INTEGRATING THE UCCC AND THE UCC— LIMITATIONS ON CREDITORS' AGREEMENTS AND PRACTICES

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Consumer credit is now controlled by a curious melange of private agreements, general commercial law, various state regulatory laws, and federal regulatory and legislative rules. One seeking to understand the law of consumer credit must read not only the contract involved but also the Uniform Commercial Code (UCC), a state installment sales law or small loan law, Federal Trade Commission materials, and, surprisingly, Defense Department directives.¹ One notable advance offered by the Uniform Consumer Credit Code (UCCC)² is the reduction in the sources to be searched by the lawyer. The fact remains, however, that much of the current controlling law, including the Uniform Commercial Code, will continue to operate on such transactions. In the course of exploring the various limitations on creditor practices and remedies in the UCCC, our analysis will also seek to identify the harmony or cacophony raised by these two uniform codes.

I

PRESERVING THE DEBTOR'S DAY IN COURT

A. Waiver of Defenses

One of the most searingly searched issues in the formulation of the Commercial Code involved the status of a financier as a holder in due course of negotiable paper. In the standardized tripartite installment sale arrangement, the seller assigns the chattel paper generated by the sale to the financier, and payments are then made by the buyer directly to the financier. If trouble develops in the transaction, the financier typically has two bases for claiming insulation from disputes between the original seller and the buyer. First, the financier may assert that as a good-faith, value-paying, and innocent transferee of negotiable paper he is entitled to the time-honored protection accorded a holder in due course. Second, the buyer may have signed a form containing a "waiver of defenses" clause of the following type:

Buyer hereby acknowledges notice that the contract may be assigned and that assignees will rely upon the agreements contained in this paragraph, and agrees

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¹ Department of Defense Directive 1344.7, issued September 1965 and reissued May 1966, provided ten standards of fairness, including disclosure, required in credit contracts.

² On the text of the UCCC, see *Foreword*, in this symposium, p. 639 n.1.

that the liability of the Buyer to any assignees shall be immediate and absolute and not affected by any default whatsoever of the Seller signing this contract; and in order to induce assignees to purchase this contract, the Buyer further agrees not to set up any claim against such Seller as a defense, counterclaim or offset to any action by any assignee for the unpaid balance of the purchase price or for possession of the property.³

Here the financier will ignore the law of negotiable instruments and attempt to isolate himself from the seller-buyer relationship.

Initially, the Commercial Code completely preserved the defenses of the buyer, then moved to a middle ground "fearfully and wonderfully made," protecting the financier in suits on the note itself but opening defenses if the finance company sought to repossess, attach, or levy on the goods sold.⁴ Later this confusing compromise was abandoned. In fact, the draftsmen quit finally the field of combat altogether when they adopted the somewhat peculiar device of first preserving the effect of negotiable instruments and waiver clauses and then providing a special exception for cases involving consumer goods when provided by another statute or a decision.⁵ Except for rules dealing with realization, the UCC's article 9 does not often invite the judge to be creative. Much of the statute is aimed at reversing the prior trend of judicial hostility to the very idea of nonpossessory chattel security.⁶ Yet in this sensitive and troublesome area of consumer defenses the Commercial Code explicitly provides that the law is whatever the judges have said or will say that it is.

If one turns to the Consumer Credit Code with the expectation that this issue will now be resolved, he faces disappointment. Negotiable instruments are prohibited in sales credit transactions,⁷ but optional rules are offered for waiver of defense clauses. Under alternative A, the waiver clause is practically made ineffective.⁸ Notwithstanding an agreement to the contrary, the assignee's rights are made subject to the claims or defenses of the buyer.

Two limitations are placed upon this exposure of the assignee to disputes between

³ *Unico v. Owen*, 50 N.J. 101, 106, 232 A.2d 405, 408 (1967).

⁴ Sutherland, *Article 3—Logic, Experience and Negotiable Paper*, 1952 Wis. L. REV. 230, 235-40.

⁵ UCC § 9-206(1).

⁶ P. COOGAN, W. HOGAN & D. VAGTS, *SECURED TRANSACTIONS UNDER THE UCC*, § 1.02[2] (1963).

⁷ UCCC § 2.403. The prohibition is not new. See B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION*, Chart 19, at 312-22 (1965). Because this section is drafted to prohibit the use of negotiable instruments other than a check, it may be suggested that a creditor could take a series of checks and avoid the rule. Cf. Bailey, *The Substantive Provisions of the Uniform Consumer Credit Code: 20th Century Consumer Protection in a Free Enterprise System*, 29 OHIO ST. L.J. 597, 617 n.130 (1968). This view overlooks two basic facts of life: (1) unscrupulous sellers particularly do not want to give the buyer time to reflect that such a series of signatures requires, and (2) courts, increasingly hostile to such instruments in consumer sales, are likely to emphasize that the check is saved solely to permit its use as a means of payment, not as a credit device. To preserve the integrity of all notes, a transferee who takes in good faith and without notice a note issued in violation of the prohibition is safeguarded. It is noteworthy that in the hands of a truly innocent third party, a note in violation of this section still may confer "holder in due course" status on the transferee. See *Griffin v. Baltimore Fed. Sav. & Loan Ass'n*, 204 Md. 154, 102 A.2d 804 (1954).

⁸ UCCC § 2.404, Alternative A.

the parties to the underlying sale. First, the assignee's liability may not exceed the amount owing at the time the claim or defense is asserted against the assignee. Second, the purchaser's rights can only be asserted defensively against a claim by the assignee. These two restrictions thus prevent the assignee from being substituted for the seller in a product liability action.

Furthermore, the limitations also preserve for the financier that great virtue of the commercial world, "finality of payment." Prior payments are treated as settled aspects of the transaction and cannot be recaptured by the buyer under the section. Consequently, as time passes the assignee's vulnerability is reduced and the buyer takes on more of the risk. On the other hand, it is in the early stages of the installment payment relationship that the buyer has the most severe potential liability for the goods, and alternative A protects him more during that time.

To take advantage of these qualifications upon the buyer's protection under section 2.404A, is it necessary that the contract contain a waiver of defense clause? For example, is the assignee otherwise liable in a restitutionary action by the buyer for payments made after notification of the assignment but before discovery of the defect? If that question is answered affirmatively—and that may be doubtful⁹—then the waiver clause is needed to assure the assignee that he will not be liable for the return of payments made. Even if the assignee is only subject defensively to the buyer's claim, one can ask whether the buyer may counterclaim seeking more than a release from the unpaid balance. The financier concerned with that possibility may also use a waiver clause to take advantage of the limitation of alternative A that permits the buyer to dispute only the amount not yet paid.

