Comments

ARIZONA'S HOME SOLICITATION AND REFERRAL SALES ACT: AN EVALUATION AND SUGGESTIONS FOR REFORM

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The notion of a cooling-off period[1] in home solicitation sales has been the subject of considerable legislative concern in recent years. The *Uniform Consumer Credit Code* (UCCC)[2] and the *National Consumer Act* (NCA),[3] two recent attempts to provide uniform legislation to protect consumers, both provide for cooling-off periods to follow home solicitation sales. Cooling-off periods have also been the subject of federal concern.[4] Although the NCA and UCCC have not been widely accepted,[5]

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[1] A cooling-off period is that time period after a sale within which a buyer may cancel the sales agreement without justification. The use of cooling-off periods in home solicitation sales originated in 1962 with recommendations made by the English Committee on Consumer Protection (the Molony Committee). Sher, *The "Cooling-Off" Period in Door-To-Door Sales*, 15 U.C.L.A.L. REV. 717 (1968).

[2] UNIFORM CONSUMER CREDIT CODE (UCCC) §§ 2.501-05. The UCCC was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1968. For a discussion of the different drafts prior to the 1969 draft, see COMMERCE CLEARING HOUSE, NEW RULES ON CONSUMER CREDIT PROTECTION 268-69 (1969).

[3] NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT: A MODEL ACT FOR CONSUMER PROTECTION (NCA). Unlike the UCCC, the NCA provides for inside, as well as outside, consumer approval transactions. " '[I]nside consumer approval transactions' [are those transactions] initiated by the consumer and consumated at the merchant's place of business in which the dollar amount . . . exceeds fifty dollars" while " '[o]utside consumer approval transactions' [are those] initiated or consummated personally by a merchant at a place other than the merchant's place of business." NCA § 2.501(1) & (2).

Subsections (1) & (3) of 2.502 provide that a "consumer is not obligated under an outside approval transaction until he has affirmed the transaction . . . [by giving] written notice of affirmation to the merchant." Section 2.504(1) requires the merchant to "return any money or property he has received" if the consumer does not affirm the outside approval transaction within ten days. As to inside consumer approval transaction within ten days. As to inside consumer approval transactions, NCA § 2.505(1) rpovides that "the merchant must present to the consumer a written statement of the consumer's right to cancel the transaction."

For an evaluation of the UCCC and the NCA, see Comment, *Consumer Protection Under the UCCC and the NCA—A Comparison and Recommendations*, 12 ARIZ. L. REV. 572 (1970).

[4] *See Federal Consumer Credit Protection Act*, 15 U.S.C. § 1635(a)-(e) (Supp. IV 1965-68). Subsection (a) states in part:

> [I]n the case of any consumer credit transaction in which a security interest is retained or acquired in any real property . . . used as the residence of the person to whom credit is extended the obligor shall have the right to rescind the transaction until midnight of the third business day following the consumation of the transaction.

Under some circumstances, both the federal and Arizona Acts will be applicable. Notwithstanding a possible homestead exemption, ARIZ. REV. STAT. ANN. § 33-981(A) (1956) provides that any person who furnishes material or labor in the al-

their attempts to cover this aspect of consumer protection have served as useful catalysts for the abundance of recent state legislation in this area.[6]

This recent movement rightly presumes that there are inherent dangers to the consumer in home solicitation selling—dangers which are not present in an ordinary retail sale.[7] The direct-selling industry has attacked the validity of this presumption with assertions that the direct-selling in-

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teration or repair of any building or structure shall have a lien on the structure for the labor or materials. Thus, a home solicitation sale for home improvement services might bring both acts into play. Under the federal Act, the buyer is given three days in which to cancel, while under the Arizona Act the buyer is given only two days. Presumably the buyer may choose the Act most favorable to his claim under these circumstances.

See also Household Sewing Machine Co., No. 8761 (F.T.C. Aug. 6, 1969). There, the Federal Trade Commission ordered a 3-day cooling-off period within which to cancel any contract entered into with the Household Sewing Corporation and negotiated in the consumer's home. Household had been engaging in unfair and deceptive practices including "bait and switch" tactics. For an illustration of "bait and switch" selling, see note 25 *infra*.

[5] The UCCC has been adopted only in Oklahoma and Utah. *See* note 6 *infra*. As of January, 1970, the NCA was "being considered for enactment in whole or in part in several states." Willier, *Introductory Note* to NATIONAL CONSUMER LAW CENTER, NCA.

[6] Twenty-three states, including Arizona, have enacted some form of cooling-off legislation: ALASKA STAT. § 45.05.125 (Supp. 1970); CONN. GEN. STAT. ANN. §§ 42-134 to -143 (Supp. 1970-71); [1970] Fla. Sess. Laws ch. 70-363, §§ 1-9; GA. CODE ANN. § 96-906 (Supp. 1970); HAWAII REV. LAWS § 476-5 (Supp. 1970); ILL. ANN. STAT. ch. 121½, § 262B (Smith Hurd Supp. 1971); IND. ANN. STAT. §§ 19-2-631 to -633 (Supp. 1970); LA. REV. STAT. ANN. § 9:2711 (Supp. 1971); ME. REV. STAT. ANN. tit. 32, §§ 4661-68 (Supp. 1970-71); MD. ANN. CODE art. 83, §§ 28-35 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 255D, § 14 (1968); MICH. COMP. LAWS ANN. § 445.1202 (1965) (limited to home improvement sales); N.H. REV. STAT. ANN. §§ 361-B:1 to -B:3 (Supp. 1970); N.J. REV. STAT. §§ 17:16C-61 to -61.9 (1970) (Door-To-Door Retail Installment Sales Act), and §§ 17:16C-95 to -103 (1970) (Door-To-Door Home Repair Sales Act); N.Y. PERS. PROP. §§ 425-30 (Supp. 1970-71); OKLA. STAT. tit. 14A, §§ 2-501 to -505 (Supp. 1970-71) (Oklahoma has adopted the UCCC); PA. STAT. tit. 73-500-202(c)(4) (Purdon Supp. 1970) (limited to home improvement sales); R.I. GEN. LAWS ANN. §§ 6-28-1 to -8 (1970); UTAH CODE ANN. §§ 70B-2-501 to -505 (Utah has adopted the UCCC) (Supp. 1969); VT. STAT. ANN. tit. 9, § 2454 (1970) (applicable to all contracts for goods and services); VA. CODE ANN. §§ 59.1-21.1 to 21.6 (Supp. 1970); WASH. REV. CODE ANN. § 63.14.040(2)(e) (Supp. 1970) (all retail installment contracts).

[7] Several factors suggest that the direct selling industry may more easily employ fraudulent sales practices than other merchandising industries. First, the direct seller has less need to maintain consumer good will than do those selling from a fixed location. Second, door-to-door salesmen are not subject to the same supervision as employees of a retail seller. Third, since most door-to-door salesmen operate on a commission basis, the incentive for high pressure sales techniques is increased, and since the consumer constitutes a captive audience in his home, he may be more susceptible to such techniques. While the consumer can determine which stores he will patronize, he has little chance to screen the type of salesman who comes to his home, and thus both the reputable and the disreputable salesmen will have an equal opportunity to talk their way into his living room. Furthermore, the consumer may be more susceptible to appeals to impulse buying in his home. Finally, since the consumer has no opportunity to shop around and compare values, he is more likely to make an unneeded purchase at an unfair price. *See* Meserve, *The Proposed Federal Door-to-Door Sales Act: An Examination of Its Effectiveness as a Consumer Remedy and the Constitutional Validity of Its Enforcement Provisions*, 37 GEO. WASH. L. REV. 1171, 1174-76 (1969). *See also* Cuming, *Consumer Protection—The Itinerant Seller*, 32 SASK. L. REV. 113, 114-16 (1967); Note, *Consumer Protection: The Proposed Cooling-Off Period*, 2 VAL. L. REV. 338, 343-45 (1968) [hereinafter cited as *Consumer Protection*].

dustry poses no special threat to the consumer,[8] and that cooling-off periods are not the answer in any event.[9]

Realizing the potential for deceptive selling which is present in home sales, the Arizona legislature recently enacted a cooling-off statute in an attempt to afford some protection to consumers.[10] The purpose of the legislation was

> to regulate, *not prohibit*, home solicitation sales by:
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> (1) Granting the buyer a statutory period during which time the contract may be canceled.
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> (2) Providing that any transfer of a note or other evidence of indebtedness shall be deemed an assignment only and all claims and defenses of the buyer against the seller shall be applicable against the transferee.
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> (3) Prohibiting referral selling in conjunction with a home solicitation sale.[11]

The bill was scheduled to take effect on August 11, 1970, but a hastily formed Direct Sellers Association immediately asserted its opposition to the bill.[12] From that point on, Arizona's Home Solicitation and Referral Sales Act was to have a chaotic and stormy history.[13] Though the bill was finally held operative,[14] that status was short-lived. On January

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[8] *See* Sher, *supra* note 1, at 726-28. Sher discusses extensively direct sellers' views of the dangers to the consumer in direct selling. Direct sellers argue that there is less high pressure selling in the consumer's home than at a retail store because most of the orders are made jointly by husband and wife pursuant to an appointment with the salesman; that door-to-door selling offers an opportunity for demonstration of the product under actual conditions; that due to modern advertising, there is no free choice when a consumer enters a retail store; and that "switch-selling" can also be employed when the consumer is inside a retail store. *Compare* Sher, *supra, with Consumer Protection, supra* note 7, at 346-48.

[9] *See* Sher, *supra* note 1, at 730-37. The main arguments against a cooling-off period are that it interferes with the decision-making process; that it constitutes discrimination against direct sellers; that it undermines the sanctity of contract; that it will have an end result of higher prices to the consumer; and that it will have a detrimental impact on reputable firms. *Cf.* Note, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 890, 1008-10 (1969) [hereinafter cited as *Direct Selling Industry*].

[10] ARIZ. REV. STAT. ANN. §§ 44-5001 to -5008 (Supp. 1970-71).

[11] Ch. 114, § 1 [1970] Ariz. Laws 2d Reg. Sess. (emphasis added).

[12] Arizona Daily Star, July 10, 1970, §A, at 2, col. 2.

[13] "Petitions are being circulated statewide by the Direct Seller's Association of Arizona that seek to place a law approved by the Arizona legislature May 11 on the Nov. 3 general election ballot." Tucson Daily Citizen, July 30, 1970, at 4, col. 5. *See* Arizona Daily Star, Aug. 11, 1970, § B, at 1, col. 1: "Members of the Direct Sellers Assn. Monday filed what they said amounts to 31,000 petition signatures sidetracking—maybe for two years—a consumer protection measure enacted in the last session of the legislature." *See also id.*, Aug. 12, 1970, § B, at 1, col. 5: "A Maricopa County legislative candidate Tuesday filed a court action challenging signatures on petitions demanding a referendum on the new state consumer protection measure." The candidate stated "he would seek to have the petitions voided on grounds they are improperly signed."

[14] McBrayer v. Bolin, No. C239221 (Maricopa County Super. Ct., Sept. 25, 1970), *hearing denied*, No. 10266 (Ariz. Sup. Ct., Nov. 17, 1970), *appeal docketed*, No. ICA-Civ. 1550 (Ariz. Ct. App., Div. I, Nov. 19, 1970). The petitions seeking to delay enforcement of the Act were held to be not legally sufficient based on an error in the preparation of the petitions, and thus House Bill 102 became effective immediately.

