Wisconsin Consumer Act: A Freak Out

Roger S. Barrett

Christian T. Jones

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The Wisconsin Consumer Act is a freak departure from the normal. It is a product of ambivalent, prohibitive and punitive thinking, combined with ambiguous language. It is difficult to know what the act actually says and it is difficult to guess what the drafters actually meant to say. Minds, reasonable as well as unreasonable, differ. There is no general or common understanding of important provisions which are conditions of lawful consumer credit contracts. Most reasonable attempts by creditors to comply may result in severe civil and criminal penalties and disciplinary action by the Banking Department.

It is unfortunate that the drafters of the Wisconsin Act chose to deviate so greatly from the Uniform Consumer Credit Code and to ignore the lessons which have been offered by the National
Conference of Commissioners on Uniform State Laws. Already serious problems have resulted.

This article will summarize the code. It will also indicate some features of the Wisconsin Consumer Act which are generally destructive to consumer credit.

**Origins of Uniform Consumer Credit Code**

The Uniform Consumer Credit Code is recommended by the National Conference of Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar Association. The Commissioners' recommendations are based on their five-year study of existing state consumer credit laws. They were aided by an expert staff and by an Advisory Committee of 21 members selected from public interest and industry groups.

The Commissioners' drafting committee was not biased toward credit users or credit grantors or any particular element of consumer credit. The public interest was well represented at the meetings of the Advisory Committee with the Commissioners on Uniform State Laws. Ten Advisors were public interest spokesmen including two experienced state regulatory officials. Ten Advisors represented a cross-section of credit grantors including licensed lenders, merchants, sales finance companies, and banks. Public interest observers included the Director for Legislative Affairs of President Johnson's Committee on Consumer Interests and the Director of Debt Analysis of the U.S. Treasury Department. The thirteen Commissioners on the Committee who drafted the Code including six law Professors, three lawyers in general practice, a Judge, and two bank attorneys.

The Uniform Commissioners sought to reach a common understanding between the public interest representatives and the industry representatives concerning consumer credit problems and the reasonable regulations to solve these problems. Their aim was to draft an adequate but balanced law which would make consumer

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2. See Uniform Consumer Credit Code (West 1968) [Hereinafter cited as UCCC].


credit readily available on terms which are reasonable from all points of view, especially credit users and credit grantors.

By 1971, the Code with some variations had been enacted in six states. Oklahoma and Utah enacted it in 1969. Colorado, Idaho, Indiana, and Wyoming enacted it in 1971. The Kansas Code enacted in May, 1973, is based on a recent redraft which the Commissioners' Code Committee has under consideration for further study but which has no official standing. The Code is presently being considered by legislatures or study committees in other states. Statutes modeled in part after or containing some features similar to the Code have also been enacted in Alabama and Louisiana.

The official Code recommended by the Commissioners on Uniform State Laws is the Code approved by the National Conference on July 30, 1968, plus amendments adopted in 1970 to qualify transactions regulated by the Code for exemption from the Federal Truth-in-Lending Act. There is no expectation that any redraft will be considered by the National Conference in 1973.

OVERVIEW OF THE CODE VS. WCA

The Uniform Consumer Credit Code as proposed creates one overall regulatory law to replace all existing state consumer credit laws. In general, the Code regulates credit extended to individuals up to $25,000 (larger amounts when real estate is involved). However, this is an oversimplification since the precise scope of the Code cannot be stated in a few words. Consumer credit as defined by the Code is loan and sale credit to individuals for personal, family, household, or agricultural purposes. The definition also includes a purchase of a home or farm when there is a charge for the credit or the credit is payable in installments. The Code would regulate all consumer credit as defined for amounts up to $25,000. Consumer leases would also be regulated in many respects but not as to maximum rates. The Code would also regulate any amount...

of consumer credit, over or under $25,000, which is used to pur-
chase a home or farm or is secured by real estate. When the
debtor is an individual, certain portions of the Code including those
concerning maximum rates would apply to credit for business pur-
poses up to $25,000. Unless real estate is involved and the debtor
is an individual, the Code would not regulate consumer credit
which exceeds $25,000. However, the $25,000 size limit is subject
to increase if there is a 10% increase in the Consumer Price Index
for Urban Wage Earners compiled by the United States Depart-
ment of Labor.

The Code repeals all consumer finance and installment loan
laws, sales finance and revolving credit laws, usury laws, and laws
regulating insurance premium financing, home repair financing,
and second mortgages on homes. The Wisconsin Consumer Act,
however, would continue, in effect, separate statutes which regu-
late licensed lenders, motor vehicle dealers and financing, and in-
surance premium financing as well as the general usury law. In
1973, Wisconsin enacted an additional separate law as to real es-
tate loans. These separate laws must be read with the WCA to
find not only the appropriate maximum rate but also other regula-
tory requirements. The Code rates (but not the WCA rate) would
replace various maximum rates, including special rates for banks
and licensed lenders and also special rates for savings and loan
associations. The proposed revision has alternative provisions
which would either repeal or not repeal existing credit union
rates.

