ARIZONA
LAW REVIEW

VOLUME 14 1972 NUMBER 4

ARIZONA'S CONSUMER LEGISLATION: WINNING THE BATTLE BUT . . . .

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Since 1968, consumer transactions in Arizona have been governed almost exclusively by the *Uniform Commercial Code* (UCC).[1] When the UCC was drafted, it was recognized that many of its rules, especially those sanctioning a considerable degree of freedom of contract,[2] were inappropriate in the consumer context. The relatively equal bargaining position assumed by the UCC is absent in most consumer transactions, and the expectations reasonably held by consumers differ markedly from those held by businessmen. Consequently, the draftsmen decided that it would be inadvisable to attempt to pro-

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1. Arizona adopted the *Uniform Commercial Code* [hereinafter cited as UCC] as ARIZ. REV. STAT. ANN. §§ 44-2201 *et seq.* (1967), effective January 1, 1968, *as amended* (Supp. 1971-72). Hereinafter, all citations to Code sections are to the particular section of the UCC (1962 Official Text), followed by the ARIZONA REVISED STATUTES ANNOTATED section number in parenthesis.

An important exception to UCC coverage has been the Arizona consumer fraud statute, ARIZ. REV. STAT. ANN. §§ 44-1521 *et seq.* (1967), *as amended*, (Supp. 1971-72), which allows the Attorney General to act to prohibit "unfair and deceptive sales practices." See Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372 (1968).

2. *See* UCC §§ 1-102(3), (4) & Comment 3 (§§ 44-2202(C), (D) (1967)). *See also* Boyd, *supra* note 1, at 379-92; Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. IND. & COM. L. REV. 59 (1960).

vide rules appropriate for consumer transactions in what was to be essentially a commercial code.[3] As an alternative, they provided that rules should be devised for consumers that would supercede the UCC and encouraged legislatures to enact special rules.[4] Thus, when the UCC was adopted in Arizona there remained the difficult task of devising rules to govern consumer transactions.

The initial effort to enact consumer legislation in Arizona involved the Uniform Consumer Credit Code (U3C),[5] which, like the UCC, was a product of the National Conference of Commissioners on Uniform State Laws. Through the device of a single comprehensive code, the U3C was intended to remedy the difficulties posed by the inappropriateness of the UCC.[6] The U3C was indeed comprehensive,[7] but its treatment of particular problems was unacceptable to many consumer protection advocates.[8] Its adoption was opposed in Arizona on the ground that it aided creditors more than its purported beneficiaries, the Arizona consumers. Those arguments were apparently persuasive, and the U3C was not adopted.[9] It has met a similar fate in most other jurisdictions[10] and is presently under revision by its draftsmen in an attempt to eliminate those creditor-oriented features that have made it unacceptable to consumer interests.[11]

In the interim, the Arizona legislature has not been idle. The considerable discussion and debate engendered among creditor and consumer advocates by the introduction of the U3C has resulted in the enactment of four bills designed to relieve a variety of particular consumer problems. House Bill 102[12] imposes special rules and restrictions on door-to-door and referral sales; House Bill 332[13] restricts the

3. *See* Gilmore, *The Secured Transaction Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 37-40, 44-48 (1951).

4. *Id.* at 46; *see* text & notes 56-57 *infra*.

5. The UNIFORM CONSUMER CREDIT CODE [hereinafter cited as U3C] was introduced in Arizona on February 18, 1969, as part of Senate Bill 161. S.B. 161, 29th Leg., 1st Sess. (1969).

6. *See* Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968).

7. The U3C governs virtually every phase of consumer transactions from precontract negotiations to the use of repossessions and deficiency judgments in collecting consumer debts.

8. *See, e.g.*, CONSUMER VIEWPOINTS: CRITIQUE OF THE UNIFORM CONSUMER CREDIT CODE (R. Elbrecht ed. 1971) [hereinafter cited as CONSUMER VIEWPOINTS]; [1969] N.Y. DEPT. OF CONSUMER AFFAIRS, REPORT ON THE UNIFORM CONSUMER CREDIT CODE; Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO ST. L.J. 624 (1968).

9. *See* Boyd, *The U3C and the NCA: A Comment & Comparison*, in CONSUMER VIEWPOINTS, *supra* note 8, at 663.

10. To date the U3C has been enacted in only six states: Colorado, Idaho, Indiana, Oklahoma, Utah and Wyoming. 1 CCH CONSUMER CREDIT GUIDE, UNIFORM CONSUMER CREDIT CODE ¶ 4770 (1972).

11. Unpublished memorandum prepared by Professor William Warren (principal draftsman of the U3C) (1971), on file at the offices of ARIZONA LAW REVIEW.

12. *Codified* ARIZ. REV. STAT. ANN. §§ 44-5001 to -5008 (Supp. 1971-72).

13. *Codified id.* §§ 44-144, -145, -5005.

availability of holder in due course status and the effect of waiver of defense clauses in connection with consumer transactions; Senate Bill 57[14] prescribes specific procedures and rules for retail installment sales transactions; and House Bill 330[15] limits deficiency judgments and the creation of security interests. This article will analyze these enactments and compare them to corresponding U3C provisions with a view toward indicating the extent to which the new laws meet the challenge of modifying a legal framework characterized by its commercial orientation.

HOUSE BILL 102: HOME SOLICITATIONS AND REFERRAL SALES

The Arizona Home Solicitations and Referral Sales Act, known as House Bill 102, includes a number of important protections against abuses associated with door-to-door selling.[16] Generally, the Act proscribes door-to-door referral sales and provides a cancellation period for all home solicitation sales. In addition, limitations are placed upon the transfer of instruments and agreements executed in conjunction with such sales. Since the Act is the subject of extensive comment elsewhere,[17] this section will stress the revisions in existing law not emphasized in the earlier comment and indicate the protection likely to be afforded by these revisions.

Cancellation of Sales Contracts

Under the UCC, a buyer who has not yet accepted the goods may cancel a sales contract only because of defects in the sellers performance.[18] If the goods have already been accepted, then the buyer may not revoke his acceptance and cancel the contract[19] unless he accepted non-conforming goods with the reasonable assumption that the nonconformity would be cured, or unless he was unaware of the non-conformity because it was difficult to discover prior to acceptance.[20] Even then the defect must have substantially impaired the value of the goods to the buyer.[21] These rules remain generally effective and undoubtedly will continue to work hardships on consumers.[22]

Under House Bill 102, however, a special cancellation right is afforded to buyers in home solicitation sales, defined to mean install-

14. *Codified id.* §§ 44-6001 to -6006.
15. *Codified id.* §§ 33-725, -727, 729, -730, -964, 44-5501.
16. For a discussion of the various abuses generally associated with direct selling, see Comment, *Arizona's Home Solicitation and Referral Sales Act: An Evaluation and Suggestions for Reform*, 12 ARIZ. L. REV. 803, 804 n.7 (1970).
17. Comment, *supra* note 16.
18. UCC § 2-711 (§ 44-2390 (1967)). *But see* UCC § 2-721 (§ 44-2400 (1967)) (rescission based on misrepresentation).
19. *Id.*
20. UCC § 2-608 (§ 44-2371 (1967)).
21. *Id.*
22. *See* Boyd, *supra* note 1, at 393-95.

ment sales solicited by the seller and consummated at a home other than the seller's.[23] Until midnight on the second calendar day after the agreement is signed, the buyer may cancel the sale without cause by giving written notice to the seller of an intention not to be bound.[24] This cancellation right is not in lieu of the buyers cancellation rights under the UCC, but is supplementary to those remedies. Thus, a buyer in a home solicitation sale may cancel without cause during the statutory "cooling-off" period, but after the expiration of that period he may cancel only if he is entitled to that remedy under the UCC.[25]

The U3C also provides for cancellation without cause in home solicitation sales, but allows the buyer 3 days to cancel non-installment as well as installment credit sales.[26] While the U3C does not prescribe any particular procedure for giving notice of cancellation, the Arizona Act requires the buyer to send his notice by "registered mail, return receipt requested" or to obtain a postal receipt indicating that the notice was mailed.[27] The Arizona provisions protect the buyer by ensuring that he will have evidence of his cancellation, but add a technical burden of compliance that may inhibit or discourage cancellation efforts. Both the U3C and the Arizona Act provide that a sale made without proper notice of the buyer's right to cancel is ineffective.[28] Neither the Arizona Act nor the U3C, however, precludes the possibility of sellers including a clause in the sales contract under which the buyer waives his right to rescind within the cooling-off period. Thus, it is possible for sellers to avoid the consequences of House Bill 102 by simply incorporating a waiver clause into the contract.[29]

A recently promulgated Federal Trade Commission rule[30] will enlarge the protection afforded by the Arizona law, at least as to interstate sales.[31] Under the rule,[32] Arizona consumers in home solicita-

23. ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1971-72).
24. *Id.* § 44-5002.
25. *See* Comment, *supra* note 16, at 813.
26. U3C §§ 2.104, 2.501, 2.502(1). For a general discussion of the U3C provisions governing home sales, see Comment, *supra* note 16.
27. ARIZ. REV. STAT. ANN. § 44-5002(B) (Supp. 1971-72).
28. U3C § 2.503; ARIZ. REV. STAT. ANN. § 44-5004 (Supp. 1971-72). *See generally* Comment, *supra* note 16, at 816-18.
29. Sellers in Arizona are already utilizing such clauses. See The Arizona Republic, Nov. 6, 1972, at 23, col. 3.
30. Fed. Trade Comm. Reg. Rule § 429.1, 37 Fed. Reg. 22934 (1972). The validity of the entire rule may be jeopardized, however, by National Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972), which held that the FTC has no substantive rule making authority.
31. The Federal Trade Commission's regulatory authority has been held to reach only interstate activity. See FTC v. Bunte Bros., 312 U.S. 349, 355 (1941); Boyd, *The Federal Consumer Credit Protection Act*, 45 NOTRE DAME LAW. 171, 184 n.103 (1970). Thus, local sales conducted by a firm doing business only in intrastate commerce will not be affected.
32. No effective date for the rule has been set by the FTC. Fed. Trade Comm. Reg. Rule § 429.1, 37 Fed. Reg. 22934, at 22935 (1972).

tion sales involving interstate commerce will have a 3-day cooling-off period to cancel such contracts.[33] Moreover, the rule makes it an unfair and deceptive trade practice for a seller in such a sale to fail to take certain actions designed to insure that the buyer will be aware of his rights. Waivers of the right to cancel are explicitly prohibited by the rule.[34] Additionally, the rule will preempt state laws except to the extent that their provisions are not directly inconsistent with the federal rule.[35] Several provisions of the Arizona Act do appear to be directly inconsistent[36] and should be amended, as urged by the FTC,[37] to conform with the new rule before it becomes effective.