14, 1971, the Act was declared unconstitutional by a Maricopa County superior court judge.[15] On appeal via special writ to the Supreme Court of Arizona, review was denied on jurisdictional grounds.[16] The case is currently on direct appeal to the Arizona supreme court.

Although the Arizona Act may fail to meet constitutional standards, its objectives are laudable. This comment will examine the Arizona Act[17] with a view toward eliminating constitutional infirmities and aiding future legislative revision. In order to surface the inadequacies of the Arizona Act, comparisons will be drawn to the UCCC[18] and the Connecticut Home Solicitation Act,[19] both of which apparently served as models for the Arizona draftsmen.[20]

SECTION 44-5001: DEFINITIONS

Home Solicitation Defined

For a transaction to be a "home solicitation sale" under the Arizona Act, five requirements must be satisfied: (1) there must be a sale of goods or services;[21] (2) the seller or his representative must have personally solicited the sale; (3) the agreement or offer to purchase must have been made at a home other than that of the person[22] soliciting the same; (4) the agreement or offer to purchase must have been given to the seller at the home; and (5) the purchase price, or any part of it, must have been "payable in installments, or a debt incurred for payment of the purchase price

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15 Direct Sellers Ass'n v. State, No. C240188 (Maricopa County Super. Ct., Jan. 11, 1971), *hearing denied*, No. 10409 (Ariz. Sup. Ct., Mar. 9, 1971), *appeal docketed*, No. 10431 (Ariz. Sup. Ct., Apr. 8, 1971). The trial judge noted: "All appreciate that in this modern day, house to house solicitation has increased to the extent that proper regulatory measures are worthy of consideration. However, such an objective must be accomplished properly within the framework of the Constitution of Arizona." No. C240188 at 1. He proceeded to declare the Home Solicitation Act and Referral Sales unconstitutional listing the following objections:

(1) It violates the due process clause of [the] Arizona Constitution.
(2) [It] does not operate alike upon all of a given class.
(3) [It] makes an unreasonable discriminatory and arbitrary classification as to persons affected.
(4) [It] is contradictory in its provisions.
(5) [It] denies . . . equal protection of law to persons affected and is not limited to the preservation of the public safety, public health, and morals. No. C240188 at 8.

16 Direct Sellers Ass'n v. State, No. 10409 (Ariz. Sup. Ct., Mar. 9, 1971).

17 ARIZ. REV. STAT. ANN. §§ 44-5001 to -5008 (Supp. 1970-71).

18 UCCC § 21.501-05.

19 CONN. GEN. STAT. ANN. §§ 42-134 to -143 (Supp. 1970-71).

20 Numerous provisions of the Arizona Act are identical to or substantially the same as provisions of the UCCC or the Connecticut Act. *See, e.g.*, notes 38 & 41 *infra*.

21 For a discussion of the "goods and services" dichotomy, see Sher, *supra* note 1, at 739-41. Sher argues that service contracts are just as susceptible to fraudulent selling techniques as contracts for goods. *Id.* at 740.

22 ARIZ. REV. STAT. ANN. § 44-5001(2) (Supp. 1970-71) provides: " 'Person' includes a corporation, company, partnership, firm, association or society, as well as a natural person."

[must have been] payable in installments."[23] As to the fifth requirement, the Arizona Act states that

> [a] sale which otherwise meets the definition of a home solicitation sale, except that it is a cash sale, shall be deemed to be a home solicitation sale if the seller makes or provides a loan to the buyer or obtains or assists in obtaining a loan for the buyer to pay the purchase price.[24]

The vague requirement that the seller or his representative personally solicit the sale leaves many issues unanswered. It is unclear, for example, whether "switch selling"[25] will avoid this requirement and thus escape regulation.[26] Furthermore, it is not clear whether the requirement of a personal solicitation would be met when the seller initially solicits through the mails or by telephone.[27] In this regard, it may be argued that the initial telephone or mail order solicitation does not involve the same degree of high pressure selling as door-to-door selling.

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[23] *Id.* § 44-5001(1).

[24] *Id.*

[25] "Switch selling," or "bait and switch" tactics, has been described as follows:

> The first step is to issue an advertisement purporting to offer a domestic article such as a sewing machine at a remarkably low price, and inviting interested persons to write in for details. Anyone who does so is soon confronted by a salesman on his doorstep, announcing that he has called in response to the householder's inquiry for a demonstration. In a typical case, the advertised article is then produced, but the salesman makes no effort to sell it; on the contrary he is only too ready to point out and demonstrate its defects, or to explain that because of a long waiting list delivery cannot be made for several months. The customer having thus been induced to say that this is of no use to him—and, incidentally, to view the visitor as an honest and reasonable caller—the 'switch' is made. It so happens that the salesman has another model in his car, which might possibly interest his victim; might he be allowed to bring it in and to demonstrate it? The customer, having so far seen only Dr. Jekyll and having a slightly uneasy conscience about having brought this pleasant man so far on a fruitless errand, readily agrees; whereupon a far more expensive article is produced and Mr. Hyde takes over.

COMMITTEE ON CONSUMER PROTECTION, FINAL REPORT, CMND. No. 1781 ¶ 743 (1962).

[26] Because "switch selling" does not involve a personal solicitation by the seller, *i.e.*, the original solicitation is accomplished through advertisement, it is possible that this sales technique would avoid the sanctions of the Arizona Act. If, however, the solicitation is considered as having occurred at the subsequent face-to-face meeting of salesman and purchaser, the requirement of a "personal" solicitation would be satisfied.

In any event, switch selling is prohibited by another Arizona statute. ARIZ. REV. STAT. ANN. § 44-152(A) (1967) prohibits deceptive practices in the sale or advertisement of any merchandise. Subsection (B) declares the legislative intention that the courts may use "as a guide interpretations given by the federal trade commission and the federal courts to §§ 45, 52 and 55(a)(1) Title 15 U.S.C.A. of the federal trade commission act." The Federal Trade Commission has prohibited bait and switch practices. 16 C.F.R. §§ 238.0 to .4 (1968).

[27] Where the initial contact with the buyer by telephone or through the mails is followed up by a home visit by the seller, the requirement should be deemed satisfied. The word "solicit," itself has raised issues of definition. *See* Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 624 n.30 (1969) [hereinafter cited as *Case Study*]. The authors report that the practical effect of the ambiguity in "solicit" as used in the Connecticut Act has been that financing agencies resolve the ambiguity "by lumping everything vaguely resembling a home solicitation sale into that category." *Id.*

The UCCC avoids these issues by defining "personal solicitation" as a face-to-face confrontation between the buyer and seller.[28] The issues raised by the failure of the Arizona Act to define this phrase could be avoided by adding a similar definition.

The third requirement—that the sales agreement be given to the seller at a home other than that of the seller[29]—represents an attempt by the Arizona legislature to encompass more types of sales than the UCCC. The UCCC limits its coverage to sales "at a residence of the buyer."[30] Thus, the Arizona Act avoids the anomalous result of excluding from coverage those sales which take place at the home of a friend or relative of the buyer. Both enactments illustrate the presumption that home sales are more susceptible to fraudulent tactics than are sales made at the buyer's place of business[31] or at fairs or exhibitions.[32]

The requirement that the purchase price in a home solicitation sale must be "payable in installments" appears to have been based on an early draft of the UCCC.[33] The probable reasoning for excluding cash sales is that a buyer able to make a cash purchase is more likely to be able to afford the item than a consumer who must purchase on credit. Furthermore, if a cash sale is involved, the purchaser will be more likely to consider the wisdom and necessity of the purchase.

The phrase "payable in installments" is not defined by the Arizona Act. The 1969 draft of the UCCC defines a home solicitation sale as a "consumer credit sale," and one of the elements of the latter is that it be "payable in installments."[34] Since the Arizona Act offers no definition, the term could mean any sale where different portions of the purchase price are payable at different times.[35] Whatever definition was intended by the Arizona legislature should be explicitly set out in the Act.

Under Arizona's Act, the requirement that the sale be payable in installments is satisfied by a cash sale if the seller provides or assists the

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[28] UCCC § 2.501, Comment 2. Whether the UCCC requires that the *initial* solicitation be face-to-face, however, is unclear. *See* Sher, *supra* note 1, at 747-48.

[29] ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1970-71).

[30] UCCC § 2.501, Comment 2: "The phrase 'at a residence' rather than 'in a residence' is used to prevent avoidance of the Act by the expedient of having the buyer sign the contract outside of, but in the immediate vicinity of, the home." The Arizona Act similarly employs "at a home," presumably to avoid the result predicted by the drafters of the UCCC. *See* ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1970-71).

[31] *See* Sher, *supra* note 1, at 754-56.

[32] *Id.* at 751-52.

[33] UCCC § 2.501 (Working Draft No. 6, 1967).

[34] "[P]ayable in installments" is defined by UCCC § 1.301(12) as "two or more periodic payments, excluding a down payment" for a consumer credit sale in which a "credit service charge is made"; "four or more periodic payments, excluding a down payment" if "no credit service charge is made"; and as "two or more periodic payments" if a consumer loan is involved.

[35] *I.e.*, whenever the obligation to pay is satisfied through a down payment and one or more other payments.

buyer in obtaining a loan.[36] The UCCC, on the other hand, impliedly excludes such sales from its coverage.[37] The Arizona provision prevents a seller from avoiding the Act simply by persuading the buyer to pay cash after aiding the buyer in obtaining a loan from another source.[38] This approach is preferable since it recognizes that the buyer may be faced with the same evils regardless of the source of the loan. In both situations, he has incurred a debt in order to pay for an item he may not have desired and may not be able to afford.

In some sales involving a loan, the buyer may desire to rescind the sales agreement after the expiration of the cooling-off period because the seller had failed to comply with the requirements imposed by the Arizona Act.[39] If, after aiding the buyer to obtain a loan, the seller is no longer in the jurisdiction or has become insolvent, the question arises as to whether the buyer or loaning institution should bear the loss attendant to the recision. For two interrelated reasons, both of which further the policies underlying the Act, the loss should be borne by the lending institution. First, the risk distribution will force lending institutions to ensure that the seller has complied with the requirements of the Act and will serve as a check to safeguard the buyer's rights. Second, requiring lending institutions to bear the loss will pressure them into screening the types of sellers with whom they deal.[40]

Exceptions to the Definition

The Arizona Act provides two basic exceptions to the definition of a home solicitation sale:

> A sale is not a 'home solicitation sale' if [1] it is pursuant to a preexisting account with a seller whose primary business is that of selling goods or services at a fixed location or [2] if it is a sale made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale.[41]

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[36] ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1970-71).

[37] The UCCC requires that credit be "granted" by the seller. UCCC § 2.104. *See* Copenhaver, *The Uniform Consumer Credit Code*, 71 W. VA. L. REV. 1, 28 n.138 (1968).

[38] The Connecticut Act has a provision identical to that of the Arizona Act. *See* CONN. GEN. STAT. ANN. § 42-134 (Supp. 1970-71). A study conducted after enactment of the Connecticut Act revealed that of 51 responding dealers, 16 practiced this method of financing. Only 3 of those 16 dealers discontinued the practice after the Act was passed. See *Case Study*, *supra* note 27, at 626 n.35.