The Code fixes the same maximum rates for all types of con-
sumer credit grantors. The maximum rates for installment credit,
consisting of loans and sales, are 36% per year on the first $300,
21% per year on the next $700, and 15% per year on the remainder;
but when these graduated rates yield less than 18% per year, the
maximum is 18% per year. These rates also apply to open end
contracts for cash advances. The rates for open end credit sales
are limited to 2% per month on the first $500 and 1-1/2% on the

12. UCCC §§ 2.104 and 3.104.
13. Id. §§ 2.602, 3.602.
14. Id. §§ 2.605, 3.605.
15. Id. § 1.106.
17. See note 11 supra.
18. UCCC §§ 2.201, 3.201, 3.508.
remainder. The minimum charge for installment contracts is $5 for credit up to $75 and $7.50 for larger amounts. The minimum for revolving credit is 50¢ a month.

In the case of installment contracts, the flat annual rate which yields the same dollar amount as the graduated rates for a particular amount of credit and payment schedule may be charged in lieu of the graduated rates. The permissible flat annual rate for contracts payable in 12 or more monthly installments would be 33% per year for $500, and estimated 25% for $1,500, and an estimated 18% for $5,000, but the maximum rate would not be less than 18% per year. The Code rates or the flat annual equivalents (or lesser rates) could be charged on actual unpaid balances or precomputed on scheduled balances according to the actuarial method. A precomputed charge would be subject to rebate for prepayment in full or refinancing according to the Rule of 78 and to additional charges for default or deferment. In terms of annual dollar addition rates, maximum precomputed charges would be approximately $20.50 per $100 for $300, $14 per $100 for $1,500, $10.30 per $100 for $5,000, and $10 per $100 for larger amounts.

The Code rates seem higher than they really are because they include many charges which have been traditional extra charges under general usury laws. The Code prohibits extra charges for credit investigation, services, expenses, brokerage, "points", and many other charges, in addition to the maximum rate. The broad definition of "loan finance" and "credit service" (sales) charges makes the Code rates comparable to the inclusive maximum rates imposed by early small loan laws. However, the creditor may charge (1) for credit life and disability insurance if the debtor requests it in writing after the creditor discloses the charge to him.

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19. See UCCC prefatory note to the volume and comment to § 2.201.
20. See note 18, supra, and UCCC § 2.207.
21. See UCCC comments to § 2.201.
22. The Rule of 78 is the popular name of a recognized mathematical formula by which a finance charge contracted as a lump sum (precomputed, discounted or added on), is prorated according to balances and periods of time scheduled by contract. Omitting details as to the effects of delinquence, deferrals, irregular payment schedules, prepayments in full not made on installment dates and other problems, the mathematical rule of 78 formulas for equal monthly payment contracts may be briefly stated as follows:

The required rebate for prepayment in full is that proportion of the original finance charge which the sum of the monthly balances scheduled to follow the prepayment in full bears to the sum of all monthly balances scheduled by the contract.

24. Id. at §§ 2.109, 3.109.
in writing, and (2) for property and liability insurance if the creditor discloses the charge in writing with a statement that the debtor may choose his own insurer. Other extra charges are limited to fees to record security and documentary taxes except that the Administrator may approve charges which are not for credit. The maximum rates do not limit annual credit card charges if the card is honored by at least one hundred merchants not related to the credit card issuer, nor the discount at which the credit card issuer purchases the debtor's obligations from merchants.

The Commissioners recommend these rates in combination with other regulatory features of the Code. Their purpose in recommending these rates is to set ceilings and not to fix rates. In brief, they believe: (1) The Code rates are necessary to provide credit to the least credit-worthy now in the market, (2) In practice, charges for most consumer credit will be set by competition rather than by the Code rates, (3) The Code provisions for disclosing finance charges in dollars and annual percentages facilitate comparative shopping which is the most effective means of limiting prices, (4) Rate ceilings should be the same for all types of consumer credit grantors, (5) Different rate ceilings for different types of credit grantors (as in the past) segment the market, reduce competition, and introduce rigidities into the market that benefit a few creditors at the expense of others and work to the disadvantage of consumers, and (6) A "combination of too low ceiling rates, too substantial restrictions on creditors' rights and remedies, or too great enhancement of debtors' rights or remedies, might deprive the less credit-worthy of lawful sources of credit and drive them to 'loan sharks' and other illegal credit grantors in whose hands they will enjoy no legal protections."