A more Machiavellian and utilitarian reason can be coupled with these two somewhat academic reasons for continuing to use a waiver clause. The consumer can be misled into believing that the waiver clause is effective if he is unaware of the protection afforded by the statute. Merely showing the untutored buyer the broadly drawn waiver clause may induce him to continue payments. There is no penalty attached to using such a clause, although the creditor who takes a negotiable instrument with notice that it is issued in violation of section 2.403 is subject to specific penalties or to a civil action by the Administrator.

Alternative B of section 2.404 also makes no reference to penalties for including a broadly drafted waiver clause and gives such a clause somewhat more effect than does alternative A. It contains the same limits on the dollar amount that the buyer can bring into the dispute, and the waiver clause is still rather severely limited. The assignee can separate his claim from disputes between the seller and the buyer only if the financier meets a number of qualifications.

The complex boundaries of an effective waiver clause under alternative B require an assignee (1) who is not related to the assignor; (2) who takes the paper in good faith and for value; (3) who gives the buyer a prescribed notice of the assignment;

⁹ A. CORBIN, *CONTRACTS* § 895 n.16 (1951, Supp. 1964).

and (4) who within three months of mailing the notice of assignment receives no written notice of the facts giving rise to the claim or defense. Even when all of these criteria are met, the agreement is enforceable only with respect to claims or defenses which have "arisen" before the end of the three-month period after notice was mailed. Since the usual claim will involve a breach of warranty, the statute of limitations provision of section 2-725 of the Commercial Code may be used casually to define when the claim arises. It states:

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Such an approach to the UCCC would in effect mean that warranty claims as to latent defects not explicitly extending to future performance would arise within the three-month period and be cut off by the waiver allowed by alternative B. That interpretation is disemboweling and really unnecessary because there is no statutory demand to interpret section 2.404B in light of the rules for the very different problems treated by the statute of limitations. In short, when the claim arises should be determined under the UCCC in light of the policy decision that the buyer needs to be safeguarded against inadvertently contracting away his defenses. Certainly the buyer needs protection most in respect of latent defects.

Good faith is defined in a less complete but somewhat more objective fashion than under the general definition in the Uniform Commercial Code.¹⁰ The definition provided is a negative one, explaining only one kind of case where the assignee does not take in good faith. The assignee cannot obtain the limited safety offered to him if he has knowledge or notice of *substantial* complaints of customers of the assignor *and* of the assignor's failure to remedy his defaults within a reasonable time after the assignee notifies him of the complaints.¹¹

This rather modest provision treating good faith cannot sensibly be read as providing the only situation where good faith is absent. Whatever passion a court may have for "*expressio unius*," a counterthrust comes from the regulatory purpose of the section.¹² The definition should not permit the deliberately dishonest to hide

¹⁰ UCC § 1-201(19) expresses the test as requiring merely "honesty in fact." The Sales Article of the UCC calls in addition for observance of the reasonable commercial standards of the trade. UCC § 2-103(b). The second more objective test may be incorporated into the UCCC. For a development of the possibilities of this standard as possibly requiring fair dealing, see Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Summers, "Good Faith" in *General Contract Law and the Sales Provision of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

¹¹ UCCC § 2.404(2), Alternative B.

¹² See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 526 (1960).

behind its words. If that conclusion is correct, what then? Is good faith to be defined in Commercial Code terms—"honesty in fact"? Or will some additional objective criteria be added by judicial elaboration? Nice academic questions on the meaning of good faith will probably be shunted to one side by courts who increasingly reveal the development of a hostile attitude toward waiver of defense clauses in consumer sales.¹³

The concern for the buyer in such cases suggests that the enactment of alternative B may actually impede the case-by-case development of a rule more favorable to the buyer. The UCCC here presents the issue squarely—have the courts by denying effect to negotiable instruments and to waiver clauses gone too far?

The most telling argument on behalf of alternative B rests on the threat that the financial community will turn to lender credit rather than sales credit and thus avoid the operation of these UCCC limitations because lenders are completely insulated from the underlying sale. Although the law at the bottom of this statement is impeccable, its practical basis is slender. It is hard to believe that the industry will sacrifice the assurance of a regular flow of business from the seller to the sales financier to protect itself from the risk of claims or defenses arising in favor of the buyer. If schemes are devised to station a loan office next to an auto dealer's showroom to make "loans" to customers "referred" by the dealer, the financier runs the risk that a court will see through the device and treat the deal as "sale credit" subject to article 2. Furthermore, such a scheme would deprive the financier of the easy means of securing the dealer's liability as indorser of the paper—and increase the possibility that a competitor would obtain the business generated at the dealer's showroom.¹⁴ The most serious deterrent to the widespread development of such satellite loan offices stems from the probability of legislative intervention rejecting any distinctions between loans and sales and subjecting lenders to the borrower's claim against sellers who were paid the proceeds of the loan. The fact that both buyer and creditor select the seller and the creditor can make more sophisticated judgments and exercise better controls justifies enabling the buyer to assert his claims and defenses against the sales financier.¹⁵ If a "lender" is in fact selecting the

¹³ *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967), is the most striking example of such an attitude. In this pre-Code case the court cited UCC § 9-206 and UCC § 2-302 on unconscionable contract terms as being closely related. This should give little comfort to any who think that the buyer can be deprived of all warranty claims under a disclaimer complying with UCC § 2-316, since unconscionability still may rise to strike down such clauses. See UCC § 2-719(3) and Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967). An excellent review of the earlier developments is in Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177, and see 44 A.L.R.2d 8 (1955) for a comprehensive annotation.

¹⁴ The Uniform Commercial Code's priority rules are of little help to the original creditor, since they are aimed at promoting free transfer of the consumer paper. UCC § 9-308.

¹⁵ For some years I have been convinced that since the finance company or bank as well as the buyer selects the dealer, and since the professional lender is both better informed and able to influence the seller, legislatures should act to preserve the buyer's defenses. Free transferability of negotiable paper is simply not enough to tip the balance in the other direction, particularly when the seller is insolvent or there is a right of recourse. Hogan, *A Survey of State Retail Instalment Sales Legislation*, 44 CORNELL

seller while legally masquerading as a complete stranger to the transaction, courts and certainly legislatures will strip away his makeup to reveal his real role.