House Bill 102 equips the buyer with another cancellation remedy unavailable under the UCC by permitting him, at his option, to void any home solicitation sale involving a referral scheme.[38] A referral scheme is an offer of a commission to the buyer "contingent upon an event that is to happen subsequent to the time the buyer agrees to buy."[39] Ordinarily, it involves an offer of a price reduction based

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33. The cooling-off period under the Arizona Act is only 2 days while the Rule provides for a 3-day cooling-off period. *Compare* Fed. Trade Comm. Reg. Rule § 429.1(a), 37 Fed. Reg. 22934 (1972) *with* ARIZ. REV. STAT. ANN. § 44-5002(A) (Supp. 1971).

34. Fed. Trade Comm. Reg. Rule § 429.1, 37 Fed. Reg. 22934 (1972).

35. Such laws . . . which do not accord the buyer . . . a right to cancel a door-to-door sale which is substantially the same or greater than that provided in this section, or which permit the imposition of any fee or penalty on the buyer for the exercise of such right, or which do not provide for giving the buyer notice of his right to cancel the transaction in substantially the same form and manner provided for in this section are among those which will be considered directly inconsistent.

Fed. Trade Comm. Reg. Rule § 429.1, note 2(b), 37 Fed. Reg. 22934 (1972).

36. The definition of door-to-door sales is more inclusive under the rule than under the Arizona Act. Cash sales, as well as sales pursuant to a preexisting account with a seller whose primary business is selling goods or services from a fixed location, are excepted from the Arizona Act, but appear to be within the Rule. *Compare* ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1971-72) *with* Fed. Trade Comm. Reg. § 429.1, note 1(a), 37 Fed. Reg. 22934 (1972). Furthermore, the Rule mandates that the buyer be given a copy of the contract, which must be in the same language as that used in the oral presentation, while the Arizona Act merely requires that the buyer be notified of his right to a copy of the contract and contains no language requirement. *Compare* § 429.1(a) *with* § 44-5004. The "Notice of Cancellation" which must be given the buyer under the Rule contains various requirements not present in the notice required under the Arizona Act: it must be in the same language as that of the oral presentation to the buyer, it must appear in 10-point type, and it must contain an easily detachable cancellation form. *Compare* § 429.1(b) *with* § 44-5004. The cancellation procedure under the Arizona Act requires the use of a specified post office form or registered mail, while the Rule permits simply mailing or delivering a written notice of cancellation. *Compare* § 44-5004(4) *with* § 429.1(b). Finally, the seller's cancellation fee allowed under the Arizona Act is not permitted under the Rule. *Compare* § 44-5007(C) *with* § 429.1, note 2(b).

37. *See* Fed. Trade Comm. Reg. Rule § 429.1, 37 Fed. Reg. 22934, at 22961 (1972).

38. ARIZ. REV. STAT. ANN. § 44-5003 (Supp. 1971-72). For a discussion of the evils of referral sales, see W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 14 (1968); Comment, *Let the "Seller" Beware—Another Approach to the Referral Sales Scheme*, 22 U. MIAMI L. REV. 861 (1968). *See also* Comment, *supra* note 16, at 815 nn. 73-74.

39. ARIZ. REV. STAT. ANN. § 44-5003 (Supp. 1971-72).

upon sales to prospective customers to whom the buyer refers the seller. One problem with the Arizona Act is that it is unclear what action the buyer must take to void the sale or to preserve his rights. It is possible to interpret the section as requiring the buyer to comply with the requirements governing his right to cancel without cause. A more reasonable interpretation, however, is that the buyer may cancel at any time by notifying the seller and offering to return the goods.[40]

A U3C provision likewise prohibits referral sales,[41] but applies to consumer credit sales and leases[42] generally while the Arizona Act is limited to home solicitation sales of goods or services.[43] Moreover, the U3C expressly states that an agreement involving a referral scheme is unenforceable.[44] At his option, a buyer may rescind the contract, or affirm the contract and retain any goods or the benefit of any services without obligation to pay for them.[45] Thus, not only is the U3C broader in scope and more explicit as to possible consequences, but by allowing the buyer to retain goods or services without obligation it operates to deter such schemes.[46] A critical shortcoming exists in both the U3C and Arizona provisions, however. Neither requires the seller to give the buyer any notice of the prohibition against referral schemes or his rights in the event such a scheme is used by the seller. Consequently, the right to void the contract often will be illusory.

Transfer of Notes and Other Evidences of Indebtedness

Another important provision of House Bill 102 is section 44-5005, concerning the holder in due course doctrine and "waiver of defense" clauses. Although the impact of this provision is qualified by portions of House Bill 332 to be discussed later, section 44-5005 must first be analyzed independently of the effect of House Bill 332.

Under the UCC, consumers are subject to the holder in due course doctrine and thus most defenses available against the taker of a negotiable instrument are invalid against a transferee of the instrument who takes for value, in good faith and without notice.[47] Similarly, a

40. *See* Comment, *supra* note 16, at 815-16.
41. U3C § 2.411.
42. The U3C prohibition is found in a part of the proposed code that limits sales practices in connection with all consumer credit sales and leases as defined in *id.* §§ 2.104, 2.106.
43. ARIZ. REV. STAT. ANN. § 44-5003 (Supp. 1971-72).
44. U3C § 2.411.
45. *Id.*
46. A further distinction between the U3C and the Arizona Act is that the latter fails to recognize the impact of the federally-created right of cancellation available in connection with a sale where a security interest is taken in the residence of the buyer. *Compare* 15 U.S.C. § 1635 (1970) *with* U3C § 2.501 *and* ARIZ. REV. STAT. ANN. § 44-5007 (Supp. 1971-72).
47. UCC § 3-305 (§ 44-2535 (1967)); *see* UCC § 3-302 (§ 44-2532 (1967))

buyer may waive defenses by signing a conditional sales contract or other security agreement containing a clause by which he agrees not to assert against an asignee defenses he may have against the seller.[48] House Bill 102 requires that any note or other evidence of indebtedness issued in connection with a home solicitation sale be stamped with a statement that the instrument is subject to the statute and is non-negotiable.[49] The transfer of a stamped writing under section 44-5005 (A) operates as an assignment only, and defenses good against the seller continue to be effective against the transferee. Clearly, a transferee of a promissory note bearing this notice cannot claim holder in due course status.

It is not as clear, however, whether this provision similarly denies effect to waiver of defense clauses inserted in evidences of indebtedness such as the sales contract. Although section 44-5005(A) appears to be directed at saving the buyer's defenses regardless of the form of writing transferrred, the other subsections seem to indicate that the law is concerned only with negotiable instruments and the effects of their negotiation.[50] A contract in which the debtor has waived all defenses against the assignee creates an instrument similar to a negotiable instrument, but it is technically incorrect to consider such a contract negotiable.[51] Consequently, it can be argued that stamping a home solicitation sales contract with a warning of non-negotiability would not impair the validity of a clause in the contract cutting off defenses as against the assignee. A problem remains even if section 44-5005(A) was intended to preserve defenses against writings other than negotiable instruments. The legislature failed to include language to the effect that an assignee is subject to all defenses "notwithstanding" any agreement to the contrary. Hence, it is not apparent from the statute whether a waiver of defense clause included by the seller would override the preservation of defenses provided by section 44-5005(A). Hopefully, any court interpreting this section would conclude, as the Supreme Court of Arizona did in an earlier case,[52] that the legislature

(requisites for holder in due course status); UCC § 3-104 (§ 44-2504 (1967)) (requisites for negotiability).

48. UCC § 9-206(1) (§ 44-3119(A) (1967)). Under this section, a person who signs a negotiable note in connection with a security agreement agrees not to assert defenses within the general rule of the section.

49. ARIZ. REV. STAT. ANN. § 44-5005(B) (Supp. 1971-72).

50. *See id.* §§ 44-5005(B)-(D).

51. Under UCC § 9-206 (§ 44-3119 (1967)), promises not to assert defenses against assignees are effective to cut off the same defenses that are unavilable against a holder in due course under UCC 3-305 (§ 44-2535 (1967)), where the assignee satisfies the prerequisites of holder in due course status. The effect of the section, however, is not to make an instrument containing a "waiver-of-defense" clause a negotiable instrument.

52. *See* San Francisco Sec. Corp. v. Phoenix Motor Co., 25 Ariz. 531, 220 P. 229

had more in mind than codifying a firmly embedded common law rule, and that waiver of defense clauses in the consumer context are against public policy in Arizona.

A further problem develops when the seller fails to stamp the non-negotiability warning on a negotiable instrument. Undoubtedly, the seller loses any right of action against the buyer.[53] Just as certainly, a transferee of the unstamped note who had no notice that it was issued in a home solicitation sale could claim holder in due course status. An uncertainty arises, however, with regard to the transferee of an unstamped note who *has* notice that it was executed in a home solicitation sale. Under the U3C, a holder of a note issued in a consumer transaction is expressly denied holder in due course status if he had notice that the note was issued in such a transaction, because he did not take the note in good faith.[54] The Arizona Act does not address this problem, but hopefully a holder who took a note with notice that it was issued in violation of the requirements of section 44-5005 would also be deemed not to have taken the note in good faith.[55]

In summary, although House Bill 102 does provide buyers in home solicitation sales with cancellation rights not previously available under the UCC, it creates problems concerning the effect of the holder in due course doctrine and waiver of defense clauses. These problems are multiplied by House Bill 332,[56] which is explicitly addressed to the effect of waiver of defense clauses and the holder in due course doctrine in consumer transactions.

HOUSE BILL 332—WAIVER OF DEFENSE CLAUSES AND HOLDER IN DUE COURSE STATUS

House Bill 332[57] limits the effect of negotiable instruments and waiver of defense clauses not just in home solicitation sales, but in consumer sales transactions generally.[58] The legislation applies to the

(1923); *An Introduction to the Uniform Commercial Code*, 9 ARIZ. L. REV. 216, 264 & n.329 (1967).

53. *See* ARIZ. REV. STAT. ANN. § 44-5005(C) (Supp. 1971-72); Comment, *supra* note 16, at 819-20.

54. U3C § 2.403.

55. This problem may be less severe since House Bill 102 makes it a misdemeanor to fail to stamp the instruments. ARIZ. REV. STAT. ANN. § 44-5008 (Supp. 1971-72).

56. House Bill 332 amended a portion of ARIZ. REV. STAT. ANN. § 44-5505(A) (Supp. 1971-72) (the codification of House Bill 102), by making section 44-5005(A) expressly subject to ARIZ. REV. STAT. ANN. §§ 44-144, 145 (Supp. 1971-72).

57. H.B. 332, 30th Leg., 1st Sess. (1971), *codified as* ARIZ. REV. STAT. § 44-145 and amending *id.* §§ 44-144, 44-5005(D).