[39] *E.g.*, ARIZ. REV. STAT. ANN. § 44-5004 (Supp. 1970-71) requires the seller to give the buyer notice of his rights in a home solicitation sale. If the seller fails to comply, the sales agreement is ineffective.

[40] *Cf.* note 98 and accompanying text *infra*.

[41] ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1970-71). In addition, certain sales meeting the definition of a home solicitation sale are excluded from the Act. Section 44-5007(D) states:

> The buyer may not cancel a home solicitation sale if he requests the seller to provide goods or services without delay because of an emergency and the seller in good faith makes a substantial beginning of performance

In contrast to the first Arizona exception, the UCCC excludes sales made pursuant to a "preexisting revolving charge account,"[42] without regard to whether the seller's primary business is that of selling goods or services at a fixed location.

The requirement that the seller must have a "fixed location" to be within Arizona's "preexisting account" exclusion was one reason that the superior court held the Act unconstitutional.[43] In holding that the distinction drawn by the Arizona Act between those sellers who operate from a fixed location and those sellers who do not was an unreasonable and discriminatory classification, the court stated that "all home solicitation salesmen sought to be classed must be classed and governed by the same uniform regulations."[44]

If a sale is made pursuant to a preexisting account, by definition, the buyer and seller have engaged in a prior transaction. The buyer is thus afforded some protection through his knowledge of the seller's previous action, and it is unlikely that the buyer will make a second purchase from the seller if he is dissatisfied with the initial purchase or if he feels he has been subjected to high-pressure sales techniques.

The Arizona Act also imposes the requirement that the seller's primary business be that of selling from a fixed location. Presumably, this requirement is based on the assumption that those who sell primarily at a fixed location will be more fair in soliciting sales in order to protect the reputation of their primary business. This assumption would seem to be a valid and reasonable one.

The Arizona Act, however, does not require that the seller's "fixed location" be in the same community where the sale occurs nor that the prior sale have taken place at that fixed location. The buyer, then, may not be aware that the seller has a fixed location. Thus, the exempted sale

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before notice of cancellation, and the goods cannot be returned to the seller in substantially as good condition as when the buyer received them.

This provision was adopted from the UCCC. *See* UCCC § 2.502(5). The UCCC explains in the Comment to that subsection that the rationale is to exclude "emergency sales" so that in such situations the seller will agree to provide goods or services before the expiration of the cooling-off period. The Comment lists common examples such as repairs to furnaces, appliances, and broken water pipes. Although the UCCC nowhere defines the word "emergency," the Comment notes that the purpose of the subsection is "to protect the seller who in good faith relies on the statement of the buyer that an emergency eixsts and who performs immediately at the request of the buyer." *Id.* Comment 3.

In the Connecticut Act insurance sales have been explicitly excluded. CONN. GEN. STAT. ANN. § 42-142 (Supp. 1970-71). Although it is not set out in the Arizona Act, the Arizona Attorney General has adopted the position "that insurance is neither goods nor services as contemplated by the . . . Act." OP. ARIZ. ATT'Y GEN. 71-3, at 8-9 (1970).

[42] UCCC § 2.501. The term "preexisting revoling charge account" is defined in UCCC § 2.108.

[43] Direct Seller's Ass'n v. State, No. C 240188, at 2-3 (Maricopa County Super. Ct., Jan. 11, 1971).

[44] *Id.* at 3.

may have little or no impact on the reputation of the seller's primary business at the fixed location. In other words, some sales may fall within the exclusion which are no more likely to be fair than those made by a seller who has dealt previously with the consumer but does not have a primary business of selling goods at a fixed location.

Though this exception is based on a reasonable assumption, the Arizona legislators have failed to draft a provision which effectively implements that assumption. The distinction presently drawn between seller's whose primary business is that of selling from a fixed location and those who do not sell primarily from a fixed location is thus both unreasonable and arbitrary.[45] The Arizona draftsmen should have imposed a requirement that the "fixed location" have some proximity to the location of the subsequent home sale.[46]

The second exception of the Arizona Act, excluding a sale made pursuant to "prior negotiations . . . at a business establishment at a fixed location," was presumably drawn from the UCCC, which has an identical exclusion.[47] The fixed location requirement in this exclusion was also found to be unreasonable and discriminatory in *Direct Sellers Association v. State*.[48] This finding was unwarranted. The UCCC explains the rationale behind the distinction:

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[45] *Id.*

[46] A change in the Arizona Act to exempt only those sales in which the seller's primary business is that of selling from a fixed location *within the community in which the buyer resides* would seem to be consistent with the assumption on which the exclusion is based. *Cf.* VA. CODE ANN. § 59.1-21.2 (Supp. 1970) (excluding home sales if the seller has an established place of business in the state within 75 miles of the place where the sale is made).

Another alternative might be to exempt sales made pursuant to a preexisting account without regard to whether the seller's primary business is that of selling from a fixed location as the UCCC has done. UCCC § 2.501. Yet this type of exclusion may still provide opportunities for imaginative direct sellers to employ deceptive selling techniques and escape the Act. For instance, a seller may make a $10 sale one day, and return the next to entice the buyer into purchasing an expensive item at an unreasonable price. And arguably, sellers whose primary business is not selling goods from a fixed location might be more likely to engage in this type of practice, since they do not have to protect their reputation at that fixed location.

[47] UCCC § 2.501. The UCCC also excludes a sale of farm equipment. *Id.* This exclusion was apparently adopted after objections were raised by the Farm and Industrial Equipment Institute. *See* National Conference of Commissioners on Uniform State Laws, *Public Hearing on Second Tentative Draft of the Uniform Consumer Credit Code* § 2, at 178 (1967) [hereinafter cited as *Public Hearing*].

[48] No. C 240188, at 3 (Maricopa County Super. Ct., Jan. 11, 1971). The court found that the lack of definition of the term "fixed location" created a hiatus which "violates the requirements of reasonable constitutional classification." *Id.* The court posed several questions which purportedly evidenced the possibility of discrimination due to the lack of a definition, *i.e.* whether a person operating a small television sales and service business in California who also solicits sales or repairs door-to-door in Arizona qualifies as having a fixed location to exempt him from the Act. *Id.* at 2. But this question does not clearly distinquish between the two exceptions to the Arizona Act. Sales made door-to-door in Arizona by the California entrepreneur would come within the Act unless his business in California was his primary business and there was a preexisting account with the buyer; or, unless prior negotiations had taken place between the buyer and seller at the California location.

Another question the court raised is whether a person operating from his home

> If the buyer must go to the seller's office or some other place to sign the contract or offer there is less likelihood that he is acting because of undue pressure by the seller. Similarly, where the buyer has already established a prior relationship with the seller by having . . . previously negotiated with the seller with respect to the sale at the seller's business establishment the likelihood of coercion of the buyer is substantially less.[49]

Because the purpose underlying the Arizona Act is to prevent deceptive selling practices by door-to-door sellers, the exclusion of sales which are not likely to involve such practices is reasonable. Since sales pursuant to negotiations at the fixed location will provide less opportunity for high pressure selling, the second exception cannot be said to be an unreasonable and discriminatory distinction.[50]

SECTION 44-5002: CANCELLATION

Cancellation Period

The Arizona Act, like the Connecticut Act and the UCCC, provides that the buyer may cancel the home solicitation sale for any reason within a limited time period after signing the sales agreement.[51] Arizona allows the buyer "until midnight of the second calendar day" after the day of signing.[52] The UCCC and the Connecticut Act, on the other hand, allow the buyer to cancel until midnight of the third day.[53] The additional day al-

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qualifies as having a fixed location. The court asserted that this question is left unanswered by the Arizona Act. *Id.* Such an assertion also ignores the distinction drawn by the Arizona draftsmen between the use of "fixed location" in the two exceptions. If the seller's primary business is that of selling goods or services at his home, that home would logically qualify as a fixed location within the first exception. If the seller offers or exhibits goods or services at his home, it would seem to qualify as a business establishment with a fixed location within the second exception. In any event, this confusion may be avoided by adopting a provision similar to that found in Virginia. VA. CODE ANN. § 59.1-21.2 (Supp. 1970) excludes a sale if the seller has an established place of business in the state and provides that "[a]n established place of business may include the seller's dwelling house."

[49] UCCC § 2.501 Comment 3.

[50] Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949): "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *See* Southern Ry. v. Greene, 216 U.S. 400, 417 (1910): "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed . . . ." *See also* Farmer v. Killingsworth, 102 Ariz. 44, 424 P.2d 172 (1967;) Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1953).

[51] All three pieces of legislation preserve other existing remedies, both statutory and common law, that the buyer may have independent of a cooling-off period. ARIZ. REV. STAT. ANN. § 44-5002(A) (Supp. 1970-71); CONN. GEN. STAT. ANN. § 42-137(a) (Supp. 1970-71); UCCC § 2.502(1).

[52] ARIZ. REV. STAT. ANN. § 44-5002(A) (Supp. 1970-71). If the signing is on a Friday, the cancellation must be posted "not later than midnight of the Monday immediately following." *Id.*

[53] UCCC § 2.502(1) (third business day); CONN. GEN. STAT. ANN. § 42-137(a) (Supp. 1970-71) (third calendar day). The NCA requires the buyer to affirm subsequent to the sale rather than giving him a cooling-off period. *See* note 3 *supra.*

lowed by Connecticut and the UCCC should be advantageous to the buyer and would not seem to impose undue hardship on the seller.[54]

It is not required under any of these pieces of legislation that the goods be delivered before the cooling-off period begins to run. The probable reasoning is that it is not the purpose of the cooling-off period to deal with the buyer's dissatisfaction with the goods; rather, the purpose is to give the buyer a period within which to contemplate the wisdom and necessity of the purchase. It permits him to rescind the agreement without legal justification. Dissatisfaction with the goods themselves is to be dealt with through other existing contract and sales remedies which are not limited to a period of 2-3 days.

One possible consideration which might justify delaying the start of the cooling-off period until delivery of the goods is that goods in the buyer's possession may provide him with a constant reminder of the sale and thus provoke reflection on the wisdom of the purchase. The implementation of this consideration, however, would impose an undue burden on the seller by requiring him in some cases to make an unnecessary delivery of the goods.[55]

In order to cut off all remedies of the buyer after a specified period some direct sellers have proposed two cooling-off periods—a three day period to run from the date of signing and an additional seven day period to run from delivery of the goods.[56] Under this proposal, the buyer could rescind without justification during the three day period; during the seven day period the buyer could rescind if he could show legal justification such as fraud or misrepresentation. Because it eliminates the availability of any remedy after termination of the seven day period, this proposal is untenable.[57]

Perhaps the best approach is that already taken by the Arizona Act. It has been argued, however, that if the goods are not delivered until the cooling-off period has expired, the remedies available to a buyer who is dissatisfied with the goods are frequently unknown to him.[58] To overcome

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[54] *See Direct Selling Industry, supra* note 9, at 1016: "If, in fact, a seller cannot exist in a system which allows the buyer to reconsider his purchase decision within a reasonable amount of time, such as three days, one is led to question the necessity of the purchase and the method of selling in the first place." (footnote omitted). Furthermore, since the buyer should be required to send the cancellation by registered or certified mail, the extra day will be helpful in insuring that the buyer will have an opportunity to register or certify the letter at a post office. *See* notes 66-68 and accompanying text *infra*.

