REPRESENTING CONSUMERS - THE UNIFORM COMMERCIAL CODE AND BEYOND

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I. INTRODUCTION

The remarkable transformation from a cash-and-carry society to a society in which consumer purchasing[1] on credit has become a way of life[2] is at once an important reason for the phenomenal increase in the level of material well-being in the United States,[3] and the cause of a multiplicity of legal and social problems presently confronting many consumers. Time-saving appliances, color televisions, stereos and new automobiles are no longer reserved to the exclusive enjoyment of the wealthy. Nevertheless, for large numbers of consumers, and low-income consumers in particular, the expansion of readily available credit which puts material luxury within their reach has been accompanied by the development of abusive practices which turn the promise of such credit into a cruel joke resulting not only in the loss of goods purchased, but often loss of a job and even bankruptcy.[4] Few seriously would advocate return to a savings and cash-oriented system which would deny the substantial benefits of an enjoy-now-pay-later economy to many, if not most, consumers. However, it is certain that the abusive practices which threaten to undermine the great rewards of a consumer credit society must be given attention.

Legislation directed at improving the consumer's lot has been

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[1] Purchasing for personal, family and household purposes. See the definition of "consumer goods" in UNIFORM COMMERCIAL CODE § 9-109 (ARIZ. REV. STAT. ANN. § 44-3109 (1967)) and the definition of a "consumer credit sale" in the proposed UNIFORM CONSUMER CREDIT CODE § 2.104.

[2] In 1919 total consumer credit was 2.6 billion dollars. By 1946, it had increased to 8.3 billion dollars. In 1954, it had grown to 34 billion dollars and between 1954 and the end of 1963, consumer credit increased two-fold to 69.6 billion dollars. *See* Note, 16 DE PAUL L. REV. 464, 465 (1966) (containing statistics issued in 1963 by the Board of Governors of the Federal Reserve).

[3] *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 1, 2 (1965).

[4] Over-commitment resulting in default, garnishment, lay-off and often personal bankruptcy is only one of the undesirable consequences of readily available credit. In addition, goods or services sold are exorbitantly priced, of low quality, or of absurdly little utility to the consumer. It appears that when a consumer can purchase on credit he not only purchases too much, but he is distinctly less discriminating as to what he buys, from whom he buys, and on what terms he buys. Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 448-49 (1967). *See also*, B. CAPLOVITZ, THE POOR PAY MORE (1963); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); Note, *Instalment Sales: Plight of the Low Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1 (1966).

proposed at both the state and national level.[5] However, the problems of the consumer are many and complex and much remains to be done in the way of perfecting these legislative proposals.[6] Moreover, passage and implementation of appropriate and comprehensive legislation which will satisfy the need will take time.[7] In the meantime, consumers will continue to be faced with increasingly difficult problems whch require legal services. This article will survey existing Arizona law affecting consumers. The objective is two-fold: first, to indicate the rights and obligations of consumers under that law and thereby permit attorneys to better represent them and help ensure that they are accorded whatever protection existing law will permit; second, to emphasize the need for legislative revision, both long and short term, and perhaps suggest the kind of revision which is needed. In furtherance of the latter objective, considerable attention will be given to the legislation of other jurisdictions, existing and proposed, and the Uniform Consumer Credit Code now being considered by the Joint Commissioners on Uniform State Laws.

The general approach will be to divide consumer transactions into three phases — the pre-contracting phase, the contracting phase, and the performance and remedial phase — and examine the legal rights and obligations of the consumer at each of those phases. Such an approach is premised on the belief that there is essential similarity, in terms of the problems confronted, among all types of consumer transactions, whether involving a small loan for the purchase of an automatic washer or an instalment sales contract for the purchase of an automobile.[8] This approach is to be contrasted with the scheme of existing legislation which consists for the most part of specific responses

[5] COMMITTEE ON COMMERCE, S.5, 90TH CONG., 2D SESS., CONSUMER CREDIT PROTECTION ACT (Comm. Print 1968); UNIFORM CONSUMER CREDIT CODE (Working Draft No. 6, 1967). *See generally* Dunham, *Second Draft of Proposed Uniform Consumer Credit Code Now Being Considered*, 21 PERS. FIN. L.Q. REP. 75 (1967); Jordan & Warren, *supra* note 4; Dunham, *Research for Uniform Consumer Credit Legislation*, 20 BUS. LAW 997 (1965).

[6] As to state legislation see Curran, *Legislative Controls as a Response to Consumer Credit Problems*, 8 B.C. IND. & COM. L. REV. 409 (1967); Felsenfeld, *Some Ruminations about Remedies in Consumer Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535 (1967); Helstad, *Consumer-Credit Legislation: Limitations on Contractual Terms*, 8 B.C. IND. & COM. L. REV. 519 (1967); Jordan & Warren, *supra* note 4; Littlefield, *Parties and Transactions Covered by Consumer-Credit Legislation*, 8 B.C. IND. & COM. L. REV. 463 (1967). As to federal legislation, *see* Barber, *Government and the Consumer*, 65 MICH. L. REV. 1203 (1966); Steffen, *Truth-in-Lending? — A Viable Subject*, 32 GEO. WASH. L. REV. 861 (1964); Note, 16 DE PAUL L. REV. 464 (1966). *See generally* Symposium — *Selected Problems Under the Uniform Commercial Code*, 65 MICH. L. REV. 1197 (1966).

[7] For example, the Uniform Commercial Code, the most successful piece of comprehensive uniform legislation drafted in this country, though in substantially completed form in 1952, was not widely adopted until the middle 1960's and was effective in Arizona on January 1, 1968. For a short but interesting comment on the process of drafting and adoption of uniform laws, see Steinheimer, *The Uniform Commercial Code Comes of Age*, 65 MICH. L. REV. 1275 (1967).

[8] *Cf.* B. CURRAN, *supra* note 3, at 131-37 (1965).

to the conduct of particular creditors or the abuses associated with particular kinds of credit transactions, and which is often difficult to appreciate and relate to consumer problems generally.[9]

Many consumer transactions are also commercial transactions governed by the Uniform Commercial Code[10] unless subject to special legislation which supplements or supersedes the Code.[11] Consequently, a discussion of the impact of the various Code provisions at each phase of the consumer transaction will constitute a major part of this effort. In fact, it will be useful and convenient to examine each phase of the consumer transaction first in terms of any general rules provided by the Code and then in terms of special legislation, existing or proposed, which operates (or would operate) to supplement or supersede the Code. Since the Code rules do not depend on buyer versus borrower distinctions as much as other existing law, such an approach should tend to de-emphasize the difference between kinds of consumer transactions and suggest the degree of protection for consumers to be found in the aggregate of laws affecting them. On the other hand, by revealing the significant extent to which the rules of the Code, a distinctly commercial statute,[12] govern the relationships of parties to consumer transactions, the approach should tend to emphasize the need for special consumer legislation.

II. THE PRE-CONTRACTUAL PHASE

The pre-contractual phase is intended to include all matters which

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[9] *See generally* B. CURRAN, *supra* note 3; Jordan & Warren, *supra* note 4.

[10] ARIZ. REV. STAT. ANN. §§ 44-2201 to 3202 (1967). As to the scope of the Code see §§ 2-102; 3-103; 9-102 (ARIZ. REV. STAT. ANN. §§ 44-2302, -2503, -3102 (1967)).

[11] UNIFORM COMMERCIAL CODE § 2-102 (ARIZ. REV. STAT. ANN. § 44-2302 (1967)) provides that Article 2 does not impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. Similarly, § 9-201 (ARIZ. REV. STAT. ANN. § 44-3114 (1967)) provides that nothing in Article 9 validates any charge or practice illegal under any statute or regulation governing usury, small loan, retail installment sales, or the like, or extends the application of any statute or regulation to any transaction not otherwise subject thereto. Section 9-203(2) (ARIZ. REV. STAT. ANN. § 44-3116 B (1967)) states that a transaction subject to Article 9 is also subject to the pawnbroker's law, ARIZ. REV. STAT. ANN. § 44-1621 (1956), the motor vehicles time sales disclosure law, ARIZ. REV. STAT. ANN. § 44-281 (1967) and the small loans law, ARIZ. REV. STAT. ANN. § 44-601 and that in the case of conflict these special statutes shall govern. In addition, certain individual provisions of the Code are expressly subject to existing law regulating consumer transactions, *e.g.*, § 9-206 (ARIZ. REV. STAT. ANN. § 44-3119 (1967)) dealing with waiver of defense clauses.

[12] The draftsmen of the Code decided at an early date that consumer problems could not be appropriately dealt with in what was conceived to be a commercial statute. *See* Gilmore, *The Secured Transaction Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 37-40, 44-48 (1951). Consequently, the Code provisions rarely distinguish for special treatment consumer, as opposed to commercial, relationships. Rather the Code is made expressly subject to special legislation designed to deal with such problems. *See* note 11, *supra*. Unfortunately, special legislation sufficient to meet the need has not been developed.

reasonably may be said to have led to a consumer sale or consumer loan. The conduct of the lender or seller is the special concern at this phase of the transaction; the kinds of advertising practices and negotiating techniques which are permissible are of particular importance. Apart from actions for fraud and misrepresentation, which have usually been of limited utility to an aggrieved consumer,[13] this phase of the consumer transaction, at least until recently, has been sadly neglected.

A. *Uniform Commercial Code*

The Uniform Commercial Code does not, in general, address itself to the pre-contractual stage[14] except insofar as it may make it easier for things that happened before a contract was signed to become a part of the contract.[15] However, an interesting possibility of relief is suggested by the obligation of good faith imposed on contracting parties under section 1-203 and Comment 3 to section 2-314.

Section 1-203 provides that every contract or duty within the statute imposes an obligation of good faith in its performance or enforcement. This means that parties to a contract must act honestly in performing or enforcing the contract,[16] and that, in addition, merchants[17] must act in accordance with reasonable commercial standards of fair dealing.[18] The obligation of good faith, thus imposed, clearly applies to the conduct of the parties under a contract once it is entered into. There is nothing in the text or comments of section 1-203 to indicate that the obligation is also effective at the pre-contractual phase. However, Comment 3 to section 2-314, which deals with the imposition of warranty liability on merchants, states that the obligation of good faith may be a source of relief against a non-merchant seller where he sells merchandise without revealing the existence of a latent defect of which he had knowledge. This comment might provide a basis for arguing that the obligation of good faith extends to the pre-contractual

[13] Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203, 1207 (1966).

