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individual testing is impractical.[53] In view of the difficulty of proving that no 36 year old could be a competent policeman,[54] the *Tamiami* test virtually forces Moundsville to consider administering separate tests to each applicant for their police department.[55]

The congressional purpose behind ADEA was to enable each worker to demonstrate his own ability rather than face blanket exclusion from employment because of his age.[56] The minimal increase test of a bfoq might have made state age restrictions in police hiring virtually unassailable, frustrating ADEA's intent.[57] Requiring states to administer individual testing if feasible forces the states to observe congressional policy. *Tamiami* imposes congressional strictures on state hiring, and to that extent the *Arritt* decision has diminished state autonomy in the interest of promoting national antidiscrimination policy.[58]

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VI. COMMERCIAL LAW

A. Retroactivity Under the UCC

The states' individual adoption of the Uniform Commercial Code (UCC) standardized commercial law in the United States.[1] As demon-

[53] 567 F.2d at 1271.

[54] Proving that all the individuals in an age group are unqualified would require the employer to prove a negative, and would not be possible under any standardized empirical survey. *See Age Discrimination, supra* note 25 at 407.

[55] *See, e.g.*, Aaron v. Davis, 414 F. Supp. 453, 463 (E.D. Ark. 1976) (individual testing as an alternative to invoking bfoq). *But see* note 56 *infra.*

[56] *Department of Labor Bulletin,* note 41 *supra,* (pointing out that differentiation based on individual exams is permissably within the congressional intent but that classification by age alone is not.) 29 C.F.R. § 860.103(f)(1)(ii) (1978); *see* ADEA, 29 U.S.C. § 621(b) (1976) (Congressional purpose to promote employment of workers based on ability rather than age). *See also* Gill v. Union Carbide Corp., 368 F. Supp. 364, 367 (E.D. Tenn. 1973) (purpose of Congress is to promote individual testing). Experts disagree on whether medical tests can accurately determine functional age or disabilities due to aging. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976), *accord* Hodgson v. Greyhound Lines Inc., 499 F.2d 859, 864 (7th Cir. 1974). *But see* Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.), *cert. denied,* 434 U.S. 966 (1977) (medical testing can accurately guage abilities of aging test pilots). *See generally* Comment, *Age Discrimination In Employment - The Bona Fide Occupational Qualification Defense - Balancing The Interest Of The Older Worker In Acquiring and Continuing Employment Against The Interest In Public Safety* 24 WAYNE L. REV. 1339, 1350 & 1358 (1978).

[57] *See* text accompanying notes 50-52 *supra.*

[58] If the Fourth Circuit test of a bfoq promulgated in *Arritt* is applied with circumspection, particularly with a view toward the economic realities of small rural police departments and volunteer fire departments, the economic burden of separate testing should not prove insufferable. Written exams and personal interviews conducted before the more expensive physical or mental examinations, for instance, would reduce the pool of applicants requiring the more expensive medical examinations.

[1] Every state except Louisiana has enacted the UCC. Although a number of amendments

strated by the Fourth Circuit decision in *Florida Power & Light Co. v. Westinghouse Elec. Corp.*,[2] however, the Code's draftsmen failed to anticipate all conflicts regarding the Code's application to pre-Code transactions. The Florida legislature specified that the UCC was to apply to all transactions entered into after the January 1, 1967 effective date of the Code[3] and that all prior transactions were to be governed in accordance with pre-Code law.[4] One of the areas of pre-Code law changed by Florida's adoption of Article 2 of the UCC was the law of excuse for failure to perform a contract.[5] The commercial impracticability standard embodied in section 672.615 (Fla. Stat.)[6] significantly relaxed Florida's common law excuse requirement.[7] *Westinghouse* involved the applicability of section

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were added to the Code by some states, commercial law under the UCC has become fairly consistent across the states. D. LLOYD, UNDERSTANDING THE UNIFORM COMMERCIAL CODE 1-3 (1973). The UCC, and in particular § 2-615(FLA. STAT. ANN. § 672.615 (West 1966)) (excusing a seller who is unable to perform the contract due to the failure of presupposed conditions), was designed to infuse good practical sense and fair dealing into commercial transactions. Reply Brief of Appellant at 2, Florida Power & Light Co. v. Westinghouse Corp., 579 F.2d 856 (4th Cir. 1978) [hereinafter cited as Reply Brief of Appellant]; Fla. Stat. Ann. § 672.615, Official Comment 6 (West 1966).

[2] 579 F.2d 856 (4th Cir. 1978).

[3] FLA. STAT. ANN. § 680.101(1) (West 1966) (renumbered from 680.10-101, *see* ch. 680, art. 10, FLA. STAT. ANN. (West Supp. 1979)) provides that, "this code shall become effective at 12:01 a.m. on January 1, 1967. It applies to transactions entered into and events occurring after that date."

[4] The Florida legislature adopted the following specific transition language pertaining to pre-Code transactions:

> Transactions validly entered into before the effective date specified in this section and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this code as though such repeal or amendment had not occurred.

FLA. STAT. ANN. § 680.101(2) (West 1966). This section corresponds to § 10-102(2) of the UCC.

[5] *See* notes 6-7 *infra.*

[6] FLA. STAT. ANN. § 672.615 (West 1966). The UCC did not codify precisely Florida's common law of excuse. Section 672.615 excuses a seller's nonperformance if the performance became impracticable by the failure of some presupposed condition essential to performance.