The maximum rate set by the Wisconsin Consumer Act is much less than the maximum rates recommended in the Uniform Consumer Credit Code. The WCA sets a general maximum rate of 18% a year on the first $500 and 12% per year on the remainder. The WCA maximum applies to all bank consumer loans and to credit purchases of household goods and services (both open-end

25. Id. at §§ 2.202, 3.202. Under the Redraft, additional charges may be made for real estate "closing costs". "Closing costs" are included in the finance charge under the UCCC to determine whether the maximum rates have been charged, but excluded from any precomputed finance charge to compute a rebate of unearned charges and excluded for disclosure purposes.
26. Id. at §§ 2.303(1)(c), 3.109(2).
27. See note 21, supra.
and closed-end), but the WCA maximum does not apply to licensed lenders, motor vehicle and farm equipment dealers and insurance premium financers. Separate statutes set different maximum rates for each of these categories. In general, these separate maximum rates are greater than the WCA rate but less than Code rates although in the case of older used motor vehicles, the rates for installment purchases exceeding $5,000 (approximate) may be higher than the Code rate.28

Besides maximum rates, the Code has significant regulatory provisions as to balloon payments,29 security,30 garnishment31 and other creditors' collection remedies;32 unconscionable or fraudulent conduct;33 a "cool-off" period for door-to-door sales;34 referral sales;35 rescission of contracts secured by the debtor's home;36 and official surveillance and enforcement by an Administrator.37 There are heavy civil and criminal penalties for violations of the Code.38 Provisions against enforcing extortionate credit extensions by judicial process facilitate federal prosecutions for extortionate practices under Title II of Federal Consumer Credit Protection Act.39

The official Code has detailed requirements as to contract disclosures and advertising similar to the requirements of the Federal Truth-in-Lending Act.40 Required disclosures for installment credit include the dollar amount and annual rate of finance charge, the dollar amount of insurance and other non-finance charges, a description of insurance coverages, a description of security, the payment schedule, and descriptions of charges for default or deferment, and the rebate of finance charge in case of prepayment in full. The dollar amount of the finance charge for credit to purchase a home need not be stated when the annual rate does not exceed

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29. UCCC §§ 2.405, 3.402.
30. Id. at §§ 2.407, 2.408, 2.409, 3.510.
31. Id. at §§ 5.104, 5.105.
32. Id. at §§ 2.403, 2.414, 3.405, 3.407.
33. Id. at §§ 4.106, 5.108, 6.111.
34. Id. at §§ 2.601, 2.605.
35. Id. at § 2.411.
36. Id. at § 5.204.
37. Id. at § 6.105 et seq.
38. Id. at §§ 5.202, 5.203, 5.204, 5.301, 5.302.
39. Id. at § 5.107.
40. Id. at §§ 2.301, 3.301. The Redraft would omit the disclosure provisions and attempt to incorporate the federal requirements into state law by reference.
10%. Advertising which states the amount of the finance charge must state the annual rate of charge and the payment schedule. Advertising which states a rate of finance charge must state the rate in terms of a flat annual interest rate, except that revolving credit rates may be stated in graduated form. The Administrator would have broad rule-making authority "to assure a meaningful disclosure of credit terms so that a prospective debtor will be able to compare" from among credit grantors.

The WCA, on the other hand, relies primarily on the Federal Truth-in-Lending Act and federal regulations and enforcement to obtain disclosure of contract terms.

The Code would exempt 75% of wages and a minimum of 40 times the federal minimum hourly wage from garnishment, prohibit garnishment of wages before judgment, prohibit wage assignments, prohibit deficiency judgments for credit sales when the cash price is $1,000 or less, subject the purchaser of credit sales contracts to defenses which the credit buyer may have against the merchant, and prohibit or limit attorneys' fees in collection suits. There is also a prohibition against employers discharging employees because their wages are garnished to collect a consumer debt. The WCA has additional restraints on creditors' collection remedies which will be mentioned later in this article.

The Administrator under the Code would have broad enforcing authority as to all types of consumer credit grantors. He may investigate any merchant or sales finance company which he has reason to believe has violated the Code and examine as a matter of right any lender who charges more than 10% per year (12% under proposed revision). He could enforce the Code by regulations, cease and desist orders, and court injunctions. He could

41. Id. at §§ 2.306, 3.306.
42. Id. at §§ 2.313, 3.312.
43. Id. at § 6.104.
44. Id. at § 5.105.
45. Id. at § 5.104.
46. Id. at §§ 2.410, 3.403.
47. Id. at § 5.103. If the purchased goods cost $1,000 or less and the creditor repossessed them, the purchaser is not personally liable for any unpaid balance. The creditor who obtains judgment without repossessing purchased goods in which he had a security interest may not levy on purchased goods which cost $1,000 or less.
48. Id. at § 2.404 (alternatives A or B).
49. Id. at §§ 2.413, 3.403 (alternatives A or B).
50. Id. at § 5.104.
51. Id. at §§ 3.506, 6.106.
52. Id. at § 6.104.
obtain injunctions against unconscionable or fraudulent conduct, but he could not predetermine by regulation or finding that particular conduct is unconscionable or fraudulent. All consumer credit grantors (merchants, lenders, sales finance companies, and supervised financial organizations) must file written notification with the Administrator and pay an annual fee. In addition, lenders who charge more than 18% a year must either be licensed or be supervised financial organizations such as banks, credit unions, savings and loan associations or similar institutions under state or federal supervision. Before issuing a license, the Administrator must find after investigation that the lender's financial responsibility, character and fitness warrant belief that the lender will operate his business honestly and fairly within the purposes of the Code. In addition to the Administrator, a Consumer Credit Advisory Council appointed by the Governor would also be established.