[55] Meserve, *supra* note 7, at 1184. An example would be where the seller delivers the goods after the buyer had cancelled but before the notice of cancellation was received by the seller.

[56] *Id.* at 1184-85.

[57] This proposal does nothing to change the cooling-off period; it merely aids the seller by cutting off all of the buyer's legal claims after the expiration of the latter period. For further discussion of this proposal, see *id.* at 1185.

[58] S. REP. No. 1417, 90th Cong., 2d Sess. 3 (1968).

this objection, a provision might be included in the agreement which would inform the buyer of all remedies and when they would be available.[59]

Method of Cancellation

The Arizona Act provides that the buyer may cancel during the cooling-off period by giving written notice "to the seller at the address specified for notice of cancellation provided by the seller" or by depositing the written notice bearing the address in a mail box.[60] Upon the occurrence of either of these two events "[c]ancellation shall occur."[61] Thus, it is the affirmative act of the buyer in "giving" or "mailing" the written notice of cancellation to the seller which must occur within the cooling-off period.

Under the Arizona Act, if the letter is sent by ordinary mail, the buyer must obtain "the time and place stamped on a receipt received from the United States post office on form 3817."[62] The notice of cancellation may also be sent "[r]egistered mail, return receipt requested, with the time and place stamped on a receipt received from the United States post office on form 3806-S."[63] In comparison, the UCCC provides that notice of cancellation need only be "deposited in a mailbox properly addressed and postage prepaid"[64] while the Connecticut Act allows the buyer to cancel only by certified mail, return receipt requested.[65]

The ordinary mail provision of the Arizona Act, although it will provide the buyer with proof of mailing, will not eliminate the risk of the seller not receiving the notice. Only registered or certified mail, return receipt

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[59] Such a provision was suggested to the drafters of the UCCC. Sher, *supra* note 1, at 724-25 n.37. Sher concludes that this type of inclusion would "seem to add nothing to the existing law of avoidance of contracts for fraud." *Id.* Although informing the buyer of other remedies would be advantageous, several factors mitigate against the effectiveness of such a proposal. To be effective, the notice should clearly inform the buyer of all available remedies and the methods of enforcement. Yet this would seem to require that the notice be lengthened greatly and some consumers might be dissuaded from reading it.

[60] ARIZ. REV. STAT. ANN. § 44-5002(B) (Supp. 1970-71). This provision is apparently not satisfied if written notice is handed to the seller or received through the mail by the seller at an address other than that specified in the agreement. This could render cancellation ineffective where a buyer, meeting the seller in his neighborhood the following day, delivers to him written notice of cancellation. To alleviate this infirmity, a phrase reading "or where the seller otherwise receives actual notice of cancellation" could be added to section 44-5002(B). The buyer should also be given notice of his right to cancel by this method.

The requirement that the letter be "deposited in a mail box" may raise unnecessary issues of proof and, if literally interpreted, would foreclose other valid methods of mailing, *i.e.* the buyer handing the letter to the mailman or attaching it to his mail box to be picked up. The statute should be changed to allow any accepted method of mailing to satisfy its requirements.

[61] *Id.*

[62] *Id.* § 44-5002(B)(1).

[63] *Id.* § 44-5002(B)(2).

[64] UCCC § 2.502(3). Comment 2 to section 2.502(3) states: "Notice of cancellation is given at the time of mailing. The risk of non-receipt of a mailed notice of cancellation is placed on the seller, but the buyer has the burden of proving that the notice was properly mailed."

[65] CONN. GEN. STAT. ANN. § 42-137(b) (Supp. 1970-71).

requested, will eliminate this risk.[66] This procedure is desirable in order to prevent the inequitable forfeiture of goods by the seller under another provision of the Act simply because the notice of cancellation was lost in the mails.[67] Furthermore, it is doubtful that to require notice by certified or registered mail will so confuse an uneducated buyer as to nullify his right of cancellation. Thus, the Arizona Act should provide for certified or registered mail, return receipt requested, or both.[68]

The Arizona Act specifies that the notice of cancellation is effective "if it indicates the intention on the part of the buyer not to be bound by the home solicitation sale."[69] The same approach is followed by the UCCC[70] and the Connecticut Act.[71] Since almost any words of discontent by the buyer could satisfy this provision, the buyer is provided with flexibility, without being held to any formal requirement.[72]

SECTION 44-5003: REFERRAL SALES PROHIBITED

Evincing a distrust of referral sales,[73] the Arizona Act prohibits the seller from offering a "commission or [giving] a rebate or discount to the buyer in consideration of the buyer's giving to the seller the names of prospective purchasers . . . ."[74] A sale is not a referral sale unless the earn-

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[66] The buyer's receipt will state that the letter was delivered on a certain date, thus proving that the seller has notice of cancellation. Should the seller refuse to accept the letter, the buyer will have a receipt documenting this fact, and the seller will be unable to claim lack of notice.

[67] ARIZ. REV. STAT. ANN. § 44-5007(A) (Supp. 1970-71). *See* notes 119-22 and accompanying text *infra*. *Cf.* Sher, *supra* note 1, at 769 n.216.

[68] The procedure for mailing a letter certified or registered mail, return receipt requested, should be explained in the notice provision of the Act.

[69] ARIZ. REV. STAT. ANN. § 44-5002(C) (Supp. 1970-71).

[70] UCCC § 2.502(4).

[71] CONN. GEN. STAT. ANN. § 42-137(c) (Supp. 1970-71).

[72] *See* notes 85-86 and accompanying text *infra*.

[73] For a general discussion of referral sales, see Comment, *Let the "Seller" Beware—Another Approach to the Referral Sales Scheme*, 22 U. MIAMI L. REV. 861 (1968). *See also* Meserve, *supra* note 7, at 1183 n.55; *Case Study*, *supra* note 27, at 619 n.8; Annot., 14 A.L.R.3d 1420 (1967). For the direct sellers' arguments against the prohibition of referral sales, see National Conference of Commissioners on Uniform State Laws, *Public Hearing*, *supra* note 47, at 231-35.

Referral selling might also be prohibited under another Arizona statute. ARIZ. REV. STAT. ANN. § 13-436 (1956) prohibits the carrying on of a lottery, and referral sales have been held by some states to constitute lotteries. *See, e.g.*, Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wash. 2d 630, 409 P.2d 160 (1966).

[74] ARIZ. REV. STAT. ANN. § 44-5003 (Supp. 1970-71). The Arizona provision was taken directly from the Connecticut Act. CONN. GEN. REV. STAT. §§ 42-140, -141 (Supp. 1970-71). The UCCC also prohibits referral sales. UCCC § 2.411, Comment 1 explains why referral sales are prohibited:

> The typical referral sale scheme which would be barred by this section is one in which the seller, before closing the sale, offers to reduce the price by $25 for every name of a person the buyer supplies who will agree to buy from the seller. The seller may be able to make an inflated price tag much more palatable to a buyer if he can convince the buyer that the referral plan will greatly reduce the amount he will actually have to pay. The buyer may not realize until later that his friends whose names he submitted are not as gullible as he and that he is bound to pay the original balance of the contract price.
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> Furthermore, some companies employing referral selling make no attempt to

ing of the commission is "contingent upon an event that is to happen subsequent to the time the buyer agrees to buy."[75] The Act further provides that a sale in violation of its provisions is "voidable" at the buyer's option.[76] Hence, affirmative action must be taken by the buyer if he wishes to cancel a home solicitation sale because it involved a referral scheme.

An issue left unresolved by a literal reading of the Arizona Act is whether the two day limitation period for cancellations also applies to those cancellations based on the existence of a referral scheme. Such a construction of the referral sales provision would render it useless, since the amount of any discount resulting from such an agreement is not likely to be known within two days.[77] The right to cancel because the sale involved a referral scheme is unrelated to the right to revoke within the cooling-off period.[78]

Although the Arizona Act grants the buyer the right to cancel if a referral scheme was involved, it nowhere requires the seller to notify the buyer of this right. Without the buyer's knowledge, the right is an empty one. The Act should, therefore, require the seller to include a provision within the notice already required by the Act which would inform the buyer of this right.[79]

SECTION 44-5004: NOTICE TO BUYER

The Arizona Act requires that the agreement of sale contain language notifying the buyer of his right to cancel. The notice must be "conspicuous" and must: (1) instruct the buyer not to sign the agreement if the spaces for the terms of the agreement are left blank; (2) notify the buyer that he is entitled to a copy of the agreement at the time he signs it; (3) disclose that the buyer may at any time prepay the full unpaid balance; (4) notify the buyer of his right to cancel within two days and include the address of the seller's main or branch office; and (5) inform the buyer that the seller cannot unlawfully enter the buyers premises to repossess the goods.[80] In addition, the agreement of sale must be dated and signed by

contact the prospective customers recommended by the buyer. W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 14 (1968). The authors cite one example in which two offices of a short-lived company which used a referral sales scheme "[w]ere stuffed with thousands of unopened referral forms mailed in by numerous victims." *Id.* at 16.

75 ARIZ. REV. STAT. ANN. § 44-5003 (Supp. 1970-71).

76 *Id.*

77 Assuming the seller intends to pursue the referrals in good faith, his success in making new sales cannot be communicated to the buyer until all perspective purchasers have been contacted. It would be extraordinary if the results could be made known to the buyer in time to afford him ample time to rescind if the period were limited to the 2-day cooling-off period.

78 *See* ARIZ. REV. STAT. ANN. §§ 44-5002(A) (Supp. 1970-71).

79 *See* text accompanying note 59 *supra.*

80 *See* ARIZ. REV. STAT. ANN. § 44-5004 (Supp. 1970-71). The Act states that the agreement shall not be effective unless it "contains a conspicuous notice as follows: . . . ." Sellers in Arizona, of course, are likely to adopt the exact language of the notice set out in the Act to insure compliance. To avoid any possible uncertainty as to whether the Act requires the notice to be in the exact form as set forth, the

the buyer.[81]

Other states have attempted to impose more explicit standards than a mere requirement that the notice be "conspicuous." The Connecticut Act specifies that the "Notice to Buyer" must appear in ten point type or larger directly above the space reserved for the buyer's signature.[82] Other possible alternatives might be to require that the heading be printed in a different color than the rest of the agreement,[83] or that the seller mail the buyer a separate notice of his right to cancel. This latter suggestion has been challenged as merely lengthening the cooling-off period and imposing additional record keeping requirements on the seller.[84] In addition, the buyer may dismiss the notice as meaningless if it is not presented when the contract is signed, but arrives several days later by mail.