58. House Bill 332 brings Arizona within the trend of recent legislation which either limits or prohibits waiver of defense clauses and holder in due course status in connection with consumer transactions. *See* Murphy, *Another "Assault upon the Citadel": Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales*, 29 OHIO ST. L.J. 667, 673-74 & nn.22-24 (1968); Note, *Consumer Financing*,

purchase or lease of consumer goods or services,[59] but excepts certain credit card transactions[60] and purchase money loans not arranged by the seller.[61] Unfortunately, while the scope of this legislation is greater than that of House Bill 102, the protection it affords the consumer is more tenuous.

Waiver of Defense Clauses

Until the enactment of House Bill 332, waiver of defense clauses in consumer transactions in Arizona were ineffective. While UCC section 9-206 provides that such clauses are effective to preclude the assertion of personal defenses against assignees who take for value, in good faith and without notice,[62] that section, as adopted in Arizona, is "subject to § 44-144, which shall remain applicable to buyers or lessees of consumer goods."[63] Until amended by House Bill 332,[64] section 44-144 stated that: "An assignment of a chose in action shall not prejudice any set-off or other defense existing at the time of the notice of the assignment. This section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due."[65] In an early decision, the Arizona supreme court concluded that the construction to be given to the predecessor to section 44-144 was that waiver of defense clauses were totally without effect as to buyers or lessees of consumer goods.[66]

House Bill 332 effectively undermines this result by making section 44-144 expressly subject to section 44-145. Section 44-145 pro-

Negotiable Instruments, and the Uniform Commercial Code: A Solution to the Judicial Dilemma, 55 CORNELL L. REV. 611, 612 & nn.9-12 (1970); Note, *The Status of UCC § 9-206—The Waiver of Defense Clause*, 31 U. PITT. L. REV. 687, 689 & nn.8-10 (1970).

59. ARIZ. REV. STAT. ANN. § 44-145(A) (Supp. 1971-72). "Consumer services" are defined by *id.* § 44-145(C)(1), as "services for use primarily for personal, family or household purposes." In addition, the legislation specifies that the definitions used in the UCC are applicable. *Id.* § 44-145(C). *See, e.g.*, UCC § 9-109(1) (§ 44-3109(A) (1967) (definition of consumer goods)).

60. ARIZ. REV. STAT. ANN. §§ 44-145(B)(1)-(2) (Supp. 1971-72).

61. *Id.* § 44-145(B)(3). For the definition of purchase money loans, see UCC § 9-107 (§ 44-3107 (1967)).

62. ARIZ. REV. STAT. ANN. § 44-3119 (1967). Defenses good against a holder in due course (real defenses), however, may be asserted against the assignee. *Id.* Of course, all defenses remain good against the seller, but frequently he has absconded or is judgment proof. Moreover, the consumer is placed in the position of a plaintiff which in practice is highly undesirable. *See* Boyd, *supra* note 1, at 381 n.52.

63. ARIZ. REV. STAT. ANN. § 44-3119(A) (1967). UCC § 9-206(1) reads: "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods . . . ." This illustrates one situation in which the drafters anticipated the harshness of a particular Code provision as applied to consumers, and specifically invited the legislatures or courts to fashion an appropriate rule. See text & notes 2-4 *supra*.

64. *See* note 83 *infra*.

65. ARIZ. REV. STAT. ANN. § 44-144 (1967).

66. San Francisco Sec. Corp. v. Phoenix Motor Co., 25 Ariz. 531, 220 P. 229 (1923), *interpreting* Ariz. Rev. Stat., Civil ¶ 402 (1913).

vides that notwithstanding any agreement to the contrary, the rights of an assignee are subject to all defenses of the debtor arising out of the sale only if prescribed notice of the defense is given within 90 days.[67] The apparent intent of the legislature was to nullify the results of a waiver of defense clause if the defense arose and notice was given within the specified time period. Thus, a buyer who signs a contract containing a waiver clause and thereafter gives the required notice of defenses may assert any personal defense against an assignee. On the other hand, if proper notice is not given, the defenses are lost. Clearly, this is a retraction of consumer protection.[68] There is a further possible adverse result which was probably not intended by the legislature. The first sentence of section 44-145 appears to require that even a buyer who signs a contract not containing a waiver clause must give notice of his defenses within 90 days in order to preserve them.[69] The statute could thus be read to imply a waiver of defense clause in the contract where the prescribed notice is not given.[70] Such a result would allow the assignee rights beyond all traditional concepts of assignment. The problems caused by this interpretation are magnified by the fact that instruments issued in home solicitation sales have been made expressly subject to section 44-145.[71] The net result is that statutes purporting to protect consumers enhance the protection for the sellers' assignees.

The U3C draftsmen, recognizing the problems for consumers created by waiver of defense clauses, provided alternative sections for states to enact.[72] Alternative *A* provides that an assignee of the seller's rights is subject to all defenses the buyer has against the seller, notwithstanding any agreement to the contrary.[73] This alternative completely invalidates waiver of defense clauses. Alternative *B* provides that an assignee can enforce a waiver clause if he acquired the contract in good faith and for value, notified the buyer of the assignment and

67. ARIZ. REV. STAT. ANN. § 44-145(A) (Supp. 1971-72). Even if the debtor gives the requisite notice, he may assert his defenses only as to amounts then owing, and then only as a defense or set off against a claim by the assignee. *Id.*

68. *See* text accompanying notes 62-66 *supra.*

69. The language of section 44-145(A) may be interpreted to mean that no defense whatsoever may be asserted unless the notice requirement is met.

70. Some support for this proposition can be found in the remarks of Arizona State Senator John Conlan, the sponsor of an amendment to the Bill. An earlier version of House Bill 332 provided that no taker of a consumer instrument could be a holder in due course. H.B. 332, 30th Leg., 1st Sess. (introduced March 9, 1971). Senator Conlan introduced an amendment making the prohibition of holder in due course status *contingent* on notice within 90 days, and has stated that the amendment made "dealers in consumer products, including automobiles, *liable for only 90 days* from the date of original sale." Tucson Daily Citizen, Oct. 27, 1972, at 4, col. 3 (emphasis added).

71. ARIZ. REV. STAT. ANN. § 44-5005(A) (Supp. 1971-72).

72. U3C § 2.404.

73. *Id.*

of the right to assert defenses, and received no notice of a defense or claim within 3 months after mailing the notice of assignment.[74] The U3C as introduced in Arizona contained alternative *B*,[75] and this was a basic objection of those who opposed its enactment.[76]

House Bill 332, however, is even more objectionable than the U3C. Most "notice" statutes, including the U3C,[77] require that the debtor be given notice of his right to notify the assignee of any grievance. Under these statutes, the 90-day period begins to run only after notice of assignment is received by the debtor.[78] The Arizona provision requires notice of a grievance within 90 days after the receipt of goods or services.[79] Since receipt of the goods by the buyer will most likely precede any notification of an assignment, the 90-day period will usually begin to run sooner under the Arizona provision than under the typical notice statute, thus further diminishing the comparative protection afforded the Arizona consumer. Under most statutes, again including the U3C,[80] the debtor is required to give notice of grievances to the assignee; under the Arizona Act, however, he is required to notify the assignor.[81] Since consumers usually do not appreciate the technicalities of assignment, and are more likely to press their grievances on the party with whom they dealt (the assignor), the likelihood that the necessary notice would be given could have been enhanced by the Arizona law.

The notice procedure of House Bill 332 includes other requirements and shortcomings, however, that not only nullify any such likelihood but render any protection afforded the consumer illusory at best. Under section 44-145, the buyer's rights "may be asserted only if the buyer or lessee gives notice of the claim or defense in writing *by certified mail* to the seller or lessor . . . within ninety days after receipt of the goods or services."[82] Although the requirement that the notice be in writing and sent by certified mail will provide the buyer with proof that notification was given to the seller, debtors may fail to utilize the remedy because of its somewhat complex nature. Moreover, any potential protection which might be offered is almost certainly negated by the failure to include a provision requiring either the assignor or assignee to inform the debtor of the procedure he must follow to preserve his defenses against the assignee.

74. *Id.*
75. S.B. 161, 29th Leg., 1st Sess. (1969).
76. *Cf.* Boyd, *supra* note 9, at 671.
77. *See* U3C § 2.404(1) (Alternative B).
78. *Id.*
79. ARIZ. REV. STAT. ANN. § 44-145(A) (Supp. 1971-72).
80. *See* U3C § 2.404(1) (Alternative B).
81. ARIZ. REV. STAT. ANN. § 44-145(A) (Supp. 1971-72).
82. *Id.* (emphasis added).

Contingent Holders In Due Course

The treatment given negotiable instruments under House Bill 332 is another of its unusual and difficult features. "For a period of ninety days after the receipt of the goods or services by the debtor, a holder or assignee is not a holder in due course if he takes an instrument, other than a check or draft . . . ."[83] This preservation of defenses for the debtor, however, is conditioned upon the same 90-day notice requirement which applies to waiver of defense clauses.[84] Thus, the legislature appears to have equated the transfer of otherwise negotiable instruments to the transfer of non-negotiable instruments.

There is a certain intuitive appeal to a statute which provides uniform treatment for negotiable notes and contracts containing agreements that waive defenses, since the effect of both may be to allow a person taking for value, in good faith, and without notice to take free of most defenses. The statute nonetheless raises certain technical objections. Conferring holder in due course status upon a transferee, not upon negotiation, but only after a 90-day period has expired and only if no notice of defenses is received by the transferor, defies the traditional concept of negotiability embodied in the UCC which requires an instrument to be negotiable "on its face."[85] Section 44-145, through this concept of contingent holder in due course status, appears to establish a basically independent commercial paper system. While negotiability is certainly a matter subject to definition and conditioning by state legislatures, the scheme chosen in Arizona takes considerable liberty with some of the most basic fundamentals of negotiable instruments law.

As for consumers, the intended beneficiaries of this complex scheme, not only is any protection offered by and large illusory because of the notice requirements, but their position may well have been worsened. Under the first sentence of section 44-145, the transferee of notes that are *not* negotiable by their terms, or which contain the stamp of non-negotiability as required by House Bill 102, takes free of personal defenses (he is in the position of a holder in due course) if the required notice is not given within the 90-day period.[86] Because effective notice usually will not be given, the protection offered by the second sentence of section 44-145 against notes that are negotiable by their terms is no protection at all for all practical purposes. Consequently, that the scheme under House Bill 332 is novel is probably the most that can be said in its favor.