As a practical matter more and more consumer sales credit seems directed not toward ordinary straight loans but to the credit card arrangements whereby the buyer uses either a bank card or the seller's card to purchase the goods. To my knowledge no bank is taking the position publicly that it must use a negotiable instrument as a charge slip or have a waiver of defense clause in order to be free of claims between the buyer and the seller in carrying on its credit card business. If freedom from defenses is not crucial to this growing form of consumer sales credit, why is it of such mighty importance in the traditional form? After all of the arguments are made, the fact remains that the financing community can prevent the continuation of merchandising schemes that produce large numbers of consumer complaints simply by refusing to finance such sellers. As the bank cards become more and more popular and as the need to sell such cards diminishes, we may find that the issuers will seek insulation from the sales transactions. Unfortunately, regulating such cards as loans under article 3 rather than article 2 of the UCCC leaves the question of the buyer's defenses outside of the sales credit safeguards.¹⁶ Perhaps in cases of bank involvement with the seller a court looking at the substance of the arrangements may apply section 2.404 by analogy or use its policies in testing the unconscionability of any terms exposing the buyer.

If the financier's power to police the dealer is a basis for either alternative A or alternative B, one may next inquire which better serves that notion. The first places the risk upon the seller within the stated limitations as to amount, while the second places the same risk on the seller limited only by the buyer's inability to assert claims or defenses arising within the three-month zone after that three-month period has expired. The latter provision has the attraction of compromise.¹⁷ It may be designed to quiet industry apprehensions about the debtor who suddenly remembers that the goods have always been unsatisfactory when he either tires of the goods or of his payments in the later stages of the arrangement. Since such a wily debtor may well have enough imagination to discover defects arising after the three month period, the creditor group may still fear such claims. Furthermore, balancing the seller's claims against vigorous attack by consumer groups, particularly those representing the poor, upon abuses arising from the whole concept of "holding in due course" and "waiving defenses" makes alternative A clearly preferable.¹⁸

L.Q. 38, 65-67 (1958). It is especially reassuring to have that view buttressed by the forthright change of mind of an astute and widely experienced commentator; Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 469-73 (1968).

¹⁶ UCCC § 1.301(9) defines a lender credit card, and UCCC § 1.301(16) defines a seller credit card. The former is squarely placed under Article 3—Loans by UCCC § 3.106.

¹⁷ This point is rather convincingly made by Murphy, *Another "Assault Upon the Citadel": Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales*, 29 OHIO L.J. 667, 686-87 (1968).

¹⁸ This supports the conclusion reached in the early drafts of UCCC §§ 6.101, .102 (First Tentative

B. Confessions of Judgment

Of course, if a judgment can be recovered against the buyer without the assertion of his claims or defenses, the creditor may proceed unconcerned with what the UCCC does to preserve those claims against an assignee. Two techniques have been used to achieve the status of a judgment creditor without troubling with the debtor's claims.

One is the confession of judgment clause whereby the creditor or his nominee is authorized to confess judgment in respect of a claim against the debtor.¹⁹ The added virtue of such a clause is that in many jurisdictions the docketing of the judgment gives the creditor an "instant" lien on the real property of the debtor.²⁰ The clauses thus permit his realty to be encumbered without either service of process upon or notice to the debtor. Both the sales and loan articles of the UCCC simply invalidate such clauses in all covered transactions.²¹

Equally subject to attack because the debtor is similarly precluded from raising his defenses is the contract clause stating the debtor's consent to the jurisdiction of a remote state or to venue of a distant county. Such clauses have escaped attack on constitutional grounds²² but have been treated less kindly under the unconscionable contract provision of the Commercial Code.²³ Since the UCCC invalidates in covered transactions any consent to the jurisdiction of another state or to the fixing of venue,²⁴ the debtor will be assured a day in a convenient court.

C. Limits Upon Deficiency Judgments

The UCCC prohibits deficiency judgments in secured sales credit transactions when the cash price of the collateral repossessed was \$1,000 or less.²⁵ Here there is a direct conflict with the Commercial Code's provision that a secured creditor is entitled to such a judgment after any properly conducted realization sale.²⁶ Once again the Consumer Credit Code limits the effect of the restrictive rule to sales credit transactions.

The first issue emerging from the situation is the adequacy of the provision for deciding whether the UCC or the UCCC controls. In a sense each code has a

Draft 1966); Comment to UCCC § 2.404 (Second Tentative Draft 1967). See Project, 7 U.C.L.A. L. REV. 618, 750 (1960), and *Proceedings, Public Hearing on Second Tentative Draft of the Uniform Consumer Credit Code* 195 (August 1-3, 1967).

¹⁹ See Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 114-32 (1961); Note, *Confessions of Judgment*, 102 U. PA. L. REV. 524 (1954), and Hunter, *The Warrant of Attorney to Confess Judgment*, 8 OHIO ST. L.J. 1 (1941).

²⁰ Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 164-65 (1957).

²¹ UCCC §§ 2.415, 3.407.

²² *National Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311 (1964).

²³ *Paragon Homes, Inc. v. Crace*, 4 UCC REP. 19 (N.Y. Sup. Ct. 1967); *Paragon Homes, Inc. v. Langlois*, 4 UCC REP. 16 (N.Y. Sup. Ct. 1967).

²⁴ UCCC § 1.201(9).

²⁵ UCCC § 5.103(2).

²⁶ UCC §§ 9-503, 9-504(2).

specific reference to the other. The UCC is replete with disclaimers of any intent to displace statutes regulating consumer credit.²⁷ In addition, section 1.103 of the UCCC itself states that the UCC applies "unless displaced by the particular provisions" of the Consumer Credit Code. The comment to this section singles out article 9 of the UCC and states that in the event of conflict the UCCC controls. Thus the UCCC takes priority over the UCC. This specific provision of the later-drafted Consumer Credit Code should overcome the hint in the Commercial Code that all statutes dealing with realizations should be repealed upon the enactment of the UCC.²⁸

Another question presented by the restrictions on deficiency judgments centers upon the efficiency of the provisions. Are there technical loopholes within the terms of section 5.103 that will permit a creditor to escape the net?

If the collateral is not returned to the creditor, the buyer remains personally liable for the balance of the debt arising from the sale. As in the common law conditional sale the option appears to rest entirely with the secured creditor.