Hawaii provides an effective method of communicating notice to the buyer, as well as facilitating the cancellation process. Hawaii requires that the seller give the buyer a form, containing the statutory notice, which the buyer can use if he elects to cancel the contract.[85] "The form may be separate or it may be attached to the contract, if readily detachable, and shall be in a type size no smaller than that generally used in the body of the contract."[86] The Hawaii statute was evidently based on an early draft of the UCCC.[87]

The practical effect of such a provision is that it provides a quick and simple method of cancellation for the buyer. As might be expected, there is strong opposition from direct sellers to any such forms. They argue that these forms are "invitations to cancel."[88] But as one commentator has pointed out, such provisions are "invitations to cancel" only "if one equates 'invitation' with 'knowing one's rights.' "[89]

Because the effectiveness of the Arizona Act depends on the assumption that the buyer will in fact receive this notice, there should be no limit to the precautions taken to assure that the notice is communicated to the buyer. In this regard, the Arizona Act's requirement that the notice be

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Act could be amended to state that the agreement "contains the following statement of the buyer's rights: . . . ." *Cf.* UCCC § 2.503(2) (requiring that the notice "read as follows . . . .").

The UCCC likewise requires that the notice have a "conspicuous caption" but it, like the Arizona Act, is devoid of any explanation as to what may constitute conspicuous. The term was probably intended to mean that the notice be such as to be reasonably calculated to impart the information to the buyer.

81 ARIZ. REV. STAT. ANN. § 44-5004 (Supp. 1970-71).

82 CONN. GEN. STAT. ANN. § 42-135 (Supp. 1970-71).

83 *Cf.* HAWAII REV. LAWS § 476-6 (Supp. 1970) (requiring that a notice given in certain sales involving insurance be of a different color than the rest of the agreement).

84 Meserve, *supra* note 7, at 1185.

85 HAWAII REV. LAWS § 476-5 (Supp. 1970).

86 *Id.* § 476-5(e).

87 UCCC § 2.504 (2d Tent. Draft 1967).

88 Sher, *supra* note 1, at 762 n.206.

89 *Direct Selling Industry, supra* note 9, at 1014.

"conspicuous" cannot be regarded as a sufficient effort by the drafters to assure actual notice. The Arizona legislature should, therefore, consider adopting one of the more effective provisions used by other jurisdictions. In addition, to accommodate the many persons residing in Arizona who speak only Spanish, a provision might be added to the Arizona Act requiring sellers to include a Spanish translation of the requisite notice in the agreement of sale.

Any agreement covered by the Arizona Act which does not comply with the notice requirements is "ineffective."[90] The use of the term "ineffective" indicates that the agreement is void, and that no further action need be taken by the buyer to rescind the contract. The UCCC takes a different approach providing that, if the seller fails to comply with the notice requirements, the buyer must take affirmative action to abrogate the agreement.[91] The Arizona approach is preferable if in fact an agreement not in compliance with the notice requirements is "void" and not merely "voidable."[92] To eliminate any ambiquity, the term "ineffective" should be changed to "void."

SECTION 44-5005: TRANSFER OF NOTES

Non-Negotiability

Notes and "other evidence of indebtedness" issued pursuant to a home solicitation sale may not be dated earlier than the date of the offer or agreement to purchase.[93] In addition, the note or evidence of indebtedness must "bear on its face a conspicuous statement as follows: 'This instrument is based upon a home solicitation sale, which is subject to the provisions of [the Act]. This instrument is not negotiable'."[94] The failure to comply with either of these requirements could subject the violator to criminal sanctions.[95]

Any transfer of an instrument bearing the statement of non-negotia-

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90 ARIZ. REV. STAT. ANN. § 44-5004 (Supp. 1970-71). The Arizona provision appears to have been based on a like provision in the Connecticut Act. CONN. GEN. STAT. ANN. § 42-135 (Supp. 1970-71).

91 UCCC § 2.503(3).

92 If the agreement is void, *i.e.*, a nullity, there may be important consequences. For example, any subsequent waiver or ratification by the buyer would also be ineffective. National Union Indem. Co. v. Bruce Bros., Inc., 44 Ariz. 454, 466-67, 38 P.2d 648, 652-53 (1934). If, however, the term "ineffective" means only that the agreement is voidable, subsequent waiver or ratification would be effective. *Id.* Thus direct sellers might, if the agreement is only voidable, fail to give the buyer his notice and then persuade him to sign a waiver of his right to receive the notice.

93 ARIZ. REV. STAT. ANN. § 44-5005(A) (Supp. 1970-71).

94 *Id.* § 44-5005(B). What is meant by the term "conspicuous," in regard to the notice to consumers has been discussed previously. *See* notes 82-84 and accompanying text *supra*. As to the section 44-5005(B) notice, however, since the persons to whom this notice is directed (*e.g.*, financiers, banks, etc.) are generally more sophisticated in examining these items than are consumers, a lesser degree of conspicuousness may be sufficient to satisfy the requirements of this provision.

95 ARIZ. REV. STAT. ANN. § 44-5008 (Supp. 1970-71). See note 103 and accompanying text *infra*.

bility is "deemed an assignment only and any right, title or interest which the transferee may acquire there [is] subject to all claims and defenses of the buyer against the seller [arising under the Act] . . . ."[96] By eliminating negotiability, the transferee is effectively precluded from attaining holder in due course status.[97] Thus, there will be no limitation of defenses as would be the case if the transferee was an HDC. This will, in effect, shift the loss for faulty merchandise, fraud or default by the seller to financing institutions.

Despite the adverse effect on free transferability of otherwise negotiable paper, this shift has been characterized as necessary and logical for two reasons:

> First, financing agencies are better able to bear the costs of default or fraud by the seller than are the individual consumers. Second, by conditioning a financial institution's liability on the seller's adequate performance, the elimination of negotiability forces financial institutions to screen more fully dealers applying for financing and to refuse to finance the sales of fraudulent dealers.[98]

Holders in Due Course[98a]

Meeting the requirements which the Arizona Act prescribes for these instruments is a condition precedent to the right of the seller or any transferee to bring an action against the buyer. There is, however, no defense available to a buyer against an HDC of an instrument not containing the language of non-negotiability. The Arizona Act expressly protects an HDC in possession of such an item: "A promissory note payable to order or bearer and otherwise negotiable in form issued in violation of this sec-

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[96] ARIZ. REV. STAT. ANN. § 44-5005(A) (Supp. 1970-71).

[97] HDC status is denied because no transferee can be a holder *i.e.*, he cannot take by negotiation. UNIFORM COMMERCIAL CODE (UCC) §§ 3-202, 3-302. UCC § 3-302(1) states: "A holder in due course is a *holder* who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." (emphasis added).

[98] *Case Study, supra* note 27, at 632 (footnote omitted). To avoid this shift financiers may refuse to take any consumer paper from direct sellers. *See* Arizona Daily Star, July 10, 1970, § A, at 2, col. 2. The Valley National Bank, in letters to direct sellers immediately after the promulgation of the Arizona Home Solicitation Act stated that its position would be to refuse to accept consumer notes from home sales. The chairman of the Direct Sellers Association asserted that " 'the bill as it's written today puts [direct sellers] out of business unless [they] can do [their] own financing.' " *Id.*

Experience in Connecticut has shown this is not an inevitable result, and further, that the long range effect may be beneficial to all concerned. After passage of the Connecticut Home Solicitation Act, banks refused to purchase notes issued pursuant to home solicitation sales. Thereafter, however, banks began taking notes from reputable dealers and the community adjusted to the effects of the home solicitation statute. Letter from Gary K. Nelson, Attorney General of the State of Arizona, to Burton S. Barr, member, Arizona House of Representatives, in Plaintiffs Motion for Summary Judgment, Exhibit D, at 2, Direct Sellers Ass'n v. State, No. C240188 (Maricopa County Super. Ct., Jan. 11, 1971).

[98a] See Editor's Note at page 833 *infra.*

tion may be enforced as a negotiable instrument by a holder in due course according to its terms."[99]

Thus, between the buyer and a good faith transferee, both innocent parties, the Arizona legislature has chosen to protect the latter, presumably in the interests of free transferability and stability of consumer instruments.[100] In effect, however, this offers an unscrupulous seller a clear opportunity to avoid the provisions regulating consumer instruments. Other states have chosen to protect the buyer by providing that no transferee of consumer instruments can become an HDC.[101] This type of legislation is perhaps in response to objections that the fraudulent seller will always fail to print the required warning of non-negotiability.[102]

Upon consideration of other factors, however, it would seem that the Arizona provision provides adequate protection for the consumer, and thus, the fear that sellers will purposefully omit the language of non-negotiability is unwarranted. First, the fact that criminal sanctions are imposed upon a seller who transfers an instrument without the requisite language of non-negotiability will deter sellers from this course of action.[103] Secondly, because financing companies will be aware of the obligations imposed on direct sellers it is unlikely that they will be able to obtain HDC status on a note from a direct seller issued without the requisite warning.[104] Finally, as a practical matter, if banks and other financing institutions supply direct sellers with blank notes already stamped with the required warning of non-negotiability, the number of notes issued without the required warning will most likely decrease. Such a practice has been adopted by banks in Connecticut.[105]

The exception allowing transferees of an instrument not containing the required notice of non-negotiability to attain HDC status applies only to

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99 ARIZ. REV. STAT. ANN. § 44-5005(D) (Supp. 1970-71).

100 *See* UCCC § 2.403. The Comment to section 2.403 states that in "rare cases second or third takers may not know of an instruments consumer origin." This is characterized as an "unusual situation" and it is stated that the policy of upholding negotiability is followed "in order not to cast a cloud over negotiable instruments generally."

101 *See, e.g.*, MD. ANN. CODE art. 83, § 147 (1969); MASS. GEN. LAWS ch. 255, § 12c (1968); VT. STAT. ANN. tit. 9, § 2455 (Supp. 1970).

102 *See* Plaintiff's Supplemental Memorandum at 4, Direct Sellers Ass'n v. State, No. C240188 (Maricopa County Super. Ct., Jan. 11, 1971). One commentator has characterized the approach of the UCCC, which likewise protects an HDC, as "unfortunate." He asserts that the seller who negotiates a note without the required statement of non-negotiability "is exactly [the] kind of seller against whom the buyer most needs protection." Helstad, *Consumer Credit Legislation: Limitations on Contractual Terms*, 8 B.C. IND. & COM. L. REV. 519, 532 (1967).

103 Although the penalty provision was held unconstitutional by the superior court, it is arguable that penalties should be imposed on a seller who negotiates a note without the required warning. *See* text accompanying notes 139 & 143 *infra*.

104 To attain HDC status, one must take the item without notice of any defense against it. *See* UCC § 3-302. *See also* UCCC § 2.403, Comment. For a discussion of finance companies as HDCs, see *Case Study, supra* note 27, at 632-37; Comment, *Holder in Due Course—A Memo to Poverty Lawyers*, 22 RUTGERS L. REV. 281, 289-95 (1968).

105 *See* Case Study, *supra* note 27, at 635 n.66.

"promissory notes payable to order or bearer."[106] The superior court in *Direct Sellers Association* found the distinction drawn between these types of promissory notes and other consumer instruments to be unreasonable,[107] since the remainder of the Arizona Act applies to any "note or other evidence of indebtedness."[108] The court's conslusion is untenable, however, since any negotiable paper that might arise from a home solicitation sale must, by definition, be a promissory note "payable to order or bearer."[109] Thus, in the context in which these two terms are used in the Arizona Act, they are synonymous, and the conclusion that a distinction between "promissory notes payable to order or bearer" and "notes and other evidence of indebtedness" is unreasonable is not, therefore, valid.[110]

SECTION 44-5006: TIME LIMITATIONS, DOWN PAYMENT, AND LIEN

Within ten days after a valid cancellation,[111] the seller must tender to the buyer any notes or other evidence of indebtedness given or any payments received pursuant to the sale.[112] In addition, if the buyer's down

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106 ARIZ. REV. STAT. ANN. § 44-5005(D) (Supp. 1970-71).