83. *Id.*
84. *Id.*
85. UCC § 3-105(2) (§ 44-2505(B) (1967)).
86. *See* text accompanying notes 67-71 *supra.*

The U3C simply prohibits the use of negotiable instruments in consumer transactions including door-to-door sales, and provides that a transferee with notice that the instrument was taken in violation of the prohibition cannot be a holder in due course.[87] If the transferee can prove he had no notice that consumer paper was involved, however, the U3C gives no protection.[88] The most desirable alternative for the consumer, therefore, is to prohibit the use of negotiable instruments in consumer transactions and to provide that no transferee of such an instrument can be a holder in due course.[89]

Exclusion of Credit Card Transactions and Purchase Money Loans

House Bill 332 does not apply to certain credit card transactions or to purchase money loans not arranged by the seller. Credit card transactions conducted outside of Arizona and three-party credit card transactions (those in which the issuer is other than the seller) in which perishable consumer goods or consumer services are sold are specifically excluded from the limitations of the Act.[90] House Bill 332 does apply in three-party credit card transactions involving non-perishable consumer goods and in all two-party credit card transactions (those in which the seller is the issuer of the credit card) involving consumer services or goods, perishable and non-perishable.

The exclusion of the enumerated credit card sales from House Bill 332's coverage will be of no consequence insofar as negotiable notes are concerned, since such notes are not issued in connection with credit card sales. Waiver clauses are invariably employed in three-party arrangements, such as bank credit cards,[91] however, so waivers in transactions involving perishable consumer goods are not affected by section 44-145. Although all two-party credit card transactions are subject to the limitations of the statute, the protections will have sig-

87. U3C § 2.403.

88. The U3C contemplated that holders of consumer paper would rarely qualify as holders in due course, "[s]ince the prohibition against certain negotiable instruments in consumer financing will be well known in the financial community . . . ." U3C § 2.403, Comment. It did envision rare cases in which second or third takers of a note might not be aware of its commercial origin, however, and chose to preserve negotiability in those instances "in order not to cast a cloud over negotiable instruments generally." *Id.*

89. *See, e.g.*, MD. ANN. CODE art. 83, § 147 (1969); MASS. ANN. LAWS. ch. 255, § 12c (1968); VT. STAT. ANN. tit. 9, § 2455 (1971). As noted previously, an earlier version of House Bill 332 did provide that no taker of a consumer instrument could be a holder in due course, but this provision was abandoned in favor of the prohibition conditioned on notice within 90 days. See note 70 *supra*.

90. ARIZ. REV. STAT. ANN. §§ 44-145(B)(1)-(2) (Supp. 1971-72). There is no apparent reason for specifically excluding those credit card transactions made outside the state, unless it is to avoid potential conflict of laws or jurisdictional problems.

91. *E.g.*, BankAmericard Terms and Conditions of Issuance, BAC4-117 (1972). The card holder agrees not to assert any claim, defense or setoff he may have against the member merchant as to goods or services purchased with the card.

nificance only if waiver clauses are included in the credit card agreement and the obligations are assigned to a third party. Present experience indicates that neither of these conditions is likely to be met.[92]

Even assuming a need to include two-party transactions within the protection of the Act, it is unclear why any distinction is made between two and three-party transactions. One possible rationale is that in three-party transactions the seller of the goods or services has not provided the credit, as is the case in two-party transactions. A three-party transaction is, from the seller's viewpoint, a cash sale with the credit card issuer providing a loan to the buyer pursuant to an open line of credit. If this is the theory, then there is no apparent reason for not excluding all three-party transactions from the coverage of the Bill. Similarly, there seems to be no logical basis for the distinction between perishables and non-perishables. While the distinction might have been employed to avoid complex problems of proof where the consumer asserts defenses involving goods that have either been consumed or have substantially deteriorated, it is then difficult to understand the failure to distinguish between perishables and non-perishables in two-party transactions.

House Bill 332 is also inapplicable to:

> [a]n instrument or other writing which evidences a loan or indebtedness to a lender or person, other than a seller or lessor, which was not arranged by a seller or lessor, the proceeds of which are used by the buyer or lessee to satisfy an obligation to a seller or lessor.[93]

The language of this provision excludes loans not arranged by the seller, and also makes it clear that loans which are arranged by the seller are encompassed by the legislation. Thus, if *C* borrows from *B* to purchase consumer goods or services from *S*, *B* can negotiate the instrument arising out of the loan or include a waiver of defense clause free of the limitation of the Act, so long as the loan was not arranged by *S*. If the loan was arranged by *S*, the limitations of House Bill 332 apply. "Arranged" is defined by the Act to mean providing or offering to provide a loan for which the person receives "a fee, compensation, or other consideration . . . or has knowledge of the terms of the loan and participates in the preparation of the instruments required in connection with the extension of the loan."[94]

92. Discussions with the credit manager of one large retailer in Tucson indicated that waiver clauses are not employed by his organization and that credit card obligations are never assigned. He knew of no other retailers who assigned the obligations arising out of two-party credit card transactions. Telephone interview with Ed Filmer, Credit Manager of Levy's Department Store, in Tucson, Arizona, May 9, 1972.

93. ARIZ. REV. STAT. ANN. § 44-145(B)(3) (Supp. 1971-72).

94. *Id.* § 44-145(C)(2).

The exclusions raise the interesting question as to the law governing credit card transactions not subject to the limitations of House Bill 332. It might be argued that the Bill preempted entirely the law existing at the time of its passage, and that waiver clauses may now be employed with impunity in those instances which are excepted from coverage. It can also be argued, however, that those sales not affected by the Bill are still governed by the law existing at the time of its passage. Consequently, such transactions would be subject to the judicial interpretation of the predecessor of section 44-144, which invalidated waiver of defense clauses in consumer transactions.[95] This interpretation would produce the anamolous result that those consumer transactions excluded from the coverage of legislation purporting to protect consumers would receive greater protection because of their exclusion. This result should surprise no one. In fact, the consumers' only hope of deriving any benefit from House Bill 332 rests in judicial interpretation of the legislative intent underlying the Act.

SENATE BILL 57: RETAIL INSTALLMENT SALES

Senate Bill 57 likewise offers little which can accurately be considered consumer protection. It has for the most part simply codified existing creditor practices, thus officially locking consumers into their present disadvantageous position.

As an essentially "all-goods" retail installment sales act, Senate Bill 57 regulates most retail purchases of goods[96] made pursuant to a retail charge account agreement[97] or a retail installment contract[98]

95. *See* text & notes 63-66 *supra.*

96. "Goods" are defined to mean all tangible chattels, including chattels to be affixed to real property, whether or not severable, and "merchandise certificates or coupons, issued by a retail seller, not redeemable in cash and to be used in the face amount instead of cash for goods or services sold by such seller." ARIZ. REV. STAT. ANN. § 44-6001(2) (Supp. 1971-72). The definition of goods specifically excludes motor vehicles, which continue to be governed by the Motor Vehicle Time Sales Disclosure Act. *Id.* §§ 44-281 to -295 (1967), *as amended,* (Supp. 1971-72), *discussed in* Boyd, *supra* note 1, at 376, 389-92, 395-96.

97. "Retail charge account agreement" is defined in ARIZ. REV. STAT. ANN. § 44-6001(8) (Supp. 1971-72), to mean "an arrangement prescribing the terms of retail installment transactions which may be made from time to time in which a retail buyer purchases goods or services and in which a time price differential or delinquency charge may be computed in relation to the buyer's balance in the account." Two-party, though not three-party, credit card transactions appear to be within this definition.

98. "Retail installment contract" is defined in *id.* § 44-6001(9) to mean:

> an arrangement for a retail installment transaction except a retail charge account agreement or memorandum reflecting a sale made pursuant to such agreement. 'Retail installment contract' may include a chattel mortgage, a conditional sale contract, any security agreement or contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for the use of the sale or leased goods a sum substantially equivalent to or in excess of the value of the goods and if it is agreed that the bailee or lessee is bound to or has the option of becoming the owner of the goods for no other or a nominal consideration upon full compliance with the provisions of the bailment or lease.

where the purchaser agrees to pay in one or more installments.[99] The Act covers secured and unsecured purchases[100] as well as arrangements which purport to be "leases" but which are in substance security agreements.[101] It also extends coverage beyond the scope of most retail installment acts by encompassing the sale of services.[102] The major impact of Senate Bill 57 on these transactions is found in the provisions controlling finance charges, delinquency and prepayment charges, and cross collateral arrangements.[103]

Finance Charges

As with many other retail installment sales acts,[104] the primary feature of Senate Bill 57 is the regulation of finance charges that may be imposed in the transactions which it regulates. In most jurisdictions, including Arizona, finance charges not subject to a special statute are governed by the "time-price doctrine." Under this judicially-created doctrine, the difference between the cash price and the time price of a sale is not interest and thus is not limited by the usury statutes.[105] The

99. *Id.* § 44-6001(10) defines a "retail installment transaction" as "any transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract or a retail charge agreement and under which the buyer agrees to pay for the goods or services in one or more installments."

100. *See* the definition of "retail installment contract," *supra* note 98.

101. ARIZ. REV. STAT. ANN. § 44-6001(9) (Supp. 1971-72). The widespread use of "leases" to disguise secured conditional sales as a way of avoiding the regulatory effects of consumer legislation has caused legislatures to enact laws specifically addressed to this problem. *See, e.g.*, UCC § 1-201(37) (§ 44-2208(37) (1967)). U3C § 2.105(4) likewise governs "disguised" credit sales with language apparently derived from the Federal Consumer Credit Protection Act [hereinafter cited as CCPA], 15 U.S.C. § 1602(g) (Supp. 1972). See Boyd, *supra* note 31, at 179.

102. "Services" are defined in ARIZ. REV. STAT. ANN. § 44-6001(12) (Supp. 1971-72), to mean "work, labor, or services of any kind." The U3C also regulates the sale of services. *See* U3C §§ 2.104(1), 2.105(5).

103. A number of protections customarily included in retail installment sales legislation are noticeably absent from Senate Bill 57. There is no requirement that contracts include a warning to debtors not to sign blank or incomplete contracts, no prohibition against the taking of blank contracts and no provisions for remedy when such contracts have been taken. The U3C also appears to lack any requirement of such warnings. The Arizona Act also does not address the problem of "balloon payments" (unequal installments that may cause a debtor to default), except to provide that the finance charge may not be artificially inflated as a result of providing for other than "substantially equal successive periodic payments." ARIZ. REV. STAT. ANN. § 44-6002(A)(1) (Supp. 1971-72).

104. *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 95 (1965).