The enforcing authority of the Wisconsin Banking Department is equal to the enforcing authority which would be delegated to a Code Administrator. However, the authority delegated by the WCA to the Banking Department could result in arbitrary administrative action if it were exercised by an unwise or biased person.

Finally, debtors have individual rights to enforce the Code independent of the Administrator's enforcing authority. Debtors may recover civil penalties and attorneys' fees from creditors for excessive charges, for failure to disclose charges as required, and for certain other violations.

The Code does not specifically authorize consumers to bring class actions against creditors to recover civil penalties for alleged violations. Unlike the Code, the WCA specifically authorizes borrowers to bring class actions to recover civil penalties for alleged violations of prohibitions and requirements many of which are ambiguous and open to two or more reasonable constructions by competent attorneys. This unwise feature of the WCA will be discussed later in this article.

53. Id. at § 6.108.
54. Id. at § 6.110.
55. Id. at § 6.111.
56. Id. at §§ 6.201, 6.203.
57. Id. at § 3.501. Under the Redraft, the requirement that lenders be either licensed or supervised financial organizations would apply where the rate exceeds 12% a year rather than 18%.
58. Id. at § 3.503.
59. Id. at §§ 6.301-6.303.
60. Id. at §§ 5.202, 5.203, 5.205.
The Code is Pro-Consumer

The Code would impose a vast array of prohibitions, limitations, and administrative discipline on credit grantors. It is clear that the Code is a pro-consumer protection law. Nevertheless, the Uniform Commissioners knew that there must be a reasonable balance between pro-consumer protections and the rights of creditors. In their Prefatory Note to the Code, the Commissioners declared:

[The Code] provisions governing ease of entry into the market, uniform disclosure of costs and terms, rate ceilings, restriction of creditors' rights and remedies, enlargement of debtors' rights and remedies, and powers granted to the Administrator are so inextricably interrelated that any substantial change in one area requires a major review of the balance struck in all other areas.61

The Commissioners sought to accomplish the balance by allowing credit grantors adequate finance charges, by allowing them legitimate collection remedies, and by stating the requirements for legality as clearly as could be stated for the first time in a new and innovative legislative proposal. Contrary to this, the drafters of the WCA did not allow adequate finance charges. Their curtailment of collection remedies went beyond what was reasonable. They were ambiguous in their terminology. The drafters offered the Legislature a hodgepodge of specialized definitions, prohibitions, and limitations along with high pressure, anti-business propaganda. The hodgepodge defied comprehension within the short time that the Legislature had to consider it.62


The drafters of the Wisconsin Consumer Act failed to use clear and unambiguous language. They failed to give sufficient consideration to the economic effects of restrictive provisions. The Legislature recognized this failure when it delayed the effective date of the law from March 28, 1972, the date of approval, until March 1, 1973. The delayed effective date was to allow time for corrective amendments and for study by the Legislative Council. Three corrective bills have already been enacted, two before the March

61. Id. at p. XX.
deadline and the third on April 19. In recognition of the ambiguities found in the WCA, the Legislature authorized the Banking Department to issue interpretations of the Act which would relieve creditors from penalties which might otherwise be imposed for hypertechnical violations of ambiguous provisions. Under this authorization the Banking Department proposed 62 clarifying regulations of which 47 were adopted. The Staff of the Legislative Council has also suggested many clarifying amendments.

Thus, it is becoming increasingly clear that the WCA is so full of ambiguities that compliance will be extremely difficult.

The economic consequences of unwise restrictions on creditors are also being recognized. By enacting Senate Bill 364, the Legislature recognized that the WCA did more harm than good to purchasers of homes and to purchasers of securities. Senate Bill 364 enacted three exemptions from the provisions of the WCA. Federally insured consumer loans are exempted from most of the WCA. First mortgage real estate loans are shifted to a new and separate statute unless the rate exceeds 12% a year. Responsible people declared that the WCA had made Wisconsin real estate mortgage loans unmarketable.