107 In arguing that the Arizona Act was unconstitutional, the Direct Sellers Association pointed out that the Act is silent as to whether a holder of an instrument other than a note, who otherwise qualifies as an HDC, would still qualify as an HDC if the instrument did not bear the statement of non-negotiability. They took the position that "[n]o amount of judicial construction can supply the omission." Plaintiff's Supplemental Memorandum at 5, Direct Sellers Ass'n v. State, No. C240188 (Maricopa County Super. Ct. Jan. 11, 1971).

The court in *Direct Sellers Association* adopted the position promulgated by plaintiff association and held that such an inconsistency constituted discrimination. No. C240188 at (Maricopa County Super. Ct. Jan. 11, 1971).

108 ARIZ. REV. STAT. ANN. § 44-5005(A) (Supp. 1970-71).

109 *See* UCC § 3-104. To be negotiable, the evidence of indebtedness must be "payable to order or bearer" and be either a draft, check, certificate of deposit, or a note. The draft, check, and certificate of deposit will not be covered by the Act since they are never "payable in installments." See note 23 *supra* and accompanying text.

110 *See* note 107 *supra.*

111 The Arizona Act states that "ten days after cancellation" is the permissible time period within which the seller must return the buyer's down payment. Since cancellation occurs when the buyer mails his notice of cancellation, the seller generally will have less than 10 days from the receipt of notice of cancellation within which to act. UCCC § 2.504, Comment 1. *See* text following note 61 *supra.*

112 ARIZ. REV. STAT. ANN. § 44-5006(A) (Supp. 1970-71). The introductory phrase to section 44-5006(A), "[e]xcept as provided in this section," which was intended to allow the seller to retain a cancellation fee, is apparently a drafting error. The phrase appears to have been taken from the Connecticut Act, and is unambiguous as used there. *See* CONN. GEN. STAT. ANN. § 42-138 (Supp. 1970-71), where the phrase refers to the provision for a cancellation fee within the same section.

Unlike the Connecticut Act, however, the Arizona Act does not provide for the cancellation fee in the same section in which the phrase appears. The cancellation fee provision appears in ARIZ. REV. STAT. ANN. § 44-5007(C) (Supp. 1970-71). There is no exception in section 44-5006 to which the phrase might refer, and thus, as used in the Arizona Act, it has no content whatsoever.

In its critique of the Arizona Act, the superior court in *Direct Sellers Association* found these provisions to be "inconsistent, confusing and contradictory." No. C 240188 at 5. Though this drafting error is not one of constitutional proportions, it should, nevertheless, be corrected to avoid confusion. *See, e.g.*, State *ex rel.* Larson v. Farley, 106 Ariz. 119, 471 P.2d 731 (1970) (presenting the statutory rule of construction which requires a court to read both statutory provisions together in order to give effect to each of them.)

payment included goods traded-in, those goods must be returned to the buyer in "substantially as good condition as when received." If the seller does not comply with this latter requirement, "the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement."[113]

What constitutes "substantially as good condition" is, of course, a factor which will vary according to the particular facts of the case.[114] A more important issue is whether the buyer will know he has the right to have the goods returned in this condition, and if they are not so returned, that he may elect to recover their trade-in value. It is unlikely that an average consumer will be aware of detailed provisions of the Arizona Act. Furthermore, it will be in the exceptional case that a seller will voluntarily inform him of this right. Notice of this right should, therefore, be included within the mandatory notice provision contained in the agreement of sale.

The Arizona Act gives the buyer a lien on the goods delivered pursuant to the agreement until the seller has returned any notes, payments, or down payment made by the buyer as well as any goods traded-in by the buyer. If the goods have not yet been delivered by the seller, the buyer's remedy against a seller unwilling to return the buyer's consideration would be a civil action to recover the considerations wrongfully withheld. The buyer could also refer the matter to a local prosecutor for criminal prosecution. The threat of civil and criminal actions may sufficiently deter sellers from unlawfully withholding the buyer's consideration.[115]

Yet the buyer will most likely be unaware of his right to a lien on goods in his possession, or alternatively, of his right to refer the case for criminal prosecution. He may, therefore, conclude that recovery would be too expensive and either not pursue recovery of his down payment, or complete the sales transaction. To insure that the buyer is aware of the protections the Act affords him, notice of these alternative remedies should be incorporated in the notice provision contained in the sales agreement.

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113 ARIZ. REV. STAT. ANN. § 44-5006(B) (Supp. 1970-71). The UCCC contains a provision substantially the same as the Arizona provision. *See* UCCC § 2504(2) and Comment 2 thereto. Comment 2 states: "The risk of loss or damage to the goods rests with the seller. If he cannot tender the goods in substantially as good condition as when received, the buyer may elect to take in cash the trade-in allowance fixed by the parties in the contract."

114 The Arizona Act is unclear as to whether the buyer may elect to recover the trade-in item along with the amount it has depreciated when such item is returned not in substantially as good condition as when the seller received it.

It has been suggested that under a similar provision in an English statute this method of recovery would not be permitted. *See* Sher, *supra* note 1, at 775 n.267. Unless under the circumstances it would greatly inconvenience the seller, there appears to be no reason to deny a buyer this method of recovery in Arizona.

115 *See* notes 139, 143 *infra*. A penalty would likewise seem to be warranted where the seller refuses to return the buyer's consideration.

Such a requirement is in no way unfair to direct sellers. Once a remedy or right is deemed by the legislature to be appropriate in a given situation, it is only fitting that steps be taken to assure that the recipients of the rights or remedies are aware of them.

SECTION 44-5007: BUYER RESPONSIBILITY AND CANCELLATION FEE

Return of Delivered Goods

If the buyer has no valid lien upon delivered goods,[116] within twenty days after cancellation, the buyer must tender back the goods if the seller so demands.[117] The buyer need only tender the goods at his own address. If the seller fails to demand return of the goods, or fails to take possession after demand, within twenty days from the time of cancellation, the goods become the property of the buyer.[118] The Arizona Act, however, is silent as to what the seller must do to satisfy the possession requirement. A literal reading would dictate that the seller, in fact, must take actual physical possession of the goods, regardless of whether he has made a good faith effort to retrieve the goods at the buyer's residence. Under this interpretation, a seller could be forced to forfeit goods after numerous unsuccessful good faith attempts to reclaim them. Section 44-5007(A) should be changed from "fails to take possession" to "fails to take reasonable steps to regain possession" to avoid any possibility of this harsh result.

The provision entitling the buyer to keep the goods if the seller fails to demand their return within twenty days was held to constitute an unjust forfeiture, and hence a violation of due process in *Direct Sellers Association*.[119] The court posed a hypothetical situation in which the seller never received notice of cancellation because it had been lost in the mails.[120] To be sure, this situation is conceivable since mail is not an infallible means of communication, and the Arizona Act impliedly imposes the risk of nonreceipt on the seller.[121]

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116 The buyer is given a lien on the goods by ARIZ. REV. STAT. ANN. § 44-5006(C) (Supp. 1970-71). The initial sentence of section 44-5007(A) imposes a duty on the buyer to tender back the goods, but excepts those situations which come within section 44-5006(C). Although it is not expressed, the effect of this exception should be to toll the running of the 20-day period while the buyer has a lien on the goods.

117 Cancellation occurs at the time notice is given to the seller at his address or when the notice is mailed by the buyer. *See* text accompanying note 61 *supra*. Since there will be a time lag between the time of mailing by the buyer and receipt by the seller, the seller may actually have only 17 or 18 days to demand return of the goods. The UCCC allows the seller a "reasonable time" in which to recover his goods and specifies that 40-days or less is presumed to be a reasonable time. UCCC § 2.505(1). Comment 1 to § 2.505 explains that the policy underlying the setting of a period within which the seller must have picked up his goods is "[t]o protect the buyer from a seller who may seek to impose an obligation on the buyer by unreasonable delays in demanding delivery . . . ."

118 ARIZ. REV. STAT. ANN. § 44-5007(A) (Supp. 1970-71).

119 No. C 240188 at 4-5.

120 *Id.* at 5.

121 *See* ARIZ. REV. STAT. § 44-5002(B) (Supp. 1970-71). *Cf.* notes 60-61, 64 and accompanying text *supra*.

The simple answer to this objection is to require that the notice of cancellation be sent by certified or registered mail, return receipt requested.[122] This would substantially eliminate the possibility of the seller being able to claim he did not receive notice of cancellation and thus was unaware that the twenty-day period had begun to run.

Buyer's Obligations

The buyer is charged with taking "reasonable care of the goods in his possession both prior to cancellation and during the following twenty-day period."[123] "During the twenty-day period after cancellation, except for the buyer's duty of care, the goods [in the buyer's possession] are at the seller's risk."[124] These two provisions would seem to imply that during the period after the sale, but before cancellation, goods in the buyer's possession are at his risk. Such an implication, although plausible, would render unnecessary the provision defining the buyer's duty of care before cancellations. Indeed, if the goods are at the buyer's risk during that period, there is no reason for also stating that the buyer has a duty of reasonable care during that period.

The UCCC avoids this ambiguity by providing that, except for the buyer's duty of care, the goods are at the seller's risk both before and after the cancellation.[125] This risk distribution protects a buyer from losing rights, otherwise available to him under the Act, through the occurrence of an unexpected event.[126] The Arizona Act should adopt, in precise terms, the risk distribution utilized by the UCCC.

Cancellation fee

Under the Arizona Act, the seller is entitled to a cancellation fee only if he performs, prior to the buyer's cancellation, any services[127] pursuant to the home solicitation sale.[128] In contrast, the UCCC allows the seller to receive a cancellation fee regardless of whether services have been performed.[129]

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122 *See* note 66 and accompanying text *supra.*

123 ARIZ. REV. STAT. ANN. § 44-5007(B) (Supp. 1970-71). For a discussion of the degree of care imposed by other statutes, see Sher, *supra* note 1, at 769-71.

124 ARIZ. REV. STAT. ANN. § 44-5007(B) (Supp. 1970-71).

125 UCCC § 2.505.

126 On one hand, to impose the risk on the seller prior to cancellation is to allow the buyer to escape his obligation to pay for goods he fully intended to buy (i.e. he did not intend to cancel) which are accidentally damaged or destroyed during the cooling-off period. To place the risk on the buyer, however, is to burden him with the obligation of paying for goods accidentally damaged or destroyed during the period when he fully intended to cancel but had not yet done so. The question in such a dilemma is who can better stand the loss, and it seems clear that the seller is in that position.

127 The Arizona Act provides no definition of "services." Presumably it refers to those services performed by the seller which are reasonably related to the sales transaction, whether the sale was for goods or services.

128 ARIZ. REV. STAT. ANN. § 44-5007(C) (Supp. 1970-71).

129 UCCC § 2.504(3).

Under an analogy to sales at a retail establishment, the Arizona approach would seem preferable in requiring services before a cancellation fee can be received. Retail sellers usually will allow buyers to return goods without charge if the buyer has the sales receipt and the goods have not been used. Unless direct sellers have in fact performed services, they should not be allowed to retain a cancellation fee simply on the basis that they went to the consumer rather than requiring the consumer to come to them.