[7] Brief of Appellee at 30, Florida Power & Light Co. v. Westinghouse Corp., 579 F.2d 856 (4th Cir. 1978) [hereinafter cited as Brief of Appellee]. Florida's common law of excuse was expounded in City of Tampa v. City of Port Tampa, 127 So.2d 119 (Fla. Dist. Ct. App. 1961), in which Port Tampa sold and transferred its water system to Tampa under the express agreement that Tampa would extend water mains, laterals and pipes to Port Tampa whenever necessary and without charge. *Id.* at 119-20. The court prohibited Tampa's later attempt to charge for the extensions on the basis that no provisions for such charges had been incorporated in the contract. *Id.* at 121. The court stated that "regardless of the fact that the years have proven this contract to be inadequate, this alone does not justify the court to modify the contract." *Id.* at 120; *see* Moon v. Wilson, 100 Fla. 791, 130 So. 25, 27, (1930) (negligence or want of skill, judgment or diligence on part of promisor precludes excuse of performance); Enid Corp. v. Mills, 101 So.2d 906, 908-09 (Fla. Dist. Ct. App. 1958) (only act of God rendering performance impossible excuses nonperformance). Under pre-Code common law, Florida courts would not alter a contract to relieve one of the parties from the hardship of an "improvident bargain." Beach Resort Hotel Corp. v. Wieder, 79 So.2d 659, 663 (Fla. 1955); *accord,* Medard v. Paulson, 37 So.2d 902, 903 (Fla. 1948); Pierce v. Isaac, 134 Fla. 666, 184 So. 509, 513 (Fla. 1938). Under section 672.615, however, a promisor is excused merely if

672.615 to a 1965 contract between the plaintiff (FPL) and Westinghouse to supply uranium to FPL's nuclear power plant.[8]

Under the terms of the 1965 contract, Westinghouse agreed to furnish fuel to the Turkey Point 3 nuclear power plant according to one of three arrangements chosen by FPL,[9] beginning when the plant became operational. FPL selected its arrangement in 1972, seven years after the original contract was signed and five years after Florida adopted Article 2. In the 1965 contract, Westinghouse also included an option, exercisable until July, 1967, for FPL to purchase fuel for a second nuclear plant, Turkey Point 4. FPL exercised this option in February, 1967, one month after the effective date of the Florida UCC.[10]

Westinghouse notified FPL in 1975 that performance of the Turkey Point 3 and Turkey Point 4 fuel contracts had become commercially impracticable[11] and that Westinghouse thus considered itself excused from performance under applicable Florida law.[12] FPL refused the Westinghouse

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performance becomes "impracticable" by the failure of a previously assumed condition, a less strict rule than existed at common law. FLA. STAT. ANN. § 672.615 (West 1966).

[8] 579 F.2d at 857. The FPL suit was one of fourteen separate actions brought against Westinghouse for its refusal to honor long-term fixed price contracts to deliver 70 million pounds of uranium. Westinghouse claimed that an unforeseen rise in the price of uranium made fulfillment of the contracts commercially impracticable, since its potential losses, if forced to perform, were estimated at approximately two billion dollars. *See* Joskow, *Commercial Impossibility, the Uranium Market and the* Westinghouse *Case*, 6 J. LEGAL STUD. 119, 119 (1977) [hereinafter cited as Joskow]. The actions against Westinghouse were brought in thirteen different federal district courts. Since the actions involved common questions of fact, Westinghouse moved to transfer all actions to the Western district of Pennsylvania for pretrial proceedings pursuant to 28 U.S.C. § 1407 (1976). *In re* Westinghouse Elec. Corp. Uranium Con. Lit., 405 F. Supp. 316, 317 (J.P.M.D.L. 1975). The judicial panel determined that transfer of the actions to the Eastern District of Virginia would best suit the parties and witnesses and promote the most efficient conduct of the litigation. The transfer under § 1407 was effected to prevent duplication of discovery, eliminate the possibility of inconsistent pretrial rulings, and avoid conflicting preliminary injunctive demands on Westinghouse. *Id.* at 318-19.

[9] 579 F.2d at 857-58. Under the contract, FPL had to choose one of three plans for purchasing the fuel. The three options were to purchase a five year supply of fuel for a lump sum with options on replacement fuel, or to purchase on a long term basis at a lump-sum price on the first core or to purchase fuel on a long-term mills-per-kwh basis. *Id.* n.2.

[10] *Id.* at 858.

[11] *Id.* The general policy followed by Westinghouse in the 1960's was to purchase uranium in excess of its supply obligations. Shortly after executing the contract with FPL, Westinghouse bought a quantity of uranium substantially exceeding its obligations to FPL. In the 1970's, however, Westinghouse began to sell uranium without replenishing its supply. By 1974, Westinghouse had sold far more uranium than it had acquired. Brief of Appellee, *supra* note 7, at 6. Westinghouse contends that events so affecting the uranium market as to render completion of the contracts impracticable included: a conspiracy by uranium producers to raise uranium prices, allocate supplies and boycott Westinghouse; the 1973 Arab Oil Embargo and the OPEC cartel creating an energy crisis affecting all fuel; pressures on the uranium supplies by the Atomic Energy Commission's contracting policies; delays in uranium reprocessing in addition to the "breeder" reactor which intensified uranium demand; and restrictions on exports by uranium producing countries, all of which disrupted the supply and demand in the uranium market. Reply Brief of Appellant, *supra* note 1, at 14.