[14] Early drafts of the Code required that financing charges be disclosed and that failure to disclose would result in loss of the financier's lien. These provisions were severely criticized and eventually abandoned. *See* Kripke, *The "Secured Transactions" Provisions of the Uniform Commercial Code*, 35 VA. L. REV. 577, 612-15 (1949).

[15] For example, to the extent that the parol evidence rule is not a bar, the use of models or samples prior to the signing of the contract will create an express warranty so long as such samples or models were "part of the basis of the bargain." This may be interpreted to mean that proof of reliance by the buyer is no longer part of the buyer's burden in establishing express warranty. *See* UNIFORM COMMERCIAL CODE, § 2-313 (1)(c) (ARIZ. REV. STAT. ANN. § 44-2330 A(3) (1967)) and Comment 3.

[16] UNIFORM COMMERCIAL CODE § 1-201(19) (ARIZ. REV. STAT. ANN. § 44-2208(19) (1967)).

[17] UNIFORM COMMERCIAL CODE § 2-104(1) (ARIZ. REV. STAT. ANN. § 44-2304 A (1967)).

[18] UNIFORM COMMERCIAL CODE § 2-103(1)(b) (ARIZ. REV. STAT. ANN. § 44-2303 A(2) (1967)).

phase of a consumer transaction. Since the obligation itself is largely open-ended, the kind of conduct it could reach might be largely a question of imaginative legal argument. Relief based on the obligation of good faith is perhaps all the more conceivable in the context of a system which is largely devoid of effective consumer protection legislation.

B. *Special Legislation Outside the Uniform Commercial Code*

Special legislation affecting the pre-contractual phase of consumer transactions is more extensive but perhaps little more satisfying than the UCC. Both the Small Loan Act[19] and the Motor Vehicle Time Sales Disclosure Act[20] contain elaborate requirements as to the information which a seller or lender must reveal to a buyer or borrower, with special emphasis on disclosure of the amount of finance or interest charge the consumer will be paying.[21]

Such emphasis on disclosure of charges is characteristic of consumer legislation to date, particularly that concerned with credit sales as opposed to consumer loans.[22] There has long been the belief that if consumers knew how much they were paying for credit their rational decisions and the forces of competition would prevent abuses in the consumer credit field.[23] In fact, that belief is the basic premise of an important piece of pending federal legislation, the Consumer Credit Protection Act (formerly the "truth-in-lending" bill).[24] This legislation develops the concept of disclosure even further by requiring that *all* affected lenders and sellers use the same method for revealing charges on the ground that such uniformity of disclosure will aid the consumer in making rational credit decisions.[25]

There are several difficulties with such *disclosure* oriented legislation. Most obvious is that it extends only to the transactions governed by the specific legislative enactments. Thus, the Arizona Motor

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[19] ARIZ. REV. STAT. ANN. §§ 6-601 to -640 (1956).

[20] ARIZ. REV. STAT. ANN. §§ 44-281 to -295 (1967).

[21] *See* ARIZ. REV. STAT. ANN. § 6-628 (1956); ARIZ. REV. STAT. ANN. § 44-287 (1967).

[22] *See* B. CURRAN, *supra* note 3, at 417, 423; Dunham, *Research for Uniform Consumer Credit Legislation*, 20 BUS. LAW 997 (1965); Hogan, *A Survey of State Retail Instalment Sales Legislation*, 44 CORNELL L.Q. 38 (1958); Jordan & Warren, *supra* note 4, at 449, 452; Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 748 (1967).

[23] *Id.* For a careful analysis of disclosure in terms of objective, effect and economic cost, see Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285 (1966).

[24] S. 5, 90th Cong., 1st Sess. (Comm. Print 1968). *See* Steffen, *supra* note 6; 16 DE PAUL L. REV. 464 (1966).

[25] S. 5, 90th Cong., 2d Sess. §§ 4(b)(7), 4(c)(5), 4(d)(2)(c) (Comm. Print 1968). Disclosure must be in terms of annual percentage rate which means either percentage rate per year or dollars per hundred per year on the average unpaid balance. S. 5, 90th Cong., 2d Sess. § 4(i)(A) (Comm. Print 1968).

Vehicle Time Sales Disclosure Act applies only to credit sales of motor vehicles.[26] There is no comparable legislation governing the sales of other goods where abuses may be more prevalent.[27] The proposed federal legislation is much more comprehensive in scope and is laudable in that respect. However, there are other difficulties associated with the federal as well as state legislation. First, the disclosure theory itself is of limited validity. There is a serious question whether any significant number of consumers actually understand the contract they eventually sign. Secondly, even if the disclosure requirement demands that the information be revealed in such form as to insure that consumers will read and understand their contracts, it nevertheless is ineffective as applied to low-income consumers. For choice based on full information to be meaningful there must be competition among the sellers and lenders. There is evidence that such competition *does not exist* in the domain of the low-income consumer who rarely ventures outside his neighborhood and prefers to deal with the *friendly* corner merchant.[28]

Perhaps the most important difficulty with the emphasis on disclosure, and especially disclosure of interest rates, is that it has resulted in insufficient recognition of and attention to what are perhaps more serious abuses incidental to an expanded credit system.[29] There is increasing evidence that ready credit not only encourages unwise rationing of credit but induces over-all inattentiveness and susceptibility to "being taken." It has been suggested that "many of the more outrageous selling practices exposed in recent years, typically in cases concerning housing siding, food freezers, encyclopedias, dancing lessons, and correspondence-school courses, were made possible only because of the availability of credit."[30]

The Arizona Small Loan Act does prohibit advertising which is false or deceptive with regard to the actual charges or conditions upon which loans are to be made.[31] And both the Small Loan Act[32] and the Motor Vehicle Time Sales Disclosure Act[33] attempt to prohibit the signing of incomplete contracts and encourage consumers to read contracts before signing them. However, such necessary, but limited protections only scratch the surface.

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[26] ARIZ. REV. STAT. ANN. § 44-281(9) (1967).

[27] Other states have recognized this fact by enacting so-called "all goods" installment sales legislation which goes beyond motor vehicle transactions. *See* B. CURRAN, *supra* note 3.

[28] *See* Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 746-54 (1967).

[29] This statement is not entirely true as to the Consumer Credit Protection Act, S. 5, 90th Cong., 2d Sess. (Comm. Print 1968), which does include some garnishment regulations. Garnishment will be discussed in Part IV of this article dealing with performance and default.

[30] Jordan & Warren, *supra* note 4, at 448-49.

[31] ARIZ. REV. STAT. ANN. § 6-618 A (1956).

[32] ARIZ. REV. STAT. ANN. § 6-621 (Supp. 1967).

[33] ARIZ. REV. STAT. ANN. §§ 44-286, -287 (1967).

The recently passed Arizona Consumer Fraud Statute[34] at least partially fills the gaps in disclosure oriented legislation. This broadly worded statute, resembling an Illinois statute[35] of the same name, designates false and fraudulent statements, deceptive practices, and concealment of information in connection with the sale or advertisement of goods, as unlawful practices. By reference to the Federal Trade Commission's interpretation of similar federal legislation and regulations,[36] the statute clearly *may* be invoked to curtail some of the more obnoxious advertising gimmicks such as "lure sales" and "referral schemes."[37] Beyond this the statute conceivably could be interpreted to prohibit most of the abuses existing at the pre-contractual phase of the consumer credit transactions.[38] The degree of protection which ultimately will be afforded by the Consumer Fraud Statute is uncertain because its enforcement is left to the attorney general who may seek to enjoin "unlawful practices."[39] Since consumer problems historically have received low priority, the record of such publicly-enforced consumer legislation is not impressive. On the other hand, the increasing agitation in the consumer's corner perhaps promises a more effective future for Arizona's Consumer Fraud Statute. The fact that the Arizona statute provides for restitution to the consumer may increase this likelihood.[40]

Finally, it is worth mentioning that there is federal legislation, the Fair Packaging and Labeling Act,[41] which is designed to prevent the more blatant forms of deception employed by sellers in the distribution of products. This act requires: (1) that commodities bear a label which identifies the commodity and the place of business of the manufacturer, packer, or distributor; (2) that the net quantity of the contents (in terms of weight, measure, or numerical count) be separately, accurately and conspicuously stated; (3) that this separate statement of net quantity not be qualified, for example, by such phrases as "giant half quarts"; and (4) that representations as to the number of servings be accompanied by a statement of the quantity of each serving.[42] The publishers of *Consumer Reports* indicated that there was

[34] ARIZ. REV. STAT. ANN. § 44-1521 (1967).
[35] ILL. REV. STAT. ch. 121-½, §§ 261-72 (1965).
[36] ARIZ. REV. STAT. ANN. § 44-1522 B (1967).
[37] *See* FTC v. Mary Carter Paint Co., 1964 Trade Cas. 79547 wherein the Federal Trade Commission held that an advertisement which purported to offer two cans of paint for the price of one was unfair and deceptive when the product had never been sold at the stated single can price. On June 9, 1967, the FTC condemned a "bait advertising" scheme. *See generally*, Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269 (1966).
[38] Arguably the language of the statute is broad enough to reach most reprehensible conduct which may be found at the pre-contractual stage. Whether the built-in FTC guidelines would operate as a limitation is an open question.
[39] ARIZ. REV. STAT. ANN. §§ 44-1524, -1528 (1967).
[40] ARIZ. REV. STAT. ANN. § 44-1528 (1967).
[41] 15 U.S.C. §§ 1451-61 (1966).
[42] 15 U.S.C. § 1453 (1966).

more public interest in this legislation (commonly known as the truth-in-packaging bill) than any other consumer issue in the history of the publication.[43]

III. The Contracting Phase

Since many of the problems of the consumer can be traced to his inability to negotiate an acceptable contract, because of a lack of bargaining power or an inability to understand the consequences of a particular bargain, a major concern must be the extent to which parties are free to design their contract without legislative interference. This is the essential inquiry at the contracting phase of the consumer transaction — what terms may, or must, be included in the contract.

A. *The Uniform Commercial Code*

Because of its commercial orientation, the Code assumes as a basic premise the notion of freedom of contract.[44] Its general scheme is to set forth rules which operate "unless otherwise agreed" by the parties. Thus, for example, under section 2-509, risk of loss remains on merchants until receipt, unless the parties agree otherwise.[45] A more important manifestation of freedom of contract, as regards consumers, is the right of the parties to provide for liquidated damages and limit other remedies for breach of contract. Under section 2-718 the parties are free to liquidate damages at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. This provision is consistent with general contract principles on liquidated damages, but the Uniform Sales Act contained no comparable provision. Section 2-719, permitting the parties to add to, substitute for, or limit the remedies otherwise provided in Article 2, and in fact permitting the parties to make a limited remedy the exclusive remedy, is perhaps of even greater significance to the consumer. For example, under section 2-719 the consumer's remedies in case of a breach of warranty by the seller may be limited to a return of the goods and repayment of the price, or to repair and replacement of defective goods or parts. As will be seen, the disclaimer of warranty provisions of Article

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[43] Barber, *supra* note 13, at 1237. *See also* 30 Consumer Reports 118 (1965), where the magnitude of commercial opposition to protective legislation is discussed. Some interesting insights into the battle for such legislation are indicated in an article by Senator Philip Hart. *See* Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted*, 64 Mich. L. Rev. 1255, 1258 (1966).