The UCCC does not allow a cancellation fee, however, if the seller has failed to comply with certain requirements, or if the buyer avoids the sale on a ground independent of those remedies expressly provided for under the UCCC.[130] If the buyer rescinds the contract on an independent ground, the seller should receive no fee under the Arizona Act, even though he has performed services, since the cancellation is not pursuant to the Act. And if the seller has failed to fulfill his obligations under the Act, it is inequitable to allow the seller to receive a cancellation fee for any services he has performed. These exceptions to the seller's right to receive a cancellation fee should be added to the Arizona Act.

Under the Arizona Act, the seller is entitled to a cancellation fee of five percent of the cash price, fifteen dollars, or the amount of the cash down payment, whichever is less. Obviously, if there is no down payment, there is no cancellation fee, and in no event can the cancellation fee exceed fifteen dollars.

The UCCC allows the seller to retain a cancellation fee of five percent of the cash price, not to exceed the amount of the down payment.[131] The fixed limit in the Arizona provision affords greater protection to the buyer. Without the fixed limit, a buyer, who has made an expensive purchase and who then desires to cancel during the cooling-off period, may elect not to do so to avoid paying a high cancellation fee and receive nothing for his money. Also, it would seem that the maximum fifteen dollar cancellation fee under the Arizona Act is high enough to dissuade capricous cancellation, and that a higher fee would only operate as a penalty on the buyer. Furthermore, direct sellers may avoid unjust losses by delaying delivery of the goods or the performance of expensive services until the cooling-off period has run.

Although both the Arizona Act and the UCCC provide that there can be no cancellation fee if no down payment has been made,[132] sellers may avoid inequities arising from this requirement[133] by demanding a substan-

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130 *Id.* § 2.504. The requirements with which the seller must comply are: (1) tendering to the buyer any payments mde by the buyer, and (2) tendering goods traded-in in "substantially as good condition" as when the seller received them.

131 *Id.*

132 *See* ARIZ. REV. STAT. ANN. § 44-5007(C) (Supp. 1970-71); UCCC § 2.504(3), Comment 3.

133 *See Public Hearings, supra* note 47, at 257-58 (testimony of William P.

tial down payment. A Comment to the UCCC suggests that this requirement will influence sellers to obtain a substantial down payment which will, in itself, dissuade reluctant buyers from being coerced by high pressure techniques.[134]

The Arizona Act includes a provision not found in the UCCC[135] relating to alteration of the buyer's property. Under the Arizona Act, if any alteration of the buyer's property results from the seller's services, the seller is required to restore the property to "substantially as good condition" as it was in prior to the services.[136] The practical effect of this provision is that direct sellers, particularly those soliciting home improvement services, will be reticent to perform any alteration of the buyer's property until they are assured cancellation has not occurred.[137]

SECTION 44-5008: PENALTY PROVISIONS

Any person who violates any provision of the Arizona Act is "guilty of a misdemeanor punishable by a fine of not more than three hundred dollars or imprisonment not to exceed ninety days, or both."[138] The superior court in *Direct Sellers Association* found that this "blanket provision" created a "criminal offense for non-compliance with a purely civil transaction."[139] The court listed numerous actions which would constitute crimes under the Act—the buyer failing to take reasonable care of the goods, the buyer predating the note, or the seller failing to tender the goods traded-in in substantially as good condition as when received.[140] Furthermore, a referral sale, though not deceptive or fraudulent, could constitute a crime under the Act. Even if a buyer chooses not to avoid a referral sale agreement, perhaps because the purchase price has actually been reduced through successful referrals, the seller could still be prosecuted for having initiated the referral agreement.

Another objection to the penalty provision has been that it allows im-

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Youngclaus, Managing Director of NERSICA [home improvement and remodeling contractors]). Youngclaus gives an example in which a contractor agrees to install storm windows and also paint the sashes and windows. He removes the old storm windows, does the painting, and then receives a notice of cancellation the next morning. Youngclaus concludes, "That's a pretty good deal for $15."

134 UCCC § 2.504, Comment 3.

135 An early draft of the UCCC contained this provision, however. *See* UCCC § 2.505(3) (Working Draft No. 6, 1967).

136 ARIZ. REV. STAT. ANN. § 44-5007(C) (Supp. 1970-71).

137 Sellers will be likely to delay delivery of goods or performance of services until several days after the expiration of the cooling-off period in order to allow for deliver of the mailed notice of cancellation.

138 ARIZ. REV. STAT. ANN. § 44-5008 (Supp. 1970-71). A survey of the various cooling-off statutes in other jurisdictions will reveal that a substantial minority do not impose any criminal sanctions. Alaska, Illinois, Louisiana, New Hampshire, New York, Oklahoma, Pennsylvania, Utah, Vermont, and Virginia impose no criminal penalties in their cooling-off statutes. *See* note 5 *supra*. The remaining states with cooling-off statutes do impose criminal penalties for violations. *Id.*

139 No. C 240188 at 6.

140 *Id.* at 6-8.

prisonment for debt contrary to the Arizona Constitution.[141] The obligation of the seller to return the buyer's down payment is a debt to the buyer arising from the contract between the buyer and seller, although, in a strict sense, it is imposed by the Act. Under the Arizona Act, the seller, even if not attempting to cheat or defraud the buyer, may be imprisoned for his failure to repay the buyer. For example, if the seller does not return the buyer's down payment because he has not received the notice of cancellation, or because he is financially unable to repay the buyer within the ten day period, he may be imprisoned. Such a result is clearly imprisonment for debt and is clearly unconstitutional.[142]

The simplest and perhaps most effective alternative[143] to remedy the defects of this provision is to deliniate those violations of the Act which are punishable. To satisfy the Arizona Constitution, the imposition of criminal sanctions must be avoided if the obligation arises from a debt between seller and buyer,[144] but a punitive damage penalty might be imposed. The seller's failure to give the buyer the required notice, and his failure to have the notice of non-negotiability stamped on a note that is transferred would seem to constitute actions which could be punishable by fine or imprisonment.

CONCLUSION

The Arizona Home Solicitation and Referral Sales Act has clearly manifested the danger of basing state legislation on early drafts of proposed uniform legislation.[145] If the superior court ruling that the Act is un-

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[141] Plaintiff's Supplemental Memorandum, at 6-7, Direct Sellers Ass'n v. State, No. C 240188, (Maricopa County Super. Ct., Jan. 11, 1971). The Association noted that if the seller failed to return the down payment to the buyer, the buyer would have a civil action for recovery of the debt and yet the Act would subject the seller to imprisonment. ARIZ. CONST. art. 2, § 18 provides: "There shall be no imprisonment for debt, except in cases of fraud."

[142] The constitutional prohibition is not applicable to imprisonment for crime, "and legislative bodies are free to provide for punishment by offenders who commit acts denominated by the said legislative bodies as offenses against the public." *Ex Parte* Nowak, 184 Cal. 701, 708, 195 P. 402, 405 (1921). But " 'the power to prescribe punishment in a criminal case may not be used to defeat the constitutional guaranty against imprisonment for debt; and the courts will not permit the purposes of such constitutional provision to be circumvented by mere form.' " State v. Bartos, 102 Ariz. 15, 17, 423 P.2d 713, 715 (1967), *quoting* 16 C.J.S. *Constitutional Law* § 204(4) (1956). The court in *Bartos* found that a criminal prosecution which would subject the violator to imprisonment for non-payment of a city sewer rental charge would contravene the constitutional provision prohibiting imprisonment for debt. It would appear that the imprisonment of the seller for his failure to return the buyer's payments is analagous to the *Bartos* situation and would be prohibited by the Arizona Constitution.

[143] Another alternative which has been suggested as a means of enforcing the seller's obligations is a punitive damage remedy. *See* Sher, *supra* note 1, at 779-80. A further method of enforcement is offered by the UCCC. It empowers an administrator to bring cease and desist actions against violators or bring actions to restrain violations. UCCC §§ 6.108, 6.110. The administrator may also bring civil actions to restrain unconscionable or fraudulent conduct and to assess civil penalties for wilful violations of the Act. *Id.* §§ 6.111, 6.113.

[144] See notes 141-42 and accompanying text *supra.*

[145] The Arizona Act is based extensively on the Connecticut Act (which was in

constitutional is upheld by the Arizona Supreme Court, the objectives which the Arizona legislature sought to accomplish should not be abandoned. On the other hand, if the appeal is successful and the Arizona Supreme Court finds that a constitutional construction can be given to the Act, the legislature nonetheless should reconsider the Act with a view towards correcting its deficiencies.

The Act in its present form does not effectively implement the objectives it sought to achieve. The statute proposed below represents an attempt to cure the deficiencies of the Act which were examined in this comment. The changes, which have been indicated by italics, are not intended to be exhaustive of what might be done to maximize the efficiency of the Act, rather, they offer viable alternatives to free the Act of major defects.[145a]

Proposed Statute

CHAPTER 15—HOME SOLICITATIONS AND REFERRAL SALES

ARTICLE 1. IN GENERAL

Section 44-5001. Definitions

In this chapter:[146]

1. "Home solicitation sale" means a sale of goods or services, *other than the sale of insurance*,[147] in which the seller or his representative, personally solicits the sale and the buyer's agreement or offer to purchase is made at a home other than that of the person soliciting the same and that agreement or offer to purchase is there given to the seller or his representative and all or any part of the purchase price is payable in installments, or a debt incurred for payment of the purchase price is payable in installments. *The phrase "personally solicits" means that the buyer and seller engage in a face-to-face confrontation, without regard to whether it is the initial solicitation.*[148] *The purchase price is payable in installments whenever the obligation to pay is to be satisfied by more than one payment.*[149] A sale which otherwise meets the definition of a home solicitation sale, except that it is a cash sale, shall be deemed to be a home solicitation sale if the seller makes or provides a loan to the buyer or obtains or

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turn based on an early draft of the UCCC) and on other previous drafts of the UCCC. *See* note 20 *supra*. The dangers involved are those of adopting the ambiguities, inconsistencies, and the initial, and perhaps unwise, policy decisions. *See* Littlefield, *The Home Solicitation Sales Act of 1967*, 42 CONN. B.J. 436 (1968).

[145a] See Editor's Note at page 833 *infra*.

[146] The initial sentence of ARIZ. REV. STAT. ANN. § 44-5001 (Supp. 1970-71) reads "[i]n this chapter, unless the context otherwise requires: . . . ." This language has been omitted here as it serves no purpose. Other grammatical and punctuation changes have been made in the proposed statute and have been indicated by italics.

[147] *See* note 41 *supra*.

[148] *See* notes 25-28 and accompanying text *supra*.

[149] *See* notes 33-35 and accompanying text *supra*.

assists in obtaining a loan for the buyer to pay the purchase price. A sale is not a "home solicitation sale" if it is pursuant to a preexisting account with a seller whose primary business is that of selling goods or services at a fixed location *within the community in which the buyer resides,*[150] or if it is a sale made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale.

