Michigan Law Review

Volume 65 | Issue 7

1967

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PROTECTION OF THE INSTALLMENT BUYER OF GOODS UNDER THE UNIFORM COMMERCIAL CODE

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BUYING on the installment plan has become a way of life for many in the United States.[1] The post-World War II years have seen installment credit expanded for the purchase of all kinds of consumer durable goods, from television sets to cars and motor boats, as well as for purchase by credit card and revolving charge account of non-durable goods and services—once the exclusive domain of cash and single-payment credit transactions.

An installment sales transaction has several characteristics that draw special attention to it. Usually, but not invariably, the buyer intends to use the goods for personal or household purposes, and thus falls within that group of persons somewhat crassly called "consumers." Now there is nothing in that term which necessarily separates one man from another, for all of us, regardless of occupation, are consumers of the goods and services supplied by others. In any given transaction, however, one party may be the consumer and the other the supplier. In a sale of goods transaction, it is typically the merchant on one side and the consumer on the other. We will have to push the point beyond this to make sense. The typical consumer that we have in mind is one who in the transaction lacks knowledge and skill and must depend upon the other party to supply these

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1. The growth of the use of installment credit by consumers is dramatically illustrated by the following figures taken from the January 1967 FED. RESERVE BULL. 132. Figures are shown in billions of dollars of outstanding consumer credit, not including real estate mortgage loans.

Year	Total	Installment	Noninstallment
1939	7.222	4.503	2.719
1941	9.172	6.085	3.087
1945	5.665	2.462	3.203
1960	56.028	42.832	13.196
1961	57.678	43.527	14.151
1962	63.164	48.034	15.130
1963	70.461	54.158	16.303
1964	78.442	60.548	17.894
1965	87.884	68.565	19.319
1966 (Nov.)	92.498	73.491	19.007

ingredients. Moreover, if he is an *installment* buyer, we suppose that he often lacks the immediate funds to buy for cash or on single-payment credit terms. But we must not harden our stereotype, since many luxuries are bought on the installment plan.

When the installment sale is of durable goods, it would seem that almost inevitably the transaction will be set forth in a written contract. Since this form has been prepared privately and in advance under the seller's auspices, it can be expected to be protective to the seller, rather than to the buyer. The form becomes truly objectionable if it contains terms which go beyond the limits of the law in its endeavor to protect the seller from such matters as liability for breach of warranty, or if it purports to give the seller an unrestricted hand in the event of the buyer's default. Without a systematic study of business practices in this area, we cannot say how widespread is the use of such overreaching clauses in sales contracts. In any event, our stereotype supposes that the buyer, when presented with this form contract to sign, is not in a position to bargain with respect to its details, even if he knows what the terms really mean.

Another characteristic of the installment sale is that very often a finance charge is added to the cash price, thereby giving rise to such questions as whether a ceiling should be placed on the amount that may be charged, whether the seller should be required to disclose in writing the amount and nature of all charges, whether a partial refund of pre-computed finance charges should be required upon repayment, and so forth. Finally, many installment sales, particularly those of durable goods, are secured transactions. They may raise questions as to the advisability of restricting the seller's rights on default, and perhaps other rights, in transactions involving special classes of persons such as consumers.

In the post-World War II years, a considerable amount of state legislation dealing with installment sales of goods to consumers has been enacted.[2] Many of these statutes deal with installment sales of motor vehicles, but quite a few deal with goods other than motor vehicles—the so-called "all goods" statutes—and some include services as well. The situation varies from state to state.[3] In Wisconsin, for example, there is special legislation regulating installment sales

2. The regulation of installment sales financing began in 1935 in Indiana and Wisconsin. By 1950, 12 states had enacted such laws. Four more joined this group between 1950 and 1957 and 10 more in 1957. See Britton & Ulrich, *The Illinois Retail Installment Sales Act—Historical Background and Comparative Legislation*, 53 Nw. U.L. Rev. 137, 150-52 (1958). By the end of 1964, 42 states had enacted some type of retail installment sales act. See Curran, Trends in Consumer Credit Legislation 254-55 (1965).

3. Curran, Trends in Consumer Credit Legislation (1965).

of motor vehicles,[4] but none for other goods. The reason is obvious. Installment sales of motor vehicles is a compact, manageable subject. It is more difficult to deal in a single statute with the vast miscellaneous remainder of installment transactions.

In states lacking such special legislation, most of the legal disputes between installment sellers and buyers involve the Uniform Commercial Code (Code). Even in states which have special legislation, problems not covered by the statutes may nonetheless fall within the provisions of the Code. The status of the installment buyer under the Code is therefore a matter of concern no matter how pervasive a given state's scheme of special regulations may be.

The present topic for discussion, protection of the installment buyer under the Code, is part of a larger topic—protection of the consumer under the Code. The remarks that follow sometimes apply generally to the status of the consumer under the Code. There are times when no distinction should be made between our model installment buyer and other consumer buyers.

I. The Code and the Consumer

The Code, now adopted in most of the states,[5] has much to say which has bearing on transactions involving the installment sale of goods to consumers, even though it rarely, if ever, singles out installment sales to consumers for special treatment. Thus, Article Two applies to the sales aspects of such transactions and if, as is frequently the case, the buyer's obligation to pay is secured, Article Nine comes in to deal with the secured aspects. And if a negotiable or non-negotiable instrument is involved, Article Three also applies. These three articles (together with general Article One) must be tied together and reconciled when legal controversies between installment seller and buyer arise. If reconciliation is not possible, it may sometimes be necessary to determine which provision of which article should control. The comment to section 2-102 declares that "The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions." Thus it is clear that the installment buyer has just as much right to complain of breach of warranty by the seller as the cash buyer. But some other matters are not so clear. What terms and conditions of the trans-

4. Wis. Stat. § 218.01 (1965). Enactment of bills currently before the Wisconsin legislature would result in broader coverage.