105. The theory is that the vendor is not engaged in lending money; he is merely selling goods. The cash price which a seller quotes is based on the assumption that the full purchase price will be paid in cash at the time of delivery. If the full cash price is not received at that time, the seller must increase the price of the goods to avoid selling at a reduced price, since cash paid at some future date is not worth as much as the same amount paid at the time of delivery. Accordingly, the vendor has a "cash on the barrel-head price" and a "time sale price." A finance or credit charge made in connection with a credit sale by a vendor is thus not interest but represents the difference between the time price and the cash price. B. CURRAN, *supra* note 104, at 13; *accord*, Carolina Indus. Bank v. Merrimon, 260 N.C. 335, 338, 132 S.E.2d 692, 694 (1963); Boyd, *supra* note 1 at 389-90. This has also been the view taken by the Arizona courts. Howell v. Mid-State Homes, Inc., 13 Ariz. App. 371, 476 P.2d 892 (1970).

time-price doctrine has come under attack, however, and has been overturned in a number of jurisdictions.[106] The threat of successful attack in Arizona undoubtedly was a major inducement to creditors to lobby for the "legitimatization" of finance charges[107] through the setting of limits on time-price differentials in excess of rates permitted by the state usury law.[108]

It is probably true that merchandise and services cannot be profitably retailed on a credit basis at rates permitted by the usury law.[109] It remains undetermined, however, what charges are necessary to maintain a financially successful operation. Logically, finance charges should be related to the risks assumed by the retailer. Senate Bill 57 nevertheless disregards the nature of the goods or service involved, whether a security interest has been utilized and the credit rating of the particular customer. Both the Arizona Act and the U3C appear to be based on the dubious assumption that rates will be voluntarily adjusted by creditors or satisfactorily influenced by competition to reflect such factors.[110]

Debates involving what finance charges are to be permitted frequently focus on the question of whether a "fixed rate" or a "ceiling" approach is preferable. The former scheme fixes actual rates that may be charged; the latter leaves rates to competitive forces and only provides maximum rates designed to prevent exorbitant charges when the regulatory effects of competition fail.[111] The difficulty with the ceiling approach is that there is little evidence that the resulting charges are the product of competition. On the contrary, rates usually rise to the

106. The doctrine was overturned relatively early in Arkansas. Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957); Hare v. General Contract Purchase, 220 Ark. 601, 249 S.W.2d 973 (1952), *rehearing denied*, 222 Ark. 291, 262 S.W.2d 287 (1953). Finance charges authorized under a retail installment sales act were characterized as interest in Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963). After the decision, the Nebraska legislature enacted a new version of the act, but the finance charges it authorized were likewise found to be interest and were held unconstitutional. Stanton v. Matteson, 175 Neb. 767, 123 N.W.2d 844 (1963). For a discussion of the Arkansas and Nebraska decisions, see B. CURRAN, *supra* note 104, at 84-90. Wisconsin has also abandoned the doctrine. State v. J.C. Penny Co., 48 Wisc. 2d 125, 179 N.W.2d 641 (1970).

107. *See* Boyd, *supra* note 1, at 390 & n.94. *See generally* Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 453 (1968). Senate Bill 57 was introduced in Arizona at the behest of the Arizona Retailers' Association, whose members and legal advisors are largely responsible for the Bill's content. *See also* Britton & Ulrich, *The Illinois Retail Installment Sales Act—Historical Background and Comparative Legislation*, 53 NW. U.L. REV. 137 (1958), suggesting that such legislation is customarily enacted in response to the demands of creditors, despite the fact that certain consumer protections are often included.

108. ARIZ. REV. STAT. ANN. § 44-1202 (1967), *as amended*, Laws 1969 ch. 76, § 4 (Supp. 1971-72), provides that no person shall receive greater than "ten dollars on one hundred dollars for one year."

109. Boyd, *supra* note 1, at 389-91.

110. Boyd, *supra* note 9, at 665.

111. *Cf.* McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. INC. & COMM. L. REV. 387, 402-406 (1967).

maximum permitted. The "fixed rates," however, are likewise unsatisfactory in that they are rarely based on any empirical determination of what rates are profitable for vendors while also fair to consumers.[112]

With regard to retail charge accounts, the rates allowed by Senate Bill 57 appear to reflect existing practices rather than a careful investigation into the rates necessary to support such credit. The Act permits charges equivalent to an annual percentage rate of 18 percent for amounts of $1,500 or less and 12 percent for amounts greater than $1,500.[113] The consumers' only consolation is that the legislature did not follow the U3C, which imposes ceilings equivalent to an annual percentage rate of 24 percent for amounts less than $1,500 and 18 percent for greater amounts.[114]

As important as the rates permitted are the balances to which they may be applied. Under the Arizona Act, the finance charge for charge accounts is to be applied to an amount determined according to one of three possible accounting methods. Two of these, the "average daily balance" and the "adjusted balance" methods,[115] are used by many larger merchandising operations. The third, the "median amount" method,[116] allows some flexibility in computation and is presumably intended to appeal to smaller volume operations not maintaining extensive bookkeeping departments, particularly those without computerized billing procedures. While these methods for determining balances are similar to the provisions of the U3C,[117] the Arizona law does differ in one important respect that should benefit consumers. Under Senate Bill 57, retailers may no longer assess charges based upon an "unadjusted opening balance." They must instead adjust the balance to reflect credits for goods returned or payments made during the billing cycle period.[118]

Finance charges for retail installment contracts are also controlled by Senate Bill 57, but the method for determining the rates is entirely different than that applied to charge accounts. For installment con-

112. *Id.* at 404; Johnson, *The New Law of Finance Charges: Disclosure, Freedom of Entry, and Rate Ceilings*, 33 LAW & CONTEMP. PROB. 671, 683-85 (1968); Littlefield & Breetz, CONSUMER VIEWPOINTS, *supra* note 9, at 365. *But see* Johnson, *Rate Competition*, 26 BUS. LAW. 777, 782-84 (1971).

113. ARIZ. REV. STAT. ANN. § 44-6003(B) (Supp. 1971-72). For an explanation of the annual percentage rate and its determination, see R. JOHNSON, R. JORDAN & W. WARREN, ATTORNEY'S GUIDE TO TRUTH IN LENDING 36-39 (1969) [hereinafter cited as R. JOHNSON].

114. U3C § 2.207(3).

115. ARIZ. REV. STAT. ANN. §§ 44-6003(B)(1), (B)(2) (Supp. 1971-72).

116. *Id.* § 44-6003(B)(3). This method appears to have been borrowed from the CCPA. 15 U.S.C. § 1606(b) (Supp. 1972). Its use is explained in R. JOHNSON, *supra* note 113, at 42-44.

117. U3C §§ 2.207(2)(a)-(c).

118. *Compare* ARIZ. REV. STAT. ANN. § 44-6003(B)(2) (Supp. 1971-72) *with* U3C § 2.207(2)(b).

tracts, the time-price differential may not exceed $10 per $100 per year,[119] and is to be computed on the principal balance of the transaction.[120] Although consumers will undoubtedly interpret this add-on charge to be a mere 10 percent, it is an effective simple annual rate approaching 20 percent.[121] Moreover, such charges are permissible as to all sales of goods and services irrespective of the amount financed.[122] By utilizing the "series of sales" device, an arrangement by which debts incurred in independent installment purchases are consolidated,[123] a retailer can avoid the lower finance charges permitted for charge accounts and apply an annual finance charge of approximately 20 percent.[124]

The rates allowed under Sentate Bill 57 seem to be comparable with rates charged under many retail installment sales acts,[125] and are again preferable to the high ceilings proposed by the U3C. Under the U3C, charges are to be calculated according to the actuarial method,[126] which entails determination by reference to declining balances with corresponding ceilings stated in terms of simple annual interest rates.[127] Charges calculated by this method are never to exceed the greater of 18 percent a year or the annual percentage rate derived by totaling the charges calculated under the permissible ceilings.[128] A comparison of the possible charges under the U3C and the New Jersey Installment Sales Act,[129] which also provides for add-on rates of $10 per $100 per year, revealed that for amounts up to $5,000 the charges authorized under the U3C were invariably greater.[130]

As was the case with charge accounts, the amount to which the rates may be applied is important. The amount used in computing the finance charge is the "principal balance"—the cash sale price plus any charges for insurance and official fees, separately identified and

119. ARIZ. REV. STAT. ANN. § 44-6002(A) (Supp. 1971-72).
120. *Id.* §§ 44-6002(A)(1).
121. As opposed to the U3C declining balance or actuarial method, the Arizona law permits a so-called "add-on" charge, which is roughly double simple annual interest charges. *Compare* U3C § 2.201(2) *with* ARIZ. REV. STAT. ANN. § 4-6002(A) (Supp. 1971-72); *see* Kripke, *supra* note 98, at 455-56 n.27.
122. *See* ARIZ. REV. STAT. ANN. § 44-6002(A) (Supp. 1971-72).
123. *See* R. JOHNSON, *supra* note 104, at 89.
124. At least one leading chain department store employs the arrangement, referred to as an EZ Payment Plan. Sears, Roebuck and Co., Retail Installment Contract and Security Agreement. It is hypothesized that this plan is offered to customers "not eligible" to open a standard revolving charge account.
125. *See* B. CURRAN, *supra* note 104, at 102: "Flat rates are the exception rather than the rule and cluster at $8 and $10 per $100 of initial unpaid balance per year."
126. U3C § 2.201(2).
127. For an example of this method, see *id.* § 2.201, Comment 2, Table B.
128. *Id.* § 2.201(2)(b).
129. 17 N.J. STAT. ANN. 16C-1 *et. seq.* (1970), *as amended*, ch. 14, N.J. Sess. Laws.
130. *See* Consumers League of New Jersey, CONSUMER VIEWPOINTS, *supra* note 8, at 251-53.

stated in the contract, less the buyer's down payment.[131] The condition that insurance charges be separately itemized and stated in the contract if they are to be part of the principal balance is a disclosure requirement whch may cause problems for retailers. Disclosure is now a matter of federal law under the Consumer Credit Protection Act (CCPA),[132] which considers a charge for insurance required by a creditor as a finance charge and requires, in most cases, that it be disclosed as such.[133] Consequently, a creditor may inadvertently violate the CCPA if he discloses a finance charge and annual percentage rate determined in compliance with Senate Bill 57, but which is nevertheless incorrectly determined and disclosed according to the CCPA.[134] The U3C avoids any potential conflict by permitting the inclusion of insurance charges in the amount used to determine finance charges only if the insurance charges have been treated as required by the CCPA.[135]

Delinquency Charges and Prepayment Penalties

Two matters customarily dealt with in installment sales legislation, delinquency charges and prepayment rebates,[136] are also covered in Senate Bill 57.[137] As to retail installment contracts, a creditor may provide for a delinquency charge not to exceed the lesser of 5 percent or $5 for each installment that is more than 10 days late.[138]

131. ARIZ. REV. STAT. ANN. § 44-6001(6) (Supp. 1971-72). "Cash sale price" is the price that would be charged were the sale for cash, and may include any taxes and charges for delivery, installation, servicing, repairs, alterations or improvements." *Id.* § 44-6001(1).