2. "Person" includes a corporation, company, partnership, firm, association or society, as well as a natural person. When the word "person" is used to designate the party whose property may be the subject of a criminal or public offense, the term includes the United States, this state, or any territory, state or country, or any political subdivision of this state which may lawfully own any property, or a public or private corporation, or partnership or association. When the word "person" is used to designate the violator or offender of any law, it includes corporation, partnership or any association of persons.

Section 44-5002. Cancellation period; method of cancellation; intent

A. In addition to any right otherwise *available* to revoke an offer, the buyer may cancel a home solicitation sale until midnight of the *third*[151] calendar day after the day on which the buyer signs an agreement subject to the provisions of this chapter, except that if the signing is on a Friday, the notice of cancellation shall be posted not later than midnight of the *Tuesday*[152] immediately following.

B. Cancellation shall occur when the buyer gives written notice of cancellation to the seller at the address specified for notice of cancellation provided by the seller, or when such written notice bearing such address is *sent by*[153] *registered or certified mail, return receipt requested,*[154] *or when the seller otherwise receives actual notice of cancellation.*[155]

C. Notice of cancellation given by the buyer shall be effective if it indicates the intention on the part of the buyer not to be bound by the home solicitation sale.

Section 44-5003. Referral sales, rebate or discount violations

No seller in a home solicitation sale shall offer to pay a commission or give a rebate or discount to the buyer in consideration of the buyer's giving to the seller the names of prospective purchasers or otherwise aiding the seller in making a sale to another person, if the earning of the commission,

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150 *See* notes 43-46 and accompanying text *supra.*
151 *See* notes 52-54 and accompanying text *supra.*
152 *Id.*
153 *See* note 60 *supra.*
154 *See* notes 66-68 and accompanying text *supra.*
155 *See* note 60 *supra.*

rebate or discount is contingent upon an event that is to happen subsequent to the time the buyer agrees to buy. Any sale made in respect to which a commission, rebate or discount is offered in violation of the provisions of this chapter shall be voidable at the option of the buyer *at any time.*[156]

Section 44-5004. Agreement requirement

A. *Any* agreement of the buyer in a home solicitation sale shall be *void*[157] unless it is dated, signed by the buyer and contains *the following statement of the buyer's rights:*[158]

NOTICE TO BUYER

1. Do not sign this agreement if any of the spaces intended for the agreed terms to the extent of then available information are left blank.

2. You are entitled to a copy of this agreement at the time you sign it.

3. You may pay off the full unpaid balance due under this agreement at any time, and in so doing you may receive a full rebate of the unearned finance and insurance charges.

4. You may cancel this agreement *provided written notice of your intent to cancel is given to the seller, or mailed by certified or registered mail, return receipt requested, to the seller*[159] *at his main office or branch office shown in the agreement, or provided the seller otherwise receives actual notice of your intent to cancel,* not later than midnight of the *third*[160] calendar day after the day on which *you sign the agreement. If* it is signed on a Friday, the notice of cancellation *shall be given or mailed*[161] not later than midnight of the *Tuesday* immediately following.

5. *To cancel by sending written notice certified or registered mail, return receipt requested, you must go to a post office to register or certify the letter and you must request and retain the return receipt.*[162]

6. *If you cancel this agreement, the seller must return any payments you have made or any goods you have traded-in pursuant to the agreement subject to the seller's right to retain a cancellation fee of five percent of the cash price, fifteen dollars, or the amount of the cash down payment, whichever is less; provided, however, that the seller, does, in fact, perform services pursuant to the sale before cancellation. If the seller refuses to return them, you may retain possession of any goods delivered to you under this agreement until they are returned.*[163]

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156 *See* notes 77-78 and accompanying text *supra.*
157 *See* notes 90-92 and accompanying text *supra.*
158 *See* note 80 *supra.*
159 *See* notes 66-68 and accompanying text *supra.*
160 *See* notes 52-54 and accompanying text *supra.*
161 *See* note 60 *supra.*
162 *See* note 68 *supra.*
163 *See* text following notes 114-115 *supra.*

7. *You may cancel this agreement at any time if it involves a referral agreement. A referral agreement is one in which the seller offers to reduce the purchase price if you supply him with the names of persons to whom he may successfully sell.*[164]

8. It shall not be legal for the seller to enter your premises unlawfully or commit any breach of the peace to reposses goods purchased under this agreement.

B. *The notice to the buyer shall be void if it does not satisfy the following requirements.*

1. *The heading "Notice to Buyer" contained in the agreement of sale must be in at least ten (10) point type and in a color different than the rest of the agreement,*[165]

2. *The notice contained in the agreement of sale shall appear in both the English and Spanish languages.*[166]

3. *The seller must also provide the buyer with a cancellation form, addressed to the seller, which the buyer may use in cancelling. A form substantially as follows is sufficient to comply with this subsection:*

Notice of Cancellation

To _____ *(Insert name and address of seller)* _____
_____ *I hereby cancel the retail installment contract signed by me on* _____ *(Insert the date buyer signed agreement)* _____ *whereby I agreed to purchase the following goods or services* _____ *(Concise description of goods or services)* _____

Date _____

Signature of buyer _____[167]

Section 44-5005. Transfer

A. A note or other evidence of indebtedness given by a buyer in respect of a home solicitation sale shall be dated not earlier than the date of the agreement or offer to purchase. Any transfer of a note or other evidence of indebtedness bearing the statement required by subsection B of this section shall be deemed an assignment only and any right, title or interest which the transferee may acquire thereby shall be subject to all claims and defenses of the buyer against the seller pursuant to the provisions of this chapter.

B. Each note or other evidence of indebtedness given by a buyer in respect of a home solicitation sale shall bear on its face a conspicuous statement as follows: "This instrument is based upon a home solicitation sale,

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164 *See* text accompanying note 79 *supra.*
165 *See* notes 82-83 and accompanying text *supra.*
166 *See* text following note 89 *supra.*
167 *See* notes 85-86 and accompanying text *supra.*

which is subject to the provisions of title 44, chapter 15. This instrument is not negotiable."

C. Compliance with the requirements of this section shall be a condition precedent to any right of action by the seller or any transferee of an instrument bearing the statement required under subsection B of this section against the buyer upon such instrument and shall be pleaded and proved by any person who may institute an action or suit against a buyer in respect thereof.

D. A promissory note payable to order or bearer and otherwise negotiable in form issued in violation of this section may be enforced as a negotiable instrument by a holder in due course according to its terms.[107a]

Section 44-5006. Time limiation; disposition of goods

A. Except as provided in this section, within ten days after a home solicitation sale has been canceled, the seller shall tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

B. If the down payment includes goods traded in, the goods shall be tendered in substantially as good condition as when received. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

C. The buyer may retain possession of goods delivered to him by the seller and has a lien on the goods for any recovery to which he is entitled until the seller has complied with the obligations imposed by this section.

D. If the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, *and has satisfied all obligations imposed by this chapter*,[168] the seller is entitled to a cancellation fee of five percent of the cash price, fifteen dollars, or the amount of the cash down payment, whichever is less. If the seller's services result in the alteration of property of the buyer, the seller shall restore the property to substantially as good condition as it was in at the time the services were rendered.[169]

Section 44-5007. Buyer responsibility; services

A. Except as provided in subsection C of § 44-5006, within twenty days after a home solicitation sale has been canceled, the buyer upon demand shall tender to the seller any goods delivered by the seller pursuant

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[107a] See Editor's Note at page 833 *infra.*

[168] *See* note 130 and accompanying text *supra.*

[169] This subsection appears in the Arizona Act as § 44-5007(C). *See* note 112 *supra.*

to the sale, but he is not obligated to tender at any place other than his own address. If the seller fails to *make a reasonable effort to*[170] take possession of such goods within twenty days after cancellation the goods shall become the property of the buyer without obligation to pay for them.

B. *Except that* the buyer shall take reasonable care of the goods in his possession both prior to cancellation and during the following twenty day period, *the goods are at the seller's risk at all times both prior to and after cancellation.*[171]

C. The buyer may not cancel a home solicitation sale if he requests the seller to provide goods or services without delay because of an emergency and the seller in good faith makes a substantial beginning of performance before notice of cancellation, and the goods cannot be returned to the seller in substantially as good condition as when the buyer received them.

Section 44-5008. Penalty

Any seller entering into a home solicitation sale as defined in section 44-5001 who fails to include in the agreement of sale the notice required by section 44-5004,[172] *or any seller who transfers a note issued pursuant to a home solicitation sale as defined in section 44-5001 not containing the warning of non-negotiability required by section 44-5005*[173] shall be punishable by a fine of not more than three hundred dollars or imprisonment not to exceed ninety days, or both. Any seller *who fails to tender to the buyer any payments, notes or evidence of indebtedness or goods traded-in within ten days of the buyer's valid cancellation pursuant to section 44-5002 shall be required to pay to the buyer, as punitive damages, twice the value of the consideration wrongly held by the seller.*[147]

EDITOR'S NOTE—On May 21, 1971, Governor Williams signed House Bill 332,[175] a measure which will have sweeping effect on consumer transactions in Arizona.[176] The enactment will take effect August 13, 1971.[177] Newly enacted *Arizona Revised Statutes Annotated* section 44-145 states, in part:

A. The rights of a holder or assignee of an instrument,

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170 *See* text following note 118 *supra.*
171 *See* notes 124-25 and accompanying text *supra.*
172 *See* note 103 and text following note 144 *supra.*
173 *See* note 115 and text following note 144 *supra.*
174 *See* text accompanying note 144 *supra.*
175 The Arizona Weekly Gazette, May 25, 1971, § A, at 1, col. 2.
176 The measure creates ARIZ. REV. STAT. ANN. § 44-145 and amends accordingly ARIZ. REV. STAT. ANN. §§ 44-144 (relating to defenses available at the time of assignment of choses in action); 44-2535 (U.C.C. § 3-305) (relating to rights of a holder in due course), 44-3119(A) (U.C.C. § 9-206(1)) (relating to agreements not to assert defenses against an assignee) & 44-5005(D) (relating to the rights of holders in due course in possession of instruments arising out of home solicitation sales).
177 *I.e.*, after midnight of the 90th day after the close of the legislative session. ARIZ. CONST. art. 4, § 1(3).

account, contract right, chattel paper or other writing, other than a check or draft, which evidences the obligation of a natural person as buyer, lessee, or borrower in connection with the purchase, lease or loan of consumer goods or services, are subject to all defenses and setoffs of the debtor arising from or out of such sale or lease, notwithstanding any agreement to the contrary. The rights of the debtor under this section may be asserted only as to amounts then owing and as a matter of defense to or setoff against a claim by the holder or assignee.

B. This section is not applicable to:

1. The rights of the issuer of a credit card, other than an issuer which is the seller, lender or lessor of consumer goods or services with respect to the unsecured obligations of the card holder to such issuer.

2. An 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.

To reconcile Arizona's Home Solicitation and Referral Sales Act with this new enactment, House Bill 332 deleted section 44-5005(D) of the Act. The effect of this deletion is to provide the buyer to a home solicitation sale for use against holders in due course in possession of his promissory note any defense which could have been asserted against the seller.[178]

[178] Most importantly, an item not containing the requisite language of non-negotiability will be unenforceable by an HDC against the buyer, a result which is contrary to that of section 44-5005(D). *See* notes 99-110 and accompanying text *supra*.