This provision is directly contrary to one of the few consumer protection decisions in article 9 of the UCC. Under the Consumer Credit Code, if the creditor elects to retake the collateral, he is explicitly excused from any obligation to conduct a resale.²⁹ Under the UCC if a substantial part of the price has been paid, the secured creditor who repossesses consumer goods must conduct a resale in order to protect the debtor's equity in the collateral.³⁰ The UCCC draftsmen apparently agree with the judgment that if the debtor has any equity he will be able to ransom the goods before repossession and that a compulsory resale is useless.³¹

Even if one agrees with that judgment, the fear lingers that some procedure should be provided for assuring that the debtor with a substantial equity will be warned of the possibility of repossession in time to arrange to pay the balance due. Ordinarily, the legitimate lender will have warned the debtor of the amount due and possibility of repossession. Others, however, may engage in what the English pungently describe as a "snatch-back."³² A surprise repossession would leave the debtor only the time permitted by the Commercial Code for rescuing his goods, *i.e.*,

²⁷ See UCC §§ 9-201, 9-203, 9-206. The debtor remains responsible for damage to the collateral and for wrongfully failing to make the collateral available. See UCC § 9-503.

²⁸ Note to UCC § 9-203.

²⁹ UCCC § 5.103(2).

³⁰ UCC § 9-505. The standard amount triggering the requirement for a mandatory sale is sixty per cent of the cash price or the loan.

³¹ In addition, the mandatory resale may in fact raise the debt because of realization expenses still authorized by UCCC §§ 2.414, 3.405, both happily entitled "Limitation on Default Charges." See *Imperial Discount Corp. v. Aiken*, 38 Misc.2d 187, 238 N.Y.S.2d 269 (Kings County Ct. 1963), where an original sales price of \$50 for a car with a balance of \$12 resulted in repossession and sales charges of \$116.80.

³² If more than one-third of the purchase price has been paid, no repossession can be effected without court order. Hire Purchase Act 1965, c. 66, pt. III. See, R. GOODE & J. ZIEGEL, *HIRE PURCHASE AND CONDITIONAL SALE* 101-03, 116-22 (1965). Reports from English observers suggest that the necessitous debtor rarely is forced to return the goods because a kind of judicial composition or extension is effected.

until the resale or the goods are retained in satisfaction of the obligation. By operation of the UCCC it is arguable that any repossession in sales of less than \$1,000 is a retention in satisfaction of the obligation and thus terminates the right to redeem. Surely the debtor should not be subjected to such a hazard when he has made a substantial investment in the goods.

If the creditor elects to pursue the balance due, he may neither repossess nor use the goods as a source of enforcing payment of the judgment.³³ An implied corollary of this provision is that the creditor could not seize the collateral under preliminary remedies of attachment or the like to commence his action for the balance due. It should not strain the imagination of any court to reach the conclusion that goods not reached by an execution process pursuant to a judgment should not be subject to the creditors' preliminary remedies.

If a seller attempts to frustrate the Consumer Credit Code plan by taking other collateral to secure the sales price of \$1,000 or less, he will himself be frustrated by a specific provision in section 5.103(3) extending the restrictions to such situations. Since the seller is not freed from his obligation to sell in this subsection, the Commercial Code provisions requiring a sale will continue to control.

The net result of these provisions forces the seller to be certain that the collateral will continue to have a value sufficient to assure that at least a major part of the balance due may be realized upon repossession and resale. Unless the seller takes such steps, he will be forced to rely on his ability to collect from the buyer's general nonexempt assets excluding the collateral.

There is no doubt that deficiency claims are a major irritant to consumer groups. There is evidence that credit problems of the poor are aggravated by such judgments. In fact, high prices rather than high rates are a distinguishing feature of the ghetto sales credit economy.³⁴ While the limitation on deficiencies may not eliminate such pricing practices, it certainly removes any legal basis for encouraging them. It has been forcefully argued that the UCCC restrictions on deficiencies are a boomerang and that ultimately the economic impact of such a change will fall upon the consumers themselves.³⁵ How can anyone quarrel with the UCCC if its result is a restriction on credit extension limiting sales credit repayment periods so that they are better related to the depreciating value of the goods? No, the source of the argument must be that the UCCC restriction will either result in higher finance charges or in the refusal of sales to marginal credit seekers. Once again no one can predict with precision the impact of this kind of restriction. The draftsmen balanced the claims of existing abuses of deficiency judgments in consumer credit sales against the risks suggested and developed the Code position. The forces of competition encouraged by the Code provisions on free entry should moderate both of the

³³ UCCC § 5.103(6).

³⁴ FTC, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968).

³⁵ Kripke, *supra* note 15, at 478-86.

suggested risks. Beyond that, as any credit manager knows, some people must be denied credit despite sales department pressures for increased volume. A statute would serve neither the creditor nor the consumer if it failed to recognize that truth and implement its consequences. The \$1,000 limitation rests on a judgment of the draftsmen that the higher ticket items are not the major source of the abuses and probably that the repayment periods in these sales usually bear some relationship to the value of the goods.³⁶

II

PRESERVING THE DEBTOR'S PROPERTY AND WAGES

A. Earnings as a Source of Payment

Financers must not only review their dependence upon freedom from defenses between the seller and buyer and upon their ability to recover a deficiency judgment but also the extent to which they rely upon earnings as security in any consumer credit extension. Both the sales and loan credit provisions of the UCCC have a series of limitations on reaching earnings of the debtor. First, assignments of wages to secure a consumer sale, lease, or a loan are explicitly prohibited and made unenforceable.³⁷ Second, garnishment of wages before judgment is eliminated as a remedy on both sales and loan credit cases.³⁸ Together these provisions delay the time when the creditor subject to the UCCC may reach the consumer debtor's principal asset, his wages. One hopes that the legislatures considering the UCCC will also review their general wage exemption and assignment law. Creditors not affected by the Consumer Credit Code should be placed on equal terms with professional financers. Otherwise the professional financers may be unfairly placed at a disadvantage when competing for collection because an unregulated creditor has taken a wage assignment or is able to obtain a garnishment prior to the time when the regulated creditor can obtain a judgment.

Wage garnishments have been singled out as a major cause of our burgeoning

³⁶ Although the Consumer Credit Code leaves the problem of default to the contract, such matters as acceleration clauses will be governed by the Commercial Code's requirement that the creditor must be in good faith (UCC § 1-208). Since the burden of proof on that issue is placed on the debtor, he receives little consolation. In some instances the UCCC is concerned with default, as in the provisions giving the nonagricultural debtor a right to a refinancing of any balloon note not related to the debtor's irregular or seasonal income. UCCC §§ 2.405, 3.402. By this "balloon term" the contract or note calls for relatively small regular payments and a final large payment. Variations on the theme are endless and may be in the time allocations of the installments as well as in the amount. The danger perceived is that such terms leave the buyer in an extremely hazardous position at the time of the last payment. He is at the mercy of the finance company, which may decide to foreclose its security interest or extend the terms of payment. Another provision, probably aimed at payment of an excessive dollar amount of finance charges, restricts the term of "supervised loans" and requires regular payments except for adjustments for seasonal or irregular income of the debtor (UCCC § 3.511). Query? How does this relate to the requirement of extending balloon payments, or, in fact, to a voluntary extension?