132. 15 U.S.C. § 1601 (Supp. 1972); FRB Regulation 2, 12 C.F.R. § 226.6 (1972). *See generally* Boyd, *supra* note 31, at 174-88.

133. The seller must set forth the cost of property insurance obtained by or through the seller and include a statement that the buyer may choose the person through whom the insurance is to be obtained. 12 C.F.R. § 226.4(a)(6) (1972). Charges for credit life, health, accident or loss of income insurance may be excluded from the finance charge only if the insurance is not required as a condition of the extension of credit, and the buyer signs a statement that he requested the insurance after its cost was disclosed to him. 12 C.F.R. § 226.4(a)(5) (1972). *See generally* Boyd, *supra* note 31, at 179.

134. For example, if a creditor includes a separately identified insurance charge for insurance which he required as a condition of extending credit, the insurance would be included in the principal balance under Senate Bill 57, but this would violate the CCPA. 12 C.F.R. § 226.4(a)(5) (1972). Such violations of the CCPA are not to be taken lightly. The civil liability provisions of the CCPA can be quite severe, especially with the possibility of class actions. *See* Boyd, *supra* note 31, at 182-85 nn. 106-07.

135. U3C §§ 2.111(3)(c), 2.202(2).

136. B. CURRAN, *supra* note 104, at 102-03 (delinquency charges) & 105 (prepayment rebates).

137. In addition, the Arizona Act, as most acts, acknowledges the practice of the assignment of credit sales contracts and charge account agreements to financing agencies. *See* ARIZ. REV. STAT. ANN. § 44-6004 (Supp. 1971-72); B. CURRAN, *supra* note 104, at 113. The Act provides that an assignee may purchase the contracts or agreement, ARIZ. REV. STAT. ANN. § 44-6004(B) (Supp. 1971-72), and that no notice to the buyer is necessary. *Id.* § 44-6004(C). If notice is not given, however, the buyer may pay the last known holder. *Id.* § 44-6004(D). Furthermore, any discount given to the assignee is not to be considered part of the time-price differential. *Id.* § 44-6004(E).

138. ARIZ. REV. STAT. ANN. § 44-6002(C) (Supp. 1971-72).

The U3C provision is similar,[139] although it also prohibits the collection of such charges where the creditor has by agreement with the debtor deferred an installment and a deferral charge has been incurred or imposed.[140] For charge accounts, Senate Bill 57 permits the creditor to impose a time-price differential or a delinquency charge.[141] This credit charge accumulates in direct relation to the size of the unpaid balance and the period the balance has been outstanding. Thus, however denominated, the charge imposed serves the purpose of a delinquency charge but is subject to the rate limitations imposed on finance charges for charge accounts.[142] The U3C treatment is again comparable.[143]

Prepayment rebates in connection with installment contracts governed by Senate Bill 57 are to be made according to a somewhat arbitrary device, the "rule of seventy-eighths."[144] By applying a standard formula, the percentage of the finance charge which will be refunded upon full payment of the debt declines geometrically with the passing of each installment period. Under this formula, the greatest amount of the finance charge is earned early in the term of the contract,[145] effectively increasing the annual rate of the finance charge if the debt is prepaid. The U3C also adopts this rule,[146] but the buyer is expressly given the right to prepay,[147] something which is left as a matter of contract under the Arizona Act. As to charge accounts under Senate Bill 57, the debtor may escape a finance charge entirely by paying the account in full before the due date of the first statement issued after the end of the billing period.[148] The U3C contains no comparable provision.

Cross Collateral Security Agreements

The Arizona legislation attempts to remedy an abuse which gained attention in the now-famous case of *Williams v. Walker-Thomas Furniture Co.*[149] The contract in that case contained a cross collateral clause making previously purchased goods security for any goods subsequently purchased, and providing that all payments would be allocated

139. U3C § 2.203(1).
140. *Id.* §§ 2.203(2), 2.204.
141. ARIZ. REV. STAT. ANN. § 44-6003(A) (Supp. 1971-72).
142. *See id.* §§ 44-6003(A), (B) and text & accompanying note 113 *supra.*
143. U3C § 2.203 & Comment 3.
144. ARIZ. REV. STAT. ANN. § 44-6002(B) (Supp. 1971-72).
145. *See* Kripke, *supra* note 107, at 454-55. The Comment to U3C § 2.210 explains the formula in detail.
146. U3C § 2.210.
147. *Id.* § 2.209.
148. ARIZ. REV. STAT. ANN. § 44-6003(6) (Supp. 1971-72).
149. 350 F.2d 445 (D.C. Cir. 1965), *discussed in* Boyd, *supra* note 1, at 383-85.

so that the items purchased first would never cease to be security until the last item's price was paid—in effect, until the entire debt was paid. In the event of default on any payment, every item purchased could be repossessed and resold or retained.[150]

Senate Bill 57 specifically authorizes this kind of security arrangement with respect to retail installment contracts, as do the UCC and U3C,[151] but provides that goods previously purchased may be security for goods obtained later only until such time as the total of payments under a previous contract or contracts has been made.[152] While the intent of the provision clearly seems to require a type of "first-in-first-out" allocation of payments and release of security interests, the language used is not so clear. The statute can be read literally to permit a percentage of each payment to be applied to each debt, with the result that none of the security interests are released until all the debts are paid—precisely the effect sought to be avoided in *Williams*. The U3C and, indirectly, the CCPA, provide a more effective remedy by specifically requiring allocation of payments on a first-in-first-out basis.[153]

Senate Bill 57 says nothing further as to the kinds of security interests that may be created. Specifically, no mention of cross collateral arrangements is made in regard to charge accounts. Therefore, retailers may be able to avoid any possible first-in-first-out requirement by incorporating the security agreements into charge account agreements. Whether such actions would be allowable, however, may depend upon an interpretation of House Bill 330, which specifically concerns the creation of security interests.

HOUSE BILL 330: LIMITATIONS ON SECURITY INTERESTS, REMEDIES AND DEFICIENCY JUDGMENTS

House Bill 330,[154] probably the most significant of the recent Arizona consumer protection statutes, contains provisions severely limiting the rights of creditors in consumer transactions. Most notably, the creditor is limited in the type of security interest which may be

150. In *Williams* the doctrine of unconscionability was invoked by way of defense against the repossession. 350 F.2d at 449-50.

151. *See* UCC § 9-204(3) (§ 44-3117(C) (1967)); U3C § 2.408.

152. ARIZ. REV. STAT. ANN. § 44-6002(D)(6) (Supp. 1971-72).

153. *See* U3C § 2.409 & Comment 1; 12 C.F.R. § 226.8(h) (1972). *See generally* Boyd, *supra* note 31, at 181-82.

154. H.B. 330, 30th Leg., 1st Sess. (1971), *codified in part as* ARIZ. REV. STAT. ANN. § 33-725 (Supp. 1971-72) (judgments of foreclosure and property which may be used to satisfy a deficiency); *id.* § 33-727 (executions when deficiency exists); *id.* § 33-964 (property affected by lien of judgment). Amendment of these sections was necessary because the new sections, 33-729 and 33-730, added by H.B. 330, altered the old procedures under which a deficiency could be taken.

taken, is forced to make an election of remedies in certain situations and is prohibited from obtaining deficiency judgments in real property transactions unless specified conditions are present.

Limitations on Security Interests[155]

Section 44-5501(C) provides that "[n]either the seller of consumer goods or services nor his assignee may take any other security for a consumer credit sale other than (1) a security interest in goods sold or as to which services have been rendered and (2) in the realty to which such goods may be affixed."[156] Thus, a seller in connection with a consumer credit sale[157] is apparently prohibited from taking a security interest in any property other than goods sold, goods which are the subject of services, realty to which the goods sold are affixed[158] or realty to which goods are affixed if services have been rendered as to the goods.

The provision clearly would prevent, for example, a seller of an automobile or his assignee from taking an interest in the buyer's home to secure the price of the automobile. The application of the provision to other arrangements is not so straightforward, however. The provision permits security interests in "goods sold." That phrase might be interpreted to include goods sold by the seller to the buyer in a previous transaction. If so, then House Bill 330 would be consistent with Senate Bill 57 and would give legislative sanction to cross collateral arrangements. On the other hand, "goods sold" might be read to include only goods the subject of the immediate sale. Under this interpretation, House Bill 330 would preclude cross collateral clauses and thus directly conflict with Senate Bill 57's allowance of such clauses in retail installment contracts.[159] Because both provisions became ef-

155. The provisions to be discussed constitute amendments to Title 44 of the ARIZONA REVISED STATUTES ANNOTATED, and involve the addition of a new chapter, Chapter 16, which is essentially independent of other chapters insofar as this subject matter is concerned. The Chapter begins with a statement that "[t]his section applies to a *consumer credit sale* of goods or services." ARIZ. REV. STAT. ANN. § 44-5501(A) (Supp. 1971-72) (emphasis added). When codified, section 44-5501 was relettered, and this discussion will refer to the relettered sections.

156. ARIZ. REV. STAT. ANN. § 44-5501(C) (Supp. 1971-72).

157. "[C]onsumer credit sale" is never defined by section 44-5501, but credit card transactions will clearly be excluded because security interests are not taken pursuant to either two or three-party credit card transactions. Filmer interview, *supra* note 92.

158. "Affixed" is left undefined by the Act. It may denote the situation where a chattel becomes a fixture, which under Arizona law requires "annexation to the realty," intention to make the chattel a "permanent accession to the freehold" and "adaptability or application as affixed to the use for which the real estate is appropriated." Fish v. Valley Nat'l Bank, 64 Ariz. 164, 170, 167 P.2d 107, 111 (1946). On the other hand, "affixed" may merely require attachment to the realty. A definition should have been provided to avoid this troublesome ambiguity.

159. *See* text & notes 149-153 *supra.*

fective at the same time,[160] the rule providing that the most recent enactment governs cannot be invoked,[161] thus leaving the provisions seemingly at odds with one another. It might be possible to read Senate Bill 57 as excepting installment contracts from the general rule of House Bill 330 precluding cross collateral arrangements. Such an interpretation would prohibit the common practice of employing cross collateral security arrangements in connection with retail charge account sales, a practice not proscribed by Senate Bill 57.[162] Should the apparent conflict be resolved by interpreting House Bill 330 to permit security interests in goods previously sold, however, it is all the more imperative that Senate Bill 57 be read to require a first-in-first-out allocation of payments and release of security interests in installment sales contracts. Unfortunately, even this interpretation of Senate Bill 57 would not preclude the use of a *Williams*-type payment arrangement in connection with retail charge accounts.