Senate Bill 364 completely exempted obligations to licensed securities dealers. It is not likely that the Legislature had a conscious intention to impose the restrictions of the WCA on the purchase of stocks and bonds from licensed security dealers. Even so, a specific exemption was required—either to relieve security margin accounts from unwise restrictions or to correct a drafting error. The unexpected effects of the WCA on margin accounts for security purchases suggest that the drafters either did not know what they were doing, or knew what they were doing but formed no balanced judgment about it. Throughout the WCA there are other destructive provisions which may have resulted either from drafting errors or from lack of balanced judgment. Often it is hard to discern whether the differences are errors in drafting which produced unexpected effects or errors of judgment which produced intended effects. The remainder of this article will attempt to show examples of each.
Drafting errors resulting in destructive ambiguities start with the specialized "Humpty-Dumpty" definitions. In section 421.301, standard dictionary terms which have habitual meanings become redefined "Humpty-Dumptys." They are distorted, over-stuffed, and understuffed by the Act to mean more or less, or both more and less, than their dictionary and commonly accepted meanings. Professor Reed Dickerson, a Uniform Commissioner from Indiana and drafting expert, says:

The temptation to use a "Humpty-Dumpty" definition is of course, strong.... At the same time it would be hard to find a better example of the penny-wise-pound-foolish approach.

Like ghosts returning to a haunted house, established connotations return to haunt the user who attempts to banish them. The draftsman who has resorted to this slovenly device has often forgotten his special definition and reverted unconsciously to the established sense, thereby introducing either an unintended result or an intended result disguised as something else.67

The worst "Humpty-Dumptys" found in section 421.301 are the redefinitions which distort the meanings of "merchant," "customer," "creditor," "lender," "services" and "consumer credit transaction." They not only confuse, surprise, and trap the reader, they also enlarge and/or narrow the scope of the WCA in unexpected ways. For example, the strange definition of "merchant" in combination with other Humpty-Dumptys includes not only merchants who are really merchants but also lenders, banks, insurance companies, credit unions, small loan companies, creditors, assignees, manufacturers, lessors, and brokers. "Merchant" therefore, may include and thereby regulate security dealers, doctors, dentists, and lawyers without even mentioning them. The "Humpty-Dumptys" specifically define services to include and thereby regulate transportation, cemeteries, and tombstones, but exclude common carriers who have filed tariffs and all insurance

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66. See L. Carroll, Through the Looking-Glass, Chap. 6; Part of the exchange between Alice and the EGG went as follows: The EGG said to Alice in scornful tones, "When I use a word, it means just what I choose it to mean—neither more nor less." Alice replied, "The question is whether you can make words mean so many different things." The EGG replied, "The question is which is to be master—that's all." Alice was puzzled by the EGG just as we are puzzled by the WCA.

not provided with consumer credit.

Legal analysts agree that the specialized definitions are problem areas. One commentator foresees that:

These circular definitions probably will cause far more confusion than assistance in determining precisely who falls under the coverage of the Act and what transactions will be covered, . . . the Act would have been easier to understand if some of these terms had not been defined at all, or at least defined without circular references.68

As we have seen, the Legislature has found it necessary to exclude by specific exemption security dealers and the credit which they extend to their customers who purchase stocks and bonds due to these definitional problems.

Another example of drafting errors resulting in destructive ambiguities is found in section 422.204(1)(a) which computes deferral charges. The deferral charge may equal "the portion of the precomputed finance charge attributable to the final installment of the original schedule of payments times the number of installments deferred times the number of months deferred."69 In the context of the WCA, "finance charge attributable" may have any one of three or more meanings. It could mean "attributable" by the contract rate, "attributable" by the disclosed Annual Percentage Rate, or "attributable" by the Rule of 78 rebate required for prepayment in full. Only one familiar with credit laws would know that the third choice probably was intended. No one could guess what the courts would say. A Banking Department Rule may alleviate the problem. It declares that the finance charge attributable to the final installment period shall be determined by the Rule of 78 thereby implying that the finance charge attributable to other installments also shall be determined by the Rule of 78.70 Further, section 426.104(4)(a) provides in effect that no penalty imposed by the WCA shall apply to any act done or omitted to be done in accordance with any rule, order, opinion, or statement of the Banking Department, notwithstanding that a court later reverses the Banking Department. The Banking Department Rule together with section 426.104(4)(a) of the WCA should protect creditors from penalties for computing deferral charges by the Rule of 78.

69. WIS. STAT. § 422.204(1)(a) (1971).
70. See note 22 supra.
However, it will not protect creditors from the possibility that a court will hold the Banking Department's rule invalid. If a court should hold that the Banking Department's rule permitting Rule of 78 deferral charges is invalid, creditors must change their contract forms and procedures to comply with the court's interpretation of section 422.204(1)(a).

Section 422.203, regarding delinquency charges, contains another destructive ambiguity. Under the Discount Loan Law71 and similar laws in other states, delinquency charges are limited to "precomputed", "discounted", or "add-on" contracts, but the WCA delinquency provisions are not so limited.