[44] *See* Uniform Commercial Code §§ 1-102(3), (4) (Ariz. Rev. Stat. Ann. §§ 44-2202 C, D (1967)) and Comment 3. *See also* Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. Ind. & Com. L. Rev. 59 (1960) (suggesting that earlier drafts tended to be more restrictive).

[45] Uniform Commercial Code §§ 2-509(3), (4). (Ariz. Rev. Stat. Ann. §§ 44-2357 C, D (1967)).

2 represent a significant concession to freedom of contract which can adversely affect consumers.

Freedom of contract is also promoted by the scheme of Article 9, which in general facilitates the creation of an enforceable security interest in almost any personal property.[46] Thus, for example, the concept of a "floating lien," a security interest which attaches not only to the property which a debtor presently owns, but to any he may acquire in the future, is expanded or at least further legitimatized.[47] By the same token there is nothing in the Code which directly prohibits the use of cross-collateral security clauses. Such clauses provide that each item purchased from a dealer becomes security for each *subsequently* purchased item, with the possible result that in case of a default on the last-purchased item, all the items purchased may be repossessed.[48]

Another Article 9 concession to freedom of contract which is of marked importance to the consumer is section 9-206(1), which provides that subject to existing law establishing a different rule for consumers, an agreement by a buyer not to assert against an assignee any personal defense he may have against the seller is enforceable by an assignee who takes for value, in good faith, and without notice of such defense.[49] The effect of this provision, in general, is to give validity to "waiver of defense" clauses in conditional sales contracts and thereby overrule decisions which had denied effect to such clauses on grounds of public policy or had limited their effect to cutting off breach of warranty defenses.[50] More importantly, this provision has the specific effect of rendering "waiver of defense" clauses valid against consumers, unless existing law otherwise provides. In Arizona, a special statute has been construed to render such clauses unenforceable, unlike other states which hold that when such a clause is present a consumer must establish that an assignee finance company did not take in good faith or without

[46] *See* UNIFORM COMMERCIAL CODE §§ 9-102, -104; (ARIZ. REV. STAT. ANN. §§ 44-3102, 44-3104 (1967)) *and* § 9-101, Comment; (ARIZ. REV. STAT. ANN. § 44-3101 (1967)); G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY ch. 10 (1965).

[47] *See* UNIFORM COMMERCIAL CODE §§ 9-204, and Comments 1, 2, 3, 9-205, 9-108; ARIZ. REV. STAT. ANN. §§ 44-3117, -3118, -3108 (1967), (ARIZ. REV. STAT. ANN. § 44-3117 (1967)); G. GILMORE, *supra* note 46, at ch. 11; Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838 (1959).

[48] *See* § 9-204, Comment 5 (ARIZ. REV. STAT. ANN. § 44-3117 (1967)). Such a clause was the basic source of difficulty in the recent case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), which will be discussed in connection with the concept of unconscionability.

[49] UNIFORM COMMERCIAL CODE § 9-206(1) (ARIZ. REV. STAT. ANN. § 44-3119 (1967)). *See, e.g.*, McCoy v. Mosley Mach., Inc., 33 F.R.D. 287 (E.D. Ky. 1963); Root v. John Deere Co., 413 S.W.2d 901 (Ky. 1967); Walter J. Hieb Sand & Gravel, Inc. v. Universal C.I.T. Credit Corp., 332 S.W.2d 619 (Ky. 1959).

[50] *See* UNIFORM COMMERCIAL CODE § 9-206, Comment 1 (ARIZ. REV. STAT. ANN. § 44-3119 (1967)). *See also*, National State Bank v. Dzurita, 2 U.C.C. REP. 728 (N.Y. Sup. Ct. 1965); Morgan v. John Deere Co., 394 S.W.2d 453 (Ky. Ct. App. 1965).

notice, or he will be unable to assert against the finance company a claim for breach of warranty by the seller or a defense of failure of consideration.[51]

The use of "waiver of defense" clauses and negotiable instruments in consumer transactions has been a subject of heated debate. Some writers argue that such devices are commercially necessary, for otherwise finance companies would not readily purchase credit instruments and credit would be depressed.[52] Others argue that such devices are inappropriate in the consumer context and that denying them validity would have the effect of forcing banks and finance companies to inquire carefully into the integrity of the dealers with whom they deal.[53] The latter position seems to have prevailed and recent consumer legislation denies or limits the effect of "waiver of defense" clauses and may even prohibit the use of any negotiable instruments in a consumer transaction.[54]

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[51] ARIZ. REV. STAT. § 44-144 (1967); San Francisco Sec. Corp. v. Phoenix Motor Co., 25 Ariz. 531, 220 P. 229 (1923).

In a number of pre-code cases involving the effects of a negotiable instrument on personal defenses which a debtor has against a seller, courts have found that the finance company was too closely associated with the sales transaction to be given holder-in-due-course status. The supplying of forms by the finance company and the commitment by the finance company before the sale to purchase the note and/or contract have been factors of special importance. *See* Commercial Credit Co. v. Childs, 199 Ark. 1078, 137 S.W.2d 260 (1940); Commercial Credit Corp. v. Orange County Mich. Works, 34 Cal. App. 2d 766, 214 P.2d 819 (1950); Mutual Finance Co. v. Martin, 63 So. 2d 649 (Fla. 1953). *See generally* Note, *Retail Investment Sales Legislation*, 58 COLUM. L. REV. 854 (1958). Because the requisites of holding-in-due-course are the same as the conditions of enforceability of a waiver-of-defense clause set forth in § 9-206 (1), such decisions should be relevant in determining whether an assignee of a contract which includes a waiver-of-defense clause has been taken under conditions which render the clause unenforceable under § 9-206 (1).

[52] *See* Note, *Waiver of Defense Clauses and Consumer Protection in Installment Sales Contracts*, 36 FORDHAM L. REV. 106, 111 (1967). Professor Kripke has argued that the problem is only one of procedure since even if the buyer is precluded from asserting defenses against the assignee, he can still recover from the seller. Kripke, *Chattel Paper as a Negotiable Instrument under the Uniform Commercial Code*, 59 YALE L.J. 1209, 1215-16, 1218 (1950). However, this argument would seem to overlook the fact that a "mere procedural" difference may impose on the consumer the not insignificant burden of bringing suit against the seller.

[53] King, *The Unprotected Consumer-Maker Under the Uniform Commercial Code*, 65 DICK. L. REV. 207, 211-13 (1961); Vernon, *Priorities, The Uniform Commercial Code and Consumer Financing*, 4 B.C. IND. & COM. L. REV. 531, 542-48 (1963); Note, *Waiver of Defense Clause and Consumer Protection in Installment Sales Contracts*, 36 FORDHAM L. REV. 106, 107 (1967); 51 KY. L.J. 134, 138 (1962).

[54] Recent amendments to the Illinois Consumer Fraud Statute provide that where a negotiable instrument is given by a consumer, negotiation will not bar the consumer from asserting any personal defenses unless the contract contains a printed notice to the buyer informing him that he has a right to give the seller notice of a defense within five days after delivery and such notice is not given. ILL. S. B. § 2D. Seven states have included in retail installment sales acts a prohibition against sellers requiring buyers to execute negotiable notes. *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 312-22, chart 19 (1965). The proposed Uniform Consumer Credit Code also prohibits the taking of a negotiable note as payment, but if a note is taken it may be enforced by a holder-in-due-course according to its terms. UNIFORM CONSUMER CREDIT CODE § 2-403 (Working Draft No. 6, 1967). *See generally* Note, 17 DE PAUL L. REV. 194, 204 (1967); Note, *Waiver of Defense Clause and Consumer Protection in Installment Sales Contracts*, 36 FORDHAM L. REV. 106, 112 (1967). The recent decision in *Unico v. Owens*, 50 N.J.

There are important exceptions to the principle of freedom of contract under the Code. Thus, although Section 2-719, in general, permits the parties to limit remedies, an exclusive remedy which fails of its essential purpose is inoperative.[55] More important, any limitation of consequential damages for personal injury in a contract for sale of consumer goods is prima facie unconscionable, and also may be ineffective.[56] Similarly, although the creation of security interests under Article 9 is liberalized, including the expansion of "floating liens," under an after-acquired property clause no security interest may attach to consumer goods given as additional security unless the debtor acquires rights in the goods within ten days after the secured party gives value (tenders goods sold or money lent).[57] Moreover, unlike the remedies of Article 2, which may be limited by the parties, the remedies under Article 9 are, with few exceptions, *not* subject to alteration by the parties.[58]

In addition to these specific qualifications of freedom of contract under the Code, there are several general limitations which may be of great significance. The obligation of good faith discussed above in terms of its effect on the pre-contractual phase of consumer transactions, perhaps may also operate as a limitation on the freedom of the parties to include whatever provisions they desire in a consumer contract. Also pervading the provisions of the Code is the obligation of commercial reasonableness.[59] While this obligation, like that of good

101, 232 A.2d 405 (1967), should be of marked importance as to these problems. In that case the court not only held that the finance company was not a holder-in-due-course with respect to the transfer of a negotiable note, but seized upon the first sentence of § 9-206 (1) to declare a waiver-of-defense clause invalid in the consumer context as being against public policy.

[55] UNIFORM COMMERCIAL CODE § 2-719(2) (ARIZ. REV. STAT. ANN. § 44-2398 (1967)). § 2-719, Comment 1 states:

> [I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion. . . . Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

See Steele v. J.I. Case Co., 197 Kan. 554, 419 P.2d 902 (1966).

[56] UNIFORM COMMERCIAL CODE § 2-719(3) (ARIZ. REV. STAT. ANN. § 44-2398 (1967)). *See* Kessler, *Protection of the Consumer: Comparative Study*, 74 YALE L.J. 262 (1964); Note, *Warranty Disclaimer and Limitation of Remedy for Breach of Warranty Under the Code*, 43 B.U.L. REV. 397 (1963); Note, *Unconscionable Contracts under the Uniform Commercial Code*, 109 U. PA. L. REV. 401 (1961).