Since Section 44-5501(C) specifies that the services must have been rendered as to the goods, a security interest in goods which are not the subject of services could not be taken to secure the price of services performed on real estate. In addition, it seems to preclude a security interest in real estate to secure the price of services performed as to the real estate. These limitations represent a much-needed response to abuses in the home improvement sales industry.[163] The provision may be too broad, however, in prohibiting all security interests in realty to secure the price of services performed on the realty. Since the statute does not define "take," it could be interpreted to preclude such nonconsensual security interests as materialmen and mechanics liens,[164] a result probably not intended by the legislature.

The U3C provisions also limit the property in which a security interest can be taken pursuant to a credit sale of consumer goods or

160. Senate Bill 57 was approved by the Governor on May 11, 1971, S.B. 57, 30th Leg., 1st Sess. (1971), while House Bill 330 was approved on May 14, 1971, H.B. 330, 30th Leg., 1st Sess. (1971). Because of the constitutional provision which states that "no Act passed by the Legislature shall be operative for ninety days after the close of the Legislature enacting such measure, except [emergency measures]" both acts took effect simultaneously. ARIZ. CONST. art. 4, pt. 1, § 1(3).

161. State v. Mort, 80 Ariz. 220, 295 P.2d 842 (1956) (if inconsistency exists between two statutes so that legislature could not have intended them to be contemporaneously operative, then the implication is that the legislature intended to repeal the earlier law by the later enactment).

162. *See* text following note 153 *supra.*

163. *See, e.g.*, Royal Const. Co., 3 TRADE REG. REP. ¶ 17,969 (1967) [1967-1970 Transfer Binder]; Matthews v. Aluminum Acceptance Corp., 1 Mich. App. 570, 137 N.W.2d 280 (1965); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

164. The CCPA provisions allowing a debtor to rescind consumer credit transactions involving a security interest in his residence define security interest to include a variety of nonconsensual liens that arise by operation of law. 12 C.F.R. § 226.2(z) (1972). See Boyd, *supra* note 31, at 180-81 & n.83.

services.[165] Generally, the protection is more complete, and certain problems created by the Arizona law are avoided. For example, cross collateral arrangements are specifically allowed.[166] Although the U3C permits security interests in goods as to which services are rendered, as does section 44-5501(C), such interests are possible only to secure debts of $300 or more.[167] In addition, the U3C, in contrast to section 44-5001, permits a security interest in land to secure the price of services which maintain, repair or improve the land, if the debt secured is $1,000 or more.[168]

Election of Remedies

In addition to limiting the types of security arrangements that can be created, section 44-5501 also forces the creditor to make an election of remedies when he attempts to enforce his security interest. Under Article 9 of the UCC, which provides for cumulative remedies, a secured creditor "may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."[169] If a permissible security interest in goods is created under section 44-5501(C), and the interest is not foreclosed by retaking the goods on default, and if the creditor chooses to sue on the unpaid balance, he cannot thereafter repossess. Nor can he execute a subsequent judgment by levying on those goods. The limitation built into section 44-5501(C) refers only to "goods" not retaken, however. Thus, a creditor who has taken a mortgage on real estate to which goods the subject of a sale or services have been affixed, need not make such an election and may execute a judgment on the realty and the attached goods.

Conversely, if a creditor elects to retake goods which were the subject of a sale, and the sales price[170] of the goods was $1,000 or less, he may not assert a deficiency against the buyer unless the buyer has wrongfully damaged the collateral or failed to make it available to the seller.[171] The Act further provides that if the fair market value

165. U3C § 2.407(1).

166. Arrangements permissible under the U3C cross collateral provision are excepted from the limitation imposed by § 2.407(1). See U3C §§ 2.407(1), 2.408.

167. *Id.* § 2.407(1).

168. *Id.*

169. UCC § 9-501(1) (§ 44-3147(A) (1967)). *See generally* Boyd, *supra* note 1, at 398.

170. "Sales price" is not defined by section 44-5501(B). Presumably, it is the total price the buyer pays for the goods, including finance charges, insurance and any other miscellaneous charges. The U3C uses "cash price" rather than "sales price." See text & note 179 *infra.*

171. ARIZ. REV. STAT. ANN. § 44-5501(B) (Supp. 1971-72). The disposition of goods continues to be governed by UCC § 9-504 (§ 44-3150 (1967)), and includes either public or private sale. See Boyd, *supra* note 1, at 397-99. Under certain circumstances, the seller may choose to retain the goods in satisfaction of the debt. This

of the goods[172] exceeds the unpaid balance, the buyer must receive the surplus.[173] This means that a buyer's right to a surplus is to be determined essentially independently of the proceeds of a disposition, except to the extent that the disposition price can be shown to be the fair market value as defined by the Act. This is an important departure from the UCC, where the existence of a surplus is determined only with reference to the proceeds on disposition.[174] A seller of goods covered may also be effectively denied the right to cut off the buyer's equity in the goods merely by retaining them in satisfaction of the debt, as is possible under the UCC.[175]

These provisions of the Arizona law are presumably intended to acknowledge that the UCC's commercially-inspired remedies are unacceptable in the context of consumer goods. The limitation on deficiencies recognizes that goods selling for $1,000 or less are likely to depreciate rapidly.[176] Thus, not only is a deficiency certain to result from an execution sale, but the creditor's right to repossess and claim a deficiency becomes more a means of coercion than a device for realizing on the debt.[177] The prohibition in section 44-5501(C) against repossession or execution following an action on the unpaid balance is based less directly upon the same reasoning. Moreover, without the limitation on execution and levy, a creditor could achieve the result sought to be avoided by the limitation on deficiencies merely by obtaining a judgment and levying on the goods.

The U3C includes similar limitations,[178] but its protection is again more complete. The U3C limitation on deficiencies is effective where the cash price of goods—not the sales price—is $1,000 or less.[179]

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is a form of strict foreclosure and, where permitted, cuts off the buyer's equity in the goods and also denies the seller any claim for a deficiency. See UCC § 9-505(2) (§ 44-3151(B) (1967)); Boyd, *supra* note 1, at 397 & nn. 128-29.

172. "Fair market value" is defined in ARIZ. REV. STAT. ANN. § 44-5501(D) (Supp. 1971-72), to mean "the price arrived at in good faith which a knowledgeable and willing buyer would pay and a knowledgeable and willing seller would ask for the goods in question."

173. *Id.* § 44-5501(B).

174. UCC §§ 9-504(1), (2) (§§ 44-3150(A), (B) (1967)).

175. *Id.*, § 9-505(2) (§ 44-3151(B) (1967)).

176. Most consumer goods depreciate markedly at the moment of sale and delivery. While automobiles are generally an exception, there is evidence that deficiencies on resales of automobiles are inflated by the practice of dealers under "repurchase agreements." Under such agreements, the dealer is obligated to cover any loss to his financer if the buyer defaults, and the "repurchase" price paid the financer, not the price received on resale by the dealer, is the basis for determining a deficiency. See Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 29-33 (1969). This practice appears to be expressly prohibited by UCC § 9-504(5) (§ 44-3150(E) (1967)).

177. *See* Boyd, *supra* note 1, at 397.

178. U3C § 5.103.

179. *Id.* § 5.103(2). "Cash price" is defined by *id.* § 2.110 to mean "the price at which the goods, services, or interest in land are offered for sale by the seller to cash buyers in the ordinary course of business . . . ."

Thus, a sale would invoke the U3C, but not the Arizona limitation, if the finance charge raised the sales price, but not the cash price, above $1,000. More importantly, the U3C provisions extend the deficiency limitation to goods not the subject of a sale, but which are taken as security for a sale.[180] Section 44-5501(B) extends protection only to goods that are the subject of a sale,[181] thus diminishing the relative coverage of the Arizona provision.[182]

Two differences between House Bill 330's provisions and those of the U3C may make the Arizona law more inclusive, however. House Bill 330 prohibits repossession once the creditor brings an action for the unpaid balance, regardless of whether the suit reaches judgment.[183] The U3C's prohibition is conditioned upon the seller having obtained a judgment.[184] Furthermore, section 44-5501(C) is not qualified by reference to the price of the goods; the $1,000 or less sales price limitation is found only in section 44-5501(B), which precludes a deficiency with respect to goods retaken.[185] Arguably, then, as to any consumer credit sale of goods or services with a corresponding security interest, purchase money or otherwise,[186] a seller who chooses to bring an action cannot later retake the goods, and if he obtains a judgment he cannot levy on goods which were subject to the security agreement.[187] The U3C, on the other hand, permits recovery of the goods or levies unless the seller brings an action when "he would not be entitled to a deficiency judgment if he repossessed the collateral. . . ."[188]

The protection afforded consumers by section 44-5501 is qualified by the fact that only the seller or his assignee is affected.[189] Thus, a seller could require a consumer to borrow the cash needed to purchase the goods or services from a third party. In such a case, the lender is neither a seller nor the seller's assignee, and may create security interests, sue or repossess free of the restraints imposed by the new Arizona provisions. The protections do not even extend to lenders who enter consumer loan arrangements as a result of referrals from sellers following prior arrangements between the seller and

180. *Id.* § 5.103(3).
181. ARIZ. REV. STAT. ANN. § 44-5501(B) (Supp. 1971-72).
182. *See* Comment 4 to U3C § 5.103.
183. ARIZ. REV. STAT. ANN. § 44-5501(C) (Supp. 1971-72).
184. U3C § 5.103(6).
185. *See* ARIZ. REV. STAT. ANN. §§ 44-5501(B), (C) (Supp. 1971-72).
186. "Purchase money" is a term borrowed from UCC § 9-107 (§ 44-3107 (1967)), and is used in text to distinguish goods the subject of a sale from goods not the subject of a sale but in which a security interest is taken to secure a sale of goods or services.
187. ARIZ. REV. STAT. ANN. § 44-5501(C) (Supp. 1971-72).
188. U3C § 5.103(6).
189. ARIZ. REV. STAT. ANN. § 44-5501(C) (Supp. 1971-72). The provisions apply only to a consumer credit sale. *But cf.* U3C § 2.104.

lender.[190] Sellers and financers might possibly adjust their "informal" arrangements to take advantage of this loophole. The U3C provisions are similarly restricted[191] on the somewhat dubious ground that the distinction between loans and sales is firmly embedded in law and practice and should not be disrupted.[192] Although many of the U3C provisions apply both to loans and sales,[193] these provisions do not extend to loans of any kind. To this extent, one can only conclude that the Arizona provisions are no worse than those of the U3C.