³⁷ UCCC §§ 2.410, 3.403.

³⁸ UCCC § 5.104.

consumer bankruptcies.³⁹ That is a strange happening at a time when so much material effort is being directed toward reducing unemployment and moving people from welfare support to self-sufficiency. There is little incentive to remaining employed if a substantial segment of your income is paid directly to creditors. Welfare looks more attractive, in such a situation, with each reduced wage payment. Perhaps as a consequence of these factors, in the UCCC garnishment after judgment is curtailed. The debtor has an exemption of at least twenty-five per cent of his disposable earnings each week or forty times the federal minimum wage.⁴⁰ By applying the multiplier of forty rather than thirty to the minimum wage, the UCCC permits a greater exemption to the debtor than the federal Consumer Credit Protection Act.⁴¹

The exclusion of wages as collateral in consumer transactions goes beyond the requirements of the federal law but is entirely consistent with the policy behind the Commercial Code's determination to exclude wage assignments from article 9.⁴² The UCC left the regulation and control of wage assignments to local regulation as a social problem; the UCCC supplies a prohibitory regulation for consumer credit transactions.

B. Other Limits on Collateral

Other UCCC restrictions on the use of collateral are technically not in conflict with the UCC but do represent a major difference in policy. The Commercial Code is founded on eliminating artificial distinctions in the old law limiting either the form or the collateral. Since the creditor is restricted to realizing upon the collateral to satisfy the obligation owed to him, the Commercial Code is not concerned with the relation of the debt to the collateral.⁴³ On the other hand, the threat to a consumer debtor that all of his furniture will be repossessed to enforce a debt for a stereo-television console offers the unscrupulous creditor a terrifying leverage in his dealings with the debtor. The UCCC offers specific but different limitations upon collateral for sales and loan credit.

A seller may obtain a security interest in the goods sold, and if the debt secured

³⁹ R. DOLPHIN, AN ANALYSIS OF ECONOMIC AND PERSONAL FACTORS LEADING TO CONSUMER BANKRUPTCY (Mich. State Univ. Bureau of Business and Economic Research Paper No. 15, 1965).

⁴⁰ UCCC § 5.105(2).

⁴¹ Consumer Credit Protection Act § 303, 82 Stat. 146 (1968) [hereinafter cited as CCPA]. The federal exemption thus amounts to \$48 a week while that in the UCCC equals \$64 a week. For an interesting explanation of the legislative interaction, see McLean, *The Federal Consumer Credit Protection Act*, 24 Bus. Law. 199, 202-03 (1968). The UCCC also prohibits the discharge of the debtor for any garnishment (UCCC § 5.106), while the federal CCPA § 304 only prohibits discharge for a single garnishment.

⁴² UCC § 9-104(d).

⁴³ One limitation on collateral in consumer goods cases is the provision that an after-acquired property clause is ineffective to encumber consumer goods given as additional security unless the debtor acquires rights in those goods within ten days after the secured party gives value. This has had little effect on the kind of cross-collateral governed by the UCCC, since each contract contains its own provision granting the security interest. In fact, the section has not yet been invoked in a reported decision. UCC § 9-204(4)(b).

is \$300 or more, in specified additional goods: (1) personalty upon which services are performed; (2) goods to which the sold goods are annexed or in which the sold goods are installed.⁴⁴ Further, if the debt is \$1,000 or more, the seller may take a security interest in land to which the sold goods are affixed or which is maintained or improved by the sold goods or services.⁴⁵ All of these situations where additional security is permitted seem only to assure that the seller may maintain his original security because either services are rendered or the goods sold are somehow merged into the additional collateral.

Cross-collateral, another form of additional collateral, is also available to the seller. If the seller has a security interest in previously sold property, he may contract for a security interest in those goods to secure the price of a present sale.⁴⁶ Conversely, he may obtain a security interest in the goods presently sold to secure the previous debt.⁴⁷ For example, under a revolving charge account, a seller who retains a security interest to secure a \$500 price for a TV set may later sell the buyer a \$200 washing machine. The UCCC permits the seller to secure the \$500 debt by using both the TV set and the washing machine as collateral and to secure the \$200 debt with the same collateral. This authorization goes beyond the idea of preserving the security in the original collateral. The risk is present that the debtor will be confronted with a loss of both the TV set and the washing machine upon default in a single payment.

The UCCC moderates that peril by specifying a scheme for the allocation of payments to each of the separate sales. A first-in-first-out rule attributes payments to the first sale, and when the debt from that sale is paid, any security interest terminates.⁴⁸ Thus the buyer faces the loss of both the TV set and the washing machine only if the payments made prior to any repossession are less than the debt on the subject matter of the first sale, the TV. The UCCC approach has been criticized because it deprives the creditor of his bargain, forcing him to allocate the payments entirely to the first sale when the value of the goods delivered under both sales is declining. The suggestion overlooks the possibility of a real extreme simply outlawing cross-collateral altogether. If the creditor objects to the approach of UCCC, he may drop cross-collateral clauses from his agreements. Such an approach is potentially harmful only to those debtors who would need to use earlier valuable purchases to secure the later purchase of rapidly depreciating goods.

On the other hand, applying this first-in-first-out method of allocation of pay-

⁴⁴ UCCC § 2.407(1). Agricultural sales for an agricultural purpose are not so limited.

⁴⁵ *Id.*

⁴⁶ UCCC § 2.408(1). It seems that the limits of UCC § 9-204(4)(b) will continue to control after-acquired property clauses.

⁴⁷ UCC § 9-204(3).

⁴⁸ UCCC § 2.409. This section was undoubtedly influenced by the now famous case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), where property sold under several contracts at some \$1,400 was repossessed to collect the price of \$400 on the last contract. The court considered the arrangement "unconscionable" even prior to the effective date of UCC § 2-302.

ments in a related but different kind of arrangement may produce unfortunate results for the debtor. If the debtor owes obligations on several separate contracts without any cross-collateral, and financial disaster strikes him, he may seek to consolidate those obligations into a single payment schedule.⁴⁹ At this point the creditor may be reluctant to accommodate the debtor because he feels that the allocation rule places him in an unduly riskful situation since nothing will be allocated to the later purchases until the previous sales obligations are satisfied. In such a case the debtor might well wish that the UCCC provided for an allocation of payments rule based on attributing part of each payment to each sale, perhaps in proportion to the amount of the purchase price for each sale.

That difficulty in consolidating debts may yet be a small price to pay for the fact that the UCCC moderates potentially harsh impact of the cross-collateral clauses. Unless both forms were covered by the rule, the unscrupulous creditor could avoid the limits on cross-collateral simply by consolidating the debts at each subsequent sale and taking a security interest in all of the sold goods to secure the new single debt. Effectively controlling cross-collateral clauses is especially important because of the ease with which such clauses can be included in the terms of a retail revolving charge account system because of the simplified formal requisites for obtaining a security interest under the Commercial Code.⁵⁰ There is little doubt that the use of such accounts will expand in the hands of imaginative merchants, and the added leverage of a cross-collateral clause in the event of default may tempt many retailers to employ such terms even when they are not essential to the credit extension. The UCCC provision modifies the harsh aspects of such clauses and thus reduces the possibility that cross-collateral will come into general use.

A second potential abuse associated with cross-collateral arises from the maximum rate provision. Since step-rates of thirty-six per cent, twenty-one per cent and fifteen per cent, breaking at \$300 and \$1,000 are provided for sales credit,⁵¹ a debtor might be charged thirty-six per cent per year on an item sold for \$250 and the same rate on an item sold later for \$300. Because the cross-collateral clause really integrates the two sales, the amount of the balance is actually \$550 and the maximum rate should be adjusted downward to twenty-one per cent. The UCCC treats such a situation as a consolidation and forces the creditor to adjust his rates accordingly.⁵² This is similar to the policy expressed in both the sales and supervised loan articles against the use of a series of agreements to obtain a higher rate under the various steps allowed in each article.⁵³

⁴⁹ UCCC § 2.206. See Kripke, *supra* note 15, at 474-75, who attributes the present text to the action of the entire Conference of Commissioners at Honolulu in August 1967.

⁵⁰ See Brennan, *Securing Department Store Charge Account Sales Under the Uniform Commercial Code*, 39 CONN. B.J. 33 (1965).

⁵¹ UCCC § 2.201.

⁵² UCCC § 2.408(2).

⁵³ UCCC §§ 2.402, 3.509.

With a single exception, any attempt by a consumer credit seller to obtain further collateral not authorized by the provisions on additional collateral is void.⁵⁴ If a consumer credit sale is primarily for an agricultural purpose, the seller is allowed to take additional security in any property of the debtor.⁵⁵ Furthermore, the allocation of payments rule for debts secured by cross-collateral does not apply in an agricultural sale.⁵⁶ One can view this exception as evidence of the fact that sweeping clauses for collateral in agricultural sales finance have not caused problems for the farmers. One might also infer that agricultural financiers simply would not tolerate such limitations on their existing practices and are potentially strong enough to obtain the exception. The Uniform Commercial Code has at least one such "farm-oriented" rule which is inordinately difficult to explain on purely rational grounds.⁵⁷ In fact, the draftsmen of article 9 are reported to have once proposed a brief credit law for farmers. "Section 1. It should be illegal to refuse to grant credit to farmers. Section 2. It shall be illegal to attempt to collect a debt from farmers."

In loan transactions the creditor is relatively unrestricted in respect of the collateral available to secure his debt. Only one provision specifically treats the problem, and that seems aimed to reduce the hazards of the "second mortgage" racket. The supervised or "high-rate" lenders may not contract for an interest in land as security, if the principal amount of the loan is \$1,000 or less.⁵⁸

Concern for the risk to the debtor who unknowingly grants a second mortgage is expressed elsewhere. With an exception as to first mortgages securing purchase money, both the federal Consumer Credit Protection Act and the UCCC give a consumer a three-day period to withdraw from sales or loan transactions secured by an interest in residential property of the debtor.⁵⁹ The time for withdrawal by the consumer does not begin to run until all disclosure requirements have been satisfied.⁶⁰ Even the relatively low-rate real estate loans, otherwise excluded from much of the regulation of the act, are brought within this provision. Details of the creditor-debtor relation, after this right to rescind is exercised, are also provided. They include freedom from further liability for the debtor, discharge of any security interest, the duty of the creditor to make refunds within ten days of the rescission, and the corresponding obligation of the debtor to tender return of any benefits received under the contract.⁶¹ The impact of such a provision in the market place is hard to gauge.

⁵⁴ UCCC § 2.407(1).

⁵⁵ *Id.*

⁵⁶ UCCC § 2.409(1).

⁵⁷ UCC § 9-307(1) protects a buyer in the ordinary course of business against his seller's inventory financier's perfected security, but if the seller's inventory is farm products, the buyer loses to the financier. This means that in your purchase of a refrigerator you are protected against a seller's lender but not in the purchase of the vegetables at a farm stand to fill that refrigerator. *Cf.* *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967).

⁵⁸ UCCC § 3.510.

⁵⁹ CCPA § 125(a); UCCC § 5.204(1).

⁶⁰ UCCC § 5.204(1).

⁶¹ CCPA § 125(b), UCCC § 5.204(2).

Most probably both legitimate and unscrupulous creditors will delay any performance on their part until this three-day cooling off period has expired.⁶² In most cases such a delay will not create troubles for the consumer, but in the event of a sudden financial crisis or particularly of sudden accidental damage to his property, the homeowner may need help immediately. To safeguard the debtor's ability to use his home as security in such cases, both acts permit the Administrator to authorize by rule the modification or waiver of the right to rescind.

After permitting homeowners a right to rescind deals other than first mortgage purchase money liens irrespective of where the transaction was negotiated, the UCCC adds for home solicitation sales a right to rescind based not upon the collateral but upon the locale of the negotiations.⁶³ The UCCC rule does not cover either farm transactions sales made pursuant prior to revolving charge accounts, or sales made after negotiations at a business establishment at fixed location where goods or services are offered or exhibited.⁶⁴

Although the time for rescission here also expires at midnight on the third business day after the sale, the time begins to run on the signing of the agreement or offer to purchase rather than at the time of disclosure.⁶⁵ Other details vary, including the fact that the seller may retain a cancellation fee of the lower of five per cent of the cash price or the cash down payment.⁶⁶ The statute here provides for the loss of the right to rescind in emergency situations, if the seller has made a substantial beginning of performance or the goods cannot be returned in substantially as good condition as when delivered. The creditor is required to disclose in detailed, conspicuous fashion the buyer's right to rescind, while in the realty security provision the details of the required disclosure are left to administrative determination.

Many transactions will involve both a second mortgage lien and a home solicitation sale. Obvious clashes between these two sets of rights will be avoided by the UCCC rule that the buyer may proceed to avoid the sale under either route.⁶⁷ Subtle clashes are less easily dismissed. If home solicitation is to be regulated because of fast-talking, high-pressure salesmen, it is easy to imagine how they might confuse the

⁶² The need for this kind of control is overwhelmingly supported by testimony developed by Senator Joseph D. Tydings of Maryland of practices in the District of Columbia. *Hearings on S. 316, S. 2589, S. 2590 and S. 2592 Before a Subcomm. of the Senate Comm. on the District of Columbia*, 90th Cong. 1st & 2d Sess. 175-218 (1968).

⁶³ UCCC § 2.502. A conspicuous statutory warning of this right to rescind must be furnished the buyer. UCCC § 2.503.

⁶⁴ For a thorough analysis of the problem by the principal draftsman of this part, see Sher, *The "Cooling Off" Period in Door to Door Sales*, 15 U.C.L.A. L. REV. 717 (1968).

⁶⁵ UCCC § 2.502.

⁶⁶ UCCC § 2.504(3). Capricious cancellations may be discouraged by taking of a down payment. See, Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 443 (1968).

⁶⁷ UCCC § 2.502(6). It also seems clear that the buyer is also entitled to revoke an unaccepted offer to buy irrespective of the Code. UCCC § 2.502(1). Because home office approval of the sale may be required, well-advised buyers have often escaped burdensome deals by this means. Since buying parties at neighbors' homes are not plainly within part 5 of article 2, irate husbands may continue to choose to revoke offers made by wives.

UCC cases. In *Frostifresh Corp. v. Reynoso*,⁷¹ a Spanish-speaking buyer signed a contract, entirely in English, for a combination refrigerator-freezer. The form was presented by a Spanish-speaking salesman and was neither translated nor explained. In the oral negotiations the salesman stated that the appliance would cost the buyer nothing because he would receive bonuses and commissions of \$25 each on numerous sales to his neighbors and friends. The contract form carried a cash price of \$900 and a credit charge of \$245.88. The plaintiff's cost for the item was \$348. After paying \$32, the buyer defaulted and the seller brought an action for the balance due, plus attorney's fees and a late charge. Because the contract was "unconscionable" the plaintiff's recovery was limited to the net cost of the refrigerator-freezer to which the appellate tribunal added a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges.

It may surprise the reader to learn that under the UCCC the buyer would probably have been free of any liability and could have retained the freezer. This results not from the doctrine of unconscionability but from the prohibition of "referral" sales in section 2.411. If the bonuses or commissions depend upon the neighbors and friends later signing sales contracts themselves, an agreement in any sale or lease to give a rebate or to pay value destroys the buyer's obligations under the contract and his obligation to make restitution. Referral transactions are treated so harshly precisely because they are themselves so harsh and deceptive. Like chain letters they depend upon people who do not perceive that the group "of friends and neighbors" needed as new customers will increase in a geometric progression until the entire population of the world must buy freezers to satisfy the bonus promises made to a relatively small number of initial buyers.⁷²

Closely related to the specific attack on referral sales are the general criteria in section 6.III(3)(a) suggesting the relevance, in testing any claim of unconscionable conduct, of the creditor's belief that there was no reasonable probability of payment in full of the obligation of the debtor. In *Frostifresh* the debtor told the salesman that his job ended in one week and he could not afford the appliance. The bonus plan was offered to cure that barrier to the debtor's making payments. If the belief of the salesman is to be laid at the door of the creditor, then the UCCC suggests still another basis for attacking that sale.

The court in *Frostifresh* seemed particularly concerned with two elements. It found evidence of "oppression" of the defendants when it compared the service charge of \$245.88 to the "price" of the appliance. Since the trial court characterized the "price" as almost equal to the service charge, the \$348.00 cost to the plaintiff-seller must have been employed as the "price" rather than the \$900 cash price in the contract.

⁷¹ 52 Misc.2d 26, 274 N.Y.S.2d 757 (Nassau Co. Ct. N.Y. 1966), *rev'd in part*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (N.Y. App. Term, 2d Dep't 1967).

⁷² See Annot., 14 A.L.R.3d 1420 (1967).

The UCCC offers a similar but importantly different formula for finding unconscionability in "price." One of the criteria for judging the Administrator's action for an injunction against unconscionable agreements or conduct is the gross disparity between the price of the property furnished and its value.⁷³ However, that value is measured not by wholesale cost to the seller but by the retail market place. The standard for comparison is the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees. Unlike the trial court in *Frostifresh*, the UCCC bows to the fact of life that wholesale price to the seller compared to the retail price in the contract is not a measure of the "oppression" in the deal. The obvious commercial reality and service requires the seller to recoup his sales expenses, transportation, etc. Although the UCCC adopts a more realistic test, one can see some difficulty in working it out in the poor-people's market place. Masking some or all of the finance charges in the cash price is a time-honored way of concealing the amount of those charges or of staying within the boundaries of any statutory rate ceiling.⁷⁴ A striking characteristic of the ghetto market is that higher prices rather than notably higher finance charges are imposed on the buyer.⁷⁵ In such circumstances we shall no doubt have disputes over who is a "like buyer or lessee" when the market price comparison is to be employed. Only one answer seems viable in light of the overall thrust of the UCCC. Since "unconscionability" is being used as an adjunct to the rate regulation scheme of the Consumer Credit Code, the general market should be tested and not the ghetto market alone. Only in this fashion can the Code approach assure that the rate ceilings are not being frustrated among the poor by pricing the goods to include silently the charge for the credit.

Another of the UCCC's criteria for unconscionability could be brought into play in the *Frostifresh* situation. Using without explanation a contract form entirely in English in a transaction negotiated by a Spanish-speaking salesman with a Spanish-speaking buyer suggests that the seller has "knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of . . . ignorance, illiteracy or inability to understand the language of the agreement."⁷⁶ Physical or mental infirmities leading to an inability to safeguard his interest also bring this test into operation.

Perhaps the final drop to be squeezed from considering *Frostifresh* in light of the UCCC is the seller's claim for attorney's fees nearly equal to the original finance

⁷³ UCCC § 6.111(3)(c).

⁷⁴ Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 YALE L.J. 839, 840-43 (1959).

⁷⁵ See FTC REP., *supra* note 34 and the more particularized portrayal in the incisive opinion of Commissioner Mary Gardiner Jones in, *In the Matter of Leon A. Tashof, d/b/a New York Jewelry Co.*, Dkt. No. 8714 (FTC, 1968), pointing out that the Federal Trade Commission's jurisdiction over unfair and deceptive practices is in no way hampered by the enactment of the Consumer Credit Protection Act.

⁷⁶ UCCC § 6.111(e). Consideration must also be given to whether the creditor knows of the inability of the consumer to receive substantial benefits from the property or services sold or leased. UCCC § 6.111(b). This should help the Administrator to deal with the dance studio that sells lifetime lessons to seventy-year-old ladies. Insurance charges may also be reviewed. UCCC § 6.111(d). See also UCCC § 1.107.

charge. Both the trial and appellate tribunal denied these fees without comment. Here the UCCC does not leave the issue to be worked out in light of the sections on unconscionable terms. Specific treatment is offered, but that treatment varies.

With an exception for high-rate loans, alternative provisions are offered in both the sales and loan articles. One simply invalidates and makes unenforceable any term in a consumer sale or lease calling for payment of attorney's fees by the debtor.⁷⁷ This provision recognizes the striking braking effect the presence of such a clause has when the debtor is either unable or unwilling to pay. Even when the debtor has an honest belief that he has a right to refuse to pay, the potential additional liability for a substantial lawyer's fee makes him hesitant to assert his claim. When the debtor is unable to pay, the added liability simply adds to the burdens of his insolvency or forces him to divert funds from necessities.

Under alternative A, attorney's fees are like any other business expense of the creditor and must be recouped from the finance charges. It is to this very point that alternative B responds in allowing payment of up to fifteen per cent of the unpaid debt after default and referral to an independent attorney.⁷⁸ Supporting this approach is the idea that to the extent that the costs of default can be isolated they should be borne by those who default and not spread through the finance charges paid by those who pay regularly.

Some help in judging the merits of the two alternatives is provided by the fact that in the high-rate or "supervised" loans of less than \$1,000, provisions for attorney's fees are prohibited.⁷⁹ Apparently, lenders here are to recover their legal expenses from the high rates in such cases. The practically identical rates permitted for sales finance credit hint that the appropriate answer is prohibition in sales credit, too.⁸⁰ In fact, there seems to be little justification for the idea that one segment of the industry should be able to state rates which do not reflect such expenses, while another segment cannot. As a consequence, after considerable vacillation, this writer opts for prohibition in all cases.

CONCLUSION

How does one react after this rapid excursion through the UCCC and its intersections with the UCC? Characteristically, the Conference of Commissioners on Uniform State Laws has managed to produce a draft technically flawless in the sense that no issues of conflict between the two codes appear to remain to plague lawyers with clashing statutory rules. Using their own favorite phrase, creditors should be able to "live with" the UCCC. The restrictions on remedies still leave adequate means of collection. Most of the prohibited or regulated practices, including the

⁷⁷ UCCC §§ 2.413, Alternative A, 3.404, Alternative A.

⁷⁸ UCCC §§ 2.413, Alternative B, 3.404, Alternative B.

⁷⁹ UCCC § 3.514.

⁸⁰ Compare UCCC § 3.508 for supervised loans with UCCC § 2.201.

opening of the buyer's right to raise defenses, are not now relied upon by large parts of the industry. In fact, the decent members of the credit community will probably find the statute helpful in eliminating unfair competitive practices of the less ethical group. Consumers will find protection from a catalogue of the abusive practices of the overreaching creditors.

Two troublesome thoughts do persist, however. The first is the sense that something more should be done to safeguard the buyer's equity when goods with a cash price of \$1,000 or less are repossessed. Abandoning the mandatory resale of the UCC may be justified, but leaving the buyer without any assurance that he will be warned in time to arrange to pay the debt is simply leaving him helpless against a midnight repossession. If the statute is not amended to safeguard the buyer's equity by providing for a notice prior to repossession, certainly a course of conduct involving sudden retakings should be evidence of unconscionable conduct subject to an injunctive relief at the request of the Administrator. Since a preliminary notice of repossession may often result in the debtor's fleeing the jurisdiction, the answer may lie in providing a redemption period of five or ten days after the repossession which discharges the debtor from liability.

The second disquieting concern is that more thought must be given to the interests of the businessmen left outside of the coverage of the Code. No one can quarrel with the conclusion that large industrial organizations do not need the Code's safeguards. Yet the small businessman, operating as a sole proprietor, may well be as unsophisticated about sales credit as the person buying for personal, family, or household purposes.⁸¹ There is no hard evidence of this need, however, and one can understand the draftsmen's reluctance to attempt to draw lines defining the businessmen who need protection. In this connection the farmer is placed in a kind of middle ground in the Code. His transactions are clearly covered, but, as we have so often noted, these transactions are excluded from a good many of the controls on agreements and practices.⁸² It may be as indicated earlier that a large part of the specialized handling of the farmer is politically based, but the solution there may nonetheless suggest a solution to how to treat the small entrepreneur.

Apart from these two relatively small worries, the UCCC is a step forward in consumer credit legislation, not a giant and revolutionary step, but a step nonetheless.

⁸¹ Limited protection is afforded the individual entrepreneur by rate control in "consumer related" sales and loans of \$25,000 or less. UCCC §§ 2.602, 3.602. The protection exists also for organizations using as collateral one or two family dwellings occupied by a person connected with the debtor. The protections discussed throughout the text are not extended to these cases.

⁸² A primarily "agricultural purpose" takes the case out of the protections against negotiable instruments in sales (UCCC § 2.403); against waiver of defenses in sales (UCCC § 2.404); limiting balloon notes (UCCC §§ 2.405, 3.402); limiting collateral (UCCC § 2.407); and requiring allocation of payments (UCCC § 2.409) and the protection of a three-day cooling-off period in home solicitation sales (UCCC § 2.501). Such loans are within the restrictions on referral sales (UCCC § 2.411); on assignment of earnings (UCCC §§ 2.410, 3.403); attorneys' fees (UCCC §§ 2.413, 3.404, 3.511); default charges (UCCC §§ 2.414, 3.405) and confessions of judgment (UCCC §§ 2.415, 3.407). All of the limits of article 5 also apply to farm transactions.

Apart from any substantive provisions the very fact of attempted uniformity is an advance for both businesses operating in several states and for our generally mobile consumer population. My reaction nearly mirrors that of another commentator, who, when asked who was eager to have the Code passed, said:

After thinking a minute, I had to observe that there was opposition from some of the sellers, there was opposition from some of the finance companies, there was opposition from some of the legal aid people, there was opposition from some of the OEO group, there was opposition from some of the present state loan administrators; I concluded that I guess you really can't say there is any group who is completely for it. Perhaps that is its best endorsement!⁸³

I would add only "some banks" to the list.

⁸³ Moo, *Commentary*, 24 BUS. LAW. 223, 226 (1968).