[57] UNIFORM COMMERCIAL CODE § 9-204(4)(b) (ARIZ. REV. STAT. ANN. § 44-3117 (1967)).

[58] UNIFORM COMMERCIAL CODE § 9-501(3) (ARIZ. REV. STAT. ANN. § 44-3147 (1967)) *and* § 9-101, Comment (ARIZ. REV. STAT. ANN. § 44-3101 (1967)). *See* Hogan, *The Secured Party and Default Proceedings Under the Uniform Commercial Code*, 47 MINN. L. REV. 205, 208 (1962).

[59] UNIFORM COMMERCIAL CODE § 1-102(3) (ARIZ. REV. STAT. ANN. § 44-3102(3) (1967)). *See* Farnsworth, *Good Faith and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963).

faith, in general has greater reference to performance of contracts or duties once they have been established by the parties, it might be invoked to aid the consumer against a merchant who has exceeded the bounds of reasonableness customarily observed by merchants in "loading" a contract in his favor.

Perhaps the most important limitation on freedom of contract, and therefore the greatest single source of protection for the consumer, is the provision by which courts may refuse to enforce unconscionable contracts. Section 2-302 of the Code authorizes courts to police contracts to detect the presence of unconscionable bargains. Arguably this only expressly permits courts to do what they have been doing under a variety of guises in the past.[60] However, such express authorization may have the effect of inducing courts to invoke unconscionability with greater frequency than in the past.[61] There is some evidence that such will be the case.[62]

The greatest difficulty with the notion of unconscionability, a difficulty which at the same time is perhaps its greatest strength, is that unconscionable is not defined in section 2-302. Comment 1 to section 2-302 states that the principle of the section is one of preventing oppression and unfair surprise. These two factors appear to have been focused upon by courts which have utilized the concept. In the leading case of *Henningsen v. Bloomfield Motors, Inc.*,[63] the court, in finding a disclaimer of warranties in a standard manufacturers' automobile sales contract ineffective, emphasized that the consumer-plaintiff could not reasonably be said to have *understood* that the contract shifted to him the risk of bodily injury resulting from defects in the automobile, and also the *lack of choice* of a consumer as to his need to purchase an automobile or as to the terms and conditions upon which such purchase would be made. The lack of understanding apparently has reference to the element of unfair surprise; the lack of choice to the element of oppression. It should be noted that *Henningsen* was *not* decided under the UCC and the decision did not expressly rest on the ground of unconscionability. However, the court clearly was anticipating the enactment of the Code and especially section 2-302.

In the more recent case of *Williams v. Walker-Thomas Furniture Co.*[64] the Court of Appeals for the District of Columbia Circuit made

[60] *See* W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 46-47 (1964); Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401 (1961); UNIFORM COMMERCIAL CODE § 2-302, Comment 1 (ARIZ. REV. STAT. ANN. § 44-2319 (1967)).

[61] W. HAWKLAND, *supra* note 60, at 44-45.

[62] *See* American Home Improvements, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966); R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE U.C.C. 4-100 to -108 (1966); W. HAWKLAND, *supra* note 60, at 45-46.

[63] 32 N.J. 358, 161 A.2d 69 (1960).

[64] 350 F.2d 445 (D.C. Cir. 1965).

explicit reference to section 2-302. The *Williams* case is an excellent example of the kind of problems faced today by some consumers, especially low-income consumers. A consumer, who was on welfare, purchased some sixteen items totalling over $1,500 from the same dealer over a period of about five years. Unfortunately for the consumer, the sales contract contained a cross-collateral clause by which each item purchased became security for each subsequently-purchased item. When the consumer defaulted on the last-purchased item, a $500 stereo, the seller asserted his right under the cross-collateral clause to repossess *all* the items purchased.

Although not deciding the case on its merits, the court of appeals, in reversing and remanding for a determination of whether the contract as written was unconscionable, stated:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[65]

Again the emphasis is on "absence of meaningful choice." The court attempts to suggest the content of the phrase. Most significant is the inequality of bargaining power — a characteristic of many consumer transactions. Inability to understand the consequences of the bargain being entered into and the commercial unreasonableness of the contract terms were also obviously important.

It is interesting to notice that the most objectionable feature of the

[65] *Id.* at 449-50.

contract was the cross-collateral clause. Arguably, this problem was one for disposition under Article 9, yet section 2-302 of Article 2 was invoked. This could be explained on the ground that the transaction was as much a sale as a secured transaction. It remains to be seen whether the principle of unconscionability will be interpreted to transcend Article 2, sale or not. There is some evidence that it may.[66] Certainly such an interpretation would be of greater benefit to consumers since secured loans as well as secured sales then would be covered.[67] Whatever else its long-range effect, the *Williams* decision will likely give sellers cause to hesitate in making one-sided bargains with customers.[68]

Apart from limitations on the parties' freedom to contract just discussed, there are certain provisions of the Code which may be interpreted to weigh the bargain in favor of the consumer, unless the seller takes special precautions. Already mentioned was the rule that, apart from special agreement, risk of loss remains on a merchant-seller until receipt by the buyer. The warranty provisions of the Code present an even better example. These provisions, in general, continue the trend begun under prior law to shift the risks of defects in title and quality from the buyer to the seller, who, for a variety of reasons, is said to be in the best position to bear such risks.[69]

Section 2-313, by eliminating reliance as part of the buyer's burden of proof, and including samples and models within its purview, generally promotes the ease with which the right of recovery under an express warranty may be established. Arguably, it is now up to the seller to show that a consumer did *not* rely on the conduct of the seller which otherwise creates an express warranty.[70] The inclusion of models

[66] *See In re* Dorset Steel Equip. Co., 2 U.C.C. REP. 1016 (E.D. Pa. 1965); *In re* Elkins-Dell Mfg. Co., 2 U.C.C. REP. 1021 (E.D. Pa. 1965), *judgment vacated*, 253 F. Supp. 864 (E.D. Pa. 1966). Both of these cases involved proceedings in bankruptcy. In each case the referee held an accounts receivables lending arrangement unconscionable. On appeal the cases were received together. Both decisions were reversed and remanded for further consideration on the issue of unconscionability. The important point of the decisions is that unconscionability and § 2-302, in principle, if not in letter, were deemed relevant to a secured loan transaction. It was not the resort to the doctrine of unconscionability of itself which concerned the appellate court, but whether the requisites of that doctrine were met on the facts of each case — especially in view of the *commercial* nature of the arrangements involved.

[67] Some indication of the importance of the concept of unconscionability is reflected by the inclusion of a provision similar to § 2-302 in the proposed Uniform Consumer Credit Code § 5.106. *See* Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 446 (1967).

[68] Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1476-82 (1967).

[69] *See* Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 810 (1965).

[70] *See* § 2-313 Comment 3 (ARIZ. REV. STAT. ANN. § 44-2330 (1967)).

and samples in the express, rather than implied warranty section[71] is not only more logical, but also favors the consumer in that, as will be seen, it is in general more difficult to disclaim an express warranty than an implied warranty.

Section 2-314 promotes the establishment of an implied warranty of merchantability in several important respects. First, it eliminates the requirement of sale "by description" which existed under the Sales Act[72] and which led some courts to distinguish between the sale of a particular item, such as an automobile on display in a dealer's showroom, and the sale of the same item by description, such as "one blue Chevrolet," finding warranty responsibility only as to the latter.[73] In addition, section 2-314(2) attempts to provide some definition of a warranty of merchantability, including the requirement that goods be fit for the ordinary purposes for which they are used. Finally, and perhaps most important, Comment 6 to section 2-314 indicates that section 2-314(2) sets forth only the *minimum* content of such warranty, thereby acknowledging that the warranty of merchantability is an increasingly demanding warranty designed to vindicate the reasonable expectations of buyers as to the quality of goods purchased.

Since, as was indicated, warranty responsibility may be disclaimed, the warranty provisions are not the absolute limitation on freedom to contract that unconscionability is. However, it may be argued that the right to disclaim is qualified by statute and decision in such a way as to favor the consumer. Section 2-316(1) provides that where there are both words or conduct tending to create an express warranty and words or conduct tending to disclaim it, the warranty and not the disclaimer will prevail. This means that a seller may not by conduct or words represent that he is selling a General Electric window fan, then deliver some inferior Japanese model by inserting a clause in the contract which seeks to exclude "all warranties, expressed or implied."[74]

The parol evidence rule of section 2-202 operates to diminish this tendency of section 2-316(1) to favor consumers. Under that section, prior representations by the seller are not admissible to establish an express warranty where the contract between the parties will be contradicted by such admission. Thus, a consumer probably could not assert that the seller represented the article to be a General Electric fan if the contract stated "one Japanese fan". However, if the con-

[71] *Compare* UNIFORM SALES ACT § 16, *with* UNIFORM COMMERCIAL CODE § 2-313(1)(c).

[72] UNIFORM SALES ACT §§ 14, 15(2), 19-4(1).

[73] *See* Torpey v. Red Owl Stores, 228 F.2d 117 (8th Cir. 1955); Williams v. S. H. Kress & Co., 48 Wash. 2d 88, 291 P.2d 662 (1955); W. HAWKLAND, *supra* note 60, at 63.

[74] *See* C. BUNN, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE 93-98 (1964); W. HAWKLAND, *supra* note 60, at 73.

tract said only "one electric fan," the consumer seemingly would be free to argue that the seller represented to him that the fan was made by General Electric, since admission of the representations would not contradict the written contract. Moreover, it could probably be shown that the writing was not intended as a complete and final statement of the agreement.

Under section 2-316(2), the implied warranty of merchantability may be disclaimed, but the disclaimer must mention merchantability, and in the case of a writing, must be conspicuous. At a minimum the seller who seeks to disclaim such a warranty, in effect, is compelled to state in the contract that his goods may be unmerchantable. In addition it can be argued that to be effective against a consumer it must be shown that in the disclaimer "of all warranties express or implied, including the warranty of merchantability," it is made clear to the consumer that the seller is shifting to him the risk that the goods purchased are not fit for the ordinary purpose for which they are used.[75]

An unresolved problem with respect to disclaimers is whether they may in fact completely absolve a seller of responsibility for personal injuries resulting from breach of a disclaimed warranty. The language of section 2-316 would seem to support the seller. On the other hand, there appears to be a conflict between such an interpretation of disclaimers and the qualification on limiting remedies referred to above. If a limitation of consequential damages resulting from personal injury in the case of consumer goods is prima facie unconscionable, why is not a complete disclaimer of responsibility for such damages also unconscionable? In short, why should a seller be able to do under section 2-316 what he cannot do under section 2-719(3)? Hopefully, section 2-316 will be limited by an interpretation consistent with the qualification contained in section 2-719 (3).[76]

The parol evidence rule is no obstacle to creation of an implied warranty of merchantability, since it is the fact of a sale by a merchant, and nothing more, which is needed to support such a warranty. Whether the parol evidence rule will affect the creation of an implied warranty of fitness for a particular purpose under section 2-315 is an unresolved question. The absence of any reference to section 2-202 in section 2-315 or section 2-316(2) (in contrast to section 2-316(1)) seems to suggest that the parol evidence rule is not meant to affect section 2-315 warranties.