[12] 579 F.2d at 858; *see* note 6 *supra*.

offer to allocate the remaining uranium among FPL and its other customers. Upon Westinghouse's failure to perform the contract as agreed, FPL sought specific performance of the contract or damages for its breach[13] and moved to strike Westinghouse's affirmative defense of commercial impracticability.[14] In granting the motion, the district court ruled that Westinghouse could not claim the benefit of a statute enacted after the contract was formed.[15] The Fourth Circuit granted Westinghouse an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[16]

Westinghouse based its commercial impracticability defense on changes in the uranium market which drove the cost of completing the contracts so high as to render their performance financially prohibitive. Among the factors responsible for the drastic changes were an alleged conspiracy by uranium producers to raise prices, the 1973 Arab Oil Embargo, demands on the uranium market by the Atomic Energy Commission, and restrictions placed on exports by uranium producing countries.[17] Although the UCC became effective in Florida after the Turkey Point 3 contract was signed, Westinghouse reasoned that when a pre-Code contract called for significant "events occurring after" the effective date of the Code, the Code would apply to those "events." Westinghouse based its argument on the Code's transition clause which specifically states that the Code "applies to transactions entered into and events occurring after" January 1, 1967.[18] Included in these "events" were FPL's choice of fuel service options in 1972, the alleged failure of presupposed conditions in 1974-1975, and the subsequent default on the contract.[19] Westinghouse contended that the contract option to supply fuel to Turkey Point 4 bound both parties only when FPL exercised the option in 1967, thus the transaction clearly came under the terms of section 672.615.[20]

The district court held that the UCC's impracticability provisions were inapplicable to both the 1965 contract and the option exercised in 1967, reasoning that both the contract and the option were binding on the parties at the time the 1965 contract was signed.[21] Further, the district court concluded that the collapse of the uranium market, the selection of the fuel purchase arrangement, and the resulting breach of the contract were not "events" within the meaning of the statute.[22] In rejecting the section 672.615 defenses, the district court, in effect, refused to allow Westing-

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[13] 579 F.2d at 858.

[14] *See* note 6 *supra.*

[15] 579 F.2d at 858.

[16] *Id.* Orders otherwise not appealable may be appealed if the order involves a controlling question of law as to which there is a substantial ground for difference of opinion. The district judge must so state in writing and the Court of Appeals must grant permission for the appeal. 28 U.S.C. § 1292(b) (1966).

[17] *See* note 11 *supra. See generally* Joskow, *supra* note 8, at 164-71.

[18] FLA. STAT. ANN. § 680.101(1) (West 1966).

[19] 579 F.2d at 859.

[20] *Id.*

[21] *Id.*

[22] *Id.*

house to benefit from a statute which was enacted after the date of the contract. The trial court's decision not to apply the Code retroactively is consistent with case law deciding similar issues.[23]

On appeal, Westinghouse urged the Fourth Circuit to apply the UCC's provisions to both fuel contracts.[24] Accepting this view in part, the Fourth Circuit applied the Code to the contract created in 1967 when FPL exercised its option to purchase uranium for Turkey Point 4. The court found, however, that the Code did not govern the original contract made in 1965, and affirmed the district court's decision.[25] The Fourth Circuit first examined the mechanics of an option contract. The court reasoned that an option contract potentially entails two contracts. The first contract is an agreement to keep an offer open, while the second contract emerges upon the exercise of that option.[26] Under this reasoning, the exercise of the option binds both parties to the resulting contract. The Fourth Circuit noted that Florida courts have accepted this traditional analysis.[27] Therefore, the second contract was created after the effective date of the Code when FPL exercised its option. Consequently, the Court applied the Code to the Turkey Point 4 transaction.[28]

Regarding the 1965 Turkey Point 3 contract, the court stated that the Code's applicability depended upon the meaning given "events" as used in the transition provision of the Florida statute.[29] Although Florida courts had not addressed the issue prior to the *Westinghouse* case, other courts generally have construed corresponding transition provisions to bar the application of the Code to pre-Code transactions.[30] The court distinguished

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[23] *See* note 30 *infra.*

[24] 579 F.2d at 859.

[25] *Id.* at 859-63.

[26] *Id.* at 859. *Cf.* Warner Bros. Theatres, Inc. v. Profitt, 329 Pa. 316, 319, 198 A. 56, 57 (1938) (option is a contract to keep an offer open, contemplating contract of sale); 1 S. WILLISTON, CONTRACTS § 61d (3d ed. 1957) (terms of option must be accepted in order to form contract binding on both parties); 11 *Williston, supra* § 1441 (3d ed. 1957) (in option contract, when offer is accepted, a new contract arises, and may be specifically enforced). In Heller v. Pope, 250 N.Y. 132, 164 N.E. 881 (1928), the court dismissed an action for breach of contract on the grounds that the language "for this option you agree to . . ." made the agreement an option, not a contract binding on both parties. *Id.* at 135, 164 N.E. at 882. The court said "[a] binding option is a contract, but it is also an offer which, when accepted, will create another contract." *Id.; accord,* Lilleback v. Lincoln Fire Ins. Co., 120 Fla. 289, 162 So. 866, 867 (1935); Acheson v. Smiths, Inc., 110 Fla. 240, 148 So. 576, 577 (1933).

[27] 579 F.2d at 859, *citing* South Inv. Corp. v. Norton, 57 So.2d 1, 2 (Fla. 1952); Frissell v. Nichols, 94 Fla. 403, 114 So. 431, 433 (1927); Goodman v. Goodman, 290 So.2d 552, 555 (Fla. Dist. Ct. App. 1973).