5. To date, only Louisiana has not adopted the Code. In addition it is in effect in both the District of Columbia and the Virgin Islands.

actions may be regarded as general sales aspects and what as security interest aspects?

The text of the Code is almost barren of provisions specially designed for the protection of the consumer as such.[6] At a fairly early stage in the drafting of the Code a fundamental decision was made—to retreat—to scuttle attempts to introduce elements of social legislation restrictive of sales and credit practices conceived to be antisocial.[7] At this point the project of a Code took shape out of a law professor's pipe dream and emerged into the world of practical men. In other words, it gained important friends.

Some vestiges of earlier concern with making the Code consumer-oriented survived the Great Decision. But in 1956 there was a further retreat. The present version can hardly be said to offer much affirmatively to the consumer point of view. One has only to contemplate the remains of Sections 2-316(1) and 9-206 to appreciate that there has been attrition.[8]

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6. The present version of the Code has few textual references to consumers. Article Nine defines "consumer goods" but not consumers apart from their goods. This is not without significance. One important reason for classifying a security interest as being in consumer goods is to provide for the perfection upon attaching, without filing or possession, of purchase money security interests in consumer goods, except for motor vehicles and fixtures. Such provision seems to be of more direct benefit to the secured party than to the debtor, since the secured party's priority over third party claims is involved. Of course, some of the provisions giving special treatment to consumer goods may be beneficial to the consumer. See, *e.g.*, UNIFORM COMMERCIAL CODE §§ 9-204(4)(b), -206(1) & -505(1) [hereinafter cited as U.C.C.]. Some Article Two provisions which may be of benefit to the consumer in some states are §§ 2-318 and -719(3).

7. In the May 1949 draft of what is now Article Nine, there appeared a separate part containing several sections dealing with consumer financing. Included in this part were provisions which (a) required an itemized disclosure in the contract of the elements making up the time and price; (b) made the security interest unenforceable against the consumer unless he had received a signed copy of the contract which, in addition to the price disclosure items, conspicuously indicated that the contract gave the secured party the right to repossess on default; (c) subjected the holder in due course of a consumer's note to the consumer's contract defenses if the holder asserted rights against the collateral; (d) invalidated an after-acquired property interest which attached more than ten days after the consumer had agreed to give a security interest; (e) discharged the consumer from his obligation to the extent of any insurance proceeds received by the secured party; (f) regulated, in the consumer's interest, such devices as lay-away plans and add-on contracts; and (g) regulated the rights of both parties on default. These provisions turned out to be among the most controversial provisions considered in the drafting of the Code. They were attacked both on the ground that they were social legislation unfair to lenders and inappropriate in a codification of commercial law, and on the ground that they provided merely illusory protection for the consumer. See 1 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 293-94 (1965). See also Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 37-40, 44-48 (1951).

8. For changes made in these sections in 1956, see 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 39-40, 270-71. In the 1952 Official Draft, § 2-316(1) stated simply that "If the agreement creates an express warranty, words disclaiming it are inoperative." Compare the present text. The attrition in § 9-206 is discussed *infra*. See also note 7 *supra*.

Consumer-oriented persons can take solace in the fact that the text of certain articles expressly leaves the door open for other legislation, apart from the Code, to make special provision for the consumer interest. Thus section 2-102 of the Article on Sales declares that the Article does not "impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers." And Article Nine on Secured Transactions declares in section 9-201: "Nothing in this Article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto."

Some justification for the policy of almost total abstinence may lie in complexities inherent in problems of consumer protection. Anyone who has had some experience in proposing or drafting legislation for installments sales knows how controversial are many of the questions, how bereft of easy answers. Just to get a taste of some of them: what kinds of transactions should be included? Only sales for personal and household purposes? Then what about the small farmer buying a tractor for farm use or the little old lady buying a refrigerator for her boarding house? Second, what, if any, terms and practices should be prohibited? High on the list of controversial questions are whether holder in due course status should be denied transferees of consumer notes given to sellers, and whether cut-off clauses should be prohibited in conditional sales contracts. Should restrictions be placed on the kinds of permissible collateral, and upon wage garnishment as a means of collection? Third, what sanctions should be adopted to make the Act effective? Blunderbuss criminal provisions? Licensing, with its threat of suspension and revocation? Should there be an administrator with broad powers to inspect records? Lastly, what about rate ceilings and other financial provisions? Would high or low ceilings, or no ceilings, be best? Should sellers be required to state the simple interest equivalents of their time price differentials?

Survey the legislation that has been enacted to date in the various states, and note the wide disparities.[9] Many variations in content are no doubt somehow related to the tugs in the legislative process. A barebones statute providing for disclosure of charges as itemized, with modest provision for partial refund of finance charge upon prepayment and comfortably high ceilings on finance charges, while offering some bones to the consumer, may be basically the contrivance of

9. See Britton & Ulrich, *supra* note 2, at 152-54.

finance company or department store cohorts, designed to remove the shadow of doubt cast by usury laws upon revolving charge and that sacred cow, the seller's time price differential, which only heretics confuse with interest.[10] In other statutes, where the consumer's point of view seemingly has prevailed more often, one can discover a miscellaneous mess of protective provisions sometimes asymmetrically making special rules for installment sales at the expense of broader treatment; containing some provisions with indicia of patch-work compromise raising questions whether their seeming ameliorative value outweighs their boomerang potential. All this for the benefit of the "consumer," in the name of "public policy"—a figure and an idea which are elusive, intangible. What is good for one consumer is not necessarily good for another. For example, to set low ceilings on rates may benefit one, but deprive another of the chance to buy on time something he should be permitted to buy in the name of free choice or need, or may force him into the unconscionable black market of credit. Who can say where wisdom lies? What we need is more and more probings into practice. We need studies, dispassionately made let us hope, to identify the real evils, to ascertain their dimensions, to evaluate the proposed remedies. Less heat, and more light. Otherwise, there is the risk of doing more harm than good.