[75] The court in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed earlier, emphasized that warranty disclaimers, to be effective, must be brought home to the buyer. *See also* R. DUESENBERG & L. KING, *supra* note 62, at 7-38 to -43.

[76] *See* R. DUESENBERG & L. KING, *supra* note 62, at 7-44 to -48; Note, *Warranty Disclaimer and Limitation of Remedy for Breach of Warranty Under the Code*, 43 B.U.L. REV. 397 (1963).

Section 2-316(3) reflects the commercial orientation of the Code by allowing the disclaimer of all implied warranties by the use of such language as "as is." A possibility of avoiding the effect of that provision may lie in the language of that same subsection stating that disclaimer language should, in the common understanding of the buyer, call attention to the fact that warranties are being excluded. In short, if "as is" does not in the common understanding of consumers suggest that the risk of defects of quality, otherwise reasonably understood to be on the seller, are being shifted to the consumer, then the words "as is" should *not* have the effect of a disclaimer.[77]

Section 2-317(c) provides that implied warranties (other than the warranty of fitness for a particular purpose under section 2-315) are replaced by inconsistent express warranties. Consequently, an express warranty offering limited protection to the consumer, but dealing with the same subject as a warranty of merchantability, may replace the warranty of merchantability. The hope for the consumer here lies in convincing the court that the express warranty is not really inconsistent with the implied warranty of merchantability. Thus, it may be argued that an express warranty relating to replacement of defective parts is *not* inconsistent with an implied warranty of fitness for ordinary purpose — that all parts will not fail to work together in such a way as to result in personal injury to the user of the article.[78]

As to the final possible limitation on warranty protection, privity, the Code is essentially neutral. Under section 2-318, warranty protection is extended to the family, household servants, and guests in the home of the consumer. This may be considered an express, although limited, abrogation of the horizontal privity requirement. As to the need for privity between the seller and other injured parties not indicated in section 2-318, and between the consumer (and other injured parties) and sellers other than the immediate seller, the text of section 2-318 is silent. However, Comment 3 indicates that developing case law is to govern as to such questions of privity. Fortunately, the trend in most jurisdictions is to do away with privity as a requirement for relief.[79] Arizona courts apparently will join the trend.[80]

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[77] *See* note 75 *supra.*

[78] *See* Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1960); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[79] R. DUESENBERG & L. KING, *supra* note 62, at 7-72 to -86; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[80] *See, e.g.*, O. S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1967). This case apparently was decided on the basis of strict tort liability rather than warranty. The overlap between strict tort liability will continue to create conceptual difficulties for courts. *See* R. DUESENBERG & L. KING, *supra* note 62, at 7-73 to -91; Speidel, *supra* note 69. However, these legal concepts involve similar considerations and to do away with privity as to one and not the other will be difficult to justify.

B. *Non-Code Limitations on Freedom of Contract*

1. *Usury*

The most predominant limitation of freedom of contract to be found in legislation outside the Code is that relating to interest charges. Most jurisdictions,[81] including Arizona,[82] have enacted statutes which establish maximum interest rates which may be charged for legal indebtedness. These statutes generally prohibit receipt for forbearance in money of more than the statutory rate of interest. The penalty for charging excessive interest in Arizona is forfeiture of all interest.[83]

Usury laws, however, have not provided much in the way of protection to consumers; in fact the contrary was true for a time. An important effect of general usury statutes was to foreclose from the consumer lending market reputable dealers who were unable to make consumer loans within the interest limitations established by such statutes. The result was that consumer-borrowers were forced to deal with disreputable lenders, the so-called "loan-sharks," who were willing to make loans at usurious rates at the risk of civil and even criminal penalties.[84] As a result of this situation small loan acts[85] were passed which were primarily designed to permit licensed lenders to make small loans at interest rates exceeding those established by the general usury laws.[86]

In the domain of credit sales, as opposed to loans, usury laws have had even less effect. The *time-price* doctrine provides in essence that for every sale of goods there is a time price and a cash price, the difference between which is not to be treated as interest. As a result of the application of this doctrine, charges on credit sales have not been limited by the general usury statutes.[87] Thus, in the area of credit sales,

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[81] *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 15, 34 (1965).

[82] *Id.* at 15. The Arizona limit is eight percent per annum if agreed to in a writing signed by the debtor; otherwise it is six dollars per hundred for a year. The Arizona statute includes forbearance in goods. ARIZ. REV. STAT. ANN. § 44-1201, -1202 (1956).

[83] ARIZ. REV. STAT. ANN. § 44-1202 (1956). *See generally* Note, 2 ARIZ. L. REV. 275 (1960).

[84] B. CURRAN, *supra* note 81, at 16-44.

[85] ARIZ. REV. STAT. ANN. § 44-601 (1956).

[86] B. CURRAN, *supra* note 81, at 16-44. The small loan acts of every state except Arkansas are modeled after the Uniform Small Loan Act drafted by the Russell Sage Foundation. *Id.* at 16. Small loan acts were followed by the enactment of installment loan acts which went further to permit the making of consumer loans at rates in excess of the general usury rate. *See* ARIZ. REV. STAT. ANN. §§ 6-254, -255 (1956). The special purpose of the installment loan legislation was to permit commercial banks to enter the consumer lending field. Jordan & Warren, *supra* note 67, at 442.

[87] B. CURRAN, *supra* note 81, at 13, 14; Kripke, *Comments on Usury in Consumer Transactions* 76 BANK. L.J. 185, 191-92 (1959); Littlefield, *Parties and Transactions Covered by Consumer-Credit Legislation*, 8 B.C. IND. & COM. L. REV. 463 (1967); Note, *Limiting Consumer Credit Charges by Reinterpretation of General*

apart from special statute, the only limitation on financing charges has been the competition among credit-vendors.[88] Many jurisdictions have promulgated retail installment legislation which imposes limits on finance charges.[89] For example, Arizona has a motor vehicle installment sales act[90] which prohibits finance charges exceeding eight dollars per hundred per annum on new motor vehicles, or twelve dollars per hundred per annum on used motor vehicles.[91] However, such statutes are of limited impact, first, because of their limited coverage in terms of subject matter and scope, and second, because dealers frequently do not charge the maximum permitted by the statutes. Moreover, in cases of credit sales, dealers intent on "gouging" consumers often can do so by merely raising the cash price to be charged for the goods.[92]

Perhaps most important, the pre-occupation with usury, as in the case of pre-occupation with disclosure related to finance charges, has had the effect of minimizing the attention to important abuses which accompany or are made possible by readily available consumer credit.[93] It is true that the small loan acts incorporated some needed reforms in credit practices, not the least of which was subjecting lenders to licensing and supervision by the state, and that retail installment acts typically have included protective provisions such as required disclosure of important information. However, the reforms accompanying such legislation, particularly in Arizona, have been inadequate.

These considerations suggest that while interest charges are a legitimate subject of legislative concern, this concern should not be at the expense of correcting other equally important abuses. It further suggests that full-scale attacks on the time-price doctrine, such as have met with success in at least two jurisdictions,[94] are of limited utility. To subject

Usury Laws and by Separate Regulations, 55 NW. U.L. REV. 303 (1960); *see* Carolina Indus. Bank v. Merriman, 260 N. Car. 335, 132 S.E.2d 692 (1963) (recent statement of the doctrine).

[88] There is reputable authority for the position that in the area of sales, as opposed to loans, competition is the only regulator of rates necessary. Boyd & Claycamp, *Industrial Self-Regulation and the Public Interest*, 64 MICH. L. REV. 1239 (1966).

[89] B. CURRAN, *supra* note 81, at 100-08; Britton & Ulrich, *The Illinois Retail Installment Sales Act — Historical Background and Comparative Legislation*, 53 NW. U.L. REV. 137, 140-48 (1958); Hogan, *A Survey of State Retail Instalment Sales Legislation*, 44 CORNELL L.Q. 38 (1958).

[90] ARIZ. REV. STAT. ANN. §§ 44-281 to -295 (1967).

[91] ARIZ. REV. STAT. ANN. §§ 44-281(12), -291 (1967).

[92] Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 762 (1967).

[93] Jordan & Warren, *supra* note 67, at 447-49.

[94] In *Sloan v. Sears, Roebuck & Co.*, 228 Ark. 464, 308 S.W.2d 802 (1957), the Arkansas court stated that the distinctions between credit sales as such and cash sales had disappeared. Two recent cases, *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963) and *Elder v. Doerr*, 175 Neb. 483, 122 N.W.2d 528 (1963) suggest that Nebraska also has abandoned any distinction between installment sales and installment loans. *See generally*, B. CURRAN, *supra* note 81, 84-90. Such attacks derive initially from a substance versus form distinction, *i.e.*, that what is in substance a loan will not be treated as a sale for purposes of applying the time-

credit-sellers to the general usury statutes might have the unfortunate consequence of creating a situation in the credit sales market not unlike that which existed in the loan market — reputable dealers foreclosed from the market and replaced by disreputable dealers who are willing to make credit sales at usurious charges at the risk of civil or criminal penalties. At the least, the effect of a successful attack on the time-price doctrine could well be a general depressing of available credit.[95]

Of course, attorneys representing consumers should investigate the charges imposed for credit as one of the few sources of relief to their clients under existing law. Such investigations should include two special kinds of charges which may accompany a credit sale. Frequently, especially in the automobile sales field, dealers and finance companies do business on the basis of "dealer participation" arrangements under which dealers receive a "cut" of the finance charges after assignment of the consumer paper.[96] Such arrangements probably do not warrant the criticism to which they have been subjected, but they do have the effect of increasing the finance charges imposed on the consumer.[97] A few states attempt to regulate dealer participation directly; in other states, such as Arizona, the limitation is an indirect one which results from the limitation on the maximum charge on the sale to the consumer.[98] Of course, where sales are not subject to statutory rate limits and the time-price doctrine operates, there is no maximum finance charge imposed by law. In the automobile sales field dealers also often act as agents in selling insurance to consumers and are paid a commission for doing so.[99] There is evidence of abuse in this practice in the form of excessive charges for insurance.[100] It might be noted that the very existence of such agency relationships, although not expressly prohibited,[101] may nonetheless provide an aggrieved consumer with bargaining power against a creditor

price doctrine. *Id.* *See also* Note, *Limiting Consumer Credit Charges by Reinterpretation of General Usury Laws and by Separate Regulation*, 55 Nw. U.L. Rev. 303 (1960). Since the Arizona Supreme Court has stated that substance not form will determine the existence of usury, Britz v. Kinsvater, 87 Ariz. 385, 351 P.2d 986 (1960), an attack on the time-price doctrine in Arizona might be effective.