Under the above types of contracts, the total finance charge for payment according to schedule is contracted for when the loan is made, subject to rebate for prepayment in full and additional charges for default or deferment. A precomputed finance charge is "precomputed" at the simple interest unpaid balance rate or rates on scheduled monthly balances for the contract period. A "discount" and "add-on" finance charge is for the contract period without regard to installment payments. Add-on is computed on and added to the original amount financed. Discount is computed on and deducted from the face amount of the note and the remainder is the original amount financed. Default charges are appropriate for defaults in paying "precomputed," "discounted," or "add-on" contracts but not appropriate for defaults in paying simple interest contracts. The WCA rate for licensed lenders is a mixture of "discount" charges or equivalent simple interest rates up to $3,000 and simple interest rates which may be precomputed for loans over $3,000.

Section 422.203 as to delinquency charges is not limited to precomputed and discounted contracts. The resulting ambiguity may be that section 422.203 either permits delinquency charges to be added to simple interest charges earned on delinquent balance or limits the amount of simple interest on delinquent balances. There are other possibilities. Litigation may be necessary to resolve this ambiguity, because the Banking Department has not yet issued a rule.

Section 422.204 referring to deferral charges avoids this ambiguity because it is limited to precomputed or discounted contracts so that it does not apply to simple interest contracts. Section 422.204(1)(a)(1)(c) provides: "The total amount of finance charges and fees shall be stated in the contract in such a manner as to indicate all charges and fees resulting from the use of the loan proceeds." 71. Wis. Stat. § 138.09 (1971).
422.203 could have been made equally clear. Fortunately, this destructive ambiguity does not apply to licensed lenders, but it may complicate installment contracts and default procedures of banks, merchants, doctors, hospitals, and perhaps other creditors.

Section 422.208, which refers to interlocking loans and sales, combined with section 425.209 which refers to deficiency judgments, results in ambiguities and uncertainties which may be deliberate rather than the result of drafting errors. Under section 422.408, there is "an 'interlocking consumer loan' if the creditor knows or has reason to know that all or a meaningful part of the proceeds of the loan are used to pay all or part of the customer's obligations to the seller . . . ." and, if any one of several other facts occurs. The consequences to a cash lender of making an "interlocking consumer loan" are that the borrower-buyer may assert against the cash lender claims and defenses which the borrower-buyer may have against the seller. Section 425.209 prohibits a deficiency judgment for any interlocked loan or any interlocked unpaid loan balance of $1,000 or less. There are other consequences. There are limitations which may spare the lender for some of the consequences. There is no doubt, however, that when suit is filed to collect a dealer-referred loan, there may be jury questions as to whether there was an interlock imposing the consequences of Sections 422.208 and 425.209 on some part or all of the unpaid balance. These sections give rights to borrower-buyers far beyond rights of a cash-paying non-borrowing buyer.

Sections 425.103 through 425.105 contain a complex definition of "default" and complex regulations of default procedures which must be complied with before creditors may bring legal action to collect the debt or recover security. If a "customer" is in "default," as defined in the Act, the debtor has 15 days to "cure" his default. Only if the customer does not cure his default may the creditor sue the customer or bring other legal action to recover the collateral. In the case of monthly installment contracts, a "default" does not arise until there is "outstanding two or more scheduled payments which have remained unpaid for more than 10 days after their original or deferred due dates," unless the default arises in paying the first or last installment. Different "Humpty-Dumpty's" apply to agricultural payments on agricultural credit and to pay-

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72. Id. at § 425.105.
73. Id. at § 425.103(2)(a)
ments due at intervals of more than sixty days. These WCA restrictions may have some unexpected effects on legitimate efforts to collect legitimate consumer debts and might also be stretched to apply even to non-consumer debts.

Subchapter II of chapter 423 of the WCA which defines and regulates "consumer approval transactions" could have unexpected effects. This subchapter was designed to protect ordinary people from high pressure door-to-door salesmen. However, it may go beyond door-to-door sales. Section 423.201 defines "consumer approval transactions." Depending on one's emphasis when reading section 423.201 and associated definitions which the section incorporates, it is possible that "consumer approval transactions" could include many loan and credit sales contracts which are made by mail. The term "consumer approval transactions" may also include some cash sales made by mail for which the purchaser pays more than $25. If a transaction falls under the confines of a "consumer approval transaction" the consequences are that it is subject to cancellations within three business days, subject to a notice requirement and related requirements, unless the "customer" certifies that immediate service is necessary.