[28] 579 F.2d at 859. The Fourth Circuit's decision in *Westinghouse* followed prior Florida case law. *See, e.g.,* Shavers v. Duval County, 73 So.2d 684, 689 (Fla. 1954) (laws existing at time and place of execution of contract which affect its discharge and enforcement are considered an express part of the contract).

[29] 579 F.2d at 860. To support the Code's applicability to the FPL contracts, Westinghouse relied on language in the Florida UCC applying the Code to "events" occurring after the Code's effective date. *See* note 3 *supra.*

[30] 579 F.2d at 860. The Fifth Circuit's decision in Empire Life Ins. Co. of Am. v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972), is typical of the general refusal to apply the UCC

several cases which have applied the Code retroactively, reasoning that they addressed procedural and remedial issues rather than the Code's substantive provisions.[31] Since the application of the Code's commercial impracticability provisions would have drastically altered the substantive rights of the parties, the Fourth Circuit followed the majority rule[32] denying retroactive application of substantive provisions.[33]

The Fourth Circuit rejected Westinghouse's argument that the election of the fuel service plan in 1972 and the failure of the presupposed condition of the uranium market were relevent "events" under section 680.101(1).[34] The court determined that FPL, in choosing its supply arrangement in 1972, merely acted pursuant to the terms of the 1965 pre-Code fuel contract.[35] Since FPL could not have rejected all of the proposed alternative plans,[36] the agreement was not an option but a sales contract which bound both parties from its inception.[37] With regard to changes in presupposed conditions, the court found that the law of excuse involved adjudicating the rights and duties of the parties.[38] Since the rights and duties set forth

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retroactively. In *Empire Life,* a post-Code foreclosure occurred pursuant to the terms of a pre-Code security agreement. *Id.* at 332-33. The trial court evaluated the foreclosure according to UCC provisions. *Id.* The Fifth Circuit reversed the trial court after noting that the overwhelming majority of cases considering the retroactivity of the Code had applied the pre-Code law to all transactions entered into before the effective date of the Code. *Id.* at 33. *See also* Scott v. Stocker, 380 F.2d 123, 127 (10th Cir. 1967), *In re* Kokomo Times Pub. and Printing Corp., 301 F. Supp. 529, 535 (S.D. Ind. 1968); Rinnert v. Indianapolis Morris Plan Corp., 74 Ill. App. 2d 388, 220 N.E. 2d 256, 258 (1966). In a case presenting a similar issue, the federal district court in Michigan reasoned that,

> [W]hile the word 'event' is not defined in the code it is inconceivable that any duty imposed by pre-Code law which may have to be performed after the effective date of the code is an event contemplated by MSA §19.9991 [identical to § 680.101(1)]. If it were, then every pre-Code transaction which had not been 'terminated, completed, consummated or enforced' prior to the effective date of the code would be governed by the code. The language of the code does not suggest such a result . . . .

In re Armor Indus., Inc., 5 U.C.C. REP. SERV. 1049, 1052 (S.D. Mich. 1968) (footnote omitted). *See also* Scott v. Stocker, 380 F.2d 123, 127 (10th Cir. 1967).

[31] 579 F.2d at 861. The Fourth Circuit had previously applied the UCC to pre-Code transactions. In Deering Milliken Research Corp. v. Textured Fibres, Inc., 415 F.2d 875, 877 (4th Cir. 1969), the Fourth Circuit held that South Carolina's long-arm statute, enacted as part of the UCC, permits jurisdiction over one who breaches a pre-Code contract. The court emphasized, however, that the legislature intended merely to expand the state's jurisdiction and not alter substantive rights of commercial parties. *Id. See also* United Sec. Corp. v. Bruton, 213 A.2d 892, 893-94 (D.C. 1965) (UCC burden of proof standard required in post-Code trial concerning pre-Code transaction); Ohio Brass Co. v. Allied Prod. Corp., 339 F. Supp. 417, 419-20 (N.D. Ohio 1972) (UCC statute of limitations applied to pre-Code contract); Humble Oil & Refining Co. v. Copely, 213 Va. 449, 451, 192 S.E. 2d 735, 736 (1972) (UCC applicable to suit involving an obligation arising after enactment of the Code).

[32] 579 F.2d at 860-62; *see* note 38 *infra.*

[33] 579 F.2d at 860-63.

[34] *Id.* at 859.

[35] *Id.* at 863.

[36] *See* note 9 *supra.*

[37] *See* notes 27-29 *supra.*

[38] The rationale behind the general refusal to apply substantive provisions retroactively is that the parties to a contract should know for planning purposes what rules of law apply

in the contract were determined under pre-Code law, Westinghouse could not rely on a subsequently enacted Code provision to excuse its performance.[39] Thus, the Fourth Circuit concluded that the first contract established an obligation on the part of both Westinghouse and FPL to sell and purchase fuel for Turkey Point 3, effective in 1965,[40] and that this contract must be governed by the pre-Code law of excuse.[41]

Allowing a pre-Code contract to be governed by the provisions of the UCC could subject many pre-Code agreements to substantive changes in the midst of the performace of the contract. The Fourth Circuit reasoned that such a result was not intended by the Code's draftsmen.[42] The intent of section 680.101(1) becomes clear when read in conjunction with subsection (2).[43] These provisions require that the law in effect at the time the transaction is entered into will control that transaction; the Code's provisions will, therefore, apply to all transactions entered into after its effective date.[44] To allow any duty imposed by a pre-Code contract to be governed by the Code simply because it must be performed after the adoption of the Code would directly contravene the intent behind section 680.101 (2).[45] The Fourth Circuit's reading of Florida's transition clause insures that laws passed subsequent to the establishment of contractual obliga-