[95] Warren, *Regulation of Finance Charges in Retail Installment Sales*, 68 Yale L.J. 839, 867 (1959).

[96] *Id.* at 857-58.

[97] *Id.* at 859.

[98] *Id.* at 860-61.

[99] *See* Mors, *Consumer Installment Credit Insurance*, Ins. L.J. 299, 318 (1956); Note, *Consumer Credit Insurance*, 55 Nw. U.L. Rev. 355 (1960).

[100] Charges for insurance may be passed on to the buyer so long as they do not exceed rates filed with, or approved by, the insurance commissioner. When properly made, such charges are not included in the credit charges, but are added to the unpaid principal balance on the basis of which the credit charge is computed. Ariz. Rev. Stat. Ann. § 44-288 (1967) and Ariz. Rev. Stat. Ann. § 20-1601 (Supp. 1967).

[101] *See* Mors, *supra* note 99; Warren, *supra* note 95, at 858-59.

who does not wish to test the legality of an insurance participation arrangement.

On the other hand, legislators should attempt to impose only reasonable finance charge limitations and to impose these on *all* consumer transactions, loan or sale,[102] at the same time being concerned with revising the entire legislative scheme in such a way as to eliminate abuses which thus far have not been attended to. For example, although both the Arizona Small Loan Act and the Motor Vehicle Time Sales Disclosure Act regulate, to some extent, the taking of security by the creditor, neither prohibits the taking of liens on real estate in connection with the transactions covered.[103] Nor does either statute prohibit wage assignments as security. There is serious debate on the question of wage assignments as security; the more important proposed legislation would eliminate such security presumably on the ground that it encourages unwise use of credit and has contributed to the alarming increase in the number of personal bankruptcies.[104] Finally, the Arizona Motor Vehicle Time Sales Disclosure Act (but not the Small Loan Act) does prohibit contract clauses immunizing the seller against any claims or defenses which the buyer may have against the seller under the contract.[105] However, this prohibition has no effect on clauses which protect third-party assignees of the contract. Arizona's special statute on the effect of assignments would presumably operate, however, as was discussed earlier, to render such "waiver of defenses" clauses unenforceable.[106] As was noted, more recent legislation has denied effect to such clauses and gone so far as to prohibit the use of negotiable instruments in consumer transactions.[107]

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[102] See Jordan and Warren, *supra* note 67, at 450-52. The arguments for having only high interest limits are forcefully stated in Johnson, *Effect of Personal Loan Rate Reduction on the Consumer*, 17 PERS. FIN. L.Q. REP. 46 (1962). An argument that rates, not limits, should be imposed is contained in McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. IND. & COMM. L. REV. 387 (1967).

[103] The proposed Uniform Consumer Credit Code § 2.406 permits a seller to contract for a security interest in real property in connection with a consumer-credit transaction only if the sale of goods or services involves maintenance, repair or improvement of the buyer's property and only if the debt amount is $1,500 or more. In regulated small loan transactions (those of $2,500 or less as defined in § 3.402), the lender is forbidden to contract for a security interest in real property. UNIFORM CONSUMER CREDIT CODE § 3.411. (Working Draft No. 6, 1967). Security interests taken in violation of these provisions are void.

[104] UNIFORM CONSUMER CREDIT CODE § 2.409 absolutely prohibits a seller from taking an assignment of earnings of the debtor as security for payment of a debt arising out of a consumer-credit sale. As to loans, the UNIFORM CONSUMER CREDIT CODE § 3.106 restricts any assignment to that part of a debtor's earnings which exceeds $100 in a calendar week. *See* Jordan and Warren, *supra* note 67, at 448; Helstad, *Consumer-Credit Legislation: Limitations on Contractual Terms*, 8 B.C. IND. & COMM. L. REV. 519, 524-26 (1967).

[105] ARIZ. REV. STAT. ANN. § 44-290 B (1967).

[106] ARIZ. REV. STAT. ANN. § 44-144 (1967). *See also* text at notes 50-53, *supra*.

[107] *See* text at note 54, *supra*.

IV. Performance and Remedies on Default

It will be convenient at this point to combine the discussion of the UCC and special legislation.

The rights and obligations of consumers relating to performance quite naturally are affected by the content of the contract which, in large part, is determined by conduct permissible at the pre-contracting stage and the terms which are legitimately included in the contract. As far as performance itself goes, the obligations of good faith and commercial reasonableness are preeminent. Thus, both seller or lender and consumer are required to act honestly and reasonably with respect to performance of their contractual obligations, and presumably with regard to any rights derived from the contract. The precise meaning this has in the consumer context is an open question.[108] Perhaps where all else fails, an attack based on general lack of good faith by a seller or lender would provide a source of relief.

Substantively, on the seller's side, satisfaction of warranty obligations is of prime importance. As was noted, the law is making increasing demands on sellers by the expansion of warranty protection. To this extent existing law favors buyers generally and consumers in particular. Unfortunately, assuring satisfactory performance of warranty obligations is no easy task. As to consumers generally, there often is little that may be done, short of suing for damages or rescission, to force sellers to meet their contractual obligations. Thus, there have been increasing complaints from Arizona consumers that they cannot obtain repair or replacement of defective automobiles and home appliances. Manufacturers either will not supply parts or refuse to pay for work performed by franchised dealers. Disputes over the interpretation of warranties, which frequently can be resolved only by legal action, often arise between buyers and manufacturers.[109]

The Code is of little or no help in this respect. Advising consumers to reject defective goods is often impractical for at least two reasons. First, the Code limits the buyer's right to reject by permitting the seller to cure any defect.[110] A right to cure, while justifiable in the

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[108] It has been suggested that "a new business ethic" based on unconscionability, good faith and commercial reasonableness may develop under the Code. King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 St. Louis U.L.J. 15 (1966).

[109] Senator Hayden, D.-Ariz. has introduced legislation bearing on this problem. *See* Tucson Daily Citizen, Dec. 7, 1967, at 40, col. 1, and at 43, col. 1.

[110] Uniform Commercial Code § 2-508 (Ariz. Rev. Stat. Ann. § 44-2356 (1967)) introduces a novel concept into sales law. Where goods have been rejected for non-conformity, § 2-508 permits the seller to make a new and conforming tender until the time for performance has passed. According to § 2-508, Comment 1, the right to cure applies even where the seller has taken back the goods and refunded the purchase price. See R. Duesenberg & L. King, Sales and Bulk Transfers under the UCC § 14.02(1) (1966); Peters, *Remedies for Breach of*

commercial context as an effort to increase the finality of sales, often may work hardships on consumers who operate at a disadvantage to begin with.[111] Secondly, defects are frequently not apparent at the time of delivery and it is not until a consumer has attempted to use the goods that the defect is discovered. In such a case the goods are deemed to have been accepted and the right of rejection, with or without cure, is no longer available.[112] The consumer's only remedy in such a case, apart from suit for breach of warranty, is to rescind, or in the Code's terminology, revoke his acceptance.[113] Unfortunately, once a buyer has accepted goods he may not revoke his acceptance (rescind) except as to defects which substantially impair the value of the goods.[114]

On the other hand, the Code eliminates the election of remedies problem which existed under section 69 of the Uniform Sales Act. A buyer who *is* entitled to revoke his acceptance may return the goods, recover his price and still sue for any damages resulting from the seller's breach.[115] Moreover, if the buyer cannot revoke his acceptance or reject, he may sue for damages for finally accepted goods, including damages based on the commonly understood measure of damages for breach of warranty.[116] The obvious difficulty which remains is that court action, and especially a suit for damages outside the area of claims for personal injury, is seldom practical for the consumer.

This state of affairs with respect to warranty obligations has prompted Senators Carl Hayden of Arizona and Warren Magnuson of Washington to propose federal legislation designed to help consumers enforce manufacturer's warranties on automobiles and home appliances. The proposed legislation would provide for the establishment of warranty standards by the Secretary of Commerce, prohibit manufacturers from contracting away warranty responsibility, and give consumers access to arbitration on interpretation of warranties. Arbitration decisions would then be enforceable in federal courts at little or no cost to consumers. The legislation would also establish franchise standards

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Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two, 73 YALE L.J. 199, 206 (1963).

[111] *See, e.g.*, Wilson v. Scampoli, 228 A.2d 848 (D.C. Ct. App. 1967) (involving the attempted return of a color television set which did not operate properly).

[112] *See* UNIFORM COMMERCIAL CODE §§ 2-606, -607(2) (ARIZ. REV. STAT. ANN. §§ 44-2369, -2370 B (1967)).

[113] UNIFORM COMMERCIAL CODE § 2-608 (ARIZ. REV. STAT. ANN. § 44-2371 (1967)).

[114] UNIFORM COMMERCIAL CODE § 2-608(1) (ARIZ. REV. STAT. ANN. § 44-2371 A (1967)).

[115] *Contrast* UNIFORM COMMERCIAL CODE §§ 2-607(2), -608(3) and -608, Comment 1 (ARIZ. REV. STAT. ANN. §§ 44-2370 B, -2371 C and -2371 (1967)), *with* UNIFORM SALES ACT § 69 as interpreted in *Authorized Supply Co. v. Swift*, 271 F.2d 242 (9th Cir. 1959).