DESTRUCTIVE ERRORS OF JUDGMENT—RATE AND COLLECTIONS

The drafters of the WCA were guilty of major errors of judgment with respect to the economics of the consumer finance business, especially in their reliance on the National Consumer Act. The National Consumer Act was drafted solely by consumer advocates whose knowledge of consumer credit was really very limited. Their experience was with people who qualify for free legal representation for legal aid societies and OEO lawyers. They saw consumer credit through the eyes of a tiny fraction of all who incur consumer debt. It would serve no useful purpose to review in detail all the errors of judgment, but the errors relating to rates of charge and collections will be mentioned to allude to the other errors.

The Wisconsin rate which applies to licensed lenders and their cash installment loans for smaller amounts up to $500 is low in comparison with the corresponding maximum rates in other states and in the Uniform Consumer Credit Code. In terms of annual percentage interest rates, the maximum is 21.11% per year com-

74. Id.
puted by the actuarial method on scheduled unpaid balances of loans up to $700. This annual percentage rate of 21.11% is equal to the annual discount rate of 9.5% authorized by Wisconsin Statutes section 138.09 when the loan contract is paid in 24 equal and consecutive monthly installments of principal and discount combined. For cash installment loans up to $300 or $500, the Wisconsin rates which apply to licensed lenders are 25% less than the corresponding rates of 43 other states. The Wisconsin rates for revolving loan or sale credit are less than the corresponding rates in 26 other states. Forty-two states authorize higher rates than WCA rates for installment sales of consumer goods (other than motor vehicles). 76

The WCA imposes restrictions on creditors' collection remedies which are not imposed by the Code and which were not previously imposed by Wisconsin law.

The business of consumer credit involves risk of loss, operating expense, and costs of raising money which are well known to those who are in the business but which may not be recognized by others. There is in fact a very small margin of profit to creditors. A small increase in a creditor's cost of borrowed money, a small increase in his operating expense, a small increase in bad debts, or a small insufficiency in the rate of charge would move the creditor from profit to loss. The narrow profit margin is demonstrated by annual statistics published by the Wisconsin Commissioner of Banking as to operations of licensed lenders under sections 138.07 and 138.09. The report for 1972 shows that licensed lenders invested in loans for the year an average of $274,852,255 and their profit was only $5,714,378. Their net profit was only 2.08% for the year of their

76. The Wisconsin maximum rates referred to are fixed by Wis. Stat. § 138.09(7) (1971) as amended by Wis. Laws 1972, ch. 239 § 9 and Wis. Stat. § 422.201 (1971). The maximum rates established in Wisconsin and other states by consumer finance loan laws, sales finance, revolving credit, usury, and allied laws are stated in the pamphlet entitled, Summary of State Consumer Credit Laws and Rates, compiled by the authors of this article as of Jan. 1973. With respect to licensed lenders (consumer finance loan laws), the Summary shows 48 states which permit higher rates than Wisconsin allows. The maximum rates authorized by Delaware, New Hampshire, New Jersey, Tennessee, and Vermont are higher than Wisconsin rates but less than 25% higher. With respect to revolving loan or sale credit, the 26 states which allow higher rates than Wisconsin are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, and Wyoming. With respect to installments sales of goods, only two states impose lower rates by statute than the Wisconsin rates (Pennsylvania and Washington); several states do not impose any maximum rates. The Arkansas Constitution sets a maximum interest rate of 10% per annum.
average investment in loans for the year and 11.02% of gross income. The bad debt expense for the same year (including write-offs and additional reserves) was $4,974,036 which was nearly 10% of gross income.\footnote{77. ANNUAL REPORT OF THE WISCONSIN BANKING DEPT. FOR 1973, at pp. 12-14.}

It is apparent that a decline in the collectibility of loans would sharply reduce the profit and could move the business from net profit to net loss. The drafters of the WCA may have overlooked these facts when they imposed new restrictions on creditors’ right to collect from their customers. Among the new WCA restrictions are the following:

(1) Self-help repossession of security without judicial process is prohibited. Judgment in action for replevin must be obtained to repossess security.\footnote{78. Wis. Stat. §§ 425.205, 425.206 (1971).} A voluntary surrender of security by the debtor is not “voluntary” if the creditor has requested the surrender.\footnote{79. Id. at § 425.204.}

(2) When the unpaid balance of a credit sale or an interlocking loan is $1,000 or less at time of default, the creditor may not repossess the security and also obtain a deficiency judgment; and if the creditor obtains judgment without repossessing, the creditor may not levy on the security to enforce the judgment.\footnote{80. Id. at § 425.209.} The unpaid balance at time of default rather than the original amount financed determines the application of this prohibition. The prohibition applies to credit sales and interlocking loans as large as $25,000 when the unpaid balance is $1,000 or less at time of default.

(3) Lenders are prohibited from having security in most household furniture except purchase money security and are prohibited from levying on it to enforce a judgment.\footnote{81. Id. at § 422.17, 425.106.}

(4) The debtor’s equity in his home to the extent of $15,000 is exempt from levy.\footnote{82. Id. at § 425.106.} This exemption is in addition to the homestead exemption of $10,000.

(5) The minimum exemption of wages from garnishment is forty times the federal minimum hourly wage plus fifteen dollars per dependent.\footnote{83. Id.} This adds fifteen dollars per week for each dependent of the debtor to the minimum exemption established by the Code.
(6) The creditor is prohibited from filing suit to collect monthly installment contracts until two installments are in default more than ten days and the creditor has given the debtor a fifteen day notice. Different minimum default periods are prescribed for the first and last installment, installment periods exceeding two months, credit for agricultural purposes, and open-end credit.

(7) A lender may be liable for claims or defenses which a borrower may have against a seller if the lender knows that a "meaningful part" of the loan is paid to the seller and if the lender knows that the seller has failed to perform contracts. There are other facts which may subject the lender to liability. The lender's liability may not exceed the amount of the loan; it is limited to the unpaid balance when the lender has notice of the borrower-buyer's claim or defense, unless the borrower-buyer has an unsatisfied judgment against the seller. If only part of the loan was paid to the seller, the lender's liability is based on that part of the loan rather than the whole loan.

(8) The Banking Department may promulgate rules to prohibit "unconscionable" collection.

(9) There is a list of statements which a creditor is prohibited from making when communicating with a delinquent debtor, or his employer, relatives, or others.

CLASS ACTIONS FOR PENALTIES

The WCA allows the Banking Department or any credit customer to bring class actions for civil penalties as well as actual damages. The civil penalties for violation are very heavy. Some violations make the contract void and allow the debtor to keep the proceeds of the contract. Other violations allow debtors to recover twice the finance charge subject to a minimum of $100 and a maximum of $1,000. In all cases, the credit customer may recover attorneys' fees when the court holds there is a violation. In the recent opinion in Eisen v. Carlisle & Jacquelin, Judge Medina, speaking for the U.S. Court of Appeals for the Second Circuit, recognized such a class action could result in what has been called

84. Id. at §§ 425.103, 425.104, 425.105.
85. Id. at § 422.408.
86. Id. at § 426.108.
87. Id. at § 427.104.
88. Id. at § 426.110.
89. Id. at §§ 425.302-425.305.
90. 479 F.2d 1005 (2d Cir. 1973).
"legalized blackmail." The drafters of the WCA not only adopted the broad provisions of Federal Rule 23 on class actions, but added a number of ambiguous provisions.

In a large number of purported class actions alleging violations of the Federal Truth-In-Lending Act, class actions have been denied because courts did not believe that Congress could have permitted penalties for violations to be recovered in class actions. Judge Frankel in *Ratner v. Chemical Bank New York Trust Co.*, noted that such a recovery "would be a horrendous, possibility annihilating punishment, unrelated to any damage to the purported class. . . ." Yet, section 426.110(14) permits class actions for penalties, unless the businessman can show that the violation was not "willful and knowing." It was an error in judgement to permit class actions for penalties in any situation; and the addition of vague language will necessitate prolonged litigation to determine its meaning.

Section 426.104(4) of the Act, permitting the Banking Department to approve creditors' practices, will be of some help in lessening the problems of determining what must be done to comply with the Act, but the Banking Department cannot approve every possible aspect of business practice.

**CONCLUSION**

The restrictions in the WCA on creditors' rights are so severe and frequently so ambiguous that creditors generally may curtail credit to consumers and some creditors may be unwilling to take

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93. *Id.* at 416.
94. Since this article was begun, the U.S. Circuit Court of Appeals for the Third Circuit vacated its decision allowing a class action to recover Truth-In-Lending penalties and ordered a rehearing *en banc*. The Carte Blanche petition cites thirty-four U.S. District Court opinions as to Truth-In-Lending class actions for civil penalties, stating that "in all but three of them, these courts have uniformly held that class action treatment is improper in such a Truth-In-Lending class action." Vacation and rehearing was granted June 20, 1973.

In another case, a federal district judge required the plaintiffs to waive the $100 minimum penalty imposed by the Truth-In-Lending Act as a precedent to bringing a class action for alleged violations of the Truth-In-Lending Act. *Eovaldi v. First National Bank of Chicago*, 57 F.R.D. 545 (N.D. Ill. 1973).

See also, Garwood, *Truth-In-Lending A Regulator's View*, 29 BUS. LAWYER, 193, 201 (1973). Mr. Garwood shows that the score in federal district courts is 16 decisions which did not permit class actions and eleven decisions which did permit class actions. Mr Garwood's score may have been compiled before June 20.
the risk. It may be a long time before we learn the economic effects of these restrictions. It may be difficult, if not impossible, to determine their economic effects on the basis of statistics. One by one each restriction may seem reasonable when considered by itself without regard to the other restrictions. It is the cumulative effect rather than the one-by-one effect, which makes the WCA so severe.