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to the contract. For example, if the parties leave out a time of delivery provision on the assumption that the present law implies a "reasonable time," it would be unfair to use a different rule on delivery if a change in law occurs before the contract is completed. The point is that the parties plan on the basis of substantive law existing at the time of the contract. The law of excuse, however, by its very nature, applies only where conditions which the parties had expected to remain constant have changed. Arguably, if Westinghouse or FPL had thought that conditions might change, rendering delivery of the uranium impossible, the companies would have insisted on special terms in the contracts. Thus, since parties do not plan with respect to factors which will excuse performance, the rationale behind the refusal to apply substantive law retroactively does not affect the impracticability provision. Section 672.615, therefore, appears to act as a remedial provision, applying a form of equitable relief. The section appears to be a seller's analog to the buyer's consequential damages, providing partial compensation to the seller. Procedural and remedial aspects of the Code are generally applied retroactively. *See* text accompanying note 31 *supra.* Consequently, if the excuse of commercial impracticability is remedial, that section of the Code may be applied to contracts negotiated prior to the Code's enactment. No direct authority exists for this particular avenue of thought, but it is currently under study. Conversation with Andrew McThenia, Professor of Law, Washington & Lee University School of Law, at Washington & Lee (Jan. 29, 1979). For commentary suggesting the remedial aspect of the excuse of commercial impracticability, see Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap For Article Two,* 73 YALE L.J. 199, 243 n.128 (1963); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis,* 6 J. LEGAL STUD. 83, 112-18 (1977).

[39] 579 F.2d at 863.

[40] *Id.* at 858.

[41] *Id.* at 862-63.

[42] *Id.* at 862.

[43] FLA. STAT. ANN. § 680.101(1) (West 1966).

[44] *See* Scott v. Stocker, 380 F.2d 123, 127 (10th Cir. 1967); *In re* Armor Ind., 5 U.C.C. REP. SERV. 1049, 1052 (S.D. Mich. 1968).

[45] *See* 5 U.C.C. REP. SERV. at 1052.

tions are not applicable to the performance of those obligations.[46] To have held otherwise would have required contracting parties to risk changes in the applicable law before the expiration of the contract.[47]

The Fourth Circuit's decision against retroactive application of subsequent legislation is consistent with Florida case law.[48] Absent a specifically enunicated intent to apply a law retroactively, Florida law will have prospective effect only.[49] Furthermore, the section 680.101 transition clause also indicates that the Code was not intended to operate retroactively.[50] Otherwise, that section would be surplusage. Clearly, the Fourth Circuit's decision adheres to the intent of the Code's draftsmen.

Read narrowly, the *Westinghouse* court's decision simply bars the application of the UCC to contracts made prior to the Code's effective date. Consequently, parties to pre-Code option contracts benefit from the certainty regarding which law will govern when the option is exercised. Similarly, parties to pre-Code contracts are assured that the law in effect at the time a contract was created will continue to govern their agreement.[51] Broader reading of the decision indicates further support in the Fourth Circuit for the general rule against the retroactive application of any law to substantive issues.[52] Such a strengthening of the rule against the retroactive application of laws provides certainty of interpretation for those parties entering long-term contracts. Thus, the Fourth Circuit recognizes that since long-term contracts necessarily impose long-term obligations, the parties should know at the outset exactly how those obligations will be construed and what the ramifications ensuing from failure to perform them will be.[53]

B. Class Action Damages Under the Truth in Lending Act

The Truth in Lending Act (the Act),[1] enacted in 1968, requires a "price tag" on credit[2] enabling consumers to determine the cost of borrowing

[46] Brief of Appellee, *supra* note 7, at 12.

[47] *Id.*

[48] *See* Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 524-25 (Fla. 1973); Springer v. Colburn, 162 So.2d 513, 515-16 (Fla. 1964); Imperial Point Colonnades Condominium, Inc. v. Freedom Prop. Int'l, Inc., 349 So.2d 1194, 1195 (Fla. Dist. Ct. App. 1977).

[49] Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 524-25 (Fla. 1973).

[50] *See* note 3 *supra.*

[51] *See* Scott v. Stocker, 380 F.2d 123, 127 (10th Cir. 1967).

[52] *See* United Sec. Corp. v. Bruton, 213 A.2d 892 (D.C. 1965); text accompanying notes 35-36 *supra.*

[53] *See* Brief of Appellee, *supra* note 7, at 11-12.

[1] 15 U.S.C. §§ 1601-1665 (1976). The Truth in Lending Act is the name commonly used to denote Title I of the Consumer Credit Protection Act.

[2] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, AMERICAN CONSUMER PROTECTION, H.R. Doc. No. 57, 90th Cong., 1st Sess. 3 (1967). President Johnson recommended the Truth in Lending Act as "a price tag that will tell a consumer the percentage rate per year that is

funds.[3] Prior to the Act, the myriad of credit disclosure practices[4] did not adequately enable the average consumer to determine the cost of deferred payment or to compare available credit plans.[5] By requiring a clear and complete disclosure of credit terms, the Act established a means of comparing credit costs without regulating the credit industry per se.[6] Through comprehensive regulations,[7] the Act provides for a uniform method of stating finance charges[8] and annual percentage rates[9] in language understandable to consumers.[10] The regulations detail the manner of disclosing credit terms without dictating the conditions under which credit may be extended.[11]

The Act is enforced by criminal penalties,[12] as well as administrative[13] and civil remedies.[14] Federal class action suits brought under the Act have

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being charged for his borrowing." *Id.* The ordinary consumer has the right to know exactly how much he pays for credit in order to shop wisely for the best credit bargain. *Id.*

[3] *Id.* The Act covers loans made to consumers, as well as credit and deferred payment sales, when made in the ordinary course of business. 15 U.S.C. § 1602(e) (1976); *see* W. WILLIER & F. HART, CONSUMER CREDIT HANDBOOK ¶92 B.03[1]-[3] (1969).

[4] H.R. REP. No. 1040, 90th Cong., 2d Sess. 1, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1970 [hereinafter cited as HOUSE REPORT 1040]. The existing disclosure practices included "add on" rates which, in contrast to the declining balance method, had the effect of understating the annual rate by approximately 50 percent. Furthermore, credit unions and small loan companies charged a flat monthly rate, while many creditors added additional fees to the quoted charges. Other segments of the credit industry failed to disclose any rates. Congress realized that "no one segment of the industry feels it can afford to reform itself by disclosing the annual percentage rate without incurring a competitive disadvantage." *Id.* Thus, Congress passed the Act to require that all creditors use the same method in computing and disclosing finance charges.

[5] HOUSE REPORT 1040 at 7, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1963.

[6] *Id.* Uniform disclosure methods would enable consumers to compare credit costs without additional calculations. *Id.* at 1970-71.

[7] 12 C.F.R. §§ 226.6-.8 (1978). The Act authorized the Board of Governors of the Federal Reserve System to draft regulations to carry out the purposes of the Act. 15 U.S.C. § 1604 (1976). The regulations promulgated are set out in Regulation Z, 12 C.F.R. §§ 226.6-.8 (1978). *See generally* Schober, *Truth in Lending: Analysis of Act and Regulation Z*, 4 REAL PROP., PROB. AND TRUST J. 305 (1969) [hereinafter cited as Schober].

[8] 15 U.S.C. § 1605 (1976). A finance charge is defined as "the sum of all charges, payable directly or indirectly by the person to whom credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." *Id.* § 1605(a). Included within this definition are interest, service charges, loan fees, and premiums or charges for insurance against credit loss. *Id.*

[9] *Id.* § 1606. The annual percentage rate is determined according to the actuarial method in the extension of credit other than on an open end credit plan. *Id.* § 1606(a)(1). Under an open end credit plan, the annual percentage rate is the total finance charge for the period, divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year. *Id.* § 1606(a)(2).

[10] *See* Schober, *supra* note 7, at 305.

[11] HOUSE REPORT 1040 at 1, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1975. Regulation Z details the uniform method of disclosure required by each segment of the credit industry. 12 C.F.R. §§ 226.6-.8 (1978).

[12] 15 U.S.C. § 1611 (1976). Maximum criminal liability is $5,000 in fines or one year in prison, or both. *Id.*

[13] *Id.* § 1607.

[14] *Id.* § 1640. For individual claims, the minimum recovery is $100 and the maximum is

engendered substantial controversy.[15] Although this procedure was not specifically provided for under the Act, plaintiffs bringing class actions advanced the traditional bases for such actions, particularly stressing the high costs of litigating individual claims involving smaller damage amounts.[16] Creditors, however, voiced strong objections to the large money judgments subsequently awarded[17] by granting each class member[18] the $100 minimum recovery permitted by the Act.[19] In cases involving large

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$1,000. *Id.* § 1640(a)(2)(A)(i).

[15] Plaintiffs combined the federal class action under rule 23 of the Federal Rules of Civil Procedure with the individual damage awards under the Act, 15 U.S.C. §1640 (1976), to bring class actions for Truth in Lending violations. Note, *Class Actions Under the Truth in Lending Act,* 83 YALE L.J. 1410, 1410-12 (1974) [hereinafter cited as *Class Actions*]. Initially, the Truth in Lending Act appeared to be well-suited for class actions. Rule 23 of the Federal Rules of Civil Procedure, combined with the individual damage award under the Act, provided large groups of consumers easy access to the courts to redress wrongs inflicted by creditors. *See* Note, *Recent Developments in Truth in Lending Class Actions and Proposed Alternatives,* 27 STAN. L. REV. 101, 101-07 (1974) [hereinafter cited as *Recent Developments*]. Since the major objective of Rule 23(b)(3) was to economize time, effort and expense in litigation, the class action seemed to provide a superior method of bringing Truth in Lending claims. Proposed Amendments to Rules of Civil Procedure for the United States District Courts (adopted by the Supreme Court on Feb. 28, 1966, effective July 1, 1966), 39 F.R.D. 69, 102-03 (1966). However, class actions under the Act quickly lost judicial favor due to the high potential damage awards. *See Class Actions, supra* at 1411-12.

[16] *See Recent Developments, supra* note 15, at 107-09. Small claimants, whose awards might be no greater than the $100 statutory minimum, often found court costs and attorneys' fees far greater than the damages awarded. Dividing litigation costs among a large number of claimants provided small claimants their day in court. Class actions were, therefore, the only means of redress for many consumers. *See* Eckhardt, *Consumer Class Actions,* 45 NOTRE DAME LAW. 633, 663-64 (1970); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant,* 10 B.C. IND. & COM. L. REV. 501, 504-08 (1969).

[17] *See Class Actions, supra* note 15, at 1411-12. When a number of classes filed suit seeking damages great enough to bankrupt creditors, the courts exhibited a great reluctance to certify plaintiff classes. Comment, *Truth in Lending and the Federal Class Action,* 22 VILL. L. REV. 418, 423-24 (1977); *see, e.g.,* Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972) (potential damages of $8 billion); Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (potential damages of $13 million); Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357 (N.D. Ill. 1972) (potential damages of $68 million); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972) (potential damages of $1 billion).

Prior to *Ratner,* federal courts generally had favored certification of class actions. *Class Actions, supra* note 15, at 1412. The *Ratner* class included 130,000 claimants, which represented potential damages of $13 million. 54 F.R.D. at 413. The *Ratner* court refused to certify the *Ratner* class on the ground that a class action was not superior to other methods of adjudication as required under Rule 23 because the proposed recovery far exceeded actual damages caused by the violation. *Id.* at 415-16. Subsequent to *Ratner,* courts have refused to certify class actions, interpreting *Ratner* to say that Congress intended to preclude class actions under the Act. *Class Actions, supra* note 15, at 1415; *see, e.g.,* Haynes v. Logan Furn. Mart, Inc., 503 F.2d 1161 (7th Cir. 1974); Weathersby v. Fireside Thrift Co., 5 CONS. CRED. GUIDE (CCH) ¶ 98,640 (N.D. Cal. 1975); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972); Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955 (N.D. Ill. 1972). *Contra,* Eovaldi v. First Nat'l Bank of Chicago, 71 F.R.D. 334 (N.D. Ill. 1976) (refusing to follow *Ratner,* certified a class of 95,000).

[18] *See Class Actions, supra* note 15, at 1411-12.

[19] 15 U.S.C. § 1640(a)(2)(A)(i) (1976).

classes, few creditors could absorb the resulting damages, which often amounted to millions of dollars.[20] While amending the Act in 1974 specifically to authorize class actions,[21] Congress responded to the creditors' objections by limiting the awards in such suits to the lesser of $100,000 or one percent of the creditor's net worth, plus actual damages.[22] The Amendment enumerated several factors to guide the courts in assessing damages, including the amount of actual damages, the financial resources of the creditor, the number of persons adversely affected, and the extent to which the violation was intentional.[23] Although the amendment clarified the use of class actions under the Act, the recent Fourth Circuit opinion in *Barber v. Kimbrell's, Inc.*[24] indicates that some problems remain unsolved.

In *Barber,* a furniture store customer instituted a class action against Kimbrell's, Inc. and its parent company, Furniture Distributors, Inc., for violations of the Truth in Lending Act.[25] Plaintiff had purchased furniture on an installment plan under which the price was added to a balance owed from a previous purchase. Barber's suit alleged that the written agreement inadequately disclosed pertinent credit information and, therefore, violated the Truth in Lending Act.[26] The alleged violations included using misleading terminology, obscuring pertinent information with unnecessary language, failing to itemize finance charges, and not listing the required information in a meaningful manner.[27] The district court granted summary judgment for plaintiff on the liability issue and awarded the maximum statutory damages, in addition to attorneys' fees of $25,000.[28]

In evaluating plaintiff's Truth in Lending claim, the district court first examined whether Kimbrell's and its parent company, Furniture Distributors, were creditors under the Act.[29] The Act defines creditors as those "who regularly extend or arrange for the extension of credit."[30] Kimbrell's, by its own admission, was a creditor regularly extending credit to its retail customers.[31] Furniture Distributors argued, however, that it had no direct credit involvement with the plaintiff, and, therefore, could not be deemed a creditor. The district court disagreed, concluding that Furniture Distributors constituted a creditor under the Act because of its control over the

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[20] *See Class Actions, supra* note 15, at 1411.

[21] Consumer Credit Protection Act, Pub. L. No. 93-495, § 408(a), 88 Stat. 1518 (1974) (current version at 15 U.S.C. § 1640(a) (1976)).

[22] 15 U.S.C. § 1640(a)(2)(B) (1976).

[23] *Id.* § 1640(a).

[24] 577 F.2d 216 (4th Cir.), *cert. denied,* 99 S. Ct. 329 (1978).

[25] Barber v. Kimbrell's, Inc., 424 F. Supp. 42, 43 (W.D.N.C. 1976). Plaintiff originally filed a private action against Kimbrell's. She later amended her complaint in order to maintain a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Her complaint was further amended to include the parent company, Furniture Distributors, as a defendant. *Id.*

[26] *See id.* at 47.

[27] *Id.* at 47-50; *see* Regulation Z, 12 C.F.R. §§ 226.6, .8 (1978).

[28] 424 F. Supp. at 52.

[29] *Id.* at 46.

[30] 15 U.S.C. § 1602(f) (1976); Regulation Z, 12 C.F.R. § 226.2(s) (1978).

[31] 424 F. Supp. at 46.

subsidiary's credit extension, the joint corporate officers of Furniture Distributors and Kimbrell's, and the parent's receipt of all credit sale contracts made by its subsidiaries.[32] Kimbrell's and its parent company, therefore, could be held jointly liable for violations of the Act.[33] Agreeing with plaintiff's contentions, the court found the defendants liable for four Truth in Lending violations.[34]

Having determined the defendants' liability, the district court considered the factors relevant to the damage award.[35] At the outset, the court noted the absence of actual damages sustained by the class. The persistency and frequency of the violations, as well as the intentional use of the noncomplying contract and large resources of the creditors, however, led to the assessment of maximum statutory damages.[36] The trial judge ascertained that one percent of Furniture Distributors' net worth exceeded $100,000 and awarded the plaintiff class $100,000.[37] Without presenting any findings of fact, the court also granted the class $25,000 in attorneys' fees.[38]

On appeal, the defendants asserted that the district court had erred in its conclusions as to both liability and damage amount.[39] While affirming the finding of liability, the Fourth Circuit concluded that damages had been assessed incorrectly.[40] The court determined that the district court's consideration of the parent's net worth in fixing statutory damages "upset the balance struck by Congress."[41] The *Barber* court reasoned that, since the plaintiff class consisted of persons who dealt at only one Kimbrell's store, that store's assets alone should determine the damage award.[42] Considering the potentially exorbitant recoveries which would result if Furniture Distributors' net worth were used in computing damages in each case involving one of its subsidiaries, the majority concluded that Congress could not have contemplated such large recoveries, particularly absent any

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[32] *Id.*

[33] *See* 15 U.S.C. § 1640(a) (1976).

[34] 424 F. Supp. at 47-50.

[35] *Id.* at 51-52; *see* 15 U.S.C. § 1640(a) (1976); *see* text accompanying notes 23-24 *supra.*

[36] 424 F. Supp. at 51-52.

[37] *Id.*

[38] Plaintiff's counsel sought only $19,955 in attorneys' fees, but the district court found $25,000 to be "a reasonable sum under the circumstances." *Id.* at 52.

[39] 577 F.2d at 220-24. In addition to liability and damages, the defendants also claimed errors as to the absence of findings to support the award of attorneys' fees and the denial of request for a jury trial. *Id.* at 224-26. On the issue of attorneys' fees, the Fourth Circuit reversed and remanded for further findings to support the amount awarded. *Id.* at 226. The court analyzed the jury trial issue on constitutional grounds, reasoning that the rights and duties created by the Act were analogous to the common law tort duty not to misrepresent and that the relief sought by the plaintiff was legal rather than equitable. Therefore, a jury trial was ordered for determining damages on remand. *Id.* at 224-25; *see* Curtis v. Loether, 415 U.S. 189, 195-96 (1974); Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977), *aff'd,* 434 U.S. 575, 584-85 (1978); Mosley v. National Fin. Co., 440 F. Supp. 621 (M.D.N.C. 1977).

[40] 577 F.2d at 218.

[41] *Id.* at 223.

[42] *Id.*

actual damages.[43] Believing that Congress intended to limit liability to one percent of the net worth of a single creditor, the Fourth Circuit remanded for a redetermination of damages based on Kimbrell's individual worth.[44]

The computation of damages under the Truth in Lending Act is keyed to the assets of the offending creditor.[45] The Fourth Circuit's disagreement with the district court in *Barber* presents a fundamental question of statutory interpretation. Like Furniture Distributors, many creditors operate through a parent-subsidiary relationship, with the parent company dominating the credit plans and form contracts used by the subsidiary.[46] Such control renders the parent corporation jointly liable with the subsidiary for violations of the Act.[47] The statute and the legislative history, however, provide little guidance on the resolution of the definitional conflict over whose assets determine the damage award.[48]

The Fourth Circuit's holding in *Barber* favors certain "creditors" in suits involving Truth in Lending violations. By focusing on the class certified and the subsidiary's asset-base rather than the asset-base of the parent and subsidiary,[49] the court ignored the one-sided nature of the Furniture Distributors-Kimbrell's relationship. While recognizing the frequent and intentional violations by both parent and subsidiary, the court refused to impose damages corresponding to the parent's net worth. Instead, the *Barber* court considered only Kimbrell's assets in determining damages for violations for which Furniture Distributors was at fault.[50] Essentially, the court keyed the damages to the class involved, the purchasers from Kimbrell's, rather than to the character of the offending creditor, as the Act seems to require. The Act, however, imposes damages against any creditor in violation of the Act and bases damages on the assets of that offending creditor.[51] Absent any special provision for violations involving a parent-subsidiary relationship, the Act indicates that the assets of each offending creditor should be considered.[52] Since Furniture Distributors' net worth

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[43] *Id.* at 223-24.

[44] *Id.*

[45] *See* 15 U.S.C. § 1640(a) (1976).

[46] *See, e.g.,* Clausen v. Beneficial Fin. Co., 423 F. Supp. 985 (N.D. Cal. 1976). The defendants in *Clausen* were a parent company and its subsidiary. Like *Barber,* the plaintiff class proved no actual damages. However, in *Clausen,* the court considered the parent company's net worth in evaluating damages against both parent and subsidiary. *Id.* at 989-90. Noting its disagreement, the Fourth Circuit dismissed *Clausen* in a footnote. 577 F.2d at 223 n.19.

[47] *Id.* at 220-21.

[48] Several commentators noted Congress' failure to specify whose net worth to consider in cases involving joint liability of a parent and its subsidiary. *See* Davenport, *Bank Class Action Defenses: The Taming of the Truth in Lending Tiger,* 92 BANKING L.J. 847, 863-64 (1975); Evans, *Amendments to the Truth in Lending Act,* 29 PERS. FIN. L.Q. 9, 13 (1974) [hereinafter cited as Evans].

[49] *See* 577 F.2d at 223 n.20.

[50] *Id.* at 223; *see* text accompanying notes 41-45 *supra.*

[51] *See* 15 U.S.C. § 1640(a)(2)(B) (1976).

[52] In considering the assets of both parent and subsidiary, the resulting damage award must still be within the statutory maximum. *Id.*