[116] UNIFORM COMMERCIAL CODE § 2-714 (ARIZ. REV. STAT. ANN. § 44-2393 (1967)).

and set procedures for reimbursement of dealers for warranty repairs or replacements.[117]

The situation of the low-income consumer is particularly critical. Such consumers are inclined to react impulsively to unsatisfactory or even fraudulent performance by sellers. Thus, they will often consider a bad bargain as being at an end without taking appropriate steps to preserve whatever rights they may have under existing law. The result is default on the consumer's part, a waiver of whatever rights he may have had, and a general worsening of the plight engendered by the originally bad bargain. It is no secret that disreputable sellers rely on the fact that such consumers will not pursue the proper course of action when confronted with a breach by the seller.[118] Attorneys must do their utmost to see that low-income consumers, especially, are apprised of their rights and obligations. Legislators should give special consideration to the problem of such persons when devising legislation directed at giving relief to aggrieved consumers. One problem deserving close attention is the practice of so-called *sewer-service* by whch defaulting consumers are never actually served, thus increasing the already disproportionate number of default judgments entered against low-income consumers.[119]

On the seller's side, the Code makes a couple of changes in existing law which may be of significance to consumers. Under section 2-706, the seller's right to resell goods where a buyer has refused to accept them is liberalized. The seller's lien is abolished and the only prerequisite to resale by the seller is a breach by the buyer.[120] Moreover, on resale the seller need not account to the buyer for any profit made on resale — the seller sells goods as his own.[121] If the buyer has made a cash down-payment, his right to recover the down-payment is unaffected by the fact that the seller has resold the goods at a profit. The seller may retain twenty percent of the value of the total performance or $500 whichever is less.[122] If the seller can show he was damaged by the buyer's breach, the buyer's right to restitution is further diminished by the amount of such damages.[123]

The Motor Vehicle Time Sales Disclosure Act makes one change

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[117] S. 2727, 2728, 90th Cong., 1st Sess. (1967).

[118] *See* Note, *Installment Sales: Plight of the Low-Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1, 4 (1966).

[119] *Id.* at 9-12.

[120] *See* UNIFORM COMMERCIAL CODE § 2-706, Comment 1 (ARIZ. REV. STAT. ANN. § 44-2385 (1967)).

[121] UNIFORM COMMERCIAL CODE § 2-706(6), and Comment 11 (ARIZ. REV. STAT. ANN. § 44-2385 F (1967)).

[122] UNIFORM COMMERCIAL CODE § 2-718(2) (ARIZ. REV. STAT. ANN. § 44-2397 B (1967)).

[123] UNIFORM COMMERCIAL CODE § 2-718(3) (ARIZ. REV. STAT. ANN. § 44-2397 C (1967)).

in the remedies provisions of the Code which is worth noting. Under that statute a buyer is entitled to receive a completed copy of the sales contract and, until he does, he may rescind it.[124] This right to rescind would appear to exist apart from any claim of defect or substantiality of defect which is necessary under the Code. However, the Time Sales Disclosure Act is unclear as to whether a buyer may recover all or any part of his down-payment in this situation. Consequently, it would seem that the Code's rule of restitution discussed above would be operable.[125] Thus, although the Motor Vehicle Time Sales Disclosure Act sets forth a right to rescind, the Code determines the consequences of such a rescission and the seller is entitled to retain twenty percent of the total value of performance or $500, whichever is less, in addition to his actual damages.

The proposed Uniform Consumer Credit Code and some more recent state statutes introduce an interesting remedy for buyers who are "taken in" by high-pressure door-to-door salesmen. Under these statutes, the buyer is given a "cooling-off period," a period of time varying from a number of days to the date of the actual receipt of the goods, to reconsider his purchase, outside the influence of the salesman, and cancel the contract.[126]

Where, as is often the case, there is a secured obligation involved in the form of a secured loan or a conditional sale, Article 9 governs. It is worth noting at the outset that section 9-203(1), the statute of frauds provision of Article 9, provides that a security interest is *not* enforceable against anyone *including the debtor* unless the debtor has signed a security agreement containing a description of the collateral. This provision could prove to be a stumbling block to the secured party who has been overly-concerned with satisfying the filing requirements of Article 9 in an effort to assure satisfactory priority as against other creditors.

Assuming the existence of an enforceable security interest, the creditor has a variety of available remedies under Part 5 of Article 9 in case of default by the consumer. Probably the most significant is that of repossession. Section 9-503 permits the creditor to include a clause in the agreement which requires the debtor to make the collateral available at a place convenient to both parties. No notice of intention to repossess is required and the possibility of the secured party's using notice to cut off the debtor's right to redeem the collateral

[124] ARIZ. REV. STAT. ANN. § 44-286 B (1967).

[125] Recall that as discussed earlier, the Code governs except as it is displaced by special legislation. See note 11, *supra*.

[126] UNIFORM CONSUMER CREDIT CODE §§ 2.501 to .505; Ill. Laws, 75th Gen. Ass. (1967), S.B. 25, § 2B, approved July 26, 1967; MASS. GEN. LAWS ch. 255 D, § 14 (1966); MICH. STAT. ANN. § 19.417 (202(c)) (Supp. 1967). *See* Note, *New Consumer Credit Reforms in Illinois*, 16 DE PAUL L. REV. 194, 197-202 (1967).

which existed under Uniform Conditional Sales Act section 17 has been eliminated. The only expressed limitation on repossession is that it not involve a breach of the peace. Since consumer goods frequently are not resalable at any meaningful price, secured parties often rely on the threat of repossession to force consumer-debtors to pay.[127] Unfortunately, there is nothing in either the Code or existing special legislation which directly prohibits such conduct by secured parties. Perhaps the obligation of good faith could be invoked as a limitation. In fact, the obligation of good faith arguably should attend the exercise of any and all remedies available to the secured party.

Except as to consumer goods for which the debtor has paid sixty per cent of the cash price,[128] the secured party may propose to retain the goods in satisfaction of the debt by notifying the debtor in writing of his intention to do so.[129] If the debtor does not object within thirty days, the seller may retain the goods. However, such retention is in complete satisfaction of the debt.

When the creditor must dispose of the collateral, or chooses to do so, the Code is quite liberal in the restrictions it places on him. In general the secured party is required only to exercise good faith and act in a commercially reasonable manner in disposing of the collateral.[130] Thus, a recent Arizona case[131] holding that the secured party must obtain at least fair market value on resale is overruled, unless "commercially reasonable manner" is interpreted to mean realization of fair market value. The Code, however, seems to be quite explicit in directing that fair market value is only one factor to be considered in determining that the secured party acted in a commercially reasonable

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[127] Note, *Installment Sales: Plight of the Low-Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1, 9 (1966).

[128] UNIFORM COMMERCIAL CODE § 9-505(1) (ARIZ. REV. STAT. ANN. § 44-3151 A (1967)) provides that in such a case the secured party *must* dispose of the collateral under § 9-504 (ARIZ. REV. STAT. ANN. § 44-3150 (1967)) and if he fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under § 9-507(1) (ARIZ. REV. STAT. ANN. § 44-3153 A (1967)) dealing with secured parties' liability. It probably should be noted that the debtor may waive this protection by a signed statement *subsequent to default.*

[129] UNIFORM COMMERCIAL CODE § 9-505(2) (ARIZ. REV. STAT. ANN. § 44-3151 B (1967)).

[130] UNIFORM COMMERCIAL CODE §§ 9-504, -507(2) (ARIZ. REV. STAT. ANN. §§ 44-3150, -3153 B (1967)) "Commercially reasonable" is an important concept which is left essentially undefined by the Code. Section 9-507(2) does indicate that dispositions approved in a judicial proceeding or by a bona fide creditors committee "shall be deemed to be 'commercially reasonable'." That section also provides that a sale in any recognized market, or at a price quoted in such a market, or in conformity with reasonable commercial practices among dealers in the type of property sold is a sale in a commercially reasonable manner. However, the important element of "recognized market" is also left undefined. *See* Alliance Discount Corp. v. Shaw, 195 Pa. Super. 601, 171 A.2d 548 (1961) ("red book" quotations for used cars do not constitute a "recognized market"); Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 218-20 (1962).

[131] Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964).

manner.[132] Contrary to prior law, the secured party may resell privately and avoid the losses sometimes occasioned by forced public sale.[133]

Notice of the time and place of a public resale must be sent to the debtor; in the case of a private resale, only notice of the time after which resale is to be made need be sent.[134] Subject to the general limitations of good faith and commercial reasonableness, and the specific requirement of section 9-505(1),[135] there is no set period within which the seller must dispose of the collateral. In contrast, the Uniform Conditional Sales Act insisted on a public sale, contained elaborate provisions for notice and required that the resale be made within thirty days of repossession.[136]

Under section 9-504(2) the secured party has a right to a deficiency judgment unaffected by any question of election of remedies. There was some doubt under prior law whether the seller could repossess, resell and still sue for a deficiency. There is currently a heated debate concerning the wisdom of the provision in the proposed Uniform Consumer Credit Code which would require the secured party to elect between repossession and suit on the personal obligation where the original debt was $1,000 or less.[137] The argument against such a provision seems to be that it in effect permits buyers to rent or borrow consumer goods rather than buy them.[138] Election may nevertheless be appropriate in the consumer context.

A change from prior law which may indirectly aid the consumer in the case of resale is contained in section 9-504(4), under which the purchaser of goods at resale is assured of good title even when the resale fails to conform to the requirements of Article 9. This means that the debtor's remedy in case of an improperly conducted resale is

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[132] *See* UNIFORM COMMERCIAL CODE § 9-507(2) (ARIZ. REV. STAT. ANN. § 44-3153 B (1967)); Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196 (Ky. 1964); Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 218 (1962).

[133] UNIFORM COMMERCIAL CODE § 9-504(3) (ARIZ. REV. STAT. ANN. § 44-3150 C (1967)). *See* Hogan, *supra* note 132, at 218, 221.

In this connection it should be noted that a secured party may purchase at any public sale but may purchase at a private sale only if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations. Uniform Commercial Code § 9-504(3) (ARIZ. REV. STAT. ANN. § 44-3150 C (1967)). See the discussion of the concept of "a recognized market" in note 130.

[134] UNIFORM COMMERCIAL CODE § 9-504(3) (ARIZ. REV. STAT. ANN. § 44-3150 C (1967)). Even this limited notice is unnecessary if the "collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market. . . ." See the discussion of the concept of "recognized market" in note 130 *supra*.

[135] *See* note 128, *supra*.

[136] UNIFORM CONDITIONAL SALES ACT § 19.

[137] UNIFORM CONSUMER CREDIT CODE § 5.103.