All in all, perhaps a case could be made for the Code's position of refraining from an attempt at uniformity pending the development of consensus. Meanwhile, each state is to formulate its own ideas as to beneficial regulation.

It does not necessarily follow, however, that the Code withdrew to a position of complete neutrality. There are too many sections of the Code which may have bearing on the resolution of the ofttimes conflicting interests of merchant and consumer for neutrality to be achievable. In many cases answers are furnished or routes suggested which perforce represent a choosing between two points of view. Many examples may be cited: a few must suffice.

Section 2-718(2) might be cited as a provision which is less favorable to the consumer. When this provision applies, it permits a seller, upon default by the buyer, to deduct and keep that part of the buyer's prepayment which is 20% of the "value of the total performance for which the buyer is obligated" or $500, whichever is less. This provision may, in certain situations, be downright onerous to the buyer, whatever justification there may be in protecting the seller's expecta-

10. See *id.* at 152. One of the authors of this article could also cite personal experience in support of these statements.

tion interest. The Code simply cannot be neutral on many points—the truism is better understood by considering some of the protective measures that were repealed by enactment of the Code. Thus, the Uniform Conditional Sales Act could reasonably be construed to permit a buyer in default to reinstate the contract by paying the amount of past defaults, even if there were an acceleration clause in the contract which purported to make the entire obligation due and payable upon default.[11] The Code takes a different view.[12]

On the other hand, we do not want to convey the impression that the choices made by the Code were in all cases less favorable to the consumer than before. Thus, a consumer-buyer can sometimes claim special protection as a "buyer in the ordinary course of business"—one of the favorites in the *dramatis personae* of the Code. Section 9-307(1) provides that such a person takes free of a security interest given by his seller even though it is perfected and even though he knows that it exists. And section 2-403(2) similarly protects such a buyer from the title claims of one who has entrusted the seller with the goods. See also section 7-205. Such special provisions, while important to the consumer, have limited application in that they normally are concerned only with the question of the title the buyer acquires.[13]

Various other provisions of the Code can be interpreted as opening up or expanding possibilities of consumer protection.[14] Perhaps

11. See 47 AM. JUR. *Sales* § 959; annot., 99 A.L.R. 1301 (1935). For a detailed comparison of Article Nine's various remedies provisions with those of the Uniform Conditional Sales Act, see Comment, 39 MARQ. L. REV. 246 (1956).

12. See U.C.C. § 9-506, comment: "[I]f the agreement contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered."

13. It may also be noted that the protection which § 9-307(1) affords a consumer as a buyer in the ordinary course of business does not extend the scope of protection afforded by pre-Code law in many states and that, while § 9-307(2) probably does expand the protection afforded by pre-Code law in some states, its scope is very limited. Section 2-403(2) provides similarly limited benefits if we consider that the person who entrusts goods to a person, such as for repair purposes, may be just as much a consumer as the person who might buy the entrusted goods.

14. With limited exceptions, the present version of the Code imposes the black letter rules of its text without distinction in favor of or against the consumer. Nevertheless, we should not overlook the obvious fact that the kind of person involved in a Code controversy—for example, a consumer—can be often of critical importance, although the black letter text does not so state. The fact that a person is a "consumer" may have to be taken into account in the interpretation of an agreement, in the determination of the reasonableness of a contractual standard, and in the application of a statutory rule to a specific case. For example, comment 4 to § 2-607(3), dealing with the requirement of notice of breach where the buyer has accepted goods, advises that " 'a reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."

Article Two is much more concerned with whether a party to a transaction in goods

chief among the Code sections with such possibilities is section 2-302, to be discussed below.[15]

II. The Code and Freedom of Contract

A. *General Principles*

At the risk of being charged with sniping tactics, we would note that while section 1-205 goes to considerable length to define "usage of trade" and describe its role in the contract so that, as between those subject to trade usage, a party may be held to have accepted some business practices as part of the contractual undertakings, there is little in the Code which takes similar cognizance of consumer usage or consumer understanding. Of course, we are now touching upon the central, most important problem of contract law: the ascertainment and effectuation of the real agreement between the parties. Traditionalist at heart, the Code does not seem to deny the basic premise that what a written contract signed by the parties says is the private law of the parties.

All the way back to the days of personal seals we can trace the axiom that what a man formerly sealed (and now signs) he should be held to—that he adopts the language of the instrument he seals even though he acts in haste, as known by the other party, or without comprehension, as known by the other party.[16] This respect for the importance of the signed word is tested when a court is called upon to apply the so-called parol evidence rule, for then the court must face the difficult question of when a signed writing should be held to be the final and exclusive expression of the parties' intention. Article Two states a parol evidence rule which adds nothing in particular.

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has the status of "merchant," as defined. Occasionally the textual rule expressly depends upon whether the buyer or seller is a "merchant." Further, Article Two gives a special definition of "good faith" for merchants which seems to require more than honesty in fact. Since § 1-203 makes every contract or duty subject to an obligation of good faith in performance or enforcement, the fact that a party is a merchant may be highly operative in determining standards in any Article Two situation. Wherever, for this reason, higher standards are imposed upon merchants than upon non-merchants, the consumer may be benefited, since he is generally a non-merchant.