Deficiency Judgments in Real Property Transactions

In addition to providing protection for consumers who have purchased goods and services, House Bill 330 also extends protection in real property transactions. Section 33-729 provides that when a mortgage given to secure the purchase price of a family dwelling is foreclosured and results in a deficiency claim enforceable by execution, the claim will be allowed only if the court determines that the foreclosure sale proceeds were insufficient because the value of the real property had been diminished as a result of waste voluntarily committed or permitted by the debtor.[194] This section not only precludes artificial deficiencies resulting from forced sales,[195] but also those caused by natural depreciation in market value.[196]

The most direct benefit of this provision will be the elimination of hardships resulting to consumers who, when purchasing a home, fail to realize the extent to which they are subjecting assets besides the home to legal process. Since the statute reduces the risks associated with default, consumers may also be encouraged to purchase more homes. At the same time, however, the protection given consumers

190. It might be possible to extend protection to these cases by analogy to the treatment provided by the CCPA. See 12 C.F.R. § 226.2(f) (1972). An argument against allowing the lender to proceed free of the restrictions of the Arizona Act might also be founded on a theory similar to that employed by courts which have found the seller and the assignee so closely connected that holder in due course status is denied to the assignee. For cases reaching this result, see Boyd, *supra* note 1, at 381 n.51.

191. U3C §§ 2.407, 5.103(1).

192. *See* Prefatory Note, U3C XXI-XXII (Revised Final Draft 1969).

193. *Compare* U3C art. 2 (credit sales) *with id.* art. 3 (loans).

194. ARIZ. REV. STAT. ANN. § 33-729(B) (Supp. 1971-72). This section applies only to "real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling . . . ." *Id.* § 33-729(A). See discussion note 197 *infra*. The elements necessary to establish waste in Arizona are "an act constituting waste," "done by one legally in possession" and "to the prejudice of the estate or interest therein of another." Jowdy v. Guerin, 10 Ariz. App. 205, 208, 457 P.2d 745, 748 (1969).

195. The proceeds from foreclosure sales are invariably low relative to the fair market value of the property sold. *Cf.* Schuchman, *supra* note 176.

196. The language of the provision does not except depreciation caused by "down turns" in the market generally or by the impact of changes in the neighborhood such as those resulting from urban decay or planning efforts.

may discourage lenders from financing homes, or at least induce them to require larger down payments.

Section 33-730, which must be read with section 33-729, provides:

> If both a security agreement and a mortgage or deed of trust have been given to secure payment of the balance of the purchase price of real property and consumer goods or services or the balance of the combined purchase price of such real property and consumer goods or services, no deficiency shall lie thereunder if no deficiency would lie under the mortgage or deed of trust given under such transaction, notwithstanding any agreement to the contrary.[197]

Although the precise meaning of this provision is difficult to ascertain, the gist is that the limitation imposed by section 33-729 is also imposed in combined sales of real property and consumer goods or services.[198] That is, if a dwelling is sold and the price is secured by a mortgage, and, in addition, consumer goods or services are sold and a security interest in the goods is taken to secure the price of the goods or services, a deficiency enforceable by execution against the goods will be allowed only if there is a deficiency with respect to the mortgage that resulted from waste voluntarily committed or permitted by the debtor. This provision is important to consumers because, in such "package" sales, the value of the goods and services usually exceeds $1,000 and the transaction is therefore immune from the section 44-5501 prohibition against deficiency judgments.

It may not be immediately apparent why a separate provision was necessary. In a sale of a dwelling and goods, a single mortgage can be drawn to create a security interest in the entire "package." A proceeding to foreclose the mortgage would operate to foreclose both the interest in the dwelling and the goods, assuming that the statutes regulating security interests in personalty were satisfied.[199] To preclude that possibility, the deficiency limitation could have been extended by providing in section 33-729 that mortgages covering the purchase price of dwellings and goods or services are subject to the limitation. It would still have been possible, however, for a seller to avoid the limitation by arranging for a mortgage and a security agree-

197. ARIZ. REV. STAT. ANN. § 33-730(A) (Supp. 1971-72). It should be noted that *id.* §§ 33-729 and 33-730 apparently apply to different types of property. Section 33-729 refers to a "single one-family or single two-family dwelling," whereas section 33-730 appears to encompass all real property. There is no obvious reason for the distinction, and in fact it may be illusory. Section 33-730 provides that no deficiency shall lie under the security agreement and mortgage unless such deficiency would lie under section 33-729. Thus, where the sale involves a mortgage on real property other than a dwelling, it could be argued that any deficiency that results always lies under the mortgage because section 33-729 only precludes deficiencies when small family dwellings are involved.

198. Once again, the U3C contains no comparable provision.

199. *See* UCC § 9-501(4) (§ 44-3147(D) (1967)).

ment, and then foreclosing separately on each instrument, claiming a deficiency under the security agreement irrespective of any deficiency under the mortgage.[200] Section 33-730 closes this potential loophole.

The scope of section 33-730 is restricted by the condition that there must be a sale of real property and consumer goods or services. The limitation on deficiency claims would not apply to sales of dwellings secured by a real estate mortgage and a security interest in consumer goods not the subject of a sale.[201] Similarly, the limitation would not apply where consumer goods or services are sold and secured by a mortgage on real estate not the subject of a sale.[202] If, on the other hand, real property is sold and services are performed, and the price of the services is secured by an interest in consumer goods not the subject of a sale, the limitation of section 33-729 would apply.[203] The types of security arrangements involved in the last two examples would be prohibited under section 44-5501, however.[204]

CONCLUSION

Legislative analysis should have as its central concern the probable impact of legislation on the subject to which it is directed. The determination to be made here is whether consumers, for whose protection the legislation under study was purportedly adopted, are actually benefited by its enactment. The hodgepodge character of recent consumer legislation in Arizona hinders that determination. Comparison with the law governing consumer transactions prior to passage of this legislation and to the protection that would have been afforded by the U3C had it been enacted, however, reveal that the activity of the Arizona legislature in the field of consumer protection is characterized more by quantity than quality.

Under two of the recent enactments, Arizona consumers ap-

200. Such a tactic was all the more likely because the UCC permits foreclosure of a security interest in personalty without the aid of legal process. See UCC § 9-503 (§ 44-3147 (1967)). This procedure was recently held to be violative of due process, however. *See* Adams v. Egley, 318 F. Supp. 614 (S.D. Cal. 1972). *See also* Fuentes v. Shevin, 407 U.S. 67 (1972), holding that pre-judgment replevin violates due process, thus casting further doubt upon the validity of self-help foreclosures. *See also* Comment, *Creditor's Prehearing Remedies and Due Process,* 14 ARIZ. L. REV. 834 (1972).

201. One condition for the application of the limitation is that a mortgage and security agreement be given to secure "the balance of the purchase price of real property and consumer goods . . . ." ARIZ. REV. STAT. ANN. § 33-730(A) (Supp. 1971-72). The provision thus applies only in those instances where the goods taken as collateral are the goods which are the subject of the sale.

202. The real property in which the mortgage is taken must likewise be the property which is the subject of the sale. See text of note 201 *supra.*

203. The section applies to situations in which a security agreement is given to secure the purchase price of consumer goods or services. ARIZ. REV. STAT. ANN. § 33-730(A) (Supp. 1971-72).

204. *See* text & accompanying notes 169-77 *supra.*

pear to be better protected than they were before. House Bill 102 gives buyers cancellation rights unavailable in home sales under prior law. Similarly, under House Bill 330, limitations are placed on deficiency judgments, sellers are put to an election of remedies and the types of security interests that may be created are limited. Comparison of the Arizona legislation with the concededly creditor-oriented U3C, however, serves to reinforce the conclusion that these improvements are less than complete. In regard to home solicitation sales, not only does the U3C provide a longer cancellation period, but it does not impose burdensome notice requirements upon the consumer as does House Bill 102. The U3C's prohibition against referral sales is also much broader in scope and harsher in terms of consequences for violations than is the Arizona Act. While the deficiency judgment provisions of House Bill 330 have no comparable counterparts in the U3C, the sections in the U3C controlling creditors' remedies and allowable security interests have broader application, are better defined and are devoid of conflicts.

Unfortunately, Arizona consumers will fare even less well under the other two legislative enactments. In regard to financing retail sales, it appears that Senate Bill 57 has merely codified, and thus legitimized, existing creditor practices. Although there are specific situations in which the Arizona provisions give the consumer greater rights than he would have had under the U3C, the U3C provisions appear generally more beneficial. Furthermore, though Senate Bill 57 has imposed lower allowable finance charges, it has not avoided conflict with federal disclosure laws as does the U3C, and its treatment of the problem of cross collateral security arrangements is clearly inferior. By authorizing waiver of defense clauses, House Bill 332 clearly constitutes a regression from prior law which held such clauses invalid as against public policy. The protection offered by the U3C as to waiver of defense clauses and the holder in due course doctrine, limited though it may be, is clearly preferable from the consumer's point of view to the almost useless protection afforded by House Bill 332. The consumer under the U3C would at least be made aware of the rights he is granted, while under the Arizona provision it will be a rare consumer who is even conscious of his rights and a still rarer one who takes advantage of them.

A large measure of the inadequacy of the Arizona legislation is perhaps attributable to the piecemeal attempt to deal with complex and often interrelated areas. The legislation embraces numerous drafting errors and deficiencies, ambiguities and unresolved conflicts. Far too many essential terms are left undefined; several provisions are

either in direct conflict with one another or are perplexingly inconsistent; other provisions clearly evidence the danger of failing to anticipate possible conflict with existing laws. A more conscientious drafting effort is in order, one which satisfactorily defines any essential terms, anticipates potential or existing conflicts, and is founded upon a basic knowledge of existing provisions, state and federal, which may be affected by or affect the legislation.

As noted initially, consumers were able to join forces to defeat the U3C. The comprehensive nature of that code focused attention on numerous consumer problems and facilitated the organization of a broad coalition of consumer interests to oppose it. The piecemeal character of the recent Arizona legislative activity has evoked an entirely different response from consumers. House Bill 102, because of the vehement opposition of direct sellers, aroused some consumer concern and provided an after-the-fact consumer input into the legislative process. Apart from that limited voice, however, it is apparent that consumer interests were not sufficiently represented in the formulation of the other enactments. Insufficient consumer input might be attributed to a lack of concern when legislation less sweeping than the U3C is proposed. More likely, it is simply a result of a lack of information. Many consumer representatives were simply unaware of the legislature's deliberations. Piecemeal legislation by way of amendment to laws not previously identified as protective of the consumer remains largely obscure until after the fact. The battle lines reflecting the opposing interests are seldom drawn until it is too late.

Any evalutaion of the relative position of the Arizona consumer under the recent enactments, as opposed to his position under prior law or the U3C, finally must account for the propensity of these enactments to preclude future legislative activity in the area of consumer protection. Any legislation, no matter how deficient its scheme, undoubtedly tends to inhibit future legislation, if for no other reason than the increasingly unmanageable workload of the legislature. Perhaps the most significant danger thus posed by these recent enactments is that they may create the illusion that consumers are now well protected in Arizona, and therefore diminish interest in a subject still seriously in need of attention.