[138] Felsenfeld, *Some Ruminations About Remedies in Consumer Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 556-62 (1967).

against the secured party, not the purchaser. But it also means that more buyers will be interested in purchasing at resales since they need not worry about the quality of title they will obtain. The result should be more bidders and higher prices at resale.[139]

Attachment and garnishment, two related remedies which are not expressly provided for in the Code are of special importance in the consumer context. Attachment is rigorously controlled by statute and must be accompanied by affidavit and bond.[140] Since the exemptions are quite liberal,[141] attachment does not seem to be a serious problem for the consumer.[142] Moreover, the danger of wrongful attachment is a strong deterrent to its reckless use.[143]

Garnishment, on the other hand, is a serious problem for the consumer. Like wage assignments, garnishment affects what is the most important asset of the debtor, his wages and livelihood.[144] Some states, including Arizona, allow garnishment prior to judgment, on the basis of sworn affidavits, but most permit garnishment only after judgment.[145] By Arizona statute, fifty percent of the earnings for services rendered at any time within thirty days preceding service of the writ are exempted from garnishment, if such earnings are necessary to the support of the debtor's family.[146] The federal Consumer Credit Protection Act will limit garnishment to ten percent of the excess over thirty dollars per week or its equivalent.[147] However, as with repossession, the threat of garnishment is frequently as effective as actual garnishment. This is true in large part because of the problem of "garnishment firing" — the discharge of employees whose wages are garnished merely because the employer does not wish to satisfy the obligations of a garnishment de-

[139] There is a similar provision in Article 2 dealing with sales. *See* UNIFORM COMMERCIAL CODE § 2-706(5) (ARIZ. REV. STAT. ANN. § 44-2385 E (1967)).

[140] ARIZ. REV. STAT. ANN. §§ 12-1521, -1522, -1524 (1956).

[141] *See* ARIZ. REV. STAT. ANN. §§ 33-101 (1956).

[142] Note, *Installment Sales: Plight of the Low-Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1, 14 (1966).

[143] U.S. Fidelity & Guar. Co. v. Davis, 3 Ariz. App. 259, 413 P.2d 590 (1966).

[144] "Wage garnishment has been, without question, the creditor remedy most devasting to the debtor, because the wage-earning consumer is completely dependent on his job to provide for the welfare of himself and his family." Jordan and Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 458 (1967)). Evidence indicates that personal bankruptcies are more frequent where garnishment laws are liberal toward the creditor. Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1236 (1965). Note, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759.

[145] *See* Felsenfeld, *supra* note 138, at 564. *See also* UNIFORM CONSUMER CREDIT CODE § 5.104.

[146] *See* ARIZ. REV. STAT. ANN. §§ 12-1593, 33-1126 (1956).

[147] S. 5, 90th Cong., 2d Sess. § 202(a) (Comm. Print 1968). Federal garnishment regulation undoubtedly will be met with constitutional objections. However, both the garnishment limitations and the garnishment-firing prohibition to be discussed probably may be sustained on the basis of Congress' power to legislate to the end of economic stability on which the regulation purports to rest, S. 5, 90th Cong. 2d Sess. § 2 (Comm. Print 1968), or the commerce power.

fendant.[148] It would help if there were some way by which employers did not have to become direct parties to the garnishment.[149] In any case, the provision in the Arizona statute that employers may suffer severe consequences for failure to satisfy the obligations of a garnishment-defendant should be modified.[150] At least one jurisdiction has sought to prohibit garnishment firing by statute.[151] The federal Consumer Credit Protection Act will proscribe the discharge of an employee because his wages have been garnished once.[152] However, such prohibitions will inevitably involve problems of proof as to whether the firing was precipated by the garnishment.[153] Perhaps complete prohibition of garnishment as a remedy for consumer debts might be advisable, especially since what little evidence there is indicates that garnishments do more harm than good.[154]

The secured obligor also has certain rights on default which should be kept in mind. Under section 9-506 the debtor may redeem the repossessed goods at any time prior to disposition under section 9-504 or until retention under section 9-505(2) has become final. This time limit could give the debtor greater redemption rights than he had under the Uniform Conditional Sales Act which required that the right of redemption be exercised within ten days.[155] Of course, if the collateral is disposed of within less than ten days the debtor's right of redemption is correspondingly diminished. To redeem, the debtor must tender payment of the debt due and also any expenses incurred by the secured party in connection with the default.[156] Moreover, according to the Comment to section 9-506, in the case of an acceleration clause the debtor must tender the entire balance of the debt. Under the Uniform Conditional Sales Act it could be argued that a buyer in default could reinstate the contract by paying the amount of past defaults, even if an acceleration clause were involved.[157]

The use of acceleration clauses in consumer contracts is a matter of serious concern. The Code does not suggest any limitations on their

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[148] Jordan & Warren, *supra* note 144, at 458; 2 COLUM. J.L. & SOC. PROB. 1, 14 (1966).

[149] Perhaps some centrally administered garnishment agency could be devised which would relieve the employer of the burdens of garnishment.

[150] ARIZ. REV. STAT. ANN. § 12-1583 (1956) rather incredibly provides that if a garnishee fails to answer within the time specified in the writ, the court may, after judgment has been rendered against the defendant, render judgment by default against the garnishee for the full amount of the judgment against the defendant.

[151] *See* N.Y. SESS. L. ch. 613, § 5252 (McKinney 1962).

[152] S. 5, 90th Cong., 2d Sess. § 203(a) (Comm. Print 1968).

[153] *See* Felsenfeld, *supra* note 138 at 565.

[154] *Id.* at 563.

[155] UNIFORM CONDITIONAL SALES ACT § 18.

[156] UNIFORM COMMERCIAL CODE § 9-506 (ARIZ. REV. STAT. ANN. § 44-3152 (1967)).

[157] Street v. Commercial Credit Co., 35 Ariz. 479, 281 P. 46 (1929); *See* Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1471 (1967).

use and expressly permits clauses providing for acceleration *prior to* default, subject only to the exercise of good faith.[158] Neither the Motor Vehicle Time Sales Disclosure Act nor the Arizona Small Loan Act regulate the use of acceleration clauses. It has been suggested that appropriate protective legislation would limit acceleration to use *after* default.[159]

Under section 9-505, the debtor who has paid sixty per cent of the cash price of consumer goods has a right to have the goods disposed of within ninety days after repossession; as to other consumer goods the debtor may force the seller to resell by objecting in writing within thirty days after recipt of the seller's notice of intention to retain. Section 9-504(2) gives the debtor a right to any surplus resulting from resale. If the secured party fails within ninety days after repossession to dispose of consumer goods for which the debtor has paid sixty per cent of the cost price, the debtor may recover either in conversion or under section 9-507(1) dealing with a secured party's liability generally for non-compliance with Article 9.

Section 9-507(1) is intended to help the debtor insure that the secured party will proceed according to the requirements of Article 9. If the debtor discovers the seller is violating any provision of Part 5 of Article 9, the debtor may seek an order restraining such violation. If he discovers a violation has already occurred, he may recover for *any* loss caused by the seller's failure to comply with Part 5. If the collateral is consumer goods, the debtor is assured of a minimum recovery of an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time-price differential plus ten per cent of the cash price. A question left unresolved by the Code is the effect of an improper disposition on the secured party's right to a deficiency judgment. The prevailing view under the Uniform Conditional Sales Act was that a seller who failed to conduct a resale in the proper manner would lose his claim for a deficiency.[160] There is recent evidence that the result will be the same under the Code.[161]

Finally, two sources of relief to consumers not dealt with in the Code should be mentioned. The first is Chapter XIII of the federal bankruptcy act providing for the establishment of a wage earner plan by which the bankruptcy court assumes control of a wage earner's prop-

[158] *See* UNIFORM COMMERCIAL CODE § 1-208 and Comment (ARIZ. REV. STAT. ANN. § 44-2215 (1967)). It also should be noted that under this section the debtor is given the burden of proving lack of good faith.

[159] Helstad, *supra* note 104, at 528.

[160] *See* G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4 (1965).

[161] *See* Norton v. National Bank of Pine Bluff, 240 Ark. 143, 398 S.W. 2d 538 (1966), in which it was held that an improper disposition creates a presumption that the collateral was worth as much as the debt and shifts the burden of proving otherwise to the secured party.

erty and wages, as they accrue, for the purpose of paying creditors according to a plan approved by the creditors and administered by a trustee in bankruptcy. Any person whose primary source of income is in the form of wages or salary may request such a plan by asserting he is insolvent or unable to pay his debts. The second is resort to consumer credit counselling agencies. The creation of such agencies is a relatively recent development based on the recognition that what consumers, especially low-income consumers, often need most, is advice on how to use credit wisely. Attorneys should not hesitate to suggest that consumers seek the assistance of such agencies. Any legislative revision should expressly provide for the creation of such agencies.[162]

V. CONCLUSION

This then is the present state of the law affecting consumers in Arizona. It should be sufficient comment on the adequacy of existing laws to conclude that the Uniform Commercial Code, a statute drafted with the commercial context in mind, by default rather than design, in substantial part regulates consumer transactions. What is needed is a complete revision of the existing legislation so as to take account of the many problems confronting the consumer today. More effective regulation of the pre-contractual phase is necessary. Perhaps provision for private remedies against consumer frauds, now subject to public attack, would be wise. Attention must also be given to the question of freedom of contract. It should be obvious that freedom of contract must be limited in the consumer context; in particular, clauses providing for cross-collateral arrangements, wage assignments, the taking of liens on real estate as security, and acceleration before default should be prohibited. Any such legislation should adopt the principle of unconscionability as a general limitation on freedom of contract. Finally, reform in the area of remedies is called for. Repossession *and* deficiency judgments arguably are inappropriate in the consumer context. Special attention must be given to the propriety of garnishment, at least as presently constituted.

Federal legislation offering increased protection to the consumer is imminent and will likely improve the situation. However, as with other federal legislation, it will not necessarily be adequate to resolve problems which are in important respects of a peculiarly local nature. Yet the passage of federal legislation may well limit the power of local

[162] The proposed Uniform Consumer Credit Code §§ 7-101-113 specifically provides for the establishment of non-profit consumer credit counseling agencies. See Dunham, *Second Draft of Proposed Uniform Consumer Credit Code Now Being Considered*, 21 PERS. FIN. L.Q. REP. 75, 77 (1967).

authorities to deal with these matters.[163] The proposed Uniform Consumer Credit Code is not without its problems, but merits close examination as an example of the type of comprehensive statute which is needed. It is hoped that the foregoing examination of existing law has suggested the degree of reform needed. Hopefully it has also provided some clues to the sources of relief presently available to consumers.

[163] The federal legislation will preempt state regulation of finance charges to the extent that the state regulation is not "substantially similar" to the federal provision dealing with the same subject. S. 5, 90th Cong., 2d Sess. § 6(a), (b) (Comm. Print 1968). The federal legislation also will preempt state garnishment regulation except to the extent that the state regulation is more demanding. S. 5, 90th Cong., 2d Sess. § 204(1), (2) (Comm. Print 1968). *See generally* Buerger, *The Uniform Law Commissioners' Consumer Credit Project*, 19 PERS. FIN. L.Q. REP. 46 (1965).