One commentator sees in the Code's treatment of unconscionability, good faith, commercial reasonableness, merchant responsibility, title and good faith purchase a new conceptualism based on the relationship of the parties in the overall setting, which he terms the Code's "new business ethic." See King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 St. Louis U.L.J. 15 (1966). To the extent that this is so, the consumer obviously is more likely to be a gainer than a loser.

15. See text accompanying notes 20-25 *infra*.

16. Of course, we recognize that exceptions to the rule may be found under headings such as fraud, mistake, undue influence and the like.

Presumably the courts will do as before; some will apply the rule more leniently than others.[17]

If we suppose that recognition of the principle of freedom of contract carries in its wake recognition of the binding force of the verbalisms of form contracts as against parties who did not write them, the basic policy of the Code—freedom of contract—tends to favor sellers and lenders more than buyers and debtors.[18] Still, we would not discount the possibility that in ascertaining the existence and meaning of "otherwise" agreements under the Code, a court may find that the "bargain in fact" goes to the realities rather than the written form of agreement. Thus, a form contract for the sale of tires to a consumer may contain language disclaiming or drastically limiting the remedy on any warranty as to durability and character of the subject matter. But use of the simple word "tires" in the contract could mean, in the opinion of some courts, that the things sold must measure up to tires as functionally defined—things suitable for use on cars. Is a *papier-maché* tire a tire?[19] Ultimately, it is how the courts apply the rules that counts. Freedom of contract means nothing until we have answered the question: What standards do the courts use in ascertaining what the contract really is? Here the Code breaks no new ground.

The counter-principle to freedom of contract is status law—the imposition by statute or judicial decision of a standard which adheres to the relationship between the parties and cannot be contracted away. Thus, section 1-102(3) says that obligations of good faith, due care, and diligence, when imposed by the Code, cannot be contracted away, although the parties may define the "standards" for the fulfillment of such duties.

Perhaps the most noteworthy assertion of this counter-principle in the Code is section 2-302, which limits the effect of the principle of freedom of contract in the sale of goods. It provides:

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17. There may be differences of opinion as to the exact effect of U.C.C. § 2-202, and it may even have a liberalizing influence on the law of some states. See, for example, Professor Patterson's analysis for the New York Law Revision Commission, 1 N.Y. LAW REV. COM. REP. 597-601 (1955).

18. It may be noted that early drafts of the Code tended to restrict freedom of contract more than do the present drafts. For a fuller discussion of this subject, see Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. IND. & COM. L. REV. 59 (1960).

19. In the appropriate case, this view as to the realities might lead a court to find an express warranty of description, thus resulting in application of § 2-316(1). Although the weasel words of present § 2-316(1) were substituted for the forthright statement in the 1952 draft that "if the agreement creates an express warranty, words disclaiming it are inoperative," an argument can be made that the substance was not changed. See Comment, 72 YALE L.J. 723, 739 (1963).

> (1) if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded an opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This is one of the more controversial sections of the Code; indeed, it was deleted from the California and North Carolina versions.[20] We regard these deletions as unfortunate. It is not that section 2-302 says very much; it is simply that it gives a court a peg to hang its hat on if it is of a mind to redress a contractual imbalance. There is nothing in the principle of section 2-302 that is particularly new, startling, or strange. We have only to reflect upon the development in Chancery of the equity of redemption—recognition of the right of a mortgagor to redeem after the law day had passed and the title of the mortgagee had according to the deed become absolute. What was this but one illustration among many of the assertion of judicial power to set aside an unconscionable forfeiture called for by a contract term? Of course, the alarmist's fear is that section 2-302 invites a court to go further than before in screening contracts. While there is nothing in the text itself calling for such action, the very presence of section 2-302, in all of its frankness, is apt to dispel hesitancy.

Under a qualification introduced in 1956 the contract clause must be found to have been unconscionable at the time the contract was made.[21] It is doubtful that this qualification will greatly restrict utilization of the concept of unconscionability, for the character of the clause when made might still be tested by hindsight, so that the clause might be viewed in light of the situation which arose subsequent to its inclusion in the contract. Another, and perhaps more meaningful, limitation upon the free play of the court's judgment is the explicit requirement in subsection (2) that there be an opportunity for a hearing on the questions of the commercial setting, purpose, and effect of the agreement. The question of unconscionability is probably wisely made a matter of law, rather than a question for the jury.

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20. See U.L.A., UNIFORM COMMERCIAL CODE 43 (Supp 1966).
21. See 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 31-32.

Perhaps section 2-302 merely authorizes a court to take action which the due process clause of the fourteenth amendment requires it to take. Judicial action constitutes state action under the fourteenth amendment, and that amendment applies to deprivation of a person's property as well as his life and liberty.[22] The Supreme Court of the United States has for some time subjected the procedural and substantive aspects of the criminal law of the states to rigorous reexamination. To date, there has been no comparable development of the constitutional aspects of commercial law, but surely it can be seen that the due process clause requires the state judiciary to observe minimum standards of justice in the administration of the civil law. The implications of *Shelley*[23] and *Barrows*[24] may extend far beyond the aspects of judicial action there involved. Perhaps we are on the verge of a new chapter in constitutional development. If so, many questions arise. For example, is "due process" of law violated when the judiciary permits judgment to be confessed by a person who acts under a power of attorney bestowed by a form contract, without notifying the defendant allegedly in default of the action taken, or without consulting him to elicit his views of the merits of the claim? Is it a sufficient reply to due process objections that the debtor may have a period of time to petition to vacate the judgment, provided he learns that the judgment has been entered and can retain an attorney to represent him? We should not sell the future short. Notions of what constitute fundamental justice, due process, and equal protection are dynamic, not static.

The vagueness of section 2-302 is at once its blessing and its curse. We are not sure when it applies, or how it applies. Does it stand as the censor in all Article Two situations? Take the case in which a seller's form contract attempts to exclude the existence of an implied warranty of merchantability. Section 2-316(2) provides that this may be done by "conspicuous" language which "mentions" merchantability. These are perhaps mechanical requirements, which may be met with comparative ease. However, does section 2-302 raise an additional hurdle to the effectiveness of the disclaimer clause? If it does, then pro-consumer results can be achieved under Article Two parallel to the results achieved if one disregards the Code and relies instead upon the strict tort liability approach of section 402A of the Restatement of Torts, Second. On the other hand, it may be

22. Similar remarks could be made about the Fifth Amendment as governing District of Columbia matters.

23. Shelley v. Kraemer, 334 U.S. 1 (1948).

24. Barrows v. Jackson, 346 U.S. 249 (1953).

argued for the seller that section 2-316(2) is a self contained, specific answer to the question of what is a conscionable provision, and that no reference need be made to section 2-302. There is nothing in the comments to section 2-316 which suggests that a disclaimer complying with section 2-316(2) must still run the gantlet of section 2-302.[25] Curiously, section 2-719, which applies when a contract clause limits the remedies for breach of warranty, expressly provides that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable." It would be illogical in our view if the same were not true when the terms of the contract take the form of an exclusion of warranty, rather than a limitation of remedy.

B. *A Case Study*

Reference to section 2-302 brings us around to the secured installment sale. Section 2-302 may have bearing, direct or indirect, upon Article Nine situations. It would be unwise to assume that the "302 Principle"[26] is neatly confined to Article Two.

In 1965 the United States Court of Appeals for the District of Columbia Circuit decided *Williams v. Walker-Thomas Furniture Co.* and its companion case *Thorne v. Walker-Thomas Furniture Co.*[27] It appeared that from 1957 to 1962 Ora Lee Williams had made sixteen separate purchases of furniture and household appliances from the store, all on installment credit, and in each case had signed fine print bailment-lease contracts which provided for monthly rental payments and reserved title in the store until payment was made in full.[28] Most of these purchases were made when a representative of the store came to her home. Each contract provided that payments under the contract would be credited pro rata on that particular and all prior purchases from the store which had not yet been paid in full; the store construed these provisions to mean that payments were to be applied in proportion to the unpaid balance on each purchase (as determined at the time of each payment), with the result that no one purchase would be paid in full until all were paid in full. Thus,

25. It is proper, however, to call attention to the comment to § 2-302, where illustrations of prior decisions within the problem area of § 2-316 are given.

26. By accident or design, the Code section dealing with unconscionability has the same number as § 302 of the *Restatement of Contracts* which applies the same principle to conditions in contracts in general.

27. 350 F.2d 445 (D.C. Cir. 1965). The opinion below may be found in 198 A.2d 914 (1964).

28. Some of the information which follows was derived from the briefs filed by the parties with the United States Court of Appeals, District of Columbia Circuit. See also the opinion of the District of Columbia Court of Appeals in 121 App. D.C. 315, 198 A.2d 914 (1964).

in Ora Williams' case, the store claimed a continuing lessor's interest in all of the goods she had bought since 1957. In 1962, Ora was sold a stereo record player on credit for $514.95, although, as stated on the reverse side of the contract her income consisted of $218 a month public assistance for herself and six or seven dependent children. That sale brought the total value of her purchases from the store since 1957 to about $1500, of which she had paid about $1056. When she defaulted some time after acquiring the stereo, the store sought to replevy all of the items purchased since 1957.[29] The facts in the companion case were equally pathetic and the plights of Ora Williams and the Thornes prompted the intervention of the Legal Assistance Office—the result was a *cause celebre.*

The Legal Assistance Office was willing to concede that the store could repossess the stereo record player for nonpayment, but what stirred them to action was that the seller sought to scoop up all that it had ever sold to Ora. The seller maintained that it still had title to everything because, under the pro rata clause, a balance remained due on each item, despite Ora's payments of over $1,000. The store's records showed that of a combined total claim of $444 as of December 26, 1962, Ora still owed 25¢ on item 1, purchased December 23, 1957 (price $45.65); 3¢ on item 2, purchased December 31, 1957 (price $13.21); $2.34 on item 3, purchased August 12, 1958 (price $127.40); and similarly for subsequent purchases, with balances of $.96, $1.70, $2.86, $1.08, $7.21, $1.53, $2.38, $5.66, $10.32, and $1.61. The only claims which were significant in relation to the purchase price were for the last three purchases: an item for $254.95, on which a balance of $65.98 was claimed; the $514.95 stereo, on which a balance of $327.89 was claimed; and an item for $15.45, on which a balance of $12.60 was claimed.[30]

What was the ultimate goal of the seller, the self-styled lessor, in replevying the items? Taking possession of the collateral after default is but one step in the liquidation process. Did the seller intend to resell the goods to others and hold the original buyers liable for any difference between the total resale price and the indebtedness of the original buyers on all items? Or did the seller perhaps intend to "rescind" the transactions after taking possession and treat the goods as stripped of the buyer's interest, so that he could then resell them without having to account for the proceeds of resale?

29. Actually, the store succeeded in seizing only the items described in the opinion of the District of Columbia Court of Appeals. *Ibid.*

30. Brief for Appellee, Exhibit "B," Williams v. Walker-Thomas Furniture Co. & Thorne v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

The transactions in *Williams* and *Thorne* were in fact conditional sales. At common law the conditional seller could, upon default by the buyer, repossess and keep the goods plus all payments made.[31] Under the Uniform Conditional Sales Act, a seller acting under section 23 could cancel the contract and keep the goods plus payments made if, after notice, the buyer failed to redeem or request resale; if the buyer had paid at least fifty per cent of the purchase price, however, the seller was obliged under section 19 to resell and account for the proceeds. Part Five of Article Nine of the Code adopts the same general plan, except that it is sixty rather than fifty per cent that makes resale mandatory and such compulsory resale applies only to consumer goods.[32] Under both uniform acts the seller may obtain a deficiency judgment against the buyer if proceeds from the resale are not enough to cover the indebtedness plus expenses.[33] Under the Code, however, resale must be conducted in a commercially reasonable way.[34] These provisions of the Code may work well in many cases, but it is not clear that they will work well in determining the seller's rights in goods and the extent of his deficiency claim if the original purchase price is inflated and exploitive. Finally, under the Code, it would be important for the seller to include in each sales contract a "cross collateral" clause making the specific items covered by the contract security not only for their own purchase price but also for all other indebtedness of the buyer. Absent such a clause, the seller's right to keep the proceeds of an Article Nine foreclosure resale in excess of amounts due on each item sold would have to depend upon his possible right to set off the buyer's claim for this excess against the seller's claim for a deficiency arising from other transactions.

The buyers' principal defense in *Williams* was that the contracts were unconscionable. In a two to one decision, the court of appeals reversed the lower court which had held that they were powerless to redress the alleged wrong done the defendants, and remanded the case for a hearing on the merits and appropriate findings. *Williams* is not a Code decision, since at the time of the transactions the Code had not yet been enacted in the District of Columbia; however, as Judge Wright put it, "in view of the absence of prior authority on the point, we consider the [subsequent] congressional adoption of § 2-302 persuasive authority for following the rationale of the

31. For fuller exposition, see UNIFORM CONDITIONAL SALES ACT § 19 and the Commissioner's note thereto.

32. U.C.C. § 9-505.

33. U.C.C. § 9-504(2); UNIFORM CONDITIONAL SALES ACT § 22.

34. U.C.C. § 9-504(3).

cases from which the section is explicitly derived."[35] *Williams* may therefore be regarded as a section 2-302 case.

What makes a transaction unconscionable? "The mores and business practices of the time and place," the opinion tells us, must be considered in the test of unconscionability—a test which is "not simple," not to be "mechanically applied."[36] These innocuous and rather sterile observations are coupled with other stronger ones which pose a threat to one-sided bargains in consumer transactions:

> 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.[37]

The significance of the decision is obscured because it is not a final decision on the merits and also because the comments in the majority opinion are difficult to apply in specific cases. But the decision does show that section 2-302 adds an unpredictable factor to installment sales and other consumer transactions. Pierre E. Dostert, who as Chief Staff Attorney for the Bar Association Legal Assistance Office successfully argued appellants' case, has stated:

> My personal comment on the cases is that they should never have been permitted by appellee to reach the appeals court. Poor cases make poor law. The law of these cases is not what I would call poor law; the problem of limitation of the effect of the decision is, how-

35. 350 F.2d 445, 449 (D.C. Cir. 1965) [quoting in part CORBIN, CONTRACTS § 128 (1963)].

36. *Id.* at 450.

37. *Id.* at 449-50.

ever, difficult and subject to variation, thus creating a degree of uncertainty.

The best effect of the decision lies in the fact that it is a dormant threat to unconscionable conduct which could become very active with little or no notice. In other words, sheer existence of Judge Wright's majority opinion has encouraged a greater degree of "conscionability" in my opinion. When the case enters the defense at trial level, plaintiffs seem to be much more disposed towards settlement, rather than risk an adverse finding under a decision with a possible trial memorandum opinion applying the reasoning of Judge Wright.[38]

Was there anything inherently wrong about what the seller did in *Williams*? Forget for the nonce that he was dealing with an impoverished buyer who asserted that she did not understand the pro rata plan and would not have bought the stereo had she known that the seller would continue to tie up all of her previous purchases. Is there any difference between this case and a case in which, to induce a loan or a credit sale, a person agrees to give the creditor a security interest in most of his personal property which he owns outright? Or in which he gives his creditor a security interest in all such property to secure the balance of a consolidated indebtedness? Is it simply the indirectness of what was done that raises questions?

The Code allows much in the name of freedom of contract: with few exceptions, a security agreement can impose a security interest upon any and all personal property of the debtor, including future property, to secure any and all obligations, including future obligations, that the debtor may owe the creditor. In only one relevant situation does the Code say no: section 9-204 provides that a security interest in consumer goods will not attach under an after-acquired property clause if the debtor acquires rights in the goods more than ten days after the secured party gives value. This may take care of a certain type of add-on clause—the prospective kind—but it does not forbid the use of a retroactive add-on clause in an agreement which consolidates prior and new indebtedness and makes the collateral

38. Letter From Pierre E. Dostert to Robert H. Skilton, dated February 1, 1967. It causes one to reflect upon the sometimes quixotic ways of justice to read in his letter that this litigation, involving amounts relatively small but nevertheless important to consumer interests, was conducted because the defendants were poor enough to qualify for legal aid. "I decided to take the two cases as far as necessary to achieve a precedent which would afford some protection to the lesser members of the community . . . . Trial, appeal to the D.C. Court of Appeals, and then to the U.S. Circuit Court of Appeals took 210 man hours of legal work for which the appellants were not obligated to pay." If they had been obligated to pay, we daresay the store would have had its way without any legal contest. How often does this happen? Private litigation is hardly the complete answer to problems of consumer protection. For a good survey of the problems involved in effective implementation of programs intended to protect the consumer, see Comment, 114 U. PA L. REV. 395 (1966). See also Comment, 33 U. CHI. L. REV. 590 (1966).

which was security for prior indebtedness security for the consolidated indebtedness. If there is something wrong in this arrangement, the wrong must be corrected by legislation apart from the Code.

The appellants in *Williams* also argued that to allow the store to utilize the pro-rata clause to enforce its claim upon so much of appellants' household goods would, in effect, subvert the policy of the statutes of the District of Columbia exempting household goods from attachment.[39] Of course, the statutes on their face do not prevent creditors from taking security interests in such goods and then seizing them on default, but the point nevertheless has merit: if our exemption statutes are to accomplish their patent purpose of protecting debtors from complete impoverishment as a result of creditor action, their provisions should be correlated with statutory provisions restricting the use of such property as security in certain kinds of transactions.

In any event, *Williams* shows how section 2-302 can invade Article Nine situations. The security arrangements in a conditional sales transaction can easily be viewed as part of the terms of a sale to which section 2-302 clearly applies. Price, terms of payment, and the extent of the buyer's obligations are obviously terms of sale, and the security interest is simply ancillary to the obligation.[40] *Williams* thus teaches that it is best to beware lest we be lulled by the seeming permissiveness of Article Nine: the voice of conscience must be heard in courts of justice. The principle of section 2-302 opposes exploitation and antisocial conduct. It probably does not matter whether the party charged is seller or lender, secured or unsecured. As counsel for appellants stated in their brief:

> It is incumbent upon this Court to restate those equitable principles and indicate the scope of their application to the Judges of the District of Columbia Court of General Sessions, as part of the appellate function of this Court. In the General Sessions Court, there are thousands of cases tried each year which involve as litigants the lowliest of our society. Nothing is harder to explain in this world to these people than injustice produced by the unwillingness of the bench to deal with the substance of a transaction. These persons cannot appreciate the limitations of the application of strict principles of law, nor should they be required to reason with the astuteness of a legal mind.
>
> Each time there is a substantial injustice in a court, there is in like degree a lessening of respect for the law, and the emotions of

39. Brief for Appellant, pp. 24-26, Williams v. Walker-Thomas Furniture Co. & Thorne v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

40. Another court has applied § 2-302 to the financing provisions of an installment sales contract. See American Home Improvement Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

> anger and hate directed towards those persons pursuing injustice, and general antipathy toward the community which permits a system of law capable of injustice to exist.[41]

Further random thoughts about *Williams*: Stranger than fiction—imagine selling a $515 stereo on credit to a woman on relief . . . . The price the Thornes paid for a used refrigerator was $305.95 . . . . In *Williams* the seller imposed no finance charges as such in his credit transactions with the plaintiff. Some sellers, catering to people who cannot pay cash, always sell on credit and, instead of adding a separate finance charge, simply inflate their prices. The District of Columbia did not have an all-goods installment act, but even if it had, imagine how difficult it would be to apply its ceilings on finance charges to sellers who always sell on credit and do not admit that they impose any finance charges . . . . Bailment-lease terminology still seems permissible under the Code, although section 1-201(37) tells us when the lessor's interest is merely a security interest. Article Nine takes no stand against the use of misleading language which in fact denies the existence of any rights in the debtor until full payment . . . . Counsel for appellants stressed the fact that the contracts were in fine print:

> The printed instruments of appellee are printed in unnecessarily small type, replete with cumbersome terminology, long sentences closely spaced and misleading statements. Counsel for appellants had great difficulty in the physical act of reading this document without a ruler to indicate the lines thereof and a magnifying glass to enlarge the print thereof to at least the size of the smallest newspaper type.[42]

To which counsel for appellee replied, "if appellee is to be condemned for the alleged use of 'microscopic type size'—they find themselves in excellent company, with the Government of the United States of America, as appears from Exhibit 'A' of which appellee respectfully requests this Court to take judicial notice" (Exhibit "A" was a Department of Interior lease) . . . .[43] Apparently, the buyers were not given copies of the contracts they signed;[44] some of the contracts Ora Williams signed were said to be "in blank" at the time she signed—whatever that means.[45] Inducing people to sign their names to contracts which have terms to be filled in later is prohibited by most retail installment acts.[46]

41. Appellant's brief, *op. cit. supra* note 39, at 11.
42. *Id.* at 21-22.
43. Appellee's brief, *op. cit. supra* note 30, at 22-23.
44. Appellant's brief, *op. cit. supra* note 39, at 3.
45. *Ibid.*
46. See CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 301-10 (1965).

C. *Section 9-206 and the Installment Buyer*

By no stretch of the imagination does *Williams* touch upon all of the points which may arise in a consumer installment sale under the Code. One of the areas which deserves at least brief discussion is the ability of an installment buyer to raise claims or defenses against the seller's assignee when he is called upon by the assignee to make payments. A vestigial remnant of the early concern for consumers that survived for a few years was a provision in section 9-206 which, in the 1952 Official Text, read as follows:

> An agreement by a buyer of consumer goods as part of the contract for sale that he will not assert against an assignee any claim or defense arising out of the sale is not enforceable by any person. If such a buyer as part of one transaction signs both a negotiable instrument and a security agreement even a holder in due course of the negotiable instrument is subject to such claims or defenses if he seeks to enforce the security interest either by proceeding under the security agreement or by attaching or levying upon the goods in an action upon the instrument.

When the seller sells goods to or renders services for the buyer, and it subsequently turns out that the goods or services were not of the quality called for by the contract, the buyer normally may assert this breach of contract as a defense to the seller's collection of the outstanding installments due under the contract. The same defense is available to the buyer if the seller has assigned the contract to a bank or finance company for collection, unless the buyer has agreed to waive all defenses against an assignee of the contract or has signed a negotiable note in connection with the contract. If the buyer has done either, the question then becomes whether the waiver of defenses clause is enforceable or, in the latter situation, whether the holder of the note may have the status of a holder in due course.[47] It is these questions to which the early draft of section 9-206 addressed itself and the position taken at that time was that the buyer of consumer goods should be protected against such cutoff clauses and holders in due course.

The section was changed in 1956,[48] presumably because it was too controversial. It has been stated that sales finance companies found the provision difficult to accept.[49] But, the provision was criti-

47. The matter is discussed fully in 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1088-106 (1965).

48. See 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 270-71.

49. See Robinson & Marsh, *Some Observations on Article 9 of the Uniform Commercial Code*, 63 DICK. L. REV. 45, 53 (1958).

cized by others because it failed to provide adequate protection to consumers: it only seemed to prevent the financing agency from attaching or levying upon the goods which were the subject of the installment sale and did not prevent the levying upon other property or the taking of other action against the buyer.[50] In any event, here, as with other consumer protection provisions, the draftsmen apparently yielded to commercial interests, for section 9-206 in its present form disclaims any intention of providing special protection for consumers, although it does expressly leave the door open so that court decisions or other statutes could provide such protection.

Some decisions and a few statutes had in fact given special protection to consumers (and occasionally to other buyers) against the cutting off of a buyer's defenses by waiver clauses and negotiable notes. Indeed, these probably were the inspiration for the 1952 provisions in section 9-206 and its predecessors.[51] A few more states have enacted such provisions since the time of the drafting of the Code, but the movement has been slow in gaining momentum.[52] Moreover, the effectiveness of some of these efforts may be questioned, for the statutes establish a procedure which still permits the assignee to take the chattel paper free of a buyer's defenses: the buyer is given specified notice designed to inform him fully of the assignee's understanding of the installment sales agreement; if the assignee's statement of the transaction is not correct, or if the buyer has some claim or defense against the seller, the buyer must so inform the assignee within a short time—usually fifteen days.[53] The fifteen-day period is likely to be too short for latent defects in the goods to show up. More important, it is questionable whether those consumers who most need the protection would read, understand, and comply with the notification requirement in any event. An effective rule would seem to require not only that a waiver of defenses provision be denied enforcement but also that the holder of a note given in connection with the consumer installment sale be made subject to such defenses to an action for payment as the buyer might have asserted against

50. See Sutherland, *Article 3—Logic, Experience and Negotiable Paper*, 1952 WIS. L. REV. 230, 235-40. It should be noted that an earlier draft provided better protection for consumers. *Id.* at 238.

51. Sutherland, *op. cit. supra* note 50, at 235-37. Sutherland lists three states as having statutes dealing with the subject as of the time of the writing of that article (1952). *Id.* at 237, n.22. Among the more recent commentaries on the holder in due course status of financing agencies are: Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177; Comment, 55 NW. U.L. REV. 389 (1960).

52. One source lists only six states as having such provisions in their installment sales acts as of the end of 1964. See CURRAN, *op. cit. supra* note 46, at 312-21 (chart 19, cols. 1 & 3).

53. *E.g.*, CAL. CIV. CODE § 1004.3 (1954); N.Y. PERS. PROP. LAW § 403 (McKinney 1962).

the seller. In addition, it might be desirable to prohibit the use of waiver clauses and negotiable notes in consumer credit sales. Such a prohibition by itself would not give complete protection, however, for an unscrupulous seller might disregard the prohibition, have the buyer sign a negotiable note, and then negotiate it to a holder in due course.

It is of course understandable that financing agencies do not wish to be burdened with responsibilities relating to the goods sold if they possibly can avoid them, but there is at least some evidence that laws making the assignee subject to the buyer's defenses have not had that effect.[54] The number of cases in which a buyer cannot get satisfaction from his seller probably represents a very small proportion of all credit sales; but, in the instances where such satisfaction is not forthcoming, the assignee of the chattel paper is in a better position to bear the loss than is the consumer. The financing agency need only investigate a seller's integrity before agreeing to buy his paper or employ such devices as recourse agreements and dealer reserves to absorb any losses that occur.

III. Looking Beyond the Code

Recently the Commissioners on Uniform State Laws have taken up the battle for the consumer. A proposed Uniform Consumer Credit Code is in draft form and will be submitted to the Commissioners for their approval in the near future.[55] The tentative draft covers a variety of subjects pertaining to consumer credit transactions, including those dealt with in early drafts of the Uniform Commercial Code.[56] It properly recognizes that many of the considerations that are pertinent to the installment sale are also applicable

54. There is some evidence that the barring of waiver clauses or negotiable notes in consumer credit transactions does not present any great problem to financers. Thus, it has been said that Pennsylvania bankers experienced no trouble with the pre-1957 version of U.C.C. § 9-206 which made assignees of installment sales contracts or holders of negotiable notes subject to defenses which a buyer of consumer goods might have asserted against the seller. Felix, *Experience With Dealer and Consumer Financing Under the Uniform Commercial Code*, 73 BANKING L.J. 229, 233 (1956). It also has been said that a 1943 decision of the New Mexico Supreme Court holding the financer subject to the buyer's defenses did not materially affect sales financing in that state. