumer of this extra large, or balloon, payment. If the initial obligation was less than fifteen hundred dollars, the WVCCPA gives the consumer a right to refinance any balloon payment that is at least twice as large as the average of the earlier scheduled payments.

DEFAULT
The WVCCPA gives a debtor a five day grace period after a payment is due and then a further ten day opportunity to cure a default in payment after a written notice of default is sent by the creditor, for the first three defaults on any

notes 160-400 for discussion of these provisions. The sections on rebate (id. § 46A-3-111), refinancing (id. § 46A-3-107), delinquency (id. §§ 46A-3-112, 113) and deferred charges (id. § 46A-3-114), are discussed in the text accompanying note 281. Permissible additional charges (id. § 46A-3-109), insurance charges (id.), and charges to perform consumer covenants (id. § 46A-3-115) are detailed in the text accompanying notes 165-300.

78 Id. § 46A-2-113.
79 Id. § 46A-2-105.
EXTORTIONATE EXTENSION OF CREDIT

Extortionate extensions of credit are uncollectible through civil process under the Act. The WVCCPA also specifies facts which make a prima facie determination of extortionate extension of credit.\(^\text{52}\)

c. REGULATION OF BARGAINING PROCESS AND CONTRACT TERMS

UNFAIR METHODS OF COMPETITION AND DECEPTIVE TRADE PRACTICES

Unfair methods of competition and unfair or deceptive acts are made unlawful\(^\text{83}\) by the WVCCPA, so as to complement similar federal statutes.\(^\text{84}\) The Act gives the Attorney General the power to interpret and to define what constitutes unfair methods of competition and unfair or deceptive acts.\(^\text{85}\) Furthermore, specific actions which will constitute such unfair or deceptive acts are enumerated by the Act, including actions that: mislead consumers as to the identity, sponsorship, affiliation, origin, or approval of the seller;\(^\text{86}\) mislead consumers as to the ingredients, uses, newness, standards, or model of the goods sold;\(^\text{87}\) falsely disparage another's business;\(^\text{88}\) advertise goods with the intent not to sell them as advertised or to supply enough;\(^\text{89}\) give false reasons

\(^{80}\) Id. § 46A-2-106. This provision also modifies, in some situations, the collection rights of secured parties as set out by id. §§ 46-9-502, 503, and the acceleration allowed by id. § 46-1-208.

\(^{81}\) Id. § 46A-2-115.

\(^{82}\) Id. § 46A-2-120.

\(^{83}\) Id. § 46A-6-104.

\(^{84}\) Id. § 46A-6-101.

\(^{85}\) Id. § 46A-6-103.

\(^{86}\) Id. § 46A-6-102(e)(1) to (5).

\(^{87}\) Id. § 46A-6-102(e)(5), (6).

\(^{88}\) Id. § 46A-6-102(e)(6).

\(^{89}\) Id. § 46A-6-102(e)(9), (10).
for price reductions; make any false or misleading act or omission or advertisement intended to cause reliance thereupon, whether or not anyone is in fact misled. The media is exempted from such liability under the Act in most transactions.

NOTICE TO GUARANTORS
The WVCCPA prescribes a certain form of a separate notice that must be given to cosigners, comakers, sureties, endorsers, and guarantors before they can be liable on a consumer credit sale or consumer loan.

APPROVAL OF FORMS AND PROCEDURES
Creditors and sellers may submit, in writing, forms and procedures to the attorney general or commissioner of banking for approval; if such approval is obtained in writing the use thereof is exempted from any penalty provision of the Act.

LEASES
The Act requires that certain information be given the lessee in consumer leases and limits the lessee's liability for keeping the leased goods past the contract period.

REFERRAL SALES
Referral sales are prohibited by the WVCCPA. Thus, a seller or lessor is prevented from inducing a buyer or lessee to purchase or lease upon a promise by the sellor or lessor to give a discount or to pay value if the buyer or lessee aids in sales or leases by the same sellor or lessor to other persons, if such discount or value is dependent upon the occur-

\^ Id. § 46A-6-102(e)(13), (14).  
\* Id. \*
\^ Id. § 46A-6-105.  
\^ Id. § 46A-2-104.  
\* Id. § 46A-7-102(2).  
\* Id. § 46A-2-111.  
\* Id. § 46A-2-112.
HOME SOLICITATION SALES

As regulation of home solicitation sales, the Act provides the buyer a three day "cooling off" period within which to cancel, in writing, most home sales; the Act requires the seller to give the buyer written notice of the buyer's right to cancel, and, in most cases, requires the seller and the buyer to return any consideration received prior to cancellation.

MAGAZINE AND CORRESPONDENCE COURSES

The WVCCPA gives a buyer the right to cancel multiple magazine subscriptions or correspondence courses; the buyer's notice of cancellation operates to terminate any further financial obligations upon the contract or subscription.

PROPERTY SUBJECT TO SECURITY INTERESTS

The kinds of property that may be subjected to a contractual security interest in a consumer credit sale are prescribed by the WVCCPA. The Act allows cross-collateral security interests in some situations and prescribes the order in which payments are applied to release the security interests upon debts arising out of two or more consumer credit sales.

COGNOVIT JUDGEMENTS

Authorizations to confess judgement on a claim arising out of a consumer credit sale or a consumer loan are void under the WVCCPA.

97 Id. § 46A-2-110.
98 Id. § 46A-2-132.
99 Id. § 46A-2-133.
100 Id. § 46A-2-134.
101 Id. § 46A-2-135.
102 Id. § 46A-2-136.
103 Id. § 46A-2-138.
104 Id. § 46A-2-107.
105 Id. § 46A-2-108.
106 Id. § 46A-2-109.
107 Id. § 46A-2-117.
UNCONSCIONABLE CONTRACTS

The Act confirms a court's power to refuse to enforce any contract or contract term that the court finds as a matter of law to be unconscionable.\(^{107}\)

d. REGULATION OF COLLECTION PRACTICES

ASSIGNMENT OF EARNINGS

The WVCCPA prohibits a person from assigning, for payment of debts arising from a credit sale or consumer loan, any portion of his wages that is more than twenty-five percent of those earnings left after legally required deductions are withheld. An employee under the Act has the right, at will, to revoke any assignment of earnings or any agreement with his employer to have wages deducted.\(^{108}\)

GARNISHMENT

Garnishment is prohibited by the WVCCPA before a judgement is obtained on the debt, and the amount of a debtor's wages that can be subject to garnishment is limited to the lesser of twenty percent of the debtor's take-home pay or the amount by which the debtor's take-home pay exceeds thirty times the federal minimum hourly wage.\(^{109}\) In addition, the Act prohibits employers from discharging or taking other forms of reprisal against employees because their wages are being garnished.\(^{110}\)

RESTRICTION ON DEFICIENCY JUDGEMENTS

The WVCCPA limits the remedies of sellers of consumer goods or services and of interlocking lenders when the balance due is one thousand dollars or less. Under such conditions the seller or lender must choose between levying on

\(^{107}\) Id. § 46A-2-121.

\(^{108}\) Id. § 46A-2-116.

\(^{109}\) Id. §§ 46A-2-118, -130.

\(^{110}\) Id. § 46A-2-131.
the collateral securing the debt or suing for the balance owed; the seller or lender may not do both.\textsuperscript{111}

\textbf{EXEMPTIONS FROM EXECUTION} Within specified value amounts clothing, furniture, children’s toys, insurance policies, and other personal property are exempted by the Act from judicial execution resulting from consumer credit transactions except from execution to recover the purchase money due on such personal property.\textsuperscript{112}

\textbf{DEBT COLLECTION} The WVCCPA: regulates debt collection practices of those engaging, directly or indirectly, in the collection of debts;\textsuperscript{113} prohibits the unlicensed practice of law by debt collectors;\textsuperscript{114} and prohibits use of threats or coercion,\textsuperscript{115} oppression or abuse,\textsuperscript{116} unreasonable publication of a consumer's indebtedness,\textsuperscript{117} deceptive representations,\textsuperscript{118} unconscionable means,\textsuperscript{119} or violations of postal laws,\textsuperscript{120} in debt collection or attempted collection.

2. \textit{REMEDIES, DEFENSES AND PENALTIES}

a. \textbf{CONSUMER REMEDIES AND DEFENSES}

\textbf{CAUSE OF ACTION FOR VIOLATIONS OF THE ACT} A consumer may recover actual damages and a civil penalty in the amount of one hundred dollars to one thousand dollars from a creditor who violates the

\begin{itemize}
  \item \textsuperscript{111} Id. § 46A-2-119.
  \item \textsuperscript{112} Id. § 46A-2-136.
  \item \textsuperscript{113} Id. § 46A-2-122.
  \item \textsuperscript{114} Id. § 46A-2-123.
  \item \textsuperscript{115} Id. § 46A-2-124.
  \item \textsuperscript{116} Id. § 46A-2-125.
  \item \textsuperscript{117} Id. § 46A-2-126.
  \item \textsuperscript{118} Id. § 46A-2-127.
  \item \textsuperscript{119} Id. § 46A-2-128.
  \item \textsuperscript{120} Id. § 46A-2-129.
\end{itemize}
Act's provisions, relating to excess charges, disclosure in consumer leases, statements of accounts, default charges, assignment of earnings, cognovit judgments, illegal, fraudulent or unconscionable conduct, prohibited debt collection practices, restrictions on security in interests in land, and on household furniture, and renegotiation by a supervised lender of a loan discharged in bankruptcy. The total obligation of a consumer in a supervised loan made by a creditor not licensed under the WVCCPA is rendered void unless (except for unlicensed loans) the creditor corrects the error within fifteen days of discovery and prior to receipt of written notice of such error; but no penalty is imposed under such circumstances if the creditor establishes by a preponderance of the evidence that a violation is unintentional.

Any consumer who suffers an ascertainable loss of money or property as a result of another person's use of an unfair method of competition or unfair or deceptive act, may recover under the Act his actual damages or $200, whichever is greater, or equitable relief. Moreover, the Act provides that if the injurious act has been enjoined by the Attorney General as an unfair or deceptive method of competition or trade practice, such injunction is prima facie evidence that the act is in fact unfair or deceptive.

123 Id. § 46A-5-101.
124 Id. § 46A-5-101(7).
125 Id. § 46A-5-101(8).
126 Id. § 46A-6-106.
<table>
<thead>
<tr>
<th>CAUSE OF ACTION FOR UNLAWFUL DISCHARGE</th>
<th>A consumer may within ninety days recover from an employer the value of up to six weeks wages which the consumer can prove were lost as a result of discharge caused by attempted garnishment in addition to reinstatement in the job.(^{125})</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASSISTANCE FROM THE ATTORNEY GENERAL</td>
<td>A consumer injured by an excess charge may request assistance of the Attorney General in redressing his injury,(^{126}) and the Attorney General may sue to recover for the consumer the excess charge, and in some cases, an additional penalty.(^{127})</td>
</tr>
<tr>
<td>REMEDIES PRESERVED</td>
<td>The WVCCPA preserves all other remedies available to a consumer; the regulatory powers given to the Attorney General do not affect the consumer’s exercise of such other available remedies.(^{128})</td>
</tr>
<tr>
<td>LONG ARM PROVISION</td>
<td>A long arm statute, reaching any non-resident holding an instrument, contract, or other writing arising from a consumer credit sale or lease subject to this article, is included in the Act for the purpose of service of notice and process in any action against such person arising from such consumer transaction.(^{129})</td>
</tr>
<tr>
<td>DISCLAIMERS</td>
<td>The Act prohibits any merchant from excluding or modifying any express or implied warranties with respect to goods that have become or are intended to become the subject of a consumer transaction and voids any attempt at disclaimer.(^{130})</td>
</tr>
</tbody>
</table>

\(^{125}\) Id. § 46A-5-101(6).
\(^{126}\) Id. § 46A-7-102(1)(2).
\(^{127}\) Id. § 46A-7-111.
\(^{128}\) Id. § 46A-7-113.
\(^{129}\) Id. § 46A-2-137.
\(^{130}\) Id. § 46A-6-107.
PRIVITY

The requirement of privity is abolished by the Act in actions for breach of warranty or negligence between the consumer and a defendant arising out of a consumer transaction.\textsuperscript{131}

ASSIGNEES, HOLDERS IN DUE COURSE, AND INTERLOCKING LENDERS

Holders in due course of negotiable credit transactions,\textsuperscript{132} assignees of non-negotiable instruments and other contracts,\textsuperscript{133} and lenders of money who have an "interlocking" relationship with the seller,\textsuperscript{134} are by the Act subject to claims and defenses that the obligor-buyer has against the seller, where the obligation arose out of a consumer sale or lease.\textsuperscript{135}

CONFLICT OF LAWS

The WVCCPA precludes a creditor from collecting a sales or loan finance charge arising from a consumer credit sale or loan consummated in another state in excess of the amount of charge permitted by the Act in an action brought in a West Virginia court.\textsuperscript{136}

b. CREDITOR AND SELLER DEFENSES

APPROVED ACTS OR OMISSIONS

Except for the refund of excess charge, any act or omission done in conformity with a rule of the Attorney General or the commissioner of banking\textsuperscript{137} is exempted from liability under the WVCCPA. Moreover, any practice permitted by the Act is not unconscionable for purposes of an action brought under the Act.\textsuperscript{138}

\textsuperscript{131} Id. § 46A-6-108;
\textsuperscript{133} Id. § 46A-2-102.
\textsuperscript{134} Id. § 46A-2-103.
\textsuperscript{135} See text accompanying notes 461-509 infra.
\textsuperscript{137} Id. § 46A-7-102(2).
\textsuperscript{138} Id. § 46A-7-109(4).
Sellers and creditors are exempted from penalties under the Act resulting from the use of forms and procedures submitted in writing to and approved in writing by the Attorney General or commissioner of banking.\textsuperscript{139}

A creditor is excused from imposition of a penalty in a suit by a consumer (except for unfair trade practices) if the creditor notifies the debtor of the creditor's violation and corrects the error within fifteen days of its discovery and before action has commenced on the violation or before the creditor has received written notice of the error.\textsuperscript{140} A creditor is also excused from paying a penalty in a suit by a consumer or the Attorney General if the creditor establishes by a preponderance of the evidence that the violation was unintentional or the result of a bona fide non-negligent error.\textsuperscript{141}

The WVCCPA provides that a consumer action to recover an excess charge shall stay a similar action by the Attorney General and that a dismissal with prejudice or a final judgement against the consumer shall result in dismissal of the Attorney General's action.\textsuperscript{142}

c. ADMINISTRATION AND CIVIL PENALTIES

The Act creates a division of consumer protection under the authority of the Attorney General\textsuperscript{143} and authorizes the Attorney General to counsel people as

\textsuperscript{139} Id. § 46A-7-102(2).
\textsuperscript{140} Id. § 46A-5-101(7).
\textsuperscript{141} Id. § 46A-5-101(8); id § 46A-7-111(1).
\textsuperscript{142} Id. § 46A-7-111(1).
\textsuperscript{143} Id. § 46A-7-101.
to their rights and duties under the Act, to conduct research and educate consumers, to promulgate regulations to effectuate the purposes of the Act, to define unfair methods of competition and unfair and deceptive acts, and to make a yearly report on consumer credit and protection problems to the Governor and the Legislature.

ACTION TO INVESTIGATE VIOLATIONS OF THE ACT

The Attorney General is authorized, and upon request of the commissioner of banking is required, to investigate violations of the Act when he has probable cause to believe that there has been a violation. To that end the Attorney General may subpoena witnesses, administer oaths, and do all that is necessary, subject to the Administrative Procedures Act, to determine whether a violation exists, provided the names of those investigated are kept secret.

ACTION TO ENFORCE COMPLIANCE WITH THE ACT

The WVCCPA authorizes the Attorney General to take action against sellers or creditors for practices in violation of the Act, to negotiate written assurances of compliance, to issue cease and desist orders subject to appeal and judicial review for violations other than unconscionable agreements or conduct, to obtain injunctions to enforce such cease and desist orders to stop other violations of the Act, and to obtain temporary injunctions pending the outcome of the actions already brought to enjoin such violations.

144 Id. § 46A-7-102.
145 Id. § 46A-7-103.
146 Id. § 46A-7-102(5)(3).
147 Id. § 46A-7-105.
148 Id. § 46A-7-104.
149 Id. § 46A-7-102(1)(a), -103(1).
150 Id. § 46A-7-107.
151 Id. § 46A-7-106.
152 Id. § 46A-7-110.
The Attorney General is authorized to sue to enjoin a creditor from unconscionable conduct in inducing credit sales or loans, from making or enforcing unconscionable contract terms, and from unconscionable debt collection practices, if such conduct, term, or practice is unconscionable, is likely to injure consumers, and if the reason the creditor has caused or is likely to cause injury is primarily because the transaction is a credit transaction.\textsuperscript{153}

The Act directs a court in the determination of unconscionability to consider belief by the creditor that debtor probably would not pay\textsuperscript{154} or receive benefit from the goods or services, gross disparity between the price and the value of the goods or services, charges for insurance, and the seller's knowledge that he was taking advantage of the debtor's ignorance.\textsuperscript{155}

The Attorney General is authorized to sue to recover up to five thousand dollars in civil penalty from any person who has engaged in repeated, willful violations of the Act within the previous four years.\textsuperscript{156}

The WVCCPA authorizes the Attorney General to sue a creditor to force a refund to the consumer of excess charges. If the excess charge was deliberate or reckless (not unintentional or the result of a bona fide error), or if the creditor does not make the refund within a reasonable time, the Attorney General

\textsuperscript{153} Id. § 46A-7-109.

\textsuperscript{154} That a buyer should not have to pay a seller who extends the buyer credit even though the seller knows the buyer will probably not pay is an interesting, but not a new idea. \textit{See The Improvident Extension of Credit as an Unconscionable Contract}, 23 \textit{Drake L. Rev.} 225 (1974).


\textsuperscript{156} Id. § 46A-7-111(2).
may force a payment to the creditor of the refund and in addition may impose a penalty of not more than the greater of the whole finance charge or ten times the excess charge. An action brought by the consumer challenging the same violation shall stay the Attorney General's action, however, and dismissal or judgement against the consumer will dismiss the Attorney General's action.157

DIVISION OF AUTHORITY WITH OTHER AGENCIES

The Act places the Attorney General in a secondary position with respect to other agencies in examining and investigating banks and other supervised financial organizations and requires the Attorney General to inform such agencies of incidents of non-compliance with the Act. Nevertheless, the Attorney General has full authority to investigate and prosecute to enforce any consumer protection provision of the Act.158

CONSUMER AFFAIRS ADVISORY COUNCIL

The WVCCPA creates a consumer affairs advisory council of nine members appointed by the Governor, four of whom shall represent consumer financing and retailing business. The council shall meet with the Attorney General and advise him on problems in consumer transactions.159

d. CRIMINAL PENALTIES

FINES AND IMPRISONMENT

A penalty of up to five thousand dollars and/or one year imprisonment may be imposed under the Act: upon a supervised lender who willfully makes an excess charge; upon a person who makes a supervised loan without a license; and

157 Id. § 46A-7-111(1).
158 Id. § 46A-7-103.
159 Id. § 46A-7-116.
upon a person who engages in consumer credit sales or loans or who takes assignments thereof and tries to collect the assigned sales or loans without registering the same with the State Tax Department. In addition, the Act imposes a penalty of up to one thousand dollars and/or one year imprisonment upon any person who commits debt collection practices specifically proscribed by the Act.¹⁰⁰

D. Banking and Supervised Lender Financing Provisions

1. Finance Charge Rate Regulation

The discussion which follows considers some of the economic factors involved in setting rates of finance charges. Thereafter, the method of setting rates of finance charges used by the drafters of the WVCCPA is studied from the viewpoint of the effectiveness of the method adopted to achieve the desired regulation of rates. Rather than adopting the method of disclosure plus maximum rate specification of the UCCC and the NCA, the drafters of the WVCCPA chose to stipulate, by classification, various rates that may be charged. But by so presenting the rates, the WVCCPA allows the clever creditor to avoid rate maximums in the confusion caused by the inclusion of the old special interest lender rates in the new rate provisions because of inaccurate paraphrasing and merging of the lender and seller rate provisions of the model acts. In one instance, a literal interpretation of the Act permits an unlimited interest rate.

It is useful to first examine the objectives of the WVCCPA provisions regulating the rates of creditor imposed finance charges. Since no rate disclosure requirements are contained in the Act,¹⁰¹ disclosure of the true rate of finance charge to the debtor could not have been an objective of the Act’s drafters. The avowed purpose of the WVCCPA is to prescribe maximum finance charges upon

¹⁰⁰ Id. § 46A-5-103.
¹⁰¹ There are two disclosure provisions in the Act affecting areas other than rates of finance charges: a provision requiring disclosure of advances to perform covenants of a consumer, W. Va. Code Ann. § 46A-3-115 (Cum. Supp. 1974), and a provision requiring disclosure of additional insurance charges. Id. § 46A-3-109(2)(d).
most credit extended through consumer sales and consumer loans. Nevertheless, because maximum rates of finance charges may be prescribed in two forms, the form chosen not only reflects the purpose intended, but also determines, in large part, the likelihood of its success in the accomplishment of that purpose. One form of maximum charge merely sets a general ceiling rate; the debtor may be charged any rate below this ceiling rate. In essence, credit rates may freely fluctuate below the maximum level. The other method interferes with the market mechanism by attempting to regulate rates. Normally, this form of regulation specifies rates according to (1) the type of individual granting credit, whether seller or lender; (2) the form of credit transaction, whether by loan, charge, revolving charge, or other credit method; (3) the type of goods purchased, whether real estate, cars, or goods; and (4) any combination of these classifications. The ultimate result of this second form of rate regulation is interference with the market rate of interest set by the supply and demand for money.

The WVCCPA follows the latter, or a regulation philosophy. Consumer credit rates are regulated according to the type of credit transaction, the identity of the creditor, and the form of goods purchased. When the economic realities are considered, however, the ability of any legislative body to control interest rates is, at best, only a temporary phenomenon, and the choice of this method may hinder accomplishment of the Act's intended purpose. Moreover, over and beyond problems inherent in the method selected, West Virginia may have more difficulty in regulating rates because of drafting errors and inconsistencies in the Act's provisions.

102 Id. § 46A-1-103. The reader should note the exclusion of lessors and others specifically excluded elsewhere in the Act particularly id. § 46A-1-105.

103 This method of controlling finance charge rates is followed by both the UCCC and the NCA. The difference in their approaches is at the level the maximum rate should be set. The NCA advocates a lower ceiling rate. Compare UCCC § 2-201, Comment 1, 1 CCH Consumer Credit Guide ¶ 5061 (1971), with NCA § 2-301, Comment 2.

104 Such an attempt to interfere is unrealistic, for example, when the market rate of interest would be greater than the maximum allowable by statute and the creditors' funds are mobile. In such a situation creditors would invest in other areas, and consumer credit might disappear.

105 WVa. Code Ann. §§ 46A-3-101, -103 to -106, § 46A-4-107 (Cum. Supp. 1974) are regulation by the identity of the creditor; id. §§ 46A-3-101, -103, -104(2), -105, -106 and id. § 46A-4-107 are regulation by credit forms; id. 46A-3-101(6), -102 are regulation by the type of goods purchased or sold.
a. Regulations Philosophy Economically Unsound

In a simplified market economy, the supply of and the demand for goods and services determines their prices. Money may be considered a good and as such its price, the market rate of interest, is determined by the interaction of the supply and demand for money. One of the components of the supply of money is the amount of consumer credit supplied. Likewise, an element of the demand for money is the ability to purchase consumer goods, services, and real estate through any form of credit. Thus, the market rate of interest is partially set by the amount of consumer credit offered by creditors and required by debtors.\textsuperscript{100}

In a similar fashion, an investor places his money in investments that yield the greatest return—assuming equal risk factors. A creditor as an investor will continue his particular business venture—credit granting—while the comparable rate of return from alternate investment ventures is equal to or less than the rate obtainable in his business. When the rate of return on the creditor’s loans (finance charges) falls below that of other equally risky or riskless investments, the creditor will shift his money to alternative investment areas to continue to maximize his rate of return.

Since the price of consumer credit, which is the rate of interest or of finance charge, is partially a function of the supply and demand for consumer credit \emph{and} for money, any governmental attempt to regulate consumer credit rates of interest or finance charges interferes with the natural market mechanism.\textsuperscript{107}

As long as the market rate is below the statutory rate, the maximum rate of consumer credit charges is irrelevant because the creditor must extend credit on the market’s terms or lose business to competitors. When the market rate is at or above the statutory rate, consumer credit can dry up. In such an instance any rational creditor will attempt to devise methods to avoid the statutory rate ceiling. Throughout history this has occurred through the use of points, discounting, the time-price doctrine, and multiple loan agreements. Alternatively, the creditor may shift his funds from forms of credit with lower statutory rates to those with higher rates: from simple loans to revolving loan accounts. Finally, the creditor may transfer his money into a different form of investment.

\textsuperscript{100} In actuality, the supply and demand of money is a function of the supply and demand for credit and vice versa.

\textsuperscript{107} See note 165 supra.
such as government securities.\textsuperscript{168} Thus, when the market rate is greater than the statutory rate, regulation of rates of finance charges is ineffective and may temporarily eliminate the supply of credit to consumers.\textsuperscript{169} Moreover, if the market rate attains or surpasses the statutory rate forcing the supply of credit to diminish, and if the demand for credit continues at the same or higher levels, the market rate for consumer credit may increase further.\textsuperscript{170} In other words, under proper conditions a statutory ceiling may aggravate the difference between the market and statutory rates.

The theoretical economic considerations have been oversimplified; however, one who disbelieves the phenomenon of consumer credit shifting should consider the Hunt Report\textsuperscript{171} and compare the percentage change in commercial bank holdings of government securities with the change in consumer loans during a period when the market rate of interest exceeds the statutory rate or rates.

The WVCCPA would protect consumers to a greater degree through the use of a \textit{single} rate ceiling below which interest rates may freely fluctuate, rather than by regulating rates imposed in different manners, varying with the form of credit, creditor classification, and goods classification. Adoption of this procedure would

\textsuperscript{168} This discussion assumes the mobility of money. In the short run, a seller may be forced to grant credit below the market rate (at the statutory maximum) to sell goods. Nevertheless, for a longer time period, even a seller cannot grant credit below the market rate because he must obtain money to finance his own purchases or to finance his credit granting — unless he is his own banker. Alternatively, a seller may subsidize his credit customers through increasing the price of all the goods he sells.

\textsuperscript{169} The shifting of consumer credit money to purchases of government securities by creditors often occurs when the market rate is below the statutory rate. This occurs partly because of the difference in the risk factor of default and/or loss present between an investment in government securities and a consumer loan. Since the risk of loss from a governmental security is generally less than that of a consumer loan or finance charge, the differential in the risk factor will be a major determinant of how far below the statutory rate consumer credit will begin to be transferred into government securities. The same rationale applies to other alternate investments.

\textsuperscript{170} The market rate for consumer credit may increase even if the demand for consumer credit falls. For this to happen, however, the change in demand for consumer credit must, at a minimum, be less than the change in the supply of consumer credit. This assumes that the other factors retain their \textit{certibus paribus} feature.

eliminate the unnecessary jumble of regulatory sections for rates of interest and finance charges. In addition, it would alleviate creditors' attempts to evade and to avoid the statutory rates and would lessen the chance that some forms of consumer credit will dry up.\textsuperscript{172}

b. Coverage of Finance Rate Provisions

Only finance charges on consumer credit sales or consumer loans granted by a seller or lender are regulated by the WVCCPA.\textsuperscript{173} The extension of credit by a seller may be by either a general grant or a revolving charge account.\textsuperscript{174} A loan of money may be by a revolving loan account from a supervised financial organization, by any other consumer loan from a lender other than a supervised lender, or by any loan from a supervised lender.\textsuperscript{175}

Particular attention should be given to what constitutes a consumer credit sale or a consumer loan. The WVCCPA excludes from such classification and from the Act's coverage: (1) transactions by a seller or lender not regularly extending credit; (2) purchases on credit by an organization;\textsuperscript{176} (3) purchases over $25,000, and (4) debts not repayable in installments and/or without finance charge.\textsuperscript{177} Additionally, sales on lender credit cards such as Bankameri-card or Mastercharge are specifically excluded from classification as consumer credit sales; they are not excluded, however, from the consumer loan category.\textsuperscript{178} Also excluded from the Act's coverage are loans guaranteed or insured by the United States government or an agency thereof.

\textsuperscript{172} The forms of credit with the lower rates necessarily dry up first. If the risk of loss factor is considered, the forms of credit with higher rates may dry up when the market rate is still below the statutory rate.


\textsuperscript{174} Id. § 46A-3-101, -103.

\textsuperscript{175} Id. § 46A-3-104, -106; id. § 46A-4-107; id. § 46A-1-102(43) defines a supervised financial organization so as to include commercial banks, industrial loan companies, building and loan associations, and credit unions. Specifically excluded from the definition are insurance companies and supervised lenders (small loan companies). A supervised lender is defined as a person authorized to make or to take assignments of supervised loans. Id. § 46A-1-102(44). This definition of a supervised lender specifically makes the assignee of one making a supervised loan a supervised lender.

\textsuperscript{176} Organization is defined as "... a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association." Id. § 46A-1-102(26).

\textsuperscript{177} Id. §§ 46A-1-102(12)(a), -102(14)(a)-(d).

\textsuperscript{178} Id. § 46A-1-102(12)(6).
Since there are individual sections regulating credit sales of real estate and non-revolving loan accounts by supervised financial organizations or "other lender(s)," neither transaction shall be considered a consumer credit sale or loan for purposes of the discussion that follows.\textsuperscript{179}

The purchase by the debtor may take one of four credit forms: from the seller as a revolving charge account; from the seller as a general grant of credit; from a supervised financial organization as a revolving loan account; or from a supervised lender in any form.

To determine the maximum rate of charge permissible under the WVCCPA, one must first determine into which of several classes the transaction falls. The extension of credit is made either by a seller in a credit sale or by a lender through a loan.\textsuperscript{180} If by loan, the class of lender must be determined. A lender is either a supervised lender or a supervised financial organization under the Act.

Next, whether credit is extended by the lender or the seller, the form of credit transaction must be determined. It may be a revolving charge (loan), a supervised lender loan, a commercial bank grant of credit, or other form.\textsuperscript{181} For each of these differentiations, a potentially different rate of finance charge exists.

\textsuperscript{179} Id. § 46A-3-102 applies to consumer credit sales of real estate in which the seller retains title or creates by agreement a purchase money lien. These sales are specifically excluded from the remaining seller credit transactions. No similar restriction on the rates in consumer loans for real estate purchases is found in the WVCCPA. Section 46A-3-105 and section 46A-3-104 of the WVCCPA are the other sections excluded from this discussion.

\textsuperscript{180} The relevant provisions are id. §§ 46A-3-101, -103, -106 & id. § 46A-4-107.

\textsuperscript{181} Id. § 46A-3-101(6) sets three rates of finance charge that only a seller of vehicles must follow. These rates are based on the age of the motor vehicle. In setting the rates by age, subsection (a) prescribes a rate applicable to motor vehicles purchased "... when such sale is made less than one year after the year of the model year designation of such motor vehicle or such motor vehicle is purchased new ... ." Assume that a 1976 motor vehicle is sold September 1, 1975, and immediately resold. Does this one year period end December 31, 1976? Literally translated, this one year does not end until December 31, 1977. More simply, for a 1976 vehicle initially sold and resold on September 1, 1975, the "one year period" is greater than two years. In contrast, for a car purchased new, the one year period may run from the date of sale in 1975. Also consider a 1976 car purchased new on December 31, 1976 or in 1977. Is the time period one year from the date of purchase or from the model year designation, December 31, 1977? Does subsection (a) purport to give the seller a choice of time periods: either one year after the year of the model year designation or one year after such motor vehicle is purchased new. For our resold vehicle, this permits two potential time periods, December 31, 1977 or
The differing rates arise from the WVCCPA's adoption of a hybrid of the rate provision of the UCCC, the NCA, and more. Rather than following either the NCA approach of using one section to set finance rates for all creditors, or the UCCC system of three rate prescriptions, a single, but different rate prescription each for sellers, for lenders, and for supervised lenders, the West Virginia Act has many different rate prescriptions for each of the creditor classifications: sellers, supervised lenders, and supervised financial institutions.\(^2\) The different rates are prescribed within the creditor classification by incorporation by reference of the many West Virginia special interest lender group rates in effect prior to adoption of the WVCCPA.\(^3\) Moreover, the WVCCPA specifies separate rates for consumer credit sales of real estate,\(^4\)

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\(^3\) The rates for sellers are set in W. Va. Code Ann. §§ 46A-3-101, -103 (Cum. Supp. 1974). Id. §§ 46A-4-107, -111 establish the finance rate limits for supervised lenders. The rates for supervised financial institutions are found in id § 46A-3-104(1). The maximum finance charge rate that may be charged by supervised financial institutions is by reference specified according to the lender, as follows: banks, as defined by id § 31A-1-2, may impose no greater rate than that authorized by either, id.; industrial loan companies are governed by the rate maximums specified in id § 31-7-11(a)(6), (6); building and loan associations must use the rates fixed by id § 31-6-17 or id 47-6-5; credit unions must not exceed the rates given in id § 31-10-16 or id § 47-6-5; any remaining lender, other than a supervised lender, may set rates as specified by id § 47-6-5(a). As part of the WVCCPA, both id § 31A-4-30 and id § 47-6-5, 5a have been amended. Id. § 47-6-5 (Cum Supp. 1974) simply restates the old provision allowing a 6% interest rate as the legal rate when not contracted; if by contract a rate of 8% is allowed. Id. § 47-6-5(a), as amended, (Cum. Supp. 1974) provides for loans repayable in installments a choice of either 6% add on interest or 6% discount up to a 15% maximum, based on the actuarial method. It also specifies that the Rule of 78's be used for rebates. With the exception of the minimum charge and certain other credit information costs, id. § 31A-4-30 is identical to id. § 47-6-5, -5(a).

\(^4\) Id. §§ 46A-3-102, -105.
for sellers of motor vehicles and for creditor advances to perform consumer covenants.\textsuperscript{185} As a result of this incorporation and individual rate specification, a minimum of fifteen different sections are used by the WVCCPA to set permissible finance charges. Although adoption of either the NCA or the UCCC approach would have simplified the determination of permissible finance charges, facilitated consumer disclosure, and made rate avoidance more difficult, neither approach was adopted by the drafters. Proliferation, rather than simplification, of rate sections is the unfortunate result.

Another result of rate section proliferation is that a clever creditor may more easily avoid these by finding a loophole in one of the many provisions. An example, is a seller who bifurcates his business subject to the rate limitations for sellers. Suppose the seller does not directly grant the consumer his credit, but he owns or controls the lender. In such a situation should the lender be deemed the seller? The West Virginia Act deems a creditor to be a seller if the creditor is an assignee of the seller's right to payment.\textsuperscript{186} One would assume that the lender above would be an assignee of the seller's right to payment (and therefore a seller) since for purposes of the buyer's defenses such a lender is considered under the Act an assignee of the seller.\textsuperscript{187} But this is not the case. For purposes of determining finance rate maximums, the WVCCPA does not regard the lender as a seller even if controlled or owned by the seller. Thus, a seller may avoid a seller rate ceiling by breaking off his credit granting from his sales.\textsuperscript{188}

\textsuperscript{185} Id. §§ 46A-3-1016, -115. For advances to perform covenants of a consumer, see discussion in text following note 227 supra.


\textsuperscript{187} Id. § 46A-2-103(1)(a)(ii).

\textsuperscript{188} The WVCCPA clearly encompasses a creditor who is both a seller and a lender in its provisions for consolidation. Id. §46A-3-103(2), (3). In Carper v. Kanawha Banking and Trust Co., 207 S.E.2d 897, 911 (W. Va. 1974), the West Virginia court considered these factors in examining the closeness of the lender-seller relationship under the time-price doctrine: "(a) sellers agreement with the buyer to finance the balance or arrange a loan; (b) additional profit to a seller through dealer reserves; (c) splitting of profit between the seller and lender from insurance premiums or other charges required of the buyer-borrower; and (d) papers signed by the buyer-borrower in blank." In light of the applicability of the WVCCPA to creditors who separate their business from their selling operations and of the ability of a supervised financial institution to charge seller rates of finance charges as an assignee of a consumer credit sale contract under W. Va. Code Ann. § 46A-3-104(4) (Cum. Supp. 1974), whether the factors mentioned in Carper may be used to deem a lender to be a seller (or vice versa) is not certain.
The National Consumer Act avoids this problem because it sets a single rate for all creditors. In the above situation, the seller would be deemed a creditor if he arranged or procured the consumer credit. But since the UCCC defines seller in the same fashion as the WVCCPA, the same avoidance scheme is available to a UCCC lender. This bifurcation may have advantages not only through different rate ceilings but also through application of the rates to different balance levels for seller or lender credit.

The methods to avoid rate regulation under the WVCCPA are limited only by the ingenuity of the creditor. The better approach would have been to adopt the NCA disclosure provision in connection with a single section setting the ceiling rate for all creditors, all forms of credit, and all types of goods. From a consumer's and a lender's view, such an approach would be simple to understand and easy to comply with. More importantly, the courts would not be as frequently involved in litigation caused by a creditor's attempts to avoid the various rate limits.

c. Difficulties in "Maximum Finance Charge"

The greatest potential for rate limit avoidance under the WVCCPA lies in those sections which permit the creditor to impose upon all accounts within a range of balances the same finance charge. Undoubtedly, the drafters of the Act intended to present only one method of determining the maximum finance charge permissible for ranges of balances. This is not the case. Those sections regulating finance charges for seller, general grants of credit, seller revolving charge accounts, supervised financial organization revolving loan accounts, and supervised lenders allow the use of

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109 NCA § 2.301 & comment 1.
110 NCA § 1.301 & comment 1.
111 UCCC § 2.107, 1 CCH Consumer Credit Guide ¶ 5047 (1975).
112 General consumer credit from a seller may not exceed a rate of eighteen percent on unpaid balances of the amount financed up to $1500 and of twelve percent on balances greater than $1500. W. Va. Code Ann. § 46A-3-101(1) (Cum. Supp. 1974). For seller revolving charge or supervised financial organization's revolving loan accounts, the rate maximum is one and one-half percent per month on the balance to $750 and one percent per month over $750. Id. §§ 46A-3-103(3), -106(3). Supervised lenders may charge a maximum of thirty-six percent on unpaid balances of $200 or less, twenty-four percent on unpaid balances from $201 to $600, and eighteen percent on unpaid balances from $601. Id. § 46A-4-107(2). In contrast, consumer loans by supervised financial organizations or other lenders not in the form of a revolving loan account are regulated only by flat rates for all ranges of balances. Id. § 46A-3-104(1).
ranges. To simplify discussion, the range method established for use by sellers under general grants of credit and for supervised lenders will be referred to as Method A. Method B will indicate the procedure to be followed to compute charges for ranges set for revolving charge accounts and non-supervised lender revolving loan accounts.

Under both methods A and B, the use of ranges allows a creditor to charge a rate of finance charge that is higher than the rate authorized by the respective sections. Using method A, the creditor may charge the same finance charge on the highest and lowest account balance in a range if:

(a) that dollar finance charge expressed as a percentage of the median balance is at or below the maximum rate permitted by the respective section, and

(b) that dollar finance charge expressed as a percentage of the lowest balance in the range is no greater than the dollar charge expressed as a percentage of the median balance ((a) above) plus 8% of the percentage calculated on the median (.08 times (a) above) 103

Example 1: Assume 18% per year is the maximum rate permitted, the median of the range is $100, and a one-month year. The creditor may charge $18.00 per year on the median balance of $100. Under the 8% rule, the creditor may charge a maximum rate on the lowest balance in the range equal to 18% + .08 (18%) = 19.44%. To find the lower limit of the range set .1944 x = $18.00. Then the lowest balance is $92.59. The upper limit is $107.41. Both the upper and lower limits are $7.41 from the median of the range. In this example, the creditor may charge $18.00 on all balances between $92.59 with an effective rate of 19.44% and $107.41 with an effective rate of 16.75%.

Using method B, the eight percent rule constraining the lower limit on the range of balances is susceptible of an interpretation that permits a greater variation in the lower limit of the range and in the actual rate of finance charges. Under Method B, the creditor may use ranges if he:

(a) makes the same charge on all balances within the specified range, and

103 Id. §§ 46A-3-101(4), -103(2)(c), -106(2)(c); id. § 46A-4-107(5), (6).
104 Id. 46A-3-101(4); id. § 46A-4-107(5), (6).
105 Id. 46A-3-101(4)(a), (b); id. §§ 4-107(5)(a), (b).
106 Id.
(b) if the percentage when applied to the median amount within the range does not produce a charge exceeding the charge resulting from applying that percentage to the lowest amount within the range by more than 8% of the charge on the median amount.\textsuperscript{197}

An astute creditor would read these provisions literally. To use the range method, the creditor must charge the same finance charge on all balances within a range. So far, there is no difficulty. The second portion poses the problem. It can be read to permit the use of ranges if the same percentage when applied to both the median and lowest amount in a range does not produce a charge on the lowest amount greater than the charge on the median amount plus eight percent times the charge on the median amount.

\textit{Example 2}: Assume as in example one that the median is $100 and the maximum rate allowed is eighteen percent. Using the range determined in example 1, the test for Method B is whether 18% of $92.59 is greater than 18% of $100 plus (.08) times ($18.00). This is a mathematical impossibility! Thus, the creditor may charge 18% on the highest balance in the range and charge this charge for all balances in the range. In our example, 18% of 107.41 is $19.33. The actual rate on the lowest balance for a finance charge of $19.33 is 20.88%.

Example two has assumed that the range is still limited by the eight percent rule; but, under Method B, the eight percent rule does not limit the lower balance in a range. In reality, there is no limit to the potential size of the range other than by those "... classifications and differentiations he (the creditor) may reasonably establish..."\textsuperscript{198}

Obviously, such a result is not contemplated by a regulative statute. The net effect of the statute, however, under a literal interpretation of Method B is to deregulate interest rates and to allow the market to determine the effective rate of finance charges.\textsuperscript{199} The deregulation under Method B is caused by imprecise wording. In Method A, "rate" means rate of finance charge expressed as a percentage of a balance.\textsuperscript{200} Thus, one would expect

\textsuperscript{197} Id. (emphasis added).
\textsuperscript{198} Id. Simple computations demonstrate that the greater the width of balances, the higher the effective rate of interest.
\textsuperscript{199} Absent the Truth-in-Lending Act and Regulation Z, the only constraint on the rate of finance charges that a creditor may charge is the market rate determined by the supply and demand factors.
\textsuperscript{200} W. VA. CODE ANN. § 46A-3-101(4) (Cum. Supp. 1974); id. § 46A-4-107(5).
"charge" to mean actual dollar charge—not a rate of finance charge. But even assuming that "charge" is used synonymously with "rate" of finance charge, and "rate" is substituted for "charge" in Method B, the eight percent rule still does not limit the lowest balance in the range. A creditor can still avoid any rate limitation because "percentage" is not defined in Method B. Does "percentage" mean the percentage on the highest, the median, or the lowest amount in the range? The clever creditor would choose the maximum rate per year on the highest balance to set the finance charge for the entire range. In this manner, eighteen percent per year (one and one-half percent per month) can never produce a rate on the lowest amount in the range that is equal to—let alone greater than—the charge on the median balance. Clearly, the sections using Method B need to be re-written; it is not sufficient to reinterpret charge to mean rate of sales (loan) finance charge. In addition, the percentage applied to the median balance must be defined as: the dollar finance charge divided by the median balance. These changes will eliminate the literal application of Method B demonstrated above.

An objection to the literal interpretation of Method B remains: these range provisions are intended to be controlled by the maximum rates set in the respective sections. Such an interpretation eliminates the range difficulty with Method B; however, it overlooks the objective of ranges of balances to permit a single charge on balances within the range. To accomplish this goal by applying the maximum rate to the median amount will always allow some balances to be charged an amount greater than the maximum rate.\footnote{There is an assumption of a continuous number of actual accounts over the entire range. Under this assumption, a creditor obtains a higher rate of finance charge on balances below the median at the cost of a lower rate on balances above the median. This assumption of continuity is not necessarily realistic—especially for small creditors with limited credit facilities.} Thus, the range method must have been intended to be an expressed exception to the statutory rates. But even as an exception to the maximum rates, the WVCCPA range sections are not properly limited. The UCCC, the National Consumer Act, the Truth-in-Lending Act, and Regulation Z,\footnote{See UCCC § 2.201(3), 3.201(5), 2.207, UCC Consumer Credit Guide §§ 5061, 5181, 5067 (1975); NCA § 2.201(5), (7)(c); 15 U.S.C. § 1606(b) (1970); 12 C.F.R. § 226.5(C)(2)(iv) (1974).} all of which preceded the WVCCPA and had similar range of balance sections, limited the operation of the maximum rate exception for
ranges so that the rate of finance charge on the median could not exceed the maximum rate allowed and effectively constrain the lower limit by the eight percent rule. But the only limits, under the WVCCPA, on the maximum rate of finance charge for creditors permitted to use Method B are the market rate, in addition to the limits imposed by Regulation Z for creditors covered by the FCCPA.

Even the suggested corrections of Method B will not suffice to remedy the problems in range regulation under the WVCCPA. Both Methods A and B pose further difficulties. To effectively regulate finance charge rates, the range of balances method assumes that the ranges will be based on a continuous cardinal scale of numbers rather than on a creditor's non-continuous (discrete)
range of actual accounts. The WVCCPA does not indicate whether or not the continuous cardinal scale should be used in connection with its provisions. Nevertheless, assuming the drafters of the WVCCPA intended for creditors to use the cardinal scale, the median balance would be the exact mid-point of the range; whereas if a creditor uses his actual balances, the median is variable.

Example 3: Ranges based on a continuous cardinal scale:

<table>
<thead>
<tr>
<th>Range</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>$100-109</td>
<td>$105</td>
</tr>
<tr>
<td>$110-119</td>
<td>$115</td>
</tr>
</tbody>
</table>

Median based on actual account balances. Assume Ex. 1. range of $92.59 to $107.41.

<table>
<thead>
<tr>
<th>Balances in the Range</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 92.59</td>
<td>$93.20 is the median</td>
</tr>
<tr>
<td>$ 93.00</td>
<td>not $100 as in Ex. 1.</td>
</tr>
<tr>
<td>$ 93.20</td>
<td></td>
</tr>
<tr>
<td>$ 93.50</td>
<td></td>
</tr>
<tr>
<td>$ 93.50</td>
<td></td>
</tr>
<tr>
<td>$107.41</td>
<td></td>
</tr>
</tbody>
</table>

Using the actual account balance distribution, the median may be above, below, or equal to the median obtained under a continuous cardinal scale.

If a creditor sets the median based on his actual distribution of accounts, the creditor can alter the ranges from those computed by the cardinal scale. The astute creditor will examine his ranges set by the cardinal scale and determine which ones have a median based on the actual amount balance distribution below the median of the cardinal scale range.

Example 4: In example 1, which assumed a continuous cardinal scale, the median of the range $92.59 to $107.41 was found to be $100. In example 3, the median of the same range based on actual account balances was found to be $93.20. Using method

205 Only the UCCC clearly indicates the use of a continuous cardinal scale of numbers. UCCC § 2.201, comment 3, CCH Consumer Credit Guide ¶ 5061 (1971). Cardinal numbers are simply the numbers with which we count, 1, 2, 3, 4, in contrast with ordinal numbers which rank, such as first, second, etc.
A which controls the lower limit of the range by the eight percent rule and assuming a one month year with an eighteen percent maximum rate of finance charge, the potential lower limit of the range shifts to $86.30.

(1) \( .18 \times 93.20 \) = $16.78
(2) \( .1944 \times x \) = $16.78
\( x = \frac{16.78}{.1944} \)

$93.20 is the median based on actual accounts and $86.30 is the lower limit.

Through successive approximations, a range can be set using the balance method that will charge a higher finance charge on lower balances than the continuous cardinal median method.\(^{206}\)

The use of actual account balances allows a lender an even greater range of return than either the average daily balance or beginning balance methods because neither of the range methods, A or B, requires that ranges be used for all accounts of the creditor. Thus, a creditor may determine which ranges produce a greater rate of return using account balance ranges than if he used the two alternate methods of computing finance charges, the maximum rate on the average daily balance or the beginning balance.\(^{207}\) Thus, for ranges that produce a greater return than the alternative methods, a creditor should compute the finance charge by the range method. And for ranges that have a lower return than the average daily balance or beginning balance, the creditor would not be wise to use the range method to determine finance charges.\(^{208}\) The same

\[ \text{Consider:} \begin{array}{lll}
\text{Cardinal Ranges} & \text{Median} \\
$92.59 \text{ to } $107.41 & $100 \\
$77.76 \text{ to } $92.58 & $85.17
\end{array} \]

Account Balances - $86.30 is the new potential lower limit for the account balance range from example 4. Thus, balances from $86.30 to $92.58 under the cardinal scale with median of $85.17 now shift to a higher range under the account balance method with a median at the least greater than $86.00. The result is a higher finance charge for balances between $86.30 and $92.58 under the account balance method.

\(^{207}\) Although W. Va. Code Ann. § 46A-3-101 (Cum. Supp. 1974) deals with precomputed sales credit, the finance charge for this credit may still be based on average daily balances or beginning balances.

\(^{208}\) Anytime range Method A is used, a rate of finance charge greater than the maximum rate is imposed on balances below the median, and a lower rate is
CONSUMER CREDIT AND PROTECTION

profit maximizing theory applies to creditors who compute ranges using the continuous cardinal scale method subject to the eight percent rule.209

As previously mentioned, the UCCC requires that the range of balances be computed on a continuous cardinal scale of numbers and that the median be the exact mid-point of a range.210 Although the National Consumer Act relies on Regulation Z and the Truth-in-Lending Act to control the dollar gap of the range, no indication is given as to which median the NCA follows.211 Since neither the Truth-in-Lending Act nor Regulation Z specify which median should be used, the NCA due to its consumer orientation, undoubtedly uses the same median as the UCCC, which employs the more consumer oriented cardinal scale.212

So far, a creditor can manipulate his use of the three computational methods to compute the amount of a debtor's unpaid account balance so as to determine finance charges.213 In this manner, the creditor can raise the effective rate of charges on some of his debtor's accounts above the maximum rate and maximize his return through the use of ranges for only some of his debtor's balance.

Example 5: Assume four ranges of balances: a to b, c to d, e to f, g to h. Also, assume that ranges a to b and e to f generate a greater total dollar finance charge by the range method than by the others. The creditor would determine a debtor's finance

imposed on balances above the median. Otherwise the creditor uses the average daily balance or beginning balance method to calculate a debtor's finance charge.

209 The profit maximizing theory is also applicable to the continuous cardinal scale ranges. To maximize profits, the increase in finance charges below the median may be considered an area under a graph. Similarly, the decrease in finance charges above the median may be represented by an area under a graph. When the area below the median is greater than the area above the median plus a variable Z representing the cost of determining balance distributions, the creditor maximizes profits through the use of the range of balances method. The difference between the two, however, is the distribution of actual balances about the median.

210 UCCC § 2.201, comment 3, CCH Consumer Credit Guide ¶ 5061 (1971).

211 NCA § 2.201, comment 6.

212 The use of standardized tables mentioned in F.R.B. Reg. Z 12 C.F.R. § 226.5 (c)(2)(i-iv) (1971) indicates that the NCA must have used the same continuous cardinal scale as is used under the UCCC. Otherwise, a standardized chart or table could not be prepared for ranges.

213 The three methods of computation are: average daily balance, beginning balance, and the range method, which employs either of the former account balance methods to compute the median and the ranges.
charge by the range method if a balance falls in ranges a to b and e to f. For the remaining ranges, the creditor would use the average daily balance method or the beginning balance method. Such a procedure is not disallowed by the WVCCPA.

The choice illustrated in example five is of greater benefit to a creditor who may use Method A under sections 46A-3-101 and 46A-4-107 of the WVCCPA. These sections not only do not require that ranges be used for all accounts; they also do not require that the creditor place all accounts into a range.214 Under Method A, the creditor may choose which accounts to exclude from a range. As a result, the ranges may be designed by the creditor to maximize his return from the ranges. To maximize his return, the creditor would create ranges for all balances from zero to infinity and determine the median for each range. All accounts that fall between the lower balance of a range and its median would be charged according to the continuous cardinal range method. All accounts above the median of a range would be excluded from the range and finance charges would be computed on the average daily or beginning balance method.215

Yet another device to raise the effective rate of finance charges may exist under the West Virginia Act through the use of ranges. Each section that authorizes the use of ranges sets maximum rates on a step basis. For example: nineteen percent on balances to $1500 and twelve percent on balances over $1500. May the creditor assign the portion above and/or below the $1500 to different ranges? May one part (say above $1500) be assigned to a range and the rest (below $1500) not be assigned to a range? If such a procedure is allowed, the effective rate of finance charge may exceed the maximum rate.216

214 W. Va. Code Ann. § 46A-3-101(4) (Cum. Supp. 1974) and id. § 46A-4-107(5) provide that “[t]he creditor may make the same sales [loan] finance charge on all amounts financed [on all principal amounts] within a specified range.” Conversely, id. §§ 46A-3-103(2)(c), -106(2)(c) require that the creditor make “. . . the same charge on all balances within the specified range . . . .”

215 The range in Example 1, computed by the continuous cardinal method, was $92.59 to $107.41 with $100 as the median. Under Method A, only accounts between $92.59 and $100 would be placed into the range. The accounts above $100 would be charged on the alternative methods. The reason for choosing accounts to be placed within ranges is to take advantage of an effective rate above the maximum rate on balances below the range median and to avoid the lower rate on balances above the median.

216 This is particularly relevant since a creditor does not have to use ranges for all balances. If $1560 falls in a range that does not maximize a creditor’s return, he
Example 6: On a $1680 balance calculated by the average daily balance method, assign $1500 to one range of balances and $1,501 to $1680 to another range. Alternately, compute the finance charge on $1500 by the average daily balance method and the credit charge on $1501 to $1680 by the range method or vice versa.

For revolving charge and revolving loan accounts, three methods of computing account balances are expressly provided by the WVCCPA. Although the beginning balances method is one choice, it should never be used by a profit maximizing creditor, because such method always gives a debtor a lower unpaid balance than the average daily balance method. The use of average daily balances generates larger unpaid balances and larger finance charges for a creditor.

Example 7: Consider an account with a balance at the beginning of a month of $100 under the following transactions:
(a) First of month purchases of $30 and thirtieth of month payments of $20, (b) First of month payments of $20 and thirtieth of month purchases of $30, (c) Fifteenth of month purchase of $30 and thirtieth of month payment of $20, (d) Fifteenth of month payment of $20 and thirtieth purchases of $30, (e) Payment of $100 on first day and purchases of $30 on thirtieth day. For application of the finance charge rates for this month, the account balances for transactions (a) to (e) using average daily balance or beginning balance are:

<table>
<thead>
<tr>
<th>Av. Daily Bal.</th>
<th>Beginning Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>129.33</td>
</tr>
<tr>
<td>(b)</td>
<td>81.00</td>
</tr>
<tr>
<td>(c)</td>
<td>115.33</td>
</tr>
<tr>
<td>(d)</td>
<td>90.33</td>
</tr>
<tr>
<td>(e)</td>
<td>0.67</td>
</tr>
</tbody>
</table>

will not use the range method for computing the finance charge on this balance. If the range from $1490 to $1520 maximizes the creditor's return, the allocation of $1500 of the $1500 to the range of $1490 to $1520 with median $1505 will increase the creditors return because of the maximization criteria. In light of F.R.B. Reg. Z, 12 C.F.R. § 226.501(b) (1974), this procedure is not altogether illegal.

217 W. Va. Code Ann. §§ 46A-3-103(2)(a-c), -106(2)(a-c) (Cum. Supp. 1974); id. § 46A-4-107(6)(a)(i-iii). These sections provide for the use of average daily balances, beginning balances, or the median of a range with balances computed by the average daily or beginning balance procedure. NCA § 2.201(7)(a).

218 If the cost of computing the average daily balance or the appropriate ranges exceeds the increase in finance charges gained by these account balance methods, the creditor should use the beginning balance method.
Had the WVCCPA used the unpaid balance on the last day of the billing cycle, a slightly more difficult choice would be presented to the creditor. From the balance on the last day, all payments, credits, and refunds to which the consumer would be entitled during the current billing cycle would be deducted to compute the unpaid balance on the last day of the billing cycle. For example, under the transactions in example seven, the unpaid balances on the last day are:

<table>
<thead>
<tr>
<th>Last Day Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) 90</td>
</tr>
<tr>
<td>(b) 90</td>
</tr>
<tr>
<td>(c) 90</td>
</tr>
<tr>
<td>(d) 90</td>
</tr>
<tr>
<td>(e) 20</td>
</tr>
</tbody>
</table>

The last day balance produces a greater balance than the average daily balance for transactions (b) and (e) and an almost identical balance for transaction (d). To the profit maximizing creditor, the beginning balance is an irrelevant choice. In contrast, the last day balance would be chosen by a creditor in place of the average daily balance method because it sometimes generates a greater account balance. Although the beginning balance method is the preferred method of computing balances for the debtor, the creditor supposedly has the choice of which procedure to use. In reality, the profit maximization criteria controls the choice of which account balance method to use. The West Virginia Consumer Credit and Protection Act should have balanced the competing interests of creditor and debtor and stipulated one method for balance computation. This would further disclosure of true rates of finance charges. Rate disclosure to a debtor would be facilitated because he would know which balance method must be followed to determine his finance

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219 NCA § 2.201(7)(a).

220 Again, the creditor would follow the profit maximization computations to determine when to use the last day balance or the average daily balance.

221 For open end credit, the National Consumer Act uses only the last day balance method and ranges using the last day balance method. NCA § 2.201(7).

Although the last day balance method was used for purposes of example, no preference is expressed by the writers for the last day balance method. Instead of a choice of three method, a single method is advocated to simplify disclosure for consumers. The account balance computational procedure should weight the positions of both debtor and creditor. That is, since the last day or beginning balance methods usually create smaller account balances than the average daily balance, the Legislature could alter the finance charge rate maximums to account for the lower dollar finance charge return to the creditor.
charge. In light of the absence of rate disclosure requirements under the WVCCPA, the allowance of only one method of account balance computation becomes more important to the debtor.

2. Rate Avoidance and Potential Violation of the Truth in Lending Act

Some provisions of the WVCCPA permit a creditor to include charges, that under the FCCPA must be included in the finance charge, in the total amount financed. This section of the article analyzes two such provisions of the Act: a provision allowing creditors to impose additional charges,\(^{222}\) including a charge for insurance and a provision authorizing charges for amounts advanced to perform consumer covenants.\(^{223}\) Such allowance of charges in the amount financed under the West Virginia Act creates potential for violation, by a creditor, of the first portion of the FCCPA, the Truth-in-Lending Act. Since a clever creditor can obtain two different rates of finance charges while complying with both the FCCPA disclosure provisions and the West Virginia finance charge rate computation procedure, the violation is only potential because of the lack of a disclosure requirement in the West Virginia Act. Reliance on this anomaly by a creditor is dangerous, however, because a subsequent refinancing, consolidation, or prepayment can trigger a violation of the Truth-in-Lending Act.\(^{224}\)

To prevent avoidance of finance rate maximums, the WVCCPA specifies those charges that must be included in the finance charge and those that may be added to the amount financed, or the principal obligation.\(^{225}\) The effectiveness of these provisions to prevent avoidance of the finance rate maximums depends on the ability of a creditor to shift items from the finance charge to the amount financed or principal.\(^{226}\) The potential for


\(^{223}\) Id. § 46A-3-115.


\(^{226}\) A creditor can avoid the finance rate maximums by shifting items from the finance charge into the amount financed. Consider a one year, $100 grant of credit repayable in one installment with a finance charge of $18.00 or a rate of 18%. The total amount of repayment is $118. If an added charge of $10 for required insurance
such shifting in either an initial extension of credit or a refinancing or a consolidation is through the application of the provisions authorizing additional charges, including charges for insurance and advances to perform covenants of a consumer. 227

The WVCCPA authorizes a creditor to charge the debtor for certain advances made by the creditor for performance of covenants of the debtor. If the covenants made by the debtor are contained in the financing agreement and the creditor "pursuant to the agreement pays for performance of such duties . . ." such advances made may be added to the amount of the debt. 228 The covenants for performance of which advances may be applied to the amount of the debt, are limited under the WVCCPA, to those "pertaining to insuring or preserving collateral or payment of taxes, fees or assessments . . ." 229

What is meant by the term debt is not clear in the WVCCPA, and this creates an initial problem for creditors attempting to take advantage of this provision. Does "debt" mean the amount financed, the principal, or the finance charge? Although "debt" is undefined in the Act, the term is used in definitions of consumer credit sale and consumer loan to mean the total amount owed by the consumer. 229 However, since the "debt" may as easily refer

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227 Both additional charges and insurance premiums may be added to the unpaid balance or the amount financed. Id. § 46A-3-109. In addition, the creditor may add to the total amount of the debt certain advances made pursuant to the financing agreement for performance of covenants of a consumer. Id. § 46A-3-115(1).

228 Id. § 46A-3-113(1).

229 Id.

229 Id. § 46A-1-102(12)(a)(iv), (14)(c). Although these sections appear to use "debt" synonymously with "amount financed" or "principal", "debt" clearly must have a different meaning. The definitions of consumer loan and consumer credit sale both include that "either the debt is payable in installments or a sales finance charge [must be] made . . ." Id. § 46A-1-102(12)(a)(iv); id. § 46A-1-102 (14)(c). This suggests that "debt" means the value of the goods or services purchased plus a finance or interest charge; in other words, the total amount owed by the consumer. In contrast, neither "principal" nor "amount financed" by definition include a finance charge or interest. Id. § 46A-1-102(4) & (33). See also National Consumer Act § 1.301(9), comment 1.
either to the amount financed (principal) plus a finance or interest charge or to only the amount financed (principal), the term is meaningless for purposes of allocating advances made for covenants between the finance charge or the amount financed.

The equivalent provision of the UCCC is similarly ambiguous.231 Although the National Consumer Act definition of amount financed is unambiguous, a similar ambiguity is found in the NCA term "unpaid balance"; since "balance" may or may not include both the sales price of the good (service) purchased and a finance charge.232

Nevertheless, an analysis of the structure of all of the above provisions suggests that "debt" means the amount financed or principal, or the unpaid balances of these amounts. Moreover, since a finance charge may be made on advances for performance of consumer covenants, the drafters must have intended such additional charges to become part of the amount financed.

A second problem of interpretation is presented to the creditor attempting to take advantage of the WVCCPA charge shifting provisions. The WVCCPA permits advances by the creditor for "payment of taxes, fees or assessments" to be added to the amount financed. May all taxes, fees, and assessments covenanted by the consumer be included in the amount financed? The question is open and unanswered since the West Virginia Act does not specify the extent to which covenants taxes, fees, or assessments may be included, and the UCCC, the NCA, and Regulation Z do not include such charges in their equivalent sections.233

Although the WVCCPA clearly authorizes the addition of the advances specified above to the unpaid amount financed or unpaid balance as to revolving loan and revolving charge accounts,234 whether the same charges may be shifted in any other extension of credit is subject to interpretation. The provision in the WVCCPA governing charges in other credit extensions provides:

A sales finance charge or a loan may be made for sums advanced pursuant to subsection (1) at a rate not exceeding the rate stated to the consumer pursuant to the provisions of the

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231 UCC §§ 2.208, 3.208 1 CCH CONSUMER CREDIT GUIDE, ¶¶ 5068, 5188 (1975).
233 UCC §§ 2.208, 3.208 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5068, 5188 (1975); National Consumer Act § 2.208; FRB Reg Z, 12 C.F.R. § 226.8(2) (Rev. ed. 1974).
"Federal Consumer Credit Protection Act" with respect to the sale or loan, refinancing or consolidation.\textsuperscript{225}

Unlike the FCCPA and Regulation Z, which require disclosure but do not state specific rates,\textsuperscript{226} the WVCCPA does not require disclosure and attempts to specify rates of finance charges. However, instead of making advances subject to the rate sections of the WVCCPA for sales, loans, refinancing, or consolidation, the West Virginia drafters have made advances subject to rates of finance charges which were quoted to the consumer with respect to the initial transactions and which were formulated according to the computational methods of the FCCPA in the Truth-in-Lending Act.\textsuperscript{227} The distinction between the rates applied is a crucial one; the incorporation of the Truth-in-Lending rates in this provision creates both a potential loophole in finance rate maximums and an inconsistency with the disclosure provisions of the Truth-in-Lending Act.

The section of Regulation Z that provides for increases in an existing extension of credit requires that only the unearned portion of the finance charge which is not credited to the existing obligation be added to the new finance charge and proscribes the inclusion of that portion in the new amount financed; it does not specify an applicable rate for advances. Thus, comparison of other provisions of Regulation Z with the WVCCPA is necessary to determine if the rate of advances, arrived at by the Truth-in-Lending Act computational method for rate disclosure, will, for purposes of disclosure under the FCCPA, be the same rate as that determined under the West Virginia Act.\textsuperscript{228}

To the extent that "insuring or preserving collateral" in WVCCPA section 3-115(1) are synonymous with the FCCPA terms "perfecting, protecting or preserving the security" for the creditor’s undertaking of the consumer's obligation in Regulation Z, the increase in the amount financed caused by advances for covenants

\textsuperscript{225} Id.


\textsuperscript{227} This is consonant with the wording of the UCCC, which of the model acts contains provisions most closely resembling those of the West Virginia section on advances for consumer covenants. UCCC § 2.208, comment, 1 CCH CONSUMER CREDIT GUIDE ¶ 5068 (1975).

\textsuperscript{228} FRB Reg. Z, 12 C.F.R. § 226.8(j) (Rev. ed. 1974).
is identical under both Acts. But should “insuring the collateral” or “taxes, fees and assessments” not be synonymous with the terms “perfecting, protecting or preserving the security” under the FCCPA, the unpaid amount financed may be different. Even if such a difference exists, however, some items may be includable in the amount financed under other provisions of Regulation Z. For example, since under Regulation Z insurance to protect collateral required by the creditor may be added to the finance charge, it follows that it may instead be added to the existing obligation. Such addition will produce no difference in the new unpaid amount financed and consequently no violation under either Act. Even so, for items that must be included in the finance charge under the FCCPA separate procedures can be carried out to comply with both state and federal law. If assessments under section 46A-3-115(1) of the WVCCPA includes such items as a charge for preparation of required disclosures under the Truth-in-Lending Act, such charges must be made part of the finance charge under the FCCPA. Because the West Virginia Act would permit these charges to be placed into the unpaid amount financed, the rate of finance charge under the FCCPA provisions may be greater than

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233 Regulation Z does not treat such increases in an existing obligation as a new transaction for purposes of its disclosure requirements. Id. Moreover, Regulation Z requires that unearned finance charges be placed into the finance charge only if the transaction is a new transaction. Thus, since an increase in the amount financed due to advances for covenants is not a new transaction, the creditor may add the advance for consumer covenants onto the unpaid amount financed.

240 If an advance for consumer covenants authorized by W. Va. Code Ann. § 46A-3-115(1) (Cum. Supp. 1974) is not also considered an increase in the consumer’s obligation to reimburse the creditor for undertaking the consumer’s obligation in perfecting, protecting or preserving the security, as defined under the Truth-in-Lending Act, the whole transaction is considered a new transaction under Regulation Z, FRB Reg. Z, 12 C.F.R. § 226.8(j) (Rev. ed. 1974), and may not be added to the amount financed. If such an advance is considered a new transaction a further determination must be made to see if the insurance of the collateral, fees, taxes, or assessments must be included in the finance charge under the Truth-in-Lending Act, 15 U.S.C. § 1605 (1971). If they must be included in the finance charge, the rate of finance charge under the West Virginia Act will vary from that stated under the Truth-in-Lending disclosure.

241 FRB Letter No. 195 (Dec. 1, 1969). In addition, optional insurance under F.R.B. Reg. Z, 12 C.F.R. § 226.814(a) (Rev. ed. 1974) may be purchased subsequent to a consumer credit transaction and the insurance alone may be treated as a new transaction. FRB Letter No. 755 (Jan. 24, 1974). In this instance, the optional insurance would not have to be included in the finance charge.

the West Virginia rate. Consequently, a higher rate could be charged on the advances than on the amount financed in the original transaction. This is not the intent of the drafters of the WVCCPA.

Example 8: Consider a $100 unpaid amount financed and a $2 assessment that may be added to the unpaid balance under the WVCCPA provisions for advances but which must be placed in the finance charge under the Truth-in-Lending Act. Also assume a one year, one installment credit grant at a rate of 18%.

W. Va. Computations

\[
\begin{align*}
\$100 & \quad + 2 \quad \text{assessment} \\
\$102 & = \text{Total amount financed} \\
\times .18 & \\
\$18.36 & = \text{Finance charge} \\
\hline
+ 102.00 & \\
\$120.36 & = \text{Total Amount Repayable}
\end{align*}
\]

Truth in Lending Computation

\[
\begin{align*}
\$100 & \\
\times .18 & \\
\$18.00 & = \text{Finance Charge}
\end{align*}
\]

Alternate A: The $2.00 assessment must be included in the $18.00 finance charge. Therefore $100 \div 18 = \text{Total amount repayable}.

Alternate B: The $2.00 assessment may be added onto the $18.00 finance charge for a total finance charge of $20.00. Therefore: $100 \div 20 = $120 = \text{Total amount repayable}.

In example eight, compliance with the FCCPA under Alternate A shows a lower dollar finance charge than the WVCCPA computation would allow. Under Alternate B, the creditor could add the two dollar assessment onto the other finance charge and obtain a greater dollar finance charge and rate of finance charge under the FCCPA than under the West Virginia Act.

But even if the rate of finance charge computed under the FCCPA is greater or less than that computed under the West Virginia Act, does it follow that there is a violation of the Truth-in-Lending Act? Because disclosure of the cost of credit is the objective of the Truth-in-Lending Act, it is possible to avoid violation
of both the WVCCPA and the Truth-in-Lending Act. In example eight, the rate of finance charge was within the rate allowed by the WVCCPA in the hypothetical West Virginia computation. Under Alternate A, although the rate of finance charge under the Truth-in-Lending Act is identical to the West Virginia rate, the actual dollar finance charge is different under the Truth-in-Lending Act figures since it is based on different amounts financed due to the variance in computing these amounts. Consequently, the dollar finance charge allowed by West Virginia Act, as a percentage of the amount financed under the FCCPA, is greater than the rate computed under the West Virginia Act. Under Alternate B, the converse is true.

In each alternative, no violation of the West Virginia provisions occurs because when calculated according to the State procedure, the rate maximum is not exceeded. Yet no violation of the Truth-in-Lending Act has occurred in either alternative because there has been an accurate disclosure of the rate used accordingly to federal computations. A violation of the Truth-in-Lending Act would arise, however, if an inconsistent State disclosure were made. But since the West Virginia Act does not require disclosure and therefore none is made, no inconsistency in disclosure can occur.

To the extent that the Truth-in-Lending Act’s purpose is “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms avail-

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23 FRB Reg. Z, 12 C.F.R. §§ 226.6, 226.604 (Rev. ed. 1974) identify state disclosures that are inconsistent with FCCPA disclosures and describe how an inconsistent state provision may be disclosed to avoid a violation. Although additional information required for state disclosure purposes may be supplied, it may not “... be stated, utilized, or placed so as to mislead or confuse the consumer or contradict, obscure, or detract attention from the information required by this part to be disclosed.” Id. § 226.6 (c). Thus, some inconsistent state disclosures may not be given to a consumer. In instances where inconsistent state disclosure is not allowed, 15 U.S.C. § 1610(a) (1970) exempts the creditor from compliance with the state requirement only to the extent of the inconsistency.

24 W. Va. Code Ann. § 46A-3-115(1) (Cum. Supp. 1974) provides for disclosure, but the section can be complied with without creating an inconsistency. For items that both state and federal acts permit to be included in the amount financed, disclosure similar to that prescribed in FRB Reg. Z, 12 C.F.R. § 226.814 (b) (Rev. ed. 1974) would meet the state requirements. With respect to advances that West Virginia allows in the amount financed but which the FCCPA requires in the finance charge, disclosure pursuant to Example 8 would satisfy both state and federal requirements.
able to him and avoid the uninformed use of credit," no violation of the Truth-in-Lending Act will result provided the actual disclosure complies with its provisions. Under Alternate A, the maximum finance charge which is allowed by the FCCPA is eighteen dollars because the charge of $18.36 under the West Virginia computation would be understated by the FCCPA disclosure and the necessary federal disclosure would not be made. Under Alternate B, the creditor can follow the FCCPA disclosure provision and not violate the Truth-in-Lending Act despite an effective rate of finance charge under its provision greater than the State rate maximum. Thus, under Alternate B there is no violation of either the West Virginia Act or the FCCPA despite two different percentage rates.

If a credit transaction is never prepaid, refinanced, or consolidated, the creditor can comply with the WVCCPA and with the

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247 FRB Reg. Z, 12 C.F.R. § 226.6(h) (Rev. ed. 1974) indicates that an overstatement of the finance charge or of a percentage may violate Regulation Z and the FCCPA. But this provision is inapplicable to the transaction in example 8 because it requires an overstatement of the disclosure required by the Regulation Z and the FCCPA—the example 8 transaction overstated the state rate and finance charge, not the Regulation Z rate or finance charge.
248 Despite the annulment of inconsistent state provisions by 15 U.S.C. § 1601(a) (1970), that provision is not necessarily applicable to a non-disclosure statute. In 15 U.S.C. § 1610(b) (1971), a further expression of intent is found:
This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the law of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit . . .

In essence, the lack of disclosure requirement in the WVCCPA avoids the application of the FCCPA provisions on inconsistent state provisions. Even under alternate B, the Truth-in-Lending Act places a lower limit on the total debt than is placed by the West Virginia Act—$120 versus $120.36. To avoid the difficulty of Alternate A, the creditor would have to charge no greater than $120. Thus, under both alternatives, A and B, the total debt repayable is the same despite the variance in the rate of finance charges under the state and federal acts. At this point in the transaction, use of the West Virginia computational procedure will not result in violation of the Truth-in-Lending Act for failure to disclose properly; a later rebate because of a consolidation, refinancing, or prepayment, however, will cause such a violation, unless the creditor follows the FCCPA and Regulation Z provisions for the entire transaction. In effect, it is a potential future event that can trigger the violation due to different allocation, originally, of items between the finance charge and the amount financed. For most consumers, the chance of discovering this violation is, at best, slight.
CONSUMER CREDIT AND PROTECTION

FCCPA and any inconsistency in results thereby will not result in violation of either. Unlike a theoretical example, however, debts are often refinanced, consolidated, or prepaid. Thus, under the rebate provisions of the West Virginia Act and the Truth-in-Lending Act, the amount of unearned finance charges rebated will vary because of the differences between the two Acts' allocation of the covenant advances.

Example 9: From example 8, Alternate B, the total FCCPA finance charges used in the rebate formula (Rule of 78) is $20.00. For the West Virginia computation, it is $18.00.

This difference in the amount of the finance charges may constitute a violation of the Truth-in-Lending Act if the allocation of advances for consumer covenants specified by the WVCCPA is used by the creditor. To avoid this potential violation, a creditor will have to follow the provisions of the FCCPA for the entire transaction and not those of the WVCCPA.

In summary, the provision for advances to perform covenants of a consumer was drafted with the intent to permit a creditor to pay for certain obligations a consumer agrees to but fails to perform. The creditor appears to be allowed to add these advances onto the unpaid amount financed and to charge the same finance rate that was charged on the original transaction (or the current revolving loan or charge rate). This goal is not attainable, however, because of a potentially different rate and amount of finance charge calculated by the FCCPA disclosure provisions than is permissible under the West Virginia Act. In addition, there is a danger of a violation of the FCCPA in a subsequent refinancing, consolidation, or prepayment of the initial transaction. Thus, the discrete creditor cannot rely on the provisions of section 46A-3-115 of the WVCCPA.

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12 This potential violation may also arise on prepayment of a deferred portion of the original transaction. For a delinquency charge that is the same as a deferral charge under W. Va. Code Ann. § 3-112(1)(b) (Cum. Supp. 1974) the same rationale applies.

120 This assumes that the creditor does not continue to make both state and federal computations separately as he did on the initial financing.


122 An interesting question is raised with reference to state and federal usury laws under the example given for advances for consumer covenants. If the creditor is a national bank under 12 U.S.C. § 21 (1970) and subject to the usury provisions of 12 U.S.C. § 85 (1970) on the initial financing including advances (as in example 9, alternate A or B), the Truth-in-Lending Act disclosures will show a higher rate
Lastly, if fees and assessments are given the same definition as official fees in section 46A-1-102(25) of the WVCCPA, the advances for consumer covenants could be added to the unpaid amount financed under both the FCCPA and the West Virginia Act.\textsuperscript{233} Taxes receive similar treatment.\textsuperscript{234} This interpretation will avoid the problems posed by a variance between State and federal computations of the amounts financed and finance charges.

When the definitions of "sales finance charge" and "loan finance charge" are considered in connection with the amount financed, a similar potential to shift items from the finance charge to the amount financed exists.\textsuperscript{235} Since additional charges are excluded from both the sales and loan finance charge by the WVCCPA and are included in the amount financed, an examination of the additional charges is necessary to see if they could encompass charges that should go into the finance charge under the Truth-in-Lending Act.\textsuperscript{236} Thus, the inquiry focuses on potential shifting of finance charge items into the amount financed and/or potential violations of the Truth-in-Lending Act.

\textsuperscript{233} The items enumerated in official fees under the West Virginia Act are specifically excluded from the finance charge in 15 U.S.C. § 1605(d)(1-2), (e) (3) (1970).


\textsuperscript{235} The definition of sales finance charge appears in W. Va. Code Ann. § 46A-1-102(39) (Cum. Supp. 1974); the definition of loan finance charge is found in id. § 46A-1-102(23); the definition of amount financed is found in id. § 46A-1-102(4). Both definitions of finance charge exclude additional charges.

\textsuperscript{236} W. Va. Code Ann. § 46A-3-109 (Cum. Supp. 1974) allows the following additional charges to be added to the amount financed: official fees and taxes; certain charges for insurance; annual charges for the privilege of using a lender or similar credit card; charges for other benefits; and reasonable closing costs for a debt secured by an interest in land. The charges for other benefits, including insurance, must meet four criteria: charges must be reasonable in relation to the benefits; cannot be for credit; must be of value to the consumer, and must be excluded as permissible additional charges from the sales or loan finance charge by rule adopted by the commissioner.
Of the additional charges includable in the amount financed under the WVCCPA, only official fees and taxes are clearly treated identically by the FCCPA.\footnote{257} Also, annual charges for the privilege of using a lender credit card are placed into the amount financed by both the State and federal acts.\footnote{258}

The three remaining additional charges includable in the amount financed under the WVCCPA if so included would produce a shifting potential and would constitute a possible violation of the Truth-in-Lending Act. The FCCPA excludes from inclusion within the finance charge specified charges made in connection with a debt secured by an interest in real property.\footnote{259} The West Virginia Act excludes from computation of finance charges “reasonable closing costs with respect to a debt secured by an interest in land.”\footnote{260} Determination of “reasonable closing costs” leaves too much leeway for a creditor’s imagination and may permit some costs that the FCCPA requires to be included in the finance charge to be shifted under the WVCCPA to the amount financed. If such shifting occurs, a violation of the Truth-in-Lending Act, identical to the one for advances for covenants, would probably result.\footnote{261}

Similarly, “charges for other benefits” under section 46A-3-109(1)(d) of the WVCCPA is too amorphous. Here too, the creditor’s ingenuity is the only limit to prevent him from shifting items out of the finance charge and into the amount financed. The language of this provision in the West Virginia Act facilitates the shifting process because the statute also includes a benefit unilaterally conferred on the consumer by the creditor.\footnote{262} Also, neither


\footnote{258} W. VA. CODE ANN. § 46A-3-109(1)(c) (Cum. Supp. 1974); FRB Reg. Z, 12 C.F.R. § 226.407 (Rev. ed. 1974). Regulation Z requires that these charges be imposed as a qualification for membership and for issuance of the credit card. West Virginia requires that the charges be imposed “for the privilege of using,” which is not necessarily a qualification for membership. However, the payable in advance requirement of W. VA. CODE ANN. § 46A-3-109(1)(c) (Cum. Supp. 1974) indicates the payment is a condition of qualification for membership; UCCC § 3.302(1)(c) uses identical wording. 1 CCH CONSUMER CREDIT GUIDE ¶ 5202 (1978).

\footnote{259} The items listed in 15 U.S.C. § 1605(e)(1)-(6) (1970) are: fees or premiums for title examination, title insurance or similar purposes; fees for preparation of a deed, a settlement statement, or other documents; escrows for future payments of taxes and insurance; notary fees; appraisal fees; and, credit report changes.


\footnote{261} See text accompanying notes 248-252.

Regulation Z nor the FCCPA excludes these items from the finance charge.\textsuperscript{233} Again, some charges placed in the finance charge under the FCCPA may be shifted into the amount financed under the West Virginia Act, and a violation of the Truth-in-Lending Act may occur if disclosure is not according to the federal act's provisions.\textsuperscript{234} The last category of permissible additional charges is insurance as described in subsection two of the additional charge provision.\textsuperscript{235} Subsection two allows the creditor to charge the consumer the cost of: reasonable life, accident and health insurance to be taken by the creditor on the consumer, reasonable insurance on property offered as security, and vendor's or creditor's single interest insurance in which the insurer has no subrogation right.\textsuperscript{236} Although the West Virginia Act specifically disallows the imposition of a requirement that life, accident, or health insurance be purchased by the consumer or that it be purchased from the creditor, a particular agent, broker, or insurance company as a condition precedent to the granting of credit, as to other forms of insurance a requirement may be imposed that it be purchased and/or purchased from a particular source.\textsuperscript{237} Conceivably, the cost of acquir-

\begin{table}
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\textbf{identical provision exists in UCCC §§ 2.202(1)(c), 3.202(1)(d) 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5062, 5182 (1975).} \\
\textbf{234} See text accompanying notes 248-252. The "permissible additional charge for other benefits conferred on the consumer" criteria of being excluded as a permissible additional charge from the sales or loan finance charge by rule adopted by the commissioner is meaningless. Additional charges are already excluded by the definitions of sales and loan finance charges. W. VA. CODE ANN. § 46A-1-102(23)(a)(ii), id. § 46A-1-102 (39)(b).} \\
\textbf{233} Id. 46A-3-109(1)(b).} \\
\textbf{233} Id. 46A-3-109(2). In addition, id. 46A-3-109(2)(e) allows a creditor to add the premium to the principal or amount financed (cash price) or deduct the premium from proceeds of a loan. If the premium is deducted from the proceeds of a loan in advance, the time factor will increase the variance between the West Virginia rate and the federally disclosed rate.} \\
\textbf{237} Although the required purchase of life, health, or accident insurance from the creditor or a designated agent, broker, or insurance company is disallowed under W. VA. CODE ANN. § 46A-3-109(2)(e) (Cum. Supp. 1974), any liability or penalty for enforcing such a requirement arises not from the violation of id. § 46A-3-109(2)(e) but from imposition of an excess finance charge. The excess charge results from the improper inclusion of required insurance in the amount financed rather than in the finance charge. Absent close scrutiny of the West Virginia statute by a consumer, this overcharge will not be noticed. \\
\hline
\end{tabular}
\end{table}
ing such required insurance can be placed in the amount financed by force of the provisions in the WVCCPA for additional charges.\textsuperscript{268}

The definitions of "sale" and "loan finance charge" present a conflict when read in connection with the provisions for additional charges. The finance charge provisions indicate that "all charges payable directly or indirectly by the buyer (debtor) and imposed directly or indirectly by the seller (lender) . . . as incident to the extension of credit . . . " are to be included in the finance charge.\textsuperscript{269} These provisions are identical to those of the UCCC and of the FCCPA.\textsuperscript{270} The interpretation given by the Federal Reserve Board to those provisions is that the finance charge shall be "the sum of all charges, payable directly or indirectly by the consumer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit . . . ." unless otherwise excluded.\textsuperscript{271} Assuming the FRB interpretation would be applicable to or persuasive with respect to the WVCCPA, it appears that a finance charge must include any required charges that are an incident to the extension of credit under the WVCCPA.\textsuperscript{272} Thus, required insurance should be placed into the finance charge—not into the amount financed.

On the other hand, not all required insurance is disallowed as an additional charge in the amount financed under the West Virginia Act. Both the sales and loan finance charge definitions exclude additional charges.\textsuperscript{273} It is possible under the construction of these two conflicting provisions that some required insurance may be added to the amount financed, rather than to the finance charge. Such shifting, as discussed previously, increases the effective rate of finance charges above the maximum rates set by article three of the WVCCPA. But it should also be remembered that any such shifting bears the potential for subsequent violation of the Truth-in-Lending Act.\textsuperscript{274}

\textsuperscript{268} W. VA. CODE ANN. § 46A-3-109(1)(b) (Cum. Supp. 1974) allows charges for insurance to be added to the amount financed through the inclusion of additional charges in the definition of amount financed, and, therefore, a potential shifting.
\textsuperscript{269} Id. § 46A-1-102(39)(a), (23)(a)(i).
\textsuperscript{270} U.C.C.C. §§ 2.109(1), comment 1; 3.109(1), comment 1 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5049, 5169 (1975); 15 U.S.C. 1605(a) (1970).
\textsuperscript{271} FRB Reg. Z, 12 C.F.R. § 226.4(a) (Rev. ed. 1974).
\textsuperscript{272} This interpretation is in accord with the legislative intent expressed in W. VA. CODE ANN. § 46A-6-101(1) (Cum. Supp. 1974).
\textsuperscript{273} Id. §§ 46A-1-102(39)(b), 23(a)(ii).
\textsuperscript{274} See text accompanying notes 248-252.
To require the addition of non-optional insurance premiums to the finance charge is theoretically justified. These charges occur because the transaction was for credit and not for cash. Moreover, when coupled with the past and present abuses connected with credit related insurance, such as rebates of consumer premiums from insurance companies to the creditor, such mandatory inclusion of non-optional insurance premiums in the finance charge is necessary to prevent maximum finance charge rate avoidance.275 The alternative means to prevent such avoidance is strict regulation of credit related insurance purchases.

Of the types of insurance permitted to be added as additional charges under the West Virginia Act, only property insurance seems to have been modeled after the Truth-in-Lending Act, and without substantial change.276 Both permit the premiums to be added onto the amount financed if the creditor furnishes

a clear and specific statement in writing to the debtor, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the debtor may choose the person through whom the insurance is to be obtained.277

Even if property insurance is required by the creditor, the disclosure required by the provision above of the West Virginia Act will satisfy the federal disclosure requirements. Therefore, the premiums may be included in the amount financed without violation of either the WVCCPA or the FCCPA.278

Although the WVCCPA specifies that life, accident, and health insurance may not be required by the creditor as a condition precedent to the extension of credit, it is possible for a creditor, as discussed above, to include the cost of such insurance within the amount financed through the provisions allowing additional charges. But a creditor doing so risks violation of the Truth-in-Lending Act. Anytime these forms of insurance are written in connection with a consumer credit transaction, the FCCPA requires the premiums to be included in the finance charge, unless

the consumer is informed in writing that the insurance is voluntary and the consumer indicates in writing a specific desire for such insurance. This form of disclosure is mandated whether or not the insurance is required. But neither written notification of the optionality nor a statement of the debtor's affirmative consent is required under the additional charge provisions of the WVCCPA. Consequently, some optional life, health, or accident insurance premiums that may be included in the amount financed under the West Virginia Act must, without disclosure, be placed in the finance charge under the Truth-in-Lending Act. Again, this different placement under the State and federal Acts will not necessarily cause a violation of either the WVCCPA or the FCCPA on the initial financing of a credit transaction. However, should a subsequent refinancing, prepayment, or consolidation occur, a violation of the Truth-in-Lending Act would arise for a creditor who relied on the State allocation of life, accident, or health insurance premiums to the amount financed for State finance rate purposes and who placed them in the finance charge for federal disclosure purposes.

In summary, because of inconsistencies in the definitions of sales and loan finance charges and of the amount financed, the provisions for additional charges and advances to perform covenants of a consumer may allow avoidance of the finance rate maximums. But a creditor who relies on these West Virginia sections may violate the Truth-in-Lending Act—if not at the initial financing, then when a rebate occurs.


The inclusion of accumulated unpaid delinquency and deferral charges in the amount financed on a prepayment, in any man-

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280 For vendor's single interest insurance written in connection with a credit transaction, Regulation Z excludes the premiums from the finance charge if the insurer waives all right of subrogation and complies with the disclosures in 12 C.F.R. § 226.4(a)(6). FRB Reg. Z, 12 C.F.R. § 226.404 (Rev. ed. 1974). West Virginia allows vendor's single interest insurance to be placed in the amount financed only if the insurer has no right of subrogation and disclosures similar to the federal provisions are made by the creditor to the debtor. W. Va. Code ANN. §§ 46A-3-109(2), -2(2)(d) (Cum. Supp. 1974). Essentially, both statutes allow this item to be included in the amount financed under identical requirements.
ner, of a debt under the WVCCPA may cause a West Virginia creditor to violate the FCCPA. In addition, the attempt by the WVCCPA to give certain creditors preferences on consolidation of debts, through sloppy drafting or planned exception, has created inconsistent subsections under the consolidation provisions of the WVCCPA. By combination of the provisions from the UCCC, the NCA, and the formerly applicable sections of West Virginia Code, the article explains how the drafters' failure to consider the overall legislative scheme of the various acts has created difficulties in the application of the WVCCPA through the absence of necessary definitions of terms. In particular, the absence of definitions for "creditor," "consumer credit transaction," and "arising out of a consumer credit sale," results in conflicting interpretations as to which creditors may consolidate and what credit transactions may be consolidated. Finally, there will be interpretive problems that arise from the Act's specification of different finance charge rates for various types of creditors in at least seven different sections, in combination with the requirement that all creditors follow the same provisions for refinancing, prepayment, consolidation, and rebates.\footnote{Prior to reading the discussion that follows, the reader should study W. Va. Code Ann. §§ 46A-3-107, -108, -111 to -114 (Cum. Supp. 1974); 16 U.S.C. § 1605 (1970); FRB Reg. Z, 12 C.F.R. §§ 226.4(c), 226.8(j) (Rev. ed. 1974).}

Since many consumer credit transactions are subsequently prepaid, refinanced, or consolidated, the applicable provisions of the WVCCPA must be scrutinized to determine if rate avoidance or Truth-in-Lending Act violations may thereby occur. To properly analyze these types of transactions, the section on rebates must be read in conjunction with those dealing with refinancing and consolidation.\footnote{The refinancing provision applicable to consumer credit sales and consumer loans is W. Va. Code Ann. § 46A-3-107 (Cum. Supp. 1974). The provision for consolidation of sales or loan finance charges, is id. § 46A-3-108. The section on rebates and application of payments is id. § 46A-3-111.}

Any precomputed consumer credit sale or consumer loan that is prepaid in full by cash, refinancing, consolidation, or other method is subject to the "Rule of 78" for rebate of a part of the finance charge on the prepaid obligation.\footnote{Id. § 46A-3-111(1), (2). The Rule of 78 is also known as the sum of the digits method. It is used to separate the earned finance charge from the unearned portion. By such separation, the consumer pays only the portion of the earned finance charge that corresponds with the balance due at the time of prepayment. To obtain the denominator, simply add the total number of months for which the obligation...} If rebate of a portion
of the finance charge on any existing obligation was not required, a refinancing of that obligation would include some unearned finance charges in the amount financed or principal of the subsequent transaction. Under the WVCCPA, the amount financed or principal of the subsequent refinancing transaction of a non-precomputed debt is the unpaid balance, plus accrued charges on the date of financing, plus deferred payments for additional charges, and plus accumulated unpaid delinquency or deferral charges. For a precomputed transaction, the amount financed or principal upon subsequent refinancing is the amount due at the time of prepayment, less the rebate available under the Act, less any minimum finance charge, and plus deferred payments of additional charges and accumulated unpaid deferral or delinquency charges. Refinancing may proceed under the WVCCPA not only under the provisions for refinancing but also under the provisions for consolidation of a precomputed debt. Once the amount refinanced or the refinanced principal has been determined, a finance charge rate is determined by the provisions on sales or loan finance

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was originally financed. For a two year loan, this is the sum of the numbers one to twenty four, or 233. The numerator is the reverse order summation of the number of months remaining on the loan after prepayment does or will occur. If a loan is prepaid in full after ten months, fourteen months remain. Thus, the numerator would be the sum of $14 + 13 + 12 + \ldots + 2 + 1$ or 105. To find the rebate, multiply 105/233 times the original amount of the finance charge for the entire life of the credit transaction. Beneficial Discount Co. v. Johnson, 211 S.E.2d 571, 573 n.1 (Va. 1975). 234 W. VA. CODE ANN. § 46A-3-107(1) to (3) (Cum. Supp. 1974).

235 Id. Regulation Z requires for disclosure purposes that any unearned portion of a finance charge, not deducted from the existing debt, be added to the new finance charge, as opposed to the amount financed. FRB Reg. Z, 12 C.F.R. § 226.8(j) (Rev. ed. 1974). The purpose of this procedure is to prevent an increase in the total finance charge as a result of including unearned finance charges in the amount financed or the principal.

If the creditor elects to keep the unearned charge in the amount financed, he may under Regulation Z charge a finance charge on these unearned items. A penalty exists for this election: the unearned finance charge included in the amount financed must be subtracted from the finance charge computed on the refinanced obligation. The result is a reduction of the effective rate of finance charge on the refinanced obligation.

The absence of disclosure requirements in the WVCCPA makes necessary the Act's requirement that rebates of unearned finance charges be excluded from the amount financed or principal of the refinanced transaction. Without such a rule, a creditor could place these unearned charges into the amount financed to comply with state finance rate maximums and as well into the finance charge to meet the FCCPA disclosure provisions.

charges.257 Thus, on refinancing an obligation may have the same or a different rate of finance charge as was applied to the prior debt.

Under a refinancing of either a precomputed or non-precomputed debt, certain sections of the WVCCPA pose difficulties of interpretation. The Act provides that the amount refinanced, or principal of the refinanced obligation, may be financed "at a rate not exceeding that permitted by the provisions on sales finance charge for consumer credit sales or loan finance charge for consumer loans, as the case may be."258 As already indicated, this wording possibly permits a higher rate of finance charge on the refinancing than was imposed on the original obligation. This approach is substantially similar to the UCC.259

Unlike the WVCCPA and the UCC, the National Consumer Act provisions on refinancing do not include accumulated unpaid delinquency or deferral charges in the new amount financed or principal.260 Aside from the consumer arguments against including unpaid "earned" delinquency or deferral charges in the new amount financed such inclusion potentially endangers the creditor.261 Despite the fact that charges for late payment, delinquency,

257 Id. § 46A-3-107.
258 Id.
259 UCC §§ 2.205, 3.205, 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5065, 5185 (1975). The National Consumer Act does not permit the creditor to charge a higher rate on the refinanced obligation. The maximum rate allowed on the refinanced obligation under the NCA is the rate disclosed on the original obligation before refinancing. NCA § 2.206, comment. Although the UCC does not expressly include delinquency or deferral charges in the amount financed, two undefined terms "unpaid balance" and "accrued charges" found in § 2.205 and § 3.205 of the UCC could include these charges. In addition, UCC §§ 2.210(7), 3.210(7), 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5070, 5190 (1975), specifically allow the collection or retention of delinquency charges on rebate upon prepayment. Consequently, a creditor can place delinquency and earned deferral charges into the amount financed on a refinancing. This is subject to the anticipation criteria of FRB Reg. Z, 12 C.F.R. § 226.4(c) (Rev. ed. 1974). See text accompanying note 289.
261 The consumer oriented argument rests in the creditor advantages of refinancing. Under a refinancing, the creditor obtains a greater dollar finance charge even if the rate is not changed. Generally, a creditor will increase the maturity period of the obligation and obtain a higher dollar finance charge partially due to the time factor. To the extent that permissible additional charges are incurred on refinancing by the consumer, the dollar finance charge increases further. Consequently, it is advantageous for a creditor to refinance even at the rate of the original transaction. Moreover, the creditor may, under the WVCCPA, be able to raise the
default or other such occurrences are not considered finance charges under the FCCPA if imposed as a result of unanticipated failures of a consumer to pay his obligation on time, deferral or delinquency charges as defined in the WVCCPA may be considered finance charges under the FCCPA, and as such cause violation by the creditor of the Federal Act. Although any earned deferral and any delinquency charge may be included in the amount financed on a refinancing under the WVCCPA, the Truth-in-Lending Act permits inclusion of such charges only if they are unanticipated. But since an anticipated deferral or delinquency charge is considered a finance charge under the FCCPA, on refinancing, only the earned portion may be added onto the amount financed or principal. Although a creditor could follow the

rate of finance charge on refinancing if the rate on the original transaction was not at the prescribed maximums.

These greater finance charges on refinancing represent the cost of extending repayment of the debt. One reason for refinancing a credit transaction is to avoid deferral and delinquency charges because of the debtor's inability to pay some or all of his installments. Since deferral and delinquency charges result from failure to pay these installments when due, a creditor who refines a debt with deferral and/or delinquency charges is charging more than once for the same consumer benefit—an extension of time for repayment of all or part of the existing debt in place of default. The addition of deferral or delinquency charges to the amount financed or principal on refinancing allows those charges to increase the cost of refinancing further. Under this approach to refinancing, the consumer is charged three times for an extension of the maturity date: once for any deferral or delinquency charge on the original obligation; again for the refinancing; and, third by application of the finance rate to the deferral or delinquency sum included in the amount financed or principal.

The writers believe the purpose of refinancing is to provide an extension of the payment period for the entire debt at a cost of increased finance charges; and that deferral and delinquency charges represent the cost of extending the payment period for part of the existing obligation. On this basis deferral and delinquency charges should be viewed as a finance charge for a separate credit transaction equal to the portion of the original transaction that is deferred or delinquent. Thus, it is inconsistent to permit a creditor who refines a credit transaction to charge a finance charge on the portion of the earned finance charge of the prior obligation, determined by the rebate allocation, and to charge a finance charge for the same deferral of earned finance charges a second time via inclusion of deferral or delinquency charges in the amount financed or principal.

**FRB Reg. Z, 12 C.F.R. § 226.4(c) (Rev. ed. 1974).**

**Id.** A vendor's charge for late payment under a credit plan requiring full payment of each billing within a stipulated period and not allowing installment payments may be a finance charge. FRB Reg. Z, 12 C.F.R. § 226.401 (Rev. ed. 1974). In this instance only the earned portion of this charge could be added onto the amount financed for a refinancing. Id. § 226.8(j).

WVCCPA provision authorizing inclusion of an anticipated deferral or delinquency charges in the amount financed for a refinancing and still be in compliance with the FCCPA, because without a duty to disclose under the WVCCPA the creditor has made no inconsistent disclosure, nevertheless, on a later refinancing, prepayment, or consolidation, the creditor may be found in violation of the Truth-in-Lending Act.295

When viewed from the consumer's perspective, the inclusion of a deferral or delinquency charge in the new amount financed represents a double charge for an extension of the repayment of the debt.296 The first charge is in the form of a deferral or delinquency charge in place of defaulting part or all of the original transaction.297 In effect, this is a charge for an extension of the repayment period. The second charge in terms of interest on the new amount financed is for an extension of the time for repayment of the entire unpaid obligation, which includes earned finance charges determined by the rebate procedure. Although, such a double charge for deferrals is not allowed for refinancing of an original transaction that was precomputed, or for a consolidation that refines a precomputed obligation,298 as to delinquency charges, no rebate of unearned charges is granted by the WVCCPA on the refinancing of the obligation,299 and thus as to delinquency charges, the WVCCPA permits an unjustified double charge.

Although no rebate of delinquency charges is required on refinancing, the WVCCPA requires such rebate when the creditor

In many transactions, the full amount of a deferral or default charge is earned because of their lump sum nature. As a result, many deferral or default charges that are anticipated under Regulation Z may still become part of the amount financed on a refinancing. The only form of anticipated late payment charges that may not be considered earned under the FCCPA is a late payment that varies with the time period of delinquency or deferral. Such a scheme is not, however, precluded under the WVCCPA from inclusion as delinquency and deferral charges. On the contrary the scheme seems clearly envisioned as to deferrals, W. Va. Code Ann. § 46A-3-114(1) (Cum. Supp. 1974), and as to delinquency charges, id. § 46A-3-112(1)(b).

295 See text accompanying notes 249-256 supra.
296 Double charge has been used to simplify the discussion. In reality, a triple charge exists. See discussion in note 291 supra.
297 See text accompanying note 290 supra.
298 W. Va. Code Ann. § 46A-3-114(1) (Cum. Supp. 1974) requires that on prepayment in full "during a deferral period, the portion of the deferral charge attributable to the unexpired full months in the deferral period shall be . . . rebated." The consolidation provision permits the refinancing of a precomputed obligation before its consolidation. Id. § 46A-3-108(1).
299 Id. §§ 46A-3-112, -114.
elects to convert certain defaulted precomputed credit transactions into non-precomputed ones, or when the creditor in effect unilaterally refinances a delinquent obligation. Upon exercising the conversion option the creditor must rebate any of the "delinquency or deferral charges made with respect to installments..."

Upon consideration of all of the above and in light of the objectives and the consumer cost of refinancing, it is inconsistent to require rebates of unearned deferral charges on a refinanced

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200 Id. § 46A-3-113(4).
201 Id. § 46A-3-112(4).
202 Id. This provision indicates that both unearned delinquency and deferral charges must be rebated if the creditor elects to convert a precomputed debt. The wording of this section may be interpreted in at least two ways. Id. § 46A-3-112(4) states:

If the creditor proceeds under this subsection, any delinquency or deferral charges made with respect to installments due at or after the maturity date of the delinquent installments shall be rebated, and no further delinquency or deferral charges shall be made.

Does this mean that all delinquency and deferral charges arising from the time that the installments that gave the creditor the conversion election were delinquent must be rebated? If so, then all of the deferral and delinquency charges on the delinquent installments from which the right to exercise the creditor conversion option arose, as well as such charges on any subsequent installments, must be rebated. No allowance is made under this interpretation for retention of any earned deferral charge or a delinquency charge.

Another interpretation of section 46A-3-112(4) is that rebate must be made of all delinquency or deferral charges on installments due on or after the date of the delinquent installments that created the conversion option. Under this interpretation, the creditor may retain deferral or delinquency charges for only the first two delinquent installments. The deferral charge under this second interpretation could be greater or less than that permitted for prepayment of an obligation under id. § 46A-3-114(1). It could be greater if the conversion option is not exercised after default on two consecutive deferral charges.

As to consumer sales it appears that the UCCC allows retention of all delinquency charges. UCCC §§ 2.210(7), 3.210(7); CCH Consumer Credit Guide ¶¶ 5070, 5190 (1975). But as to consumer loans "any delinquency or deferral charges made with respect to installments due at or after the date of the first delinquent installment shall be rebated, and no further delinquency or deferral charges shall be made." Id. § 3.203(4), ¶ 5183. Unfortunately, the West Virginia section is not this clear.

The National Consumer Act does not allow delinquency charges to be retained for any installment that is part of a refinancing or consolidation. This is true whether the refinancing or consolidation occurs contemporaneously with the delinquency charge or at a later time. NCA § 2.204(3), comment 1. Due to the differing treatment of delinquency charges by the UCCC and the National Consumer Act, neither is helpful in interpreting the West Virginia provisions.
transaction and not to allow rebates of delinquency charges. Moreover, this inconsistency is highlighted by the express requirement of rebates of delinquency charges for unilateral refinancing of a precomputed obligation by the creditor under the WVCCPA.303

For consolidation of consumer credit transactions, the same difficulties posed by the refinancing provision exist: the consolidation of a refinanced precomputed debt under the West Virginia Act may include anticipated unpaid delinquency and deferral charges in the amount financed or principal.204 An added consolidation problem may arise from the inconsistent treatment of deferral or delinquency charges permitted by the creditors unilateral refinancing of a debt.205

The remaining problems under the consolidation section of the WVCCPA arise from the specified method of finance charge rate determination.206 The Act presents three different procedures to determine which finance charge rate may be applied to the amount financed or principal in a consolidation. First, if the consolidated debts arise solely from a consumer credit sale, the rate is governed by the consumer credit sales finance charge section, section 46A-3-101. Second, although not as clearly stated, the consumer loan finance charge allowed by section 46A-3-104 governs consolidations of consumer loans.207 And third, a consumer loan

202 W. Va. Code Ann. § 46A-3-112(4) (Cum. Supp. 1974). This is true only if a deferred or delinquent debt is subsequently refinanced.

203 The section allowing consolidation of at least two consumer credit transactions owed to the same creditor permits the parties to agree to combine these obligations into a single schedule of payments. Id. § 46A-3-108(1). For consolidating these debts, subsection one prescribes the determination of the amount financed for precomputed and non-precomputed debts.

204 Id. § 46A-3-112(4). See discussion in note 302 supra.


206 Id. § (2); id. § 46A-3-104 is the only provision that logically governs consolidation because the remaining rate section for consumer loans applies to revolving loan accounts. To permit the use of the revolving loan account rates on consolidation would contradict the express exclusion of the identical section as applied to consumer credit sales. Id. § 46A-3-108(2). The terminology of the provision specifying the loan rate allowed on consolidation is probably not as precise as that applicable to consumer credit sales because the provision also applies to supervised lenders by cross reference in id. § 46A-4-107(3)(b). To require consolidated consumer loans to be governed solely by the rates stipulated in id. § 46A-3-104 would impose lower rates on the consolidated debt than on the original obligation owed to a supervised lender. In such a situation, the supervised lender would probably not agree to consolidation. The UCCC allows the supervised lender rate to apply in this case. UCC § 3.206(1)-(2), 1 CCH CONSUMER CREDIT GUIDE ¶ 5186 (1975).
may be consolidated with a consumer credit transaction arising from a consumer credit sale. If the consolidated debt is composed of a prior consumer loan and consumer credit sale, the creditor may charge the rate of finance charge for consumer credit sales on that portion of the consolidated amount financed that represents the prior consumer credit sale. The portion attributable to a prior consumer loan may be charged according to the rate provisions for consumer loans.308

The problems with the consolidation portions of the WVCCPA arise from its attempt to give certain parties to consumer credit transactions an optional method of debt consolidation.309 Apart from the problem of determining who are "parties" who may elect this alternate method of consolidation, there is an oversight in the wording. The Act states that "the parties may agree to the consolidation resulting in a single schedule of payments either pursuant to subsection (2) or by adding together the unpaid balances with respect to the two sales."310 This provision refers to the method for computing a schedule of payments in subsection two of the same section; however, subsection two discusses only the computation of the finance charge. Since a payment is composed of both a finance charge and a sum by which the principal or amount financed is reduced, the first phrase in the above quote is meaningless. With proper drafting the same provision should read "... pursuant to subsections (1) and (2)...."311

Prior to considering who may elect the second method of consolidation under section 46A-3-108(3), an understanding of the meaning of a seller, lender, creditor, and consumer credit transaction is necessary. The WVCCPA defines a seller (lender) as "... an assignee of the seller's (lender's) right to payment."312 Thus, an assignee of a seller is a seller and an assignee of a lender is a lender. The Act does not define a creditor. In its normal usage, creditor means anyone to whom money is due.313 Applying this normal usage to the WVCCPA, a creditor is anyone to whom money is due on a debt arising from a consumer credit sale, a consumer loan, a

309 Id. § 46A-3-108(3).
310 Id.
311 Subsection one of id. § 46A-3-108 sets forth the procedure used to compute the amount financed or principal of the consolidated debt; subsection two sets forth the procedure for determination of the finance charge.
312 Id. § 46A-1-102(20), (40).
313 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 533 (1961).
consumer lease, or a seller or lender credit card.\(^{314}\) Consumer credit transaction is also not defined in the West Virginia Act. In fact, only the National Consumer Act defines consumer credit transaction.\(^{315}\) The NCA definition of consumer credit transaction includes consumer credit sales, consumer leases, and consumer loans and transactions pursuant to seller or lender credit cards. But since the West Virginia Act specifically defines a consumer as “a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan,” a consumer credit transaction under the WVCCPA may only encompass a consumer credit sale or a consumer loan.\(^{316}\) Under such a construction, consumer leases are excluded from consumer credit transactions under the WVCCPA. Although such an interpretation is possible, it makes no sense to exclude a consumer lease from the definition of a consumer credit transaction. This is particularly true when one realizes that a consumer lease may be identical to a consumer credit sale except that the goods or services may not be totally purchased. In other words, a consumer lease may be a credit sale for part or all of the value of an equivalent consumer credit sale of the same good or service.\(^{317}\)

An alternate definition of consumer credit transaction under the WVCCPA could be all consumer credit sales, consumer loans, and consumer leases.\(^{318}\) Under this definition of consumer credit transaction, the WVCCPA would apply also to lender and seller credit card transactions.\(^{319}\) Under either definition of consumer credit transaction, a clever seller or lender could come within requirements necessary to have the option of consolidation methods. In order to have the option of consolidation methods presented in section 46A-3-103(3) of the WVCCPA, there must be a consumer credit transaction.\(^{314}\) Lender credit card is defined in W. Va. Code Ann. § 46A-1-102(21) (Cum. Supp. 1974). Seller credit card is defined in id. § 46A-1-102(41).

\(^{315}\) NCA § 1.301(10).


\(^{317}\) This is particularly true when the consumer has an option of subsequently purchasing the leased good or service. Also, to the extent that the leased price of a good or service over its life normally exceeds the purchase price, a finance charge is included in the lease payment.

\(^{318}\) This is the method used by the National Consumer Act to define consumer credit transaction. NCA § 1.301(10), comment 1.

\(^{319}\) Although lender credit card is not within the definition of a consumer credit sale or consumer lease, it is not specifically excluded under the consumer loan definition. W. Va. Code Ann. §§ 46A-1-102(12)(b), (13)(b), (14) (Cum. Supp. 1974). A seller credit card is included in the definition of a consumer credit sale. Id. § 46A-1-102 (12)(a)(i).
who "owes an unpaid balance to a creditor with respect to a consumer credit transaction arising out of a consumer credit sale, and becomes obligated on another consumer credit sale made by the same seller,. . ." What is "a consumer credit transaction arising out of a consumer credit sale"? Clearly, a consumer credit sale does not include a lender credit card. Regardless of the exclusion of lender credit cards from consumer credit sales, it is possible to have a consumer credit transaction arising from a consumer credit sale through the use of a lender credit card. This possibility depends on the meaning of "arising out of a consumer credit sale." If the consumer obtains a cash advance through a lender credit card to repay a consumer credit sale debt, a consumer loan has been made that is within either proffered definition of a consumer credit transaction. Then the use of the proceeds to repay a consumer credit sale debt may meet the criteria of arising out of a consumer credit sale. This construction relies on three factors: the nonexclusion of lender credit cards from consumer loans, the lack of any requirement that the consumer loan be for goods or services, and a liberal interpretation of "arising out of a consumer credit sale."

Should "arising out of a consumer credit sale" be construed in the strictest sense to require some degree of privity of contract between the seller who grants the credit and the consumer, only those consumer loans granted by the seller would come within the term "consumer credit transaction arising out of a consumer credit sale." By definition, the assignee of a seller's right to payment is a seller. Thus, a creditor who is fortunate enough to be an assignee of the seller's right to payment may obtain the consolidation option.

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320 Id. § 46A-1-102 (12)(b). Despite the fact that this provision precludes from definition of a sale the use of a lender credit card when the seller allows the buyer to purchase pursuant to a lender credit card, it does not necessarily exclude from sale the case where the consumer borrows money through the lender credit card and purchases the items from the seller with the proceeds. This transaction would come within the definition of a consumer credit transaction but not within a consumer credit sale because the seller did not grant the credit. Id. § 46A-1-102(12)(a)(i).

321 Id. § 46A-1-102(14)(a)(b) requires that the debt be "incurred primarily for a personal, family household or agricultural purpose."

322 Id. § 46A-1-102(40).

323 To obtain the option under id. § 46A-3-108(3) one more condition must be met; the second consumer credit transaction must arise out of another consumer credit sale made by the same seller.
Once an interpretation of "arising out of a consumer credit transaction" is made, a further restriction is met: the other consumer credit transaction must also arise out of a consumer credit sale from the same seller. For the initial seller of the goods or services, this second criteria presents no problem. But since "seller" is synonymous with the assignee of the seller's right to payment, literal application of the definition of a seller permits the consolidation of two consumer credit transactions arising out of a consumer credit sale from two different sellers. If a creditor makes sales of goods and services on credit and takes assignments from sellers, as well, he could take an assignment of a consumer credit sale and be a seller within section 46A-3-108(3). Then the creditor could make a consumer credit sale to the consumer whose sale he is now assignee of and be the seller in both transactions for purposes of consolidation.

The mental gymnastics above, which one must perform to interpret this consolidation section of the WVCCPA, are unnecessary and are the result of an apparent attempt to grant a benefit to only one class of creditor. To the extent that this provision was written for the benefit of one class of creditors, it has not necessarily achieved its aim. As shown by literal application of the definition of a seller, the scope of section 46A-3-108(3) can include creditors other than the actual seller. This expansion is due to the absence of definitions for "creditor" and "consumer credit transaction" which are necessary to interpret "consumer credit transaction arising out of a consumer credit sale."

If section 46A-3-108(3) of the WVCCPA was not written for a special class of creditors, it makes no sense unless considered in light of the drafting techniques. Throughout article three of the WVCCPA, the drafters have attempted to write the provisions for refinancing, consolidation, prepayment and rebates for both consumer credit sales and consumer loans in single sections. Such a procedure is possible, as is the case under the NCA, when both lenders and sellers are treated identically and are called creditors for consumer credit purposes.325 But unfortunately, the WVCCPA

325 The National Consumer Act treats both lenders and sellers as the same creditor for finance charge rate purposes and does not attempt to exclude certain consumer credit transactions such as the lender credit card provisions in certain sections of the WVCCPA. NCA § 2.201, comment 3. The UCCC treats sellers and lenders differently, and uses separate articles to set forth finance charge rates, refinancing, prepayment, consolidation, and rebates. UCCC §§ 2.101 et seq., 3.101 et seq., 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5043 et seq., 5161 et seq. (1975).

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drafters did not adopt the National Consumer Act's use of identical treatment of sellers and lenders for finance charge purposes. Moreover, they did not eliminate inconsistencies or interpretation difficulties that are caused by piecemeal adoption and rewriting of portions of two or more model acts.228

4. Delinquency and Deferral Charges

The WVCCPA contains two sections governing the imposition of delinquency charges on precomputed and non-precomputed

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228 A further example of this problem is in the adoption of finance charge rates applicable to finance the consolidation of a consumer loan and a consumer credit sale. W. Va. Code Ann. § 46A-3-108(2) (Cum. Supp. 1974). The WVCCPA allows a creditor to determine the total finance charge of the consolidated debt by applying the sales finance charge rate on that portion of the obligation that represents the consumer credit sale and the loan finance charge rate on that portion of the obligation attributable to the consumer loan. Id. Such a procedure is not necessary under the National Consumer Act because the finance charge rate section governs all creditors. NCA § 2.201, comment 3. The UCCC does not permit a creditor who is a seller to consolidate a consumer loan and a debt from a consumer credit sale, although a lender may do so. UCCC §§ 2.206, 3.206, 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5066, 5186 (1975). The West Virginia Act attempts to moderate UCC § 3.206 in two ways: first, by allowing both seller and lender to consolidate a consumer loan with a consumer credit sale transaction; second, by proscribing the application by the creditor of the higher finance rate, whether consumer sales or consumer loan, to the full amount financed or principal of the consolidated obligation. Since only the lender may consolidate under the UCCC in this situation the principal on consolidation must be charged under the applicable lender rate. UCC § 3.206(2), 1 CCH CONSUMER CREDIT GUIDE ¶ 5186 (1975).

The adoption and combination of different provisions from model acts by mere rearrangement or integration presents significant difficulties under the WVCCPA when some terms are not used in one model act or are defined differently. Although the terms consumer credit transaction and creditor are used and defined in the National Consumer Act, neither term is defined in the UCCC or the West Virginia Act. Moreover, the UCCC does not use the term "consumer credit transaction" in its sections on rebates, refinancing, consolidation, prepayment, or finance charge rates. When a drafter attempts to limit or otherwise alter provisions from a model act and uses terms out of their original context, the potential for interpretation problems increases further.

Finally, the addition of a provision not contemplated by any of the model acts complicates matters beyond reason. Subsection three of W. Va. Code Ann. § 46A-3-108 (Cum. Supp. 1974) is one example; subsection four of that provision is another. Subsection four is an exception to the attribution rule of subsection two that requires the portion of the amount consolidated in consolidation of a consumer loan with a debt from a consumer credit sale that is attributable to the loan to be charged according to the rate provisions for consumer loans and that provision which is attributable to the sale to be charged according to consumer sale rates. Subsection four provides that a creditor consolidating a consumer credit sale of real
consumer credit sales and consumer loans.\textsuperscript{327} Particularly with respect to supervised lenders, these sections make significant changes from prior practice.\textsuperscript{328} For example, the order of the application of payments on installments is the order in which they fall due,\textsuperscript{329} except as provided in the delinquency subsections.\textsuperscript{330} The order of application of payments as to delinquent obligations is first, to satisfy current installments, second, to satisfy delinquent installments, and finally, to pay delinquency and other charges. Another change in the prior practice is in the rate of delinquency charges. The creditor of a precomputed debt has an option as to the rate imposed: the creditor may impose five percent of the unpaid amount of the delinquent installment, up to five dollars, with one dollar as a minimum, or he may impose the deferral charge that would be allowed to defer the installment for the delinquency period.\textsuperscript{331} In contrast the creditor of a non-precomputed debt has no option; he may not use the equivalent deferral charge as an option for computing the delinquency charge.\textsuperscript{332} The differing treatment of precomputed and non-precomputed debts arises from the nature of the two obligations. Unlike a non-precomputed debt, a precomputed obligation is composed of the amount financed and the sales finance charge, computed in advance on the theory that all installments will be paid when due.\textsuperscript{333} A failure to pay on time deprives the creditor of the opportunity to earn additional income on both the principal and finance charge for the period of delay. For non-precomputed debts, the finance charge is not calculated on the assumption that all installments will be paid when due. Rather in fact, the non-precomputed finance charge is based on the size of the unpaid balance and the period during which it is unpaid. Consequently, the creditor still earns on the unpaid debt

\textsuperscript{327} W. VA. CODE ANN. §§ 46A-3-112,-113 (Cum. Supp. 1974). For a discussion of the application of the id. § 46A-3-112(4) delinquency charge provision on creditor conversion of a precomputed debt to a non-precomputed obligation, see text accompanying notes 300-303 supra. This provision appears to be taken from UCCC § 3.203(4) and repealed W. VA. CODE ANN. § 4-7A-13(7) (1966).

\textsuperscript{328} Supervised lenders were governed by W. VA. CODE ANN. § 47-7A-13(4) (1966) as to delinquency charges.

\textsuperscript{329} Id. § 46A-3-111(1).

\textsuperscript{330} Id. §§ 46A-3-112(3),-113(3).

\textsuperscript{331} Id. § 46A-3-112(1)(a-b).

\textsuperscript{332} Id. § 46A-3-113(1).

\textsuperscript{333} Id. §§ 46A-3-101(2)(a),-104(2)(a); id. § 46A-4-107(3)(a).
during the period of delay. His only loss resulting from nonpayment is from lack of use of the payment. For this reason, precomputed obligations should be allowed a greater delinquency charge. The difference in the ability to earn additional interest on late payments appears to be the justification for granting only the creditor of a precomputed debt the option of using the equivalent deferral charge as the delinquency charge. Thus, by separate treatment of precomputed and non-precomputed debts the WVCCPA recognizes differences in the cost to the creditor of those different credit forms. This valid distinction is not recognized in the National Consumer Act or the UCCC.334

Several additional changes with respect to delinquency charges have been made in sections 46A-3-112 and 46A-3-113 of the Act. Both sections indicate that creditors may contract for delinquency charges and that a delinquency charge may be imposed on any installment not paid in full.335 Under prior practice, a small lender could unilaterally impose a delinquency charge on installments only "if one half or more of any installment remains unpaid. . ."336

The WVCCPA provides that both a delinquency and deferral charge may be incurred on a deferred installment of a precomputed debt;337 and only precomputed debts may have a deferral charge imposed on them.338 These provisions benefit both the creditor and the consumer. In particular, the amount of deferral charge permitted for and the number of installments that may be deferred have increased for small loans, under the WVCCPA.339 It should be

334 NCA § 3.204; UCC § 2.203, 3.203, 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5063, 5183 (1971). Although the UCC grants the creditor the same options in determining delinquency charges granted by the WVCCPA, the UCC delinquency provisions apply only to precomputed debt. Id. § 2.203, comment 1, ¶ 5063. This is based on a misunderstanding of the components of the creditor's opportunity cost resulting from a delinquent payment. There are two parts of such opportunity cost: loss of finance charges for the delay period and loss of earnings from the inability to reinvest the payment. Precomputed debt has both the above opportunity costs while non-precomputed debt has only the second.

336 Id. § 47-7A-13(4) (1966).
337 Id. § 46A-3-112(2) (Cum. Supp. 1974).
338 Id. § 46A-3-114(1).
339 Under prior practice only wholly unpaid installments could be deferred by small lenders; and the rate of deferral was two cents per month per dollar of the installment(s) deferred. Id. § 47-7A-13(5) (1966). Id. § 46A-3-114(1) (Cum. Supp. 1974) permits deferral of all or part of an unpaid installment and a deferral charge.
kept in mind, as already mentioned, that any unearned deferral charge must be rebated on prepayment in full, refinancing, or consolidation.340

Two remaining provisions of the WVCCPA pertaining to financing need to be briefly discussed. Similar to the model consumer credit acts, the West Virginia Act creates a general right to prepayment in full, without penalty,341 except in consumer credit sales of real estate and in “a non-precomputed consumer loan secured by an interest in land and subject to the provisions on rebate upon prepayment...”342 The exclusion above of non-precomputed loans secured by real estate is meaningless, however, because a non-precomputed consumer loan is not subject to the provisions on rebate upon prepayment. Section 46A-3-111 is the rebate section of the WVCCPA referred to in the exclusion and only a precomputed debt is within its terms.343

Finally, the WVCCPA specifically allows supervised financial organizations that are assignees of a consumer credit sale to collect, receive or enforce the sales finance charge provided in said contract, and [provides that] any such charge so collected, received or enforced by an assignee shall not be deemed usurious or in violation of this chapter or any other provision of this code if such sales finance charge does not exceed the limits permitted to be charged by a seller under the provisions of this chapter.344

By force of the above, a supervised financial organization will find it more profitable in some consumer transactions, to take assignments of consumer credit sale contracts rather than to make loans. The clearest example where this would be the case is where the seller’s interest rate maximum is greater than the lender’s rate maximum. Thus, a lender can avoid the rate maximums through the guise of an assignment of a consumer credit sale contract.

equal to the finance charge of the first deferral installment multiplied by the number of months of the deferral.

340 The problem of rebating is discussed in notes 298 and 302.
343 Id. § 46A-3-111(2).
344 Id. § 46A-3-104(4).
5. The Supervised Lender

The WVCCPA repeals the former law regulating small loans and specifies the licensing procedure by which creditors may become supervised lenders. The administrative procedures for licensing will not be discussed in this article. Moreover, the WVCCPA prescription of finance rate maximums applicable to supervised lenders has already been discussed. Similarly, because the Act through incorporation by reference makes the provisions on refinancing, consolidation, and prepayment of a consumer credit sale or consumer loan equally applicable with respect to a supervised loan, the reader should refer to the discussion of these provisions above with respect to consumer credit sales and consumer loans. Similarly, although not incorporated by reference, the provisions discussed earlier in this article on delinquency, deferral, additional charges, insurance, the right to prepay, and advances to perform consumer covenants also govern supervised lenders.

With respect to interest rates applicable to supervised lenders two provisions of the WVCCPA are significant. First, the WVCCPA raises the upper range on which the maximum finance charge may be applied by supervised lenders. Under former law, the ranges were $0 to $200, $201 to $600, and $600 to $800. The new ranges are identical, except the $601 to $800 range has been expanded to $601 to $1200. As a result, any loan by a supervised lender, now above $1200, is limited to six percent per annum. Finally, the use of multiple loan agreements is specifically barred under the WVCCPA, when used by a supervised lender with the intent to obtain a higher loan finance charge than would otherwise be permitted.

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245 Id. § 46A-4-112. The repealed portions are id. §§ 47-7A-1 et seq. (1966).
247 Id. § 46A-4-107(3)(b).
248 See text accompanying note 252 supra.
249 A supervised loan is defined as "a consumer loan made by other than a supervised financial organization . . ." Id. § 46A-1-102(45). A discussion of the provisions on deferral, delinquency, additional charges, insurance, the right to prepay, and advances to perform consumer covenants, is found in the text accompanying notes 228 to 280 supra.
251 Id. § 46A-4-107(2)(a)-(c), 111 (Cum. Supp. 1974).
252 Id. § 46A-4-111. Any loan above $1200 by a supervised lender is not a supervised loan by definition. Id. § 46A-1-102(45).
253 Id. § 46A-4-108. An example of a multiple loan agreement is: two $200 loans
E. Selected Consumer and Consumer Credit Protection Provisions

There is not enough space in this article to discuss at length the seventy-four sections of the Act found outside the finance charge and supervised lender sections previously discussed. Some have been chosen for discussion here because they are more important, some because they are of particular interest to the authors, and some because more information was available as to relevant legislative history. Many important sections and legal questions will not be discussed and, no doubt, will be the subject of further comment in future issues of this Review.

1. Confession of Judgement

The UCCC's treatment of confessions of judgement, commonly called cognovit judgements, are interesting. The UCCC bifurcates this legal practice: it statutorily prohibits cognovit judgements in those situations where unfairness is common, but it does not prohibit them in other situations. The West Virginia Act follows this procedure, and yet all cognovit judgements have been invalid at common law in West Virginia for a long time.

A cognovit judgement is the legal device by which a debtor consents in advance to the creditor's obtaining a judgement without the debtor getting either notice or hearing.\textsuperscript{354} Cognovit or confession of judgement clauses can appear in all types of contracts, but they most often appear in promissory notes, where they are called cognovit notes. The purpose of the cognovit note is "to permit the note holder to obtain judgement without a trial of possible defenses which the signers of the notes might assert."\textsuperscript{355}

At first blush a clause giving away a party's right to notice and hearing before judgement is rendered against him seems onerously unfair and offensive to current ideas of fourteenth amendment due process. Accordingly, many states have disallowed the practice

\textsuperscript{354} Commonly a cognovit note operates through a clause in the note through which the signer authorizes the creditor's attorney, or any qualified attorney, to appear before a court and confess judgment against the person signing it. Such a practice was well established in common law, known at least as far back as Blackstone's time. 3 W. BLACKSTONE, COMMENTARIES 397.

\textsuperscript{355} Hadden v. Rumsey Prod., Inc., 196 F.2d 92, 96 (2d Cir. 1952).
through court decision or by statute. The constitutional challenge to cognovit judgements concentrates upon reasonable notice requirements and the opportunity to be heard. The Supreme Court examined these questions in companion opinions decided on February 24, 1972.

The first case, *D. H. Overmyer Co. v. Frick*, involved a routine construction subcontract in which Frick agreed to do the work and Overmyer agreed to make progress payments at specified times. Overmyer became delinquent in its payments and Frick refrained from further work. A postcontract agreement was reached by which Overmyer made an immediate partial payment and issued an installment note for the balance. Frick completed the work and Overmyer accepted the work as satisfactory. Thereupon Overmyer balked at payment, and the parties again entered negotiations. Overmyer, a large corporation which admitted to making tens of thousands of contracts in many states, was represented by counsel. A second post-contract agreement was reached wherein Frick reduced the monthly payment, reduced the interest rate, extended the payment period, and released three mechanics liens, all in exchange for a second mortgage and a confession-of-judgement provision. The court, stressing Overmyer’s equal bargaining power, its sophistication, its understanding of the cognovit clause, and the consideration received, held that Overmyer had effectively given away its right to present a defense. Nevertheless, the court cautioned, “Our holding necessarily means that a cognovit clause is not, per se, violative of the Fourteenth Amend-

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258 The court, especially in the concurring opinion by Douglas, pointed out that Ohio courts have broad powers to open confessed judgments so that if Overmyer had a legitimate defense he could get a court to hear it. 405 U.S. at 189, 190. The Ohio Supreme Court in *Livingstone v. Rebman*, 169 Ohio St. 109, 158 N.E.2d 366 (1959), had held that a court must suspend the judgment and send the issue to a jury if reasonable minds could reach different conclusions on the evidence supporting the debtor. Thus only a minimal obstacle impeded a real hearing of the debtor’s defense.
To some extent, the companion opinion of Swarb v. Lennox involved such other facts of other cases. In Swarb seven persons filed suit in the United States District Court on behalf of a class consisting of all Pennsylvania residents who have signed documents containing cognovit provisions that could lead to a confessed judgement in Philadelphia County. The defendants were the county prothonotary, the sheriff, and the officials responsible for recording and for executing such judgements. The complaint alleged that the Pennsylvania rules and statutes supporting cognovit judgements were unconstitutional on their face by depriving members of the class of procedural due process in the denial of notice and hearing before judgement, that the signing of the cognovit contract was not an intelligent and voluntary waiver, and that the plaintiffs only recourse was an action to strike or to reopen the judgement that was costly and burdensome to low income consumers.

The relief sought in Swarb was a declaration that the Pennsylvania rules and statutes are unconstitutional and an injunction restraining the defendants from recording and executing the cognovit judgements. A hearing was held before a three judge panel. The parties stipulated that they were unaware of the cognovit clause, would not have understood it if they had read it, were unable to bargain for it, and that some of the plaintiffs could not afford proceedings to strike or to reopen. Also stipulated as evidence was a sociological report entitled Consumers in Trouble, by David Caplovitz, showing that ninety-six percent of confessed-judgement debtors in Philadelphia had annual incomes of less than ten thousand dollars, that only thirty percent had graduated from high school, and that only fourteen percent knew that the contracts they were signing contained cognovit clauses.

The three judge court found the evidence sufficient to support a finding that those earning less than ten thousand dollars annually as a class, did not voluntarily, intentionally, and intelligently waive their constitutional rights to notice and a hearing.

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351 405 U.S. at 187, 188.
The court accordingly held that, as of November 1, 1970, the defendants were permanently enjoined from entering cognovit judgments against persons with annual incomes of less than $10,000, unless it is shown that at the time of executing the document the debtor "intentionally, understandingly, and voluntarily waived his rights lost under the Pennsylvania law." 304

Justice Blackmum, speaking for the Court, commented on the different results in the two cases. "[In Overmyer] we state that the decision is not controlling precedent for other facts of other cases and we refer to contracts of adhesion, to bargaining power disparity, and to the absence of anything received in return for a cognovit provision. When factors of this kind are present . . . 'other legal consequences may ensue'. . ." 305

Thus, the Supreme Court has drawn a line on cognovit notes. They are permissible in cases where, like Overmyer, the debtor is a business that knows about and understands the cognovit clause, has real bargaining power, and receives consideration in return for inclusion of the cognovit. They are not permissible in cases where, like the class in Swarb, the debtors are individual consumers, 306 not likely to know that the contract contains a cognovit clause, probably would not understand the clause if they read it, do not have the power to bargain over the terms of the agreement, and do not receive consideration in exchange for the inclusion of the cognovit term. 307

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304 405 U.S. at 199.
305 Id. at 201. The lower court determined the appropriate size of the class: The record does not support a determination that this action may be maintained as a class action on behalf of individual natural persons with incomes of over $10,000. . . . [O]nly 4% of the debtors in the Caplovitz study earned more than $10,000. There has been no showing that these plaintiffs are representative parties who fairly and adequately protect the interest of persons signing confession of judgments notes who have income over $10,000.

[But this is a class action] on behalf of those individual natural persons signing confession of judgement clauses in leases and consumer financing transactions who are residents of Pennsylvania having incomes of less than $10,000 a year.

314 F. Supp. at 1098, 1099.
306 Albeit a consumer whose annual income is less than $10,000. Yet, this is not to say that the court would not have found the same way for consumers with incomes over $10,000. It was simply that the plaintiffs in the case were found not to adequately represent the class. See note 305 supra.
307 Some credit consumers receive consideration for the cognovit clause in the
The UCCC also proscribes cognovit judgements. The UCCC provides that "a buyer or lessee may not authorize any person to confess judgement on a claim arising out of a consumer credit sale or a consumer lease." This rule does not distinguish between income groups; few laws do, or even could, with constitutional validity. Moreover, it does not allow the creditor to evade the prohibition by proving, as allowed in Overmyer, that the debtor intentionally, understandingly, voluntarily, and for consideration waived his rights. Evidently the drafters of the UCCC felt that in the total number of consumer credit transactions so few would truly satisfy the requirements for an effective waiver that problems could be avoided at little cost by having an absolute prohibition against cognovit judgements. Because these judgements are viewed unfavorably even if freely agreed upon, such a limitation upon the freedom of contract comes with little cost to society.

In West Virginia, confessions of judgement have been invalid at common law and by statute, except for confessions entered after a suit has been instituted by process. It appears that "[i]n the sense that they are such poor credit risks that they would not get the credit sale or loan if they would not agree to the cognovit. But many signers of cognovits are only slightly better than poor credit risks, and even with cognovits prohibited, would get the sale or loan at the same terms.

244 UCCC § 2.415, 1 CCH CONSUMER CREDIT GUIDE ¶ 5115 (1975). There are advantages in predictability and ease of judicial administration in having an arbitrary rule. There is probably some doubt about whether there is any commonly occurring type of consumer business (outside the twenty-ton yacht trade) which would involve a significant number of buyers who would know about, understand, and be able to bargain for a cognovit clause. There is no way to equalize bargaining power generally between the consumer buyer and the merchant seller or lender. Moreover, when interest charges are pressing the top of the legal interest rate it is difficult for the seller to give consideration in exchange for the cognovit. And although a seller might be able to prove the buyer saw the cognovit by having the buyer initial it, proving that he understood the cognovit might be difficult. Understanding is a state of mind. The best evidence of comprehension is the testimony of the buyer, the description of his actions, and the complexity of the cognovit clause. The first is predictable. The second, if limited to an admission of the buyers initialing, is not really persuasive in light of retail buying experiences of the average juror. As for the third, the cognovit clause is not particularly meaningful to the average buyer.

245 W. VA. CODE ANN. § 56-4-48 (1966). This is a written confession of liability written after service of process, which is then admitted as evidence in the judicial proceedings in which judgment is entered. There are no due process objections to such a confession of judgment because the party confessing judgment has notice and the opportunity to be heard. The value of this process is that it avoids needless litigation.
early Colonial history of Virginia, [cognovit notes] seem to have had considerable recognition, but their use was abolished, and prohibited by penal statutes, enacted in 1744, and they did not again come into use until that statute was repealed by the Code of 1849.”

The West Virginia Supreme Court halted attempts to revive this practice in 1912, in the case of Farquhar & Co. v. Dehaven.\textsuperscript{371} In that case a judgement note authorized the creditor, its agents, or any clerk or attorney of record to confess judgement against the debtor without notice and without instituting a formal action. The creditor argued that judgement notes were acceptable at common law, and the 1849 legislation repealing the 1744 statute reinstated the common law.

The court agreed that the repeal of the statute restored the common law but held that the use of cognovit judgements before 1744 was merely a “condemned . . . practice [which had] of late been introduced”\textsuperscript{372} and had never been recognized as legitimate at common law. The court, citing several other states’ laws held that to allow a defendant to bargain away the right to be heard in court was contrary to public policy and that a confession of judgement made prior to process was void on its face. This decision has been affirmed in recent years,\textsuperscript{373} and so the provision in the WVCCPA that prohibits cognovit judgements does nothing to the law of West Virginia other than cement the judicial attitude that such clauses are inequitable and against the public policy of the State.\textsuperscript{374}

\textsuperscript{370} Farquhar & Co. v. Dehaven, 70 W. Va. 738, 740, 75 S.E. 65 (1912). An 1819 revision of this penal statute provided: “If any attorney . . . shall presume to appear under any power of attorney made before action brought, for confessing . . . judgement to pass by default . . . for any defendant . . . such Attorney shall . . . forfeit and pay fifteen hundred dollars to such defendant, for his own use.” Revised Code of Virginia, ch. 76, § 12 (1819).

\textsuperscript{371} 70 W. Va. 738, 75 S.E. 65 (1912).

\textsuperscript{372} Id. at 740, 741, 75 S.E. at 66 (1912).

\textsuperscript{373} Perkins v. Hall, 123 W. Va. 707, 17 S.E.2d 785 (1941). But see Gavenda Bros. v. Elkins Limestone Co., 145 W. Va. 732, 116 S.E.2d 910 (1960), where the West Virginia Supreme Court of Appeals felt bound by the full faith and credit clause of the Constitution of the United States to enforce a cognovit judgment entered against the debtor in an Illinois court on an Illinois contract, even though enforcement involved contravention of some public policy of West Virginia.

\textsuperscript{374} The WVCCPA provision ends by stating: “the provisions of this section shall not be construed as in any way impliedly authorizing a confession of judgment in any other type of transaction.” W. VA. CODE ANN. § 46A-2-117 (Cum. Supp. 1974).
2. Home Solicitation Sales

Consistent with most recent consumer acts, the WVCCPA provides for the traditional three-day "cooling off" period within which to cancel a home solicitation sale.\(^{275}\) The WVCCPA defines a home solicitation sale as a consumer credit sale\(^{276}\) of over twenty-five dollars in which the buyer receives a solicitation of the sale at a place other than the seller's fixed place of business.\(^{277}\) The Act excludes from its definition of home solicitation sale sales pursuant to pre-existing revolving charge accounts; sales resulting from prior negotiations at the seller's place of business; sales of motor vehicles, mobile homes, or farm equipment; and sales governed by the Federal Truth-in-Lending rescission provisions. The federal three-day right to rescind is applicable to any transaction that might result in a security interest in real property.\(^{278}\)

The Act prescribes a specific form of written notice telling the buyer of the three-day right to cancel, requires that the buyer sign and date a written agreement in his own handwriting, and requires that the date of the agreement be the date of such signing.\(^{279}\) Not only can the buyer cancel the home solicitation sale by notifying the seller [u]ntil the seller has fully complied with this section,"\(^{280}\) but the WVCCPA provides that "[n]o such agreement or offer to purchase shall be effective until after it has been signed by the


\(^{276}\) The WVCCPA defines a consumer credit sale as a sale of goods, services, or an interest in land made by a seller who regularly engages as a seller in like credit transactions or by a seller to a natural person for personal, family, household, or agricultural purpose, where the debt is payable in installments or a finance charge is made and with respect to goods or services a lender credit card is not made, and the amount financed does not exceed $25,000. Id. § 46A-1-102(19). A sale which meets the above requirements but which is paid for in whole or in part by money received in a consumer loan by an interlocking lender is also a home solicitation sale. Id. But where the buyer has requested goods or services without delay because of a bona fide emergency, there is no right of cancellation or right to notice. Id. § 46A-2-132, -133.

\(^{277}\) Id. § 46A 1-102(19).


\(^{280}\) Id. Rescission rights likewise continue under the federal act until the timely opportunity is afforded following proper notice. See Palmer v. Wilson, 359 F. Supp. 1099 (N.D. Cal. 1973).
buyer, and he has written the date of such signature in his own handwriting. So if the buyer does not personally date the instrument, he has no duty to even pursue the cancellation procedures to prevent being bound to the contract.

This requirement that the buyer personally write in the date of the current day on the contract is a significant improvement in the area of rescission rights. Under the Federal Act, the standard procedure of the fraudulent home improvement contractor, for example, is to provide the buyer at the time the contract is made with a form instrument denoting only the cash price and indicating that such is the total cost. Sometime later, or even after completion of the work by the seller, the seller will ask for additional signatures on disclosure statements containing rescission notices that are back-dated to the date of the contract, thereby denying to the consumer any meaningful right to rescind.

Statutory cooling-off periods are provided in the WVCCPA to protect consumers from high pressure selling tactics exerted upon them in their home where they did not seek the goods and where they cannot escape by simply leaving. Because most people find it hard, or think it rude to ask a person to leave their house, the sales pitch continues and often the buyer will sign simply to get the salesperson to leave. Possible evasion of the WVCCPA protection might be possible if the seller orally promises credit terms and reduces only the price and the discription of the goods to writing. Since the WVCCPA only applies to home purchases on credit, a seller might successfully use the parol evidence rule and the written contract to avoid both the credit terms and the protection of the Act. Although a better reading of the parol evidence rule would allow evidence of the credit terms and the credit nature of the transaction into evidence, consumers who default by not appear-

332 Under the WVCCPA, such use of a back-dated right of rescission notice would not remove the buyer's right to cancel because the notice does not "designate as the date of the transaction the day on which the buyer signed it". Id. If the buyer also did not personally sign the current date, the agreement would not be effective, and the buyer would not have to bother to cancel. Id.
333 See note 376 supra. Although an oral assurance of credit and a description of the purported credit terms are made, the writing might not mention it, or might provide that if credit is not approved, the balance is to be paid at the end of the month.
334 If nothing is said in the writing as to terms of payment the evidence of the oral credit terms should be admissible as a consistent additional term under the
ing in court or who appear without counsel might be taken advantage of. The Attorney General could prevent this by promulgating a regulation requiring every home solicitation sale not made on credit to include in the buyer's handwriting a statement to the effect that "this sale does not involve the extension of credit but is to be paid in full by the end of the month, etc."  

3. Deficiency Judgements

The Act provides that if a seller or an interlocking lender repossesses or accepts surrender of goods in which he has a security interest to secure a debt arising from a consumer sale or a consumer loan, and the balance owed at that time is less than one thousand dollars, the buyer or borrower is not liable to the seller or lender for any unpaid balance following the seller's or lender's sale of the collateral. Conversely, if the seller or lender brings suit for the unpaid balance of the loan or sale when the balance due is less than one thousand dollars, the creditor may not repossess the property or subject it to sale following the judgement.

This section of the WVCCPA attempts to deal with what has been a major abuse in the area of consumer financing. The credit sale of a large ticket item (often an automobile) generally involves the taking of a security interest in the goods. Following the sale and an actual or alleged default, the creditor will then take possession of the collateral, sell the item, and sue for the difference between the proceeds of the sale and the obligation (the deficiency), adding the cost of repossession and sale. Often in actual practice, the creditor sells the property to himself, or to another with whom he has an unknown business relationship, for less than its actual value, and even if the sale is technically at arms-length, it is often sold at the same low price. Although the law mandates that the sale be made in a commercially reasonable manner, only the debtor has an interest in checking to see if in fact it was, and

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UCC, especially where a form contract drafted by the seller is used. See W. Va. Code Ann. § 46A-2-202 (1966). If the writing prescribes the method of payment as cash, the consumer would have to resort to the defense of fraud, unconscionability or would be forced to bring an action for a reformation of the contract.

335 The Attorney General has the power to adopt regulations to effectuate the purposes of this chapter and to prevent circumvention or evasion thereof. W. Va. Code Ann. § 46A-7-102 (Cum. Supp. 1974).

336 Id. § 46A-2-119(2) to (4).

337 Id. § 46A-2-119(7).

338 Id. § 46A-2-119(7).
usually being without legal counsel, the debtor fails to do so. The
creditor will then bring an action for a now inflated deficiency and,
in all but a very few lawsuits, will obtain a default judgement on
the deficiency since the debtor, if unable to make payments, is also
unable to obtain counsel. The effect of such a practice is of great
benefit to the creditor. By collecting on an inflated deficiency, the
creditor is able to secure a greater profit by a default than he would
by full performance of the contract.\textsuperscript{389} Some judges have attempted
to police this practice by refusing to give default judgements in
deficiency situations, demanding instead that the creditor prove
that the sale was made in a commercially reasonable manner.

This new provision should limit the widespread use of the
practice, but it will not stop the practice. First, the WVCCPA
section does not apply to obligations in which the balance owed at
the time of repossession or surrender exceeds one thousand dollars.
Many states have a higher threshold below which a deficiency may
not be sought.\textsuperscript{390} Furthermore, the pattern of grossly deflated sales
prices, inflated deficiencies, and default judgements will continue
in spite of the Act’s provision to the contrary. It appears that some
months after the enactment of the WVCCPA, many creditors con-
tinue to bring lawsuits for deficiencies, even though the balance
owed before repossession was less than one thousand dollars. If the
creditor indicates in his pleading that the original debt was partly
satisfied through a sale of secured property, a judge-or Justice of
the Peace whose jurisdiction now extends to $1500-who knows of
the Act’s protection might disallow the attempt to collect the defi-
ciency especially if the defendant is not represented by counsel or
fails to appear. But the judge might also treat the provision as an
affirmative defense and allow the deficiency, and probably will do
so if the defendant appears with counsel. If creditor uses a short
complaint,\textsuperscript{391} alleging the balance owed and attaching only the
original note or contract, the debtor or his attorney will have to
appear and assert the protection provided by the Act.

The sanctions under the WVCCPA for such continued abuse

\textsuperscript{389} See Shuchman, \textit{Profit on Default, An Archival Study of Automobile

\textsuperscript{390} See Cal. Civ. Code § 1812.5 (Deering 1972) (no deficiencies permitted); D.C.
Code Ann. § 28-3812(e)(3) (1973) (no deficiency if cash price is less than $2000); Md.
Ann. Code art. 83, § 148 (1975) (no deficiency if cash price is less than $2000); Ore.
Rev. Stat. § 83.830 (1974) (no deficiency if unpaid balance is less than $1250.)

\textsuperscript{391} A complaint similar to short forms 3 and 4 in Lugar & Silverstein, W. Va.
Rules 546-47 (1960) should be used.
are not really adequate, except against a creditor who repeatedly and willfully violates the provision. A consumer has no cause of action for a penalty because the conduct is not an unfair trade practice or a violation of those sections that give the consumer a cause of action to recover a civil penalty. If the consumer complains to the Attorney General, the Attorney General can investigate and issue a cease and desist order prohibiting future violations, or seek an injunction against future violations. If the creditor has engaged in a course of repeated and willful violations within the last four years, the attorney general can seek a penalty of up to five thousand dollars.

A remedy should be given to the injured consumer, who is the person most likely to discover the violations and have an interest in prosecuting. To do this, and to stop the part-time violator, or to avoid the problem of proving repeated violations, the WVCCPA should be amended to add unlawful suits for deficiency judgements or repossessions to those violations that give a consumer a cause of action to recover damages and a civil penalty of from one hundred to one thousand dollars. An alternate would be to add to the WVCCPA a provision requiring the plaintiff to plead part satisfaction by repossession in an action to collect on a consumer debt, imposing a penalty for not doing so and requiring a judge to deny the cause of action if the claim falls within the Act.

Because the prohibition of deficiency judgements applies only when the "amount owed" upon repossession is one thousand dollars or less, the question might arise as to whether the one thousand dollars refers to only the unpaid principal or to the sum of the unpaid principle and the remaining finance charges. For a seller who repossesses goods that gave rise to the debt, the use of the phrase "the balance owed for the goods repossessed" most clearly refers to the money represented by the goods, that is the balance of the cash price. For an interlocking lender who repossesses goods securing the debt, the use of the phrase "the balance

383 Id. § 46A-5-101(1).
384 Id. § 46A-7-101.
385 Id. § 46A-7-104.
386 Id. § 46A-7-106.
387 Id. § 46A-7-108.
388 Id. § 46A-7-111(2).
389 Id. § 46A-7-101(1).
390 Id. § 46A-2-119(2).
owed on the net proceeds of the loan paid to . . . the borrower”\textsuperscript{401} also most clearly means the capital of the loan and excludes the finance charges.

This interpretation is confirmed by a written presentation made to the Conference Committee by one of its members during the committee’s deliberations on the Act:

It has been suggested that we should return the language in subsection (2) of “cash price of $1500”, instead of the language which has been placed there, which consists of a “a balance owed of $1000.”\textsuperscript{402} The way the section reads now, if a buyer has a balance owing on the cash price of the goods of $1000 or less at the time the seller or assignee repossesses the goods, then the buyer is not liable to the seller for a deficiency judgement after the sale of the collateral. The language in the UCCC provided that said buyer was not liable for a deficiency judgement after repossession if the original cash price of the goods exceeded $1500. I suggest that the language which is in the section now relating to the balance owing on the cash price of the goods, reaches the abuse in a better fashion than the original language.\textsuperscript{403}

But for a seller who repossess goods that did not give rise to the debt, the use of the phrase “balance owed on such debt”\textsuperscript{404} seems to refer to the entire debt, including finance charges, less any amount which would have been allowed as rebate had full prepayment been made at the time of repossession.

The limitation on deficiency judgements is made applicable to attempts to collect on obligations made prior to the effective date of the WVCCPA: the chapter applies to “all consumer credit transactions made before this chapter becomes operative insofar as

\textsuperscript{401} Id. § 46A-2-119 (4).
\textsuperscript{402} The provision first proposed in the legislative committee was the UCCC version which applies to repossessions when the original cash price of the goods was $1600. UCCC § 5.103, 1 CCH CONSUMER CREDIT GUIDE ¶ 5313 (1975). The committee balked at the apparent scope of the $1500 coverage and readily accepted the $1000 figure as a compromise. But the $1000 substitute applies to the balance due upon the repossession and, therefore, applies to purchases above $1500. Since many defaults occur when the goods are deteriorating and the incentive to pay for new purchases has gone, the balance owed on expensive purchases has often been reduced to $1000 when the default occurs. The $1000 balance due measure probably gives more protection than the $1500 original price measure.
this chapter limits the remedies of creditors." A creditor might claim that such retroactivity is unconstitutional because in taking away a remedy the WVCCPA is taking away property without due process of law, and impairing the obligation of contracts.

In a case applying a similar statute, the Oklahoma Supreme Court held that the denial of deficiency judgement was not unconstitutional because a creditor has no property right to any particular form of remedy. As for the impairment of contract rights, it is well established that states by legislative act can change the remedies available to parties of private contracts without impairing the obligation of such contracts in violation of the contract clause. "The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions so seriously to impair the value of the right." Limitations on deficiency judgements leave as many remedies available to the creditor as do limitations on garnishment, limitations on assignment of earnings, and discharges in bankruptcy.

4. Assignment of Earnings and Garnishment

The provision in the WVCCPA restricting wage assignments corrects a wide-spread exploitative practice in West Virginia. Prior to the enactment of this section, a store closely affiliated with a specific employer, generally called the "company store" whether

405 Id. § 46A-8-101(3).
406 See W. Va. CONST. art. III, § 10; U.S. CONST. amend. XIV.
407 See W. Va. CONST. arts. III, IV; U.S. CONST. art. 1, § 10.
409 Sturges v. Crowninshield, 4 Wheat. 122 (1819); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903); Crane v. Hahlo, 258 U.S. 142 (1922); City of El Paso v. Simmons, 379 U.S. 497 (1965). "Scrip laws" in West Virginia, which prohibited the payment of wages in scrip redeemable only at the company store, or which construed the payment in scrip to be a promise to pay the sum specified therein in lawful money, have been held not to impair contract rights and to be a proper exercise of the police power under both the state and federal constitutions. See State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S.E. 1000 (1892); Atkins v. Grey Eagle Coal Co., 76 W. Va. 27, 84 S.E. 906 (1915); Holliday v. Elkhorn-Piney Coal Mining Co., 102 W. Va. 147, 134 S.E. 736 (1926).
or not owned by the employer, often had access to one hundred percent of the employee's wages. The store would extend the employee more credit than he could repay from his surplus salary and then require the employee to assign all of his wages to the store. Without money, or the promise of earnings, the employee could not secure credit elsewhere, and his only recourse was to return to the company store for necessities of life, often at inflated prices. To secure cash for other necessities such as rent or utilities, the wage-earner was often forced to buy large-ticket items and sell them to a friend at a fraction of their value, thereby further snowballing the exploitative practice.

The statute dealing with wage assignments prior to the new law was either unenforced, or was interpreted to the detriment of the wage-earner. Generally, the West Virginia statutory law limits wage assignments to twenty-five percent of an individual's earnings, and prescribes a form for such wage assignments. However, the statute goes on to create an exception: "Provided further, that nothing herein contained shall be construed as affecting the right of employer and employee to agree between themselves as to deductions to be made from the payroll of employees." Many employers construe this to mean that no limitation is placed upon wage assignments so long as the employer and employee initially agree to the wage assignments. Yet the term "deductions" would seem to refer to a limited category of wage subtractions. For example, union dues, charitable contributions, and payroll savings plans are types of withholdings connoted by the word "deductions." Such an interpretation is consistent with the use of the term in the wage assignment statutes of other states. Moreover,

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412 No assignment of an order for future wages shall be valid for a period exceeding one year from the date of such assignment or order. Such assignment or order shall be acknowledged by the party making the same before a notary public or other officer authorized to take acknowledgements, and such order or assignment shall specify thereon the total amount due and collectible by virtue of the same and three-fourths of the periodical earnings or wages of the assignor shall at all times be exempt from such assignment or order and no assignment or order shall be valid which does not so state upon its face: Provided further, that no such order or assignment shall be valid unless the written acceptance of the employer of the assignor to the making thereof is enclosed thereon.  
Id. § 21-5-3 (1970 Replacement Volume).  
413 Id.  
414 Id.  
it is consistent with the rule of statutory construction which provides that remedial statutes are to be liberally construed to accomplish the purposes of the statute.\textsuperscript{416} And finally, a 1975 amendment to the general provisions on wages gives a similar definition of deductions.\textsuperscript{417}

The WVCCPA limits the assignment of earnings for the purpose of paying debts arising from consumer loans or from any sale of goods or services,\textsuperscript{418} to twenty-five percent of those earnings remaining after legally required deductions are withheld.\textsuperscript{419} It also makes any assignment of earnings or any agreed upon deduction revocable by the employee at will.\textsuperscript{420} Included in assignments of earnings, as used in the twenty-five percent limitation, are all types of wage transfers, including deductions, transfers, sales of earnings, and deductions, except deductions for union dues, pension plans, payroll savings plans, charities, stock purchase plans, and medical insurance.\textsuperscript{421} All assignments and deductions seem to be included in the employees right to revoke.

Under pre-existing code provisions, all wage assignments, except those defined as deductions under the new definition\textsuperscript{422} are

\textsuperscript{416} See Hasson v. Chester, 67 W. Va. 278, 67 S.E. 731 (1910); Pfalzgraf v. County Court, 73 W. Va. 723, 81 S.E. 397 (1914). It is easily seen that to interpret the statute to mean that if the employer and the employee agree to have wages deducted and given to the creditor, a creditor can have access to the total amount of the employee's wages and thereby negate the effect of the statute. But see the use of the word deduction in W. Va. Code Ann. § 21-5-3 (1973 Replacement Volume).

\textsuperscript{417} The 1975 legislature provided a set of definitions for W. Va. Code Ann. § 21-5-1 to -8 (1973 Replacement Volume). The definition for the term "deductions" which is of course, now applicable to section three provides: "The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance." Enr. S.B. 482, W. Va. Code Ann. § 21-5-1 (1975).

\textsuperscript{418} The Act refers to "payment of . . . debts arising from one or more consumer credit sales or one or more consumer loans, or one or more sales as defined in section one hundred two, article six of this chapter." W. Va. Code Ann. § 46A-2-116(1) (Cum. Supp. 1974). Id. § 46A-6-102(c) includes as a sale "any goods for cash or credit or any services or offer for services for cash or credit."

\textsuperscript{419} Id. § 46A-2-116.

\textsuperscript{420} Id. § 46A-2-116(3).

\textsuperscript{421} Id. § 46A-2-116(2)(b).

invalid unless: the assignment states the total amount due, the assignment is notarized, and the employer endorses his acceptance on the agreement.\textsuperscript{423} Whether an assignment which fails to conform to these requirements makes the employer liable for a penalty under the Act is doubtful. First, the penalty section begins: "if a creditor has violated the provisions of this chapter"\textsuperscript{424} The chapter referred to, chapter 46A, only limits the amount of earnings that may be assigned, it does not prescribe the form necessary to effectuate such an assignment. That is done in chapter 21. Second, the penalty section subjects only a "creditor" to the penalty,\textsuperscript{425} and the duty to use the prescribed form probably falls upon the employer, who often is not the creditor.

Three provisions of the WVCCPA relate to wage garnishment, or "suggestee execution" as it has been known in this state. The Act insulates eighty percent of a consumer’s wages or an amount equal to thirty times the federal minimum hourly wage, whichever is greater, from all garnishment brought to collect on a consumer debt.\textsuperscript{426} Thus, the WVCCPA gives only minimal additional protection to the wage-earner because West Virginia law has long provided a twenty percent maximum to creditors.\textsuperscript{427} Whereas the existing statute limited suggestee execution to twenty percent of the total wages, the WVCCPA limits execution to twenty percent of "disposable earnings," which is something less. The provision excluding a minimum dollar amount from garnishment is identical to the provision in the FCCPA.\textsuperscript{428} The WVCCPA contains a novel concept in permitting the wage-earner to petition a court to have a wage execution set aside temporarily or permanently because the wage execution causes "undue hardship."\textsuperscript{429} This concept owes its origin to the recommendations of the National Commission on

\textsuperscript{423} W. VA. CODE ANN. § 21-5-3 (1973 Replacement Volume).


\textsuperscript{425} The employer withholds the wages and either keeps them for himself for a debt due him or sends them to a third party creditor. The penalties subjected fall upon the employer. Id. § 46A-5-101.


\textsuperscript{427} W. VA. CODE ANN. § 38-5A-3 (1966). It should be emphasized that the existing statute limits garnishment to twenty percent for the enforcement of any judgment, while the WVCCPA limits garnishment to the stricter twenty percent of take home wages, but this applies only for the enforcement of judgments arising from a consumer credit sale or a consumer loan.


Consumer Finance. The apparently open-ended standard should allow a court considerable flexibility in reducing or disallowing a garnishment.

Other wage-related provisions of the WVCCPA have only minimal effect. The provision disallowing garnishment before judgement has little or no effect because existing law allowed garnishment only to judgement creditors. The only possible previous exception was that under certain circumstances, wages could be the subject of an attachment proceedings; such proceedings have recently been ruled unconstitutional. The WVCCPA should settle any further question by prohibiting garnishment through the attachment statute for consumer debts.

Similar to the federal act, the WVCCPA prohibits discharge because of garnishment or attempted garnishment. The State act differs in that it applies only to garnishments brought to satisfy a judgement arising from a consumer credit sale or loan; the federal act applies to all garnishments. A further difference is that the WVCCPA prohibits discharge for any garnishment, while the federal act only prohibits discharge "for garnishment for any one indebtedness." The WVCCPA also provides the consumer a

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430 Consumer Credit in the United States, REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE 33 (1972). The WVCCPA provision was taken from the Field-Palumbo Bill, S.B. 338, H.B. 1060 (1973), drafted following the recommendations of this report.


432 Id. §§ 38-5A-2, -3 (1966); id. §§ 38-5B-1, -2.

433 Id. §§ 38-7-1 to -46. The West Virginia attachment statute allows a claimant who is suing or who is about to sue on a claim or a debt, to attach a defendant's property when there are grounds (id. § 38-7-2) to believe that the defendant might dispose of his property in order to defraud the possibly successful claimant. Id. § 38-7-7 includes personal property among that property attachable; and id. § 38-7-15 provides for garnishment.


435 The Act states that the creditor "may not attach unpaid earnings of the debtor by garnishment or like proceedings" prior to entry of judgment. W. VA. CODE ANN. § 46A-2-118 (Cum. Supp. 1974). That attachment is a "like proceeding" is made clear by the use of the word "garnishment" as the title of section 15 of the attachment statute. Id. § 38-7-1 to -46 (1966).


438 Id. See Johnson v. Pike Corp. of Am., 332 F. Supp. 490 (D. Cal. 1971). This probably means that there must be at least two non-consumer related garnishments before a resulting discharge can be legal. If there is one non-consumer related garnishment, a resulting discharge will violate the federal act. If a consumer related
cause of action to recover up to six weeks in resulting lost wages and reinstatement in the job.\textsuperscript{439}

Although it did not make it a part of the WVCCPA, the 1974 Legislature gave significant additional protection to wages by increasing from two hundred to one thousand dollars the amount of personal property a debtor can exempt from levy.\textsuperscript{440} If a debtor wants to protect his wages more than his other personal property, he can do so by listing the wages presently due him on a schedule that lists all of his personal property, note the wages and other personal property up to a combined total of one thousand dollars as that property he wants to exempt from levy, and deliver the schedule to the court officer (constable for a J.P. Court, circuit clerk for a circuit court) whose duty it is to levy on the existing judgment. Since the list only exempts that property actually owned by the debtor at the time the list is filed, the debtor must file a new list each pay period in order to exempt the newly earned wages.

The Act provides for the exemption of some personal property from execution brought to collect for consumer debts, but it does not extend its protection to wages due the debtor.\textsuperscript{441}

5. **Disclaimers and Privity**

The provisions that invalidate disclaimers of warranties and abolish privity as a requirement to recover on warranties will probably affect existing litigation practice more than anything else in the Act.\textsuperscript{442} The important part of the section concerning disclaimers states:

garnishment were to be added to a non-consumer related garnishment a resulting discharge would not violate the federal act because there would be two garnishments. Nevertheless, because the consumer related garnishment was needed to avoid the federal prohibition, any discharge would be a result of that consumer related garnishment, and this would violate the WVCCPA.
\textsuperscript{440} Id. §§ 38-8-1-3. This amendment to the Code's exemptions from levy implements the 1973 constitutional amendment which increased the homestead exemption from $1000 to $5000 and the personal property exemption from $200 to $1000. W. VA. CONST. art. VI, § 48. The increase only applies to debts incurred after the ratification of the amendment. Id.
The exemption applies only to the head of the household so a husband and a wife are probably limited to a combined exemption of $1000. See McGrew v. Stewart, 113 W. Va. 45, 166 S.E. 847 (1932).
\textsuperscript{442} For a good discussion of the traditional problems in West Virginia concern-
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 limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose . . . . Any such exclusion, modification or attempted limitation shall be void.\textsuperscript{43}

The important part of the section concerning privity reads: "[n]o action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made."\textsuperscript{44} Both the section on disclaimers and the section on privity apply to cash as well as credit sales.\textsuperscript{45}

It is therefore clear that a retail seller cannot disclaimer express or implied warranties created under the Uniform Commercial Code\textsuperscript{46} in a sale of consumer goods, and any attempt to do so is void. Nevertheless since the Act says that "no merchant shall disclaimer," the question arises as to who is a "merchant" within the meaning of this statute.

In a typical situation, a manufacturer will manufacture the consumer goods and sell them to a wholesale distributor; the wholesale distributor will sell them to a retail seller; the retail seller will finally sell them to a consumer; the consumer in some cases will sell them in a used condition to someone else. The retail seller is clearly a merchant, and the consumer who later sells the goods at a garage sale is clearly not a merchant. But are the manufacturer and the distributor merchants under this section? The Act does not define "merchant."

The National Consumer Act defines "merchant" as one who regularly deals in property in a manner that leads to a consumer


\textsuperscript{44} Id. § 108.

\textsuperscript{45} All of article six of the WVCCPA applies to both cash and credit transactions. Id. § 46A-1-103 & §§ 46A-6-102(b), (c).

\textsuperscript{46} The Act defines warranties as those warranties contained in sections -313,-314, and -315 of chapter 46, article two of the UCC. Id. § 46A-6-102(f).
transaction and specifically includes a manufacturer within the definition.\textsuperscript{47} Since the NCA served as one of the models for the Act, this definition is meaningful. More persuasive is the definition of “merchant” found in the UCC, which states that a merchant is “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill, peculiar to the practices or goods involved in the transaction.”\textsuperscript{48} This clearly includes a manufacturer and at least one case has so held.\textsuperscript{49} This definition is important not only because both the WVCCPA and the UCC deal with sales of goods but because the disclaimer section of the Act is specifically tied to the warranty provisions of the UCC.\textsuperscript{50} Furthermore the abolition of the requirement of privity by the Act makes it clear that the Legislature intended that consumers have a remedy against the manufacturer and the distributor of the goods purchased. This remedy would become ineffective if the manufacturer and the distributor could disclaim liability. But there are a group of cases in other jurisdictions which hold that a manufacturer is not a merchant.\textsuperscript{51} Although these holdings are concerned with taxes levied upon “merchants” and not with the presence or absence of warranties, the Legislature should amend the statute and define merchant to include manufacturers. Under the UCC, the NCA, and case law, the term “merchant” includes one who buys and resells goods, so a distributor is clearly a merchant under the Act.

Once it is determined that the disclaimer provision applies to manufacturers there is no problem in determining which buyers in the chain of purchasers enjoy the benefit of the prohibition of disclaimers. The Act simply states that an attempted disclaimer by a merchant is void. Therefore a disclaimer by a manufacturer as to goods that are intended to become the subject of a consumer

\textsuperscript{47} NCA § 1.301(23).
\textsuperscript{50} The Act prohibits exclusion of warranties in article 6, section 107, and defines warranties in article 6, section 102 (f) as those “warranties described and defined in sections three hundred thirteen, three hundred fourteen and three hundred fifteen, of the UCC . . .”
transaction is not effective against a claim by the wholesale distributor, the retail seller, the consumer purchaser, or a third party user who is otherwise allowed to recover.

A recent amendment to the WVCCPA indicates that the abolition of the privity requirement applies only to vertical privity and not to horizontal privity. The Act now defines "consumer" as a "natural person to whom a sale is made in a consumer transaction." Thus if a person purchases a defective consumer product from a retail seller to be used by herself, her family, or her friends, she can recover from the manufacturer even though she was not in contractual privity with the manufacturer. Members of the purchaser's family and guests in her home have been allowed by the Uniform Commercial Code to recover from the retail seller even though they were not in contractual privity with that seller. But it appears that the WVCCPA does not provide these same family members or guests with a cause of action against the manufacturer. The Act states "no action by a consumer for breach of warranty . . . shall fail because of lack of privity." Since the Act defines consumer as one "to whom a sale is made," it takes away privity as a bar to a suit brought by one "to whom a sale is made," that is the purchaser, but it does not abolish privity as a bar to a suit by one who is not the purchaser.

Nor can it be argued that the Uniform Commercial Code extends warranties of the manufacturer to the family and guests of the buyer. The UCC states that "a seller's warranty . . . extends

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422 W. VA. CODE ANN. § 46-2-318 (1966). It must be emphasized that although this code section itself extends warranties of the seller only to the family and house guests of the buyer, it is silent on the extension of these warranties by courts to further classifications of users, including persons not guests of the purchaser. See id. § 46-2-318, Comment 3. It should also be noted that this code section applies only to actions for personal injury and not for economic loss standing alone. The WVCCPA's privity section applies to economic injury as well as personal injury.
423 Id. § 46A-6-108.
424 Many members of a family are arguably the purchaser even if they do not themselves personally make the purchase. When a husband buys a toaster, he is probably buying it as the agent for both himself and his wife, at the direction and for the benefit of them both. It makes no difference who happened to be driving near the hardware store that day. So even if the wife personally picks up the toaster at the seller's store, if the husband gets burned by its defective wiring, he should be considered one of the people "to whom [the] . . . sale is made," and not be barred by lack of privity from suing the manufacturers. This is not so clear when the son of the mother and father is suing because he probably did not share in the decision to purchase, and he had no share in the money used for the purchase.
to . . . the family or household of his buyer . . ." The consumer is not "his" buyer. The retailer (or other distributer) is his buyer.

Any further analysis is probably unnecessary in light of the West Virginia Supreme Court of Appeals’s recent decision in Dawson v. Canteen Corp. The defendant in Dawson baked a sandwich bun, sold the bun to a retail seller, the seller used the bun in a vending machine from which the plaintiff purchased it. Contaminants in the bun caused the buyer acute food poisoning. The defendant baking company raised lack of contractual privity as a defense. In striking down this defense, the court said "[a]ccordingly the requirement of privity of contract in actions grounded in breach of express or implied warranty is abolished in West Virginia . . .." 458

Although Dawson involved a question of vertical privity, it appears that the court intended to strike down both vertical and horizontal privity as requirements in warranty actions. In its discussion of the privity question, the court stated that the privity requirement began to erode in West Virginia when the Uniform Commercial Code eliminated the requirement of horizontal privity and that it was further eroded by the WVCCPA’s elimination of vertical privity in consumer transactions. After this discussion of both vertical and horizontal privity, the court stated in conclusion: "It is sufficient merely to hold that lack of privity alone is no longer a defense to a warranty action in West Virginia." 459 A conservative reading of this case suggests that the court intends to allow those persons enumerated by the UCC, as family or guests in the home of the buyer, to recover from manufacturers for damage caused by defective consumer or non-consumer products, even though any kind of contractual privity may be lacking. 460

6. Limitations on the Lenders Defenses

If a buyer buys goods from a seller and the goods turn out to

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457 212 S.E.2d 82 (W. Va. 1975).
459 212 S.E.2d at 82-83.
460 212 S.E.2d at 84.
461 Taken literally the court’s broad ruling would mean that anyone, no matter how far removed from the buyer or the user of the defective product, could recover from the manufacturer for damage caused by the defectively manufactured product. This would include, among others, recovery by employees of the buyer, and recovery by innocent bystanders injured by a defectively manufactured automobiles. Most jurisdictions have not extended warranty protection this far.
be defective, the buyer is under no duty to pay the full contract price for the goods.\textsuperscript{41} If the buyer has not yet paid for the goods, she is in an advantageous position. Commonly, however, a buyer of goods on credit finds herself under a legal duty to pay for the goods, even though the goods are clearly defective, and even though she has not yet paid for them. This comes about in several ways. The buyer might arrange a loan from a third party lender and use the money obtained from the loan to buy the goods from the seller. Since the lender is theoretically outside the sales contract, the lender's rights under the loan contract are not affected by the failure of the seller to perform on the sales contract. In this manner the seller is able to sell his goods to one who does not have the cash available, and yet receive the money immediately. The lender is able to make a loan for a charge and yet not be liable for defects in the goods. Because of this legal phenomenon, a party in the business of selling goods on credit will commonly split his business structure into two separate legal entities, one entity selling the goods and the other lending the money to the buyer for the purchase. Thus, due to the sophistication of the seller, and his use of what is really a legal technicality, the buyer loses a defense she would normally have.\textsuperscript{42}

The same result can occur where the seller himself purports to extend the credit to the buyer by the use of a waiver-of-defense clause in the sales contract or the holder-in-due-course doctrine in

\textsuperscript{41} W. VA. CODE ANN. §§ 46-2-601,-602,-711 (1966).

\textsuperscript{42} The best justification for this practice is that it leaves the buyer in the same situation she would have been in had she paid cash. Another person (the seller) would have his $300, and the buyer would have only a cause of action against the seller for $300. The leverage remains with the seller. Usually a buyer will seek to purchase on credit, not to gain the protection of leverage on the chance that the seller will default, but because the buyer does not have the money or finds it more convenient to take the goods on credit. The buyer is looking for credit, not protection. If the charge she pays for this credit is the going interest rate for loans of this size, then she is paying only for the credit. If she also wants the protection, then she should have to pay an additional amount for it.

But conversely, especially when the seller himself purports to extend credit, even a credit buyer motivated chiefly by a need for credit will often think she does not have to pay if the goods turn out to be defective. So while she would inspect the goods or services exhaustively before she turned the $350 in cash over to the seller, she might sign a credit instrument without such exhaustive inspection, putting it off until later under the misapprehension that she will not have to pay for them if they then prove to be defective. In this way her reasonable expectations are defeated by the esoteric operation of legal principles.
the credit instrument. In the former, the sales contract contains a clause whereby the buyer agrees to waive any claims or defenses she might have on the contract against the assignee who buys the contract. In the latter, the buyer signs a negotiable note. When the note is sold (negotiated) to a third party who takes for value, in good faith, and without notice of any defenses the buyer might have, the third party has a right to collect on the note regardless of any defenses the buyer may eventually in fact have against the seller.

Countless sales are made using these techniques, especially involving more expensive consumer purchases where the seller is not large enough to truly finance the transaction. Under the WVCCPA, lenders who participate in or are connected with consumer credit sales, assignees of seller’s rights in a consumer credit sales contract, and holders of non-demand negotiable instruments taken in a consumer credit sale have no immunity from claims and defenses that the borrower or buyer may assert against the seller.

In West Virginia prior to the passage of the Act, anyone who could qualify as a holder in due course under the provisions of the Uniform Commercial Code, or under the Uniform Negotiable

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463 When the seller does the initial financing and then sells the “debt” to the third party, it is this third party who is actually extending the credit to the buyer to finance the purchase. This third party is commonly the same bank who could have made the cash loan directly to the buyer in the previous example. Yet the bank benefits more when it buys the debt from the seller because the seller, as the initial extender of credit, can change the rates allowed for credit sales, which are usually higher than those allowed for cash loans. See 1 CCH CONSUMER CREDIT GUIDE, Charts ¶¶ 510, 570 (1971). The UCCC and the WVCCPA allow the same rates for both consumer credit sales and consumer cash loans. UCCC §§ 2.401, 3.503, 1 CCH CONSUMER CREDIT GUIDE ¶¶ 5101, 5248 (1971); W. VA. CODE ANN. §§ 46A-3-101 et seq. (Cum. Supp. 1974).


467 A check is not a credit instrument; it is a form of immediate payment. For this reason, the WVCCPA applies only to negotiable instruments “other than a currently dated check.” W. VA. CODE ANN. § 46A-2-101 (Cum. Supp. 1974).

468 Id. See also UCCC § 2.403, 1 CCH CONSUMER CREDIT GUIDE ¶ 5103 (1971); NCA § 2.405. It should be emphasized that for the first year of the Act, these defenses against interlocking lenders, assignees, and holders in due course can be avoided by a complicated notice system set out in subsections of W. VA. CODE ANN. §§ 46A-2-101 to -103 (Cum. Supp. 1974).

469 "A holder in due course is a holder who takes the instrument (a) for value;
Instruments Act,470 or under the common law of negotiable instruments471 took negotiable instruments free from most claims and defenses that the original maker of the note might have asserted against the original payee.472 While the new law applies only to consumer credit sales or consumer loans, abolition of the defenses of a holder in due course of consumer paper represents a substantial change from prior law and will undoubtedly change the business practices of those dealing in consumer paper.

The change made in the law by these sections of the Act has a basis in the case law of most states, and therefore operates to bring West Virginia more in step with the consumer law of other states.473 Courts have increasingly refused to apply the holder-in-course concept against consumer makers of notes in consumer sales or consumer loans when strict application of the rule would result in an inequitable or unconscionable holding. The courts have usually allowed the maker of the paper to assert defenses by refusing to recognize the assignee as a holder in due course, either because the assignee had notice or knowledge that the maker held a claim against the payee or other lack of good faith.

Many of the cases where the holder of a note given in a consumer sale was held not to be a holder in due course involved the

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\[\text{and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.}^{470}\]

\[\text{W. VA. CODE ANN. § 46-3-302 (1966).}\]

\[\text{470 A holder in due course is a holder who has taken the instrument under the following conditions: (1) that the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of infirmity in the instrument or defect in the title of the person negotiating it.}^{471}\]

\[\text{W. VA. CODE ch. 98, art. 52, (Barnes 1923).}\]

\[\text{471 See Interstate Fin. Co. v. Schroder, 74 W. Va. 67, 81 S.E. 552 (1914).}\]


use of conditional sales contracts entered into at the time of the making of the note. Some courts found that the negotiability of such notes was destroyed by their connection with the contract.\footnote{See, e.g. Old Colony Trust Co. v. Stumpel, 126 Misc. 375, 213 N.Y.S. 536, aff'd 219 App. Div. 771, 220 N.Y.S. 893, aff'd without opinion 247 N.Y. 538, 161 N.E. 173 (1926).} Other courts have held that while such notes retained their negotiability, the holder either had knowledge of unfulfilled conditions of the contract,\footnote{Cooke v. Real Estate Trust Co., 180 Md. 133, 22 A.2d 554 (1941).} or otherwise did not meet the requirements of good faith, and thus did not enjoy the protection given to a holder in due course.\footnote{Commercial Credit v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940).}

The states which held that a note’s negotiability could be destroyed by its connection, sometimes physical, with the conditional sales contract often referred to the “single contract” theory.\footnote{See, e.g., Federal Credit Bureau v. Zelkor Dining Car Corp., 238 App. Div. 379, 264 N.Y.S. 723 (1933).} Under the single contract theory, courts allowed the maker of a note to assert defenses against the holder (who usually also held the conditional sales contract) by reasoning that the holder, by his holding of the actual contract, had notice that a condition needed to be met before the note was good (thereby defeating a finding of an unconditional promise to pay);\footnote{Cooke v. Real Estate Trust Co., 180 Md. 133, 22 A.2d 554 (1941); First & Lumberman’s Nat’l Bank v. Bucholz, 220 Minn. 97, 18 N.W.2d 771 (1945).} or, by reasoning that while the maker could not assert a defense against the holder of the note, he could assert a defense against the holder as a holder of the contract, as a counter-claim in the holder’s suit against the maker.\footnote{The West Virginia Supreme Court of Appeals expressly refused to adopt the single contract theory in Cotton States Mut. Ins. Co. v. Bibbee, 147 W. Va. 786, 792, 131 S.E.2d 745, 750 (1963).}

Many of the elements that led the courts to find that an assignee of consumer paper was not a holder in due course have become those elements which make a lender an interlocking lender under the WVCCPA. Elements such as the preparation of credit forms by the lender to the seller,\footnote{Palmer v. Associates Discount Corp., 124 F.2d 225 (D.C. Cir. 1941).} the guarantee of the loan by seller,\footnote{Mutual Finance Co. v. Martin, 63 So. 2d 649 (Fla. 1953).} and the existence of an extensive course of dealing between lender and seller,\footnote{Unico v. Owen 50 N.J. 101, 232 A.2d 405 (1967).} have all been cited by courts as reasons
for refusing to find that an otherwise qualified holder in due course did not take free from claims of the buyer against the seller.

Clearly the object of the courts in these cases has been to do justice to unsophisticated consumers who would otherwise fall prey to "the jungle of finely printed, creditor oriented provisions." The modern use of credit by consumers has spread faster than the understanding that one who signs a negotiable instrument relinquishes his defenses against a holder in due course.

In the famous case of Unico v. Owen, the Supreme Court of New Jersey found a maker not liable on a note given to a door-to-door salesman in return for a promise to deliver 140 record albums and a free stereo. After paying over three hundred dollars of the $840 due, the Owens had received only the stereo and twelve albums, which were delivered immediately after the contract was signed. When a year elapsed during which the Owens paid faithfully without receiving any more records, they stopped paying and were sued by Unico, the corporation that now held the note. Universal, the seller of the records, had become insolvent by that time.

The facts showed that Unico was formed expressly for the purpose of financing Universal, that Unico bought all of Universal's customer's notes, that Unico determined the credit worthiness of Universal's customers, and that it otherwise exercised general control over Universal's extention of credit. The court held that the close relationship between Unico and Universal prevented Unico from taking notes in the required good faith of a true holder in due course.

Close connections between a lender and a seller, and the knowledge by the lender of the questionable business practices of the seller have also served as reasons to deny holder-in-deue-course status in cases involving the sale of come-on schemes, sales of used cars more suited for flavoring iced tea than for transportation, and sales of broken down equipment to small businesses.

The cases referred to above arose before the enactment of consumer credit codes. The undefined, uncoordinated state of the

453 Id. at 111, 232 A.2d at 410.
457 Mutual Finance Co. v. Martin, 63 So.2d 649 (Fla. 1953).
case law that had begun to chip away at holder-in-due-course status in consumer credit cases provided the impetus for the abolition by statute of holder-in-due-course status in consumer sales.

Forty states now have some statutory modification of the doctrine of holder in due course in consumer credit sales. These statutes vary in the type of transaction covered, the requirement of interconnection between lender and seller, the time limit, if any, during which the buyer may assert such defenses, and the requirements, if any, that a consumer note state on its face that it was taken in a consumer transaction.

There are a number of things that should be noted about the WVCCPA provisions. If a seller wilfully and repeatedly takes negotiable instruments in consumer transactions in violation of the prohibition against taking such instruments, he is liable for a five thousand dollar civil penalty. If a business makes a practice of buying such prohibited instruments, the business should be subject to the same penalty for assisting in the violation of the Act.

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[51] Some states require the consumer to assert his claims within a limited period ranging from five days (Illinois) to twelve months (Wisconsin).


[54] Id.
There is a question as to whether a buyer can initiate a lawsuit against a holder, an assignee, or an interlocking lender, or whether the protection given her under the WVCCPA can be used only as a defense. The first bill passed by the 1973 Legislature\textsuperscript{403} contained no limitation. But the final versions of each section contains limitations:

A claim or defense which a buyer or lessee may assert against a ... [holder in due course assignee, interlocking lender] ... may be asserted only as a matter of defense to or set off against a claim by the holder.\textsuperscript{404}

The section above suggests that the protection is available to the buyer only if the creditor brings the lawsuit. But further provisions of the sections above indicate otherwise:

\textit{Provided}, that if a buyer or lessee shall have a claim or defense which could be asserted ... as a matter of defense to or setoff against a claim by the [holder, assignee, or interlocking lender] were [they] to assert such a claim against the buyer or lessee, then such buyer or lessee shall have the right to institute and maintain an action ... [to cancel]. ... the indebtedness ... or [to release any lien securing payment thereof].\textsuperscript{405}

These exceptions seem to allow those types of actions that a consumer would wish to bring in any case. If the limitation has any effect, it limits the amount that a consumer can recover against the holder, assignee, or interlocking lender, to that amount still owed such creditor. This sets a limit for claims against a holder where that section does not otherwise provide a limit.\textsuperscript{406} But if it does operate to limit the amount of a consumer's claim, it conflicts with those limits found elsewhere in the sections dealing with assignees and interlocking lenders.\textsuperscript{407} If indeed the sections do conflict, the inconsistency should be settled by legislative amendment. Liability to the consumer for resulting damage to person or property is specifically excluded by all three sections.\textsuperscript{408}

\textsuperscript{405} Id. The sections also allow buyers or lessors to sue at any time for fraud, lack of consideration, or penalties for violation of the WVCCPA. Id.
\textsuperscript{406} Id. § 46A-2-101.
\textsuperscript{407} A claim by a consumer brought against the assignee is limited to the amount owing at the time of such assignment. Id. § 46A-2-102(5). A claim by a consumer brought against an interlocking lender is limited to the amount of the loan used for the sale. Id. § 46A-2-103(3).
\textsuperscript{408} Id. §§ 46A-2-101(8), -102(8), -103(8).
The Legislature clearly intended that the developing common law defenses against holders and assignees remain available to consumers who do not find protection under the WVCCPA. This is made clear by a written statement presented to the conference committee by one of its members during the final deliberations of the bill.

The provision that subjects the lender to liability in interlocking loan-sale transactions was derived from the Massachusetts provision. First, the provision enumerates six circumstances under which an interlocking loan-sale transaction is deemed to exist. Second, by the inclusion of the language "without limiting the generality of the foregoing," the statute leaves to court construction and jury decision a case-by-case determination of what other facts will constitute a lender "connection" with the transaction, so as to subject him to the defenses of the borrower-buyer. The case law in this area should supply some guidelines. Also, the broad rule-making authority given to the Attorney General authorizes him to delineate additional indicia of financier involvement in a sales transaction. The fact that the general language was intended to permit a case-by-case determination is evident.

49 Id. §§ 46A-2-101(3), -102(3).
500 There is a substantial body of case law from the various states as to what indicates a close business relationship between a buyer and an assignee or holder of negotiable paper. This subsection makes it very clear that these two sections of the Code should not be construed to limit the buyer's access to this common law to show notice or lack of good faith or the like of an assignee or holder of negotiable instrument because of the statutory sections we are writing into law. The buyer should nevertheless have the access to his common law approach of showing a close business relationship between the assignee or holder and the seller, so as to defeat his claim of bona-fide purchase. This is, of course, in addition to the rights provided the buyer by virtue of this section. It should be emphasized that by enacting the two sections as a whole, we are not attempting to take away any rights that the buyer might have under the evolving case law of this and the other jurisdictions.

502 MASS. CODE ANN. ch. 255, § 12F.
504 Id.
from the statement, presented to the committee, in opposition to the attempt to delete the language:

The language contained here, "without limiting the generality of the foregoing", is very necessary in that the circumstances enumerated in (i) through (vii), are not the only circumstances indicating that a lender is connected with sales transactions. In fact, no complete catalog of circumstances could be made inasmuch as they vary with each type of transaction. A few are now spelled out in West Virginia case law, and many others have been indicated by other states' case law, and there are many more yet to be articulated anywhere. Therefore, the language here, "without limiting the generality of the foregoing", indicates that the clause in the general prohibition "if such lender participates in or is connected with" is left to the general case-by-case legal interpretation, as it should be.

Further, it is clear from the language of the rule-making authority given the administrator, pursuant to Section 46A-7-102(e), that the administrator can further define circumstances which he considers to be circumstances which indicate that "such lender participates in or is connected with the sales transaction". I believe that the generality language should be retained to make it readily apparent that the enumerated circumstances are not the only ones which render the lender subject to defenses and claims of the buyer against the seller when there is some business relationship between the two. Varying circumstances of business relationships can therefore be included within the general provision of "participating in or being connected with" a transaction either in a particular case or by the administrators' listing of circumstances. Otherwise, the bill, if it becomes law, may well become a sham.507

Concern and opposition to this section subjecting interlocking lenders to defenses that the buyer has against the seller is probably unfounded. A lender can avoid the operation of the section by not arranging with the seller for a referral fee, by avoiding relationships with the seller, by not receiving guarantees of the loan from the seller, by not directly supplying the seller with documents of loans or vice versa, by not conditioning loans on purchases from the seller, and by not issuing non-lender credit cards.508 The facts that will constitute an interlocking relationship over which the lender

has no control will be so hard and expensive for consumers to prove in the usual case, that it is really no cause for concern.\textsuperscript{509}

7. The Rule Making Authority of the Attorney General

Among the most important features of the WVCCPA are the two sections conferring rule-making authority upon the Attorney General.\textsuperscript{510} One provision authorizes the Attorney General to make rules “interpreting and defining unfair methods of competition and unfair or deceptive acts or practices,” as defined in section 102 of article six, and as used in article six.\textsuperscript{511} The second gives to the Attorney General power to adopt “regulations in accordance with the . . . [West Virginia Administrative Procedures Act] . . . as are necessary and proper to effectuate the purposes of this chapter [the entire Act] and to prevent circumvention or evasion thereof.”\textsuperscript{512}

The WVCCPA makes unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce unlawful, whether the methods, acts, or practices involve cash or credit transactions\textsuperscript{513} and imposes penalties for such violations.\textsuperscript{514} The Act defines as unfair methods and acts, fourteen common practices, including among others passing off goods or services as those of another, representing that goods are new if they are used, disparaging the goods of another by false or misleading representations of fact, and engaging in any conduct that similarly

\textsuperscript{509} Id. § 46A-2-103(1)(a)(vi).

\textsuperscript{510} The Attorney General has set up a division of consumer protection within the Attorney General's office and has appointed a director to run it. The director is presently engaged in drafting rules and regulations needed to administer the WVCCPA.

\textsuperscript{511} W. Va. Code Ann. § 46A-6-103 (Cum. Supp. 1974). This is potentially the most important of the powers given to the Attorney General under the WVCCPA. But this section also authorizes him to make rules interpreting the terms “advertisement,” “consumer,” “consumer transaction,” “merchantable,” “sale,” “trade or commerce,” and “warranty” as these terms are used in article six. Id. The terms “consumer” and “consumer transaction” were added to this section by Enrolled H.B. 1421 (Reg. Sess. 1974).

\textsuperscript{512} W. Va. Code Ann. § 46A-7-102(1)(e).

\textsuperscript{513} Id. § 46A-6-104.

\textsuperscript{514} One penalty gives to any consumer who suffers an ascertainable loss as a result of an unfair act or practice a cause of action for actual damages or two hundred dollars, whichever is greater. Id. § 46A-6-106. Another authorizes the Attorney General to bring a civil action against the violator for a penalty of up to $5000 for repeated wilful violations of the Act. Id. § 46A-7-111(2).
creates a likelihood of confusion or of misunderstanding.515 The WVCCPA gives the Attorney General the authority to promulgate regulations interpreting and defining what other acts and practices will constitute such illegal unfair acts and practices.

The effectiveness of this whole scheme will turn on how much authority the Act really gives to the Attorney General. That this authority is very broad is clear from the provision's origin, its language, and its legislative history. Article six is modeled after the Federal Trade Commission Act,516 and states in its introductory section that its purpose "is to complement the body of federal law governing unfair competition and unfair, deceptive, and fraudulent acts or practices."517 The Federal Act declares unfair practices to be unlawful and entrusts to the Federal Trade Commission the power to define what specific practices constitute such unfair practices. Changing views under the federal law will be complemented by changing views under the WVCCPA as required by the authority granting section of the Act:

Such rules and regulations shall conform as nearly as practicable with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the "Federal Trade Commission Act," as from time to time amended.518

To accomplish this, the rule-making power of the Attorney General must be broad.

That the power of the Attorney General is broad is also made clear by the language of section 102(e), which defines unfair methods and practices: illegal conduct "includes, but is not limited to" the specified acts and practices.

The legislative history of the article underscores the intent to vest in the administrator the broad power to define additional unfair practices. Immediately prior to the passage of the Act, the bill had been passed by both houses and was in conference committee. At that time Delegate Field, as a member of the committee, suggested the addition of the language "and defining" to the description of rule-making authority, in order to clarify the power of the administrator to delineate additional unfair practices:

515 Id. § 46A-6-102(e).
518 Id. § 46A-6-103.
I would suggest adding the language "and defining" to Section 103 for the reason that I feel it is not abundantly clear that the Attorney General has the power to, without this word, actually define practices which he finds to be an unfair method of competition and an unfair or deceptive act or practice. A reading of Section 102 of the same Article indicates that he does have this power; subsection (e) states 'unfair methods of competition and unfair or deceptive acts or practices' means and includes, but is not limited to, any one or more of the following." The language "but is not limited to" would indicate that the Attorney General's Office would have the power to set up its own categories of unfair methods of competition and unfair or deceptive acts or practices within the meaning of article 6; however, by adding the word "defined" to the Attorney General's rule-making power, it is then abundantly clear, together with the inclusionary language of "but is not limited to" from the definition that the Attorney General has the power to define unfair methods of competition and unfair methods of deceptive acts or practices which do not fall into any one specific category as enumerated in (1) thru (14) of subsection (e) of Section 102. 519

The statement further suggested that this rule-making power would insure that the administrator would not have to go back to the Legislature every time a deceptive seller derives a new fraudulent technique. 520

The second authority provided the Attorney General is the general rule-making authority for the overall supervision of the WVCCPA. The Act authorizes the Attorney General to:

Adopt, amend and repeal such reasonable rules and regulations . . . as are necessary and proper to effectuate the purposes of this chapter and to prevent circumvention or evasion thereof. . . 521

The language of the provision has its origin in the Federal Consumer Credit Protection Act, which gives to the Federal Reserve Board the power to promulgate rules and regulations as are necessary and proper to effectuate the purposes of that chapter and to prevent circumvention and evasion thereof. 522

520 Id.
522 The Board shall prescribe regulations to carry out the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and
It is clear from the language employed, and the interpretation of the identical language in the Federal Act by the United States Supreme Court, that the rule-making authority is a broad one. The United States Supreme Court has indicated that the language empowers the agency to write regulations going beyond the express language of the Act. The situation that gave rise to Supreme Court construction of this rule-making language in *Mourning v. Family Publication Service, Inc.*\(^{523}\) clarifies the extremely broad nature of the language authorizing rules "to effectuate purposes" of the Act and "to prevent circumvention and evasion thereof". The Federal Consumer Credit Protection Act provides that its coverage extends to all transactions in which "a finance charge is or may be imposed."\(^{524}\) The federal agency promulgated rules extending that coverage to transactions in which "either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments."\(^{525}\) The Supreme Court held that even though the regulation went beyond the specific language of the Act, Congress in using the broad rule-making language, had given to the agency the power to make the act effective and to prevent its evasion, and that the regulation accomplished such a purpose.\(^{526}\)

The actual language used in the WVCCPA was initially incorporated into the bill in the deliberations in the Senate Judiciary Committee in 1973 Regular Session.\(^{527}\) There were attempts to remove the broad language in the 1974 Regular Session, and a written statement submitted by a delegate in support of the broad language spells out clearly its derivation and purpose.\(^{528}\) Thus,

exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.


\(^{527}\) S.B. 1070, Reg. Sess. (1973) Originating in the Committee for the Judiciary of the State Senate.

\(^{528}\) The language of this provision is specifically taken from the Federal Truth-in-Lending Act, 15 U.S.C. § 1604. The provision in this bill [46A-7-102(e)] permits the Attorney General to adopt reasonable rules and regulations that are "necessary and proper to effectuate the purposes of the Act and prevent circumvention or evasion thereof". This is important rule-making authority. As always with any piece of consumer legisla-
from this legislative history, the language used, and the origin of
the language, it is clear that the rule-making power given to the
Attorney General in the WVCCPA is very broad indeed.

III. CONCLUSION

The WVCCPA strikes a balance somewhere between the inter-
ests of creditors and the interests and protection of debtors. That
is not to say the Act on a whole is "just" or is "right." There may
well be no "just" or "right." After all, most of the problems con-
tion, consumer credit being the intricate and complicated field that it is,
certain creditors and devious sellers find ways and technicalities to avoid
a specific provision designed to prohibit a certain practice or area of
practices.

The Federal Truth-in-Lending Act specifically provided language
that would permit the rule-making authority to write regulations which
went beyond the specific language of the Act in an effort to prevent
circumvention or evasion of an Act. For example, the Federal Truth-in-
Lending Act provided that the disclosure mandate related to a transac-
tion in which a finance charge was imposed. 15 U.S.C. § 1602(F). The
Federal Reserve Board, the rule making authority, pursuant to the Act,
15 U.S.C. § 1604, wrote a regulation known as the "Four Installment
Rule" which said that any transaction in which there was a finance
charge or in which was payable in more than four installments was sub-
ject to the provisions of the Act. 12 C.F.R. § 226.2(k). This provision was
clearly beyond the specific language of the Act, but was necessary be-
cause creditors were burying the finance charge in the cash price to avoid
coverage of the Act. The United States Supreme Court specifically up-
held this rule making authority provision in the case of Mourning v.
Court found that Congress had specifically intended to prevent certain
devious persons and others to avoid the purposes of the Act by the use of
technicalities which would bring them outside of the coverage of the Act.

Likewise with our Act here, I am certain that some sellers or creditors
will find ways to avoid coverage of specific provisions of the Act. For
example, a seller or a lender might structure his selling or lending to fall
outside the coverage of the provision, rendering an assignee or lender
subject to defenses. Further legislative action should not be required
when the purpose could be accomplished by a broad regulatory authority.

The broad regulatory language which permits the regulatory agency
to write regulations prohibiting circumvention of the intent of the provi-
sions is important. This, I suggest, is the language that we should retain
in the draft of the Act that we have here. The language has been upheld
as a proper rule-making authority by the United States Supreme Court,
and thereby we have a body of case law to follow in the construction of
the rule-making authority.

Written statement of Del. William Field to Conference Committee, on the West
fronited by the Act are social and political and pose social and political questions. The answers given by the Act are social and political answers. This does not mean the WVCCPA is not an important step forward for West Virginia. In some situations it clearly is, and in others it might be. Citizens who need cash for consumer goods can more easily find a lender now that interest rates on loans are higher. Consumers who were once barred from suing by disclaimers they never saw or never understood can now recover. Privity, a doctrine which was never in the interests of citizens who consumed goods manufactured in other states, is now abolished. The coal miner who for forty years saw every penny of his earnings taken by the company store is freed at least from this form of economic slavery.

It will take several years of experience with other provisions of the WVCCPA to show how effective it is in regulating finance charges and lending practices, and how much it will protect the consumer and redress the traditional imbalance between consumer purchasers and merchant sellers. But some general statements about the WVCCPA can be made. Some of the provisions in the Act do not seem particularly important because the abuses they reach are not common in West Virginia. Referral sales are one example.529 Other sections are directed at common consumer problems, but they may not go far enough to solve the abuses. Balloon payments are still allowed with notice, and there is no right to refinance the balloon payment if the initial obligation is more than $1500.530 Many automobile purchases will therefore fall outside the protection of this section. Garnishment is still allowed on up to twenty percent of disposable earnings,531 and an employer can still fire an employee for two or more non-consumer related garnishments.532 Some assignment of earnings is still allowed533 and deficiency judgements in larger purchases are still available.534 Some household goods, necessary for civilized living, can still be reached to satisfy a judgment.535 Importantly, although penalties are provided for some violations, they are not provided for others, and even those penalties which are provided might not be high enough

530 Id. § 46A-2-105.
531 Id. § 46A-2-130.
532 Id. § 46A-2-131.
533 Id. § 46A-2-116.
534 Id. § 46A-2-119.
535 Id. § 46A-2-136.
to encourage consumers to pursue the violation and then also pay for the consumer's attorney.\textsuperscript{536}

To make the rate ceilings and regulations effective, the Act should be amended. It should adopt, for computation purposes, the finance charge regulations of the Uniform Consumer Credit Code, the National Consumer Act, or the Federal Consumer Credit Protection Act; or in the alternative, the WVCCPA should be amended to require lenders to disclose the true interest rates, which would make their computations conform to the Federal Consumer Credit Protection Act Truth-in-Lending provisions for inconsistent provisions.

There are a number of problems that the Act does not attempt to reach. The President's Commission on Consumer Finance recommended that creditors be allowed to provide for reasonable attorney's fees up to fifteen percent of the outstanding debt for collecting upon the debtor's default and also recommended that the creditor be required to pay the debtor's attorney's fees if the creditor's lawsuit fails.\textsuperscript{537} The Act says nothing about horizontal privity, so it is still left to the courts to determine who, besides the buyer or members of her family or household, are protected by warranties of the seller.\textsuperscript{538}

Moreover, the WVCCPA says nothing about "sewer service,"\textsuperscript{539} or problems with the parol evidence rule in consumer sales,\textsuperscript{540} although it is not clear whether these are problems common to West Virginia consumer transactions.

\textsuperscript{536} Id. § 46A-5-101; id. § 46A-6-106; id. § 46A-7-111.
\textsuperscript{537} \textit{National Comm'n on Consumer Finance, Consumer Credit in the United States XV.} (1972) [hereinafter Consumer Credit Report].
\textsuperscript{539} See the recommendations concerning the problem of failure to serve summons found in Consumer Credit Report, note 537 supra, at 41.
\textsuperscript{540} Most consumer transactions involve face to face oral negotiations between the buyer and seller in which descriptions, promises and conditions of the agreement are made. In many instances this is followed by the seller producing a form contract at the last minute and having the buyer sign it, which the buyer does and usually without reading the contract. The buyer's signature implies that he agrees with the terms contained in the writing, when often that is not necessarily the case. The parol evidence rule operates to keep out any evidence of agreements or promises made outside the writing which conflict with the terms of the writing. Even if the preferred evidence does not conflict with the writing but merely supplements it, many courts will find that the writing was meant to contain all the terms agreed upon (that it is an integrated contract), and will not allow the introduction of the preferred evidence. This is done in spite of the liberal rule found in the clear
A large problem left untouched by the Act is that of default judgments. Consumers commonly fail to get legal counsel when they are sued, many because they cannot afford it, and some because they do not comprehend the importance of the suit. Many of the latter fail to appear in court. If the law does not provide some way to represent the interest of those who fail to appear, or who appear without counsel, the substantive protections supplied by the WVCCPA largely disappear. Default judgments cannot be abolished; otherwise a party could avoid his legal obligations simply by staying away from the court. But they can be regulated. One way to regulate default judgments would be to enact a statute allowing any party to re-open simply by motion, any judgment against her based upon a consumer transaction. This would help those consumers who awaken to the seriousness of the threat against their interests when the judgment creditor is attempting to levy upon their property or wages.

There are more effective ways of protecting consumers who fail to appear to defend themselves. All plaintiffs should be required in any lawsuit arising from a consumer transaction, to aver in their pleadings the basis of the debt, the amount and manner of the payment already made, the alleged reasons for the defendants failure to pay, if known, and any defenses claimed by the defendant that have been communicated to the plaintiff. This requirement should be accompanied by heavy sanctions for non-disclosure placed upon both the plaintiff and his attorney, and by a duty placed upon the court to raise sua sponte all defenses that the consumer could raise on the facts as presented in the pleadings. This would have to be done by statute, and the sanctions, especially those placed upon the attorneys, would have to be enforced. But adoption of the requirements above might solve many of the abuses caused by default judgments entered against poor, unsophisticated, unaided defendants.

language of the Uniform Commercial Code's parol evidence rule. See W. Va. Code Ann. § 46-2-202 (1966). The result is that consumers are left without contract promises that they thought they had, and are bound to contract conditions they did not know about. One solution would be to determine those contract terms which are often contained or excluded by seller's form contracts to the detriment of the buyer and require that these terms be independently initialed by the buyer before they can effectively bind him. The WVCCPA prohibition of disclaimers eliminates the most damaging use of the parol evidence rule to injure consumers. Id. § 46A-6-107 (Cum. Supp. 1974).
Finally, the chief weakness in the WVCCPA is that it is too complicated for the average consumer to understand even if she does read it. In fact, it is unlikely that the average attorney will spend the dozen hours necessary to gain a good understanding of the Act. It might be that the Act could not be made more simple without discarding the exceptions and compromises needed for its enactment. But regardless of the reasons, the end product is not a simple, clearly understandable statement of consumer rights and protections. It is rather a complicated, interrelated, lengthy piece of legislation, which contains within its excess verbiage a number of solid provisions protecting consumers. This article has attempted to gather in a more orderly fashion a clear restatement of those provisions. We must hope that the director of the division of consumer protection will take steps to use the mass media to communicate these protections to the consumers for whose benefit the Act was drafted.\footnote{One of the duties of the director of the division of consumer protection is to conduct programs to educate the public about consumer problems. See id. § 46A-7-103(1) (Cum. Supp. 1974).}
APPENDIX

This table provides cross references to provisions in the Uniform Consumer Credit Code and the National Consumer Act which are similar to the corresponding sections of the West Virginia Consumer Credit and Protection Act. It provides a reference to the UCCC and the NCA through such publication as the Consumer Credit Guide of CCH, the NCA Official Text (with comments) and Selected Commercial Statutes (1973). This enables the researcher to examine the drafter’s comments which follow each code section showing the purpose and reasoning in drafting that particular provision. Many of these publications, especially CCH, provide listings of recent cases in other jurisdictions relating them to corresponding UCCC sections, that may have dealt with a similar problem or question. Also a growing number of law review articles are being written on particular provisions of the UCCC and NCA. Reference to these materials enables the researcher to better interpret the West Virginia Act and allows some predictability as to how the courts will interpret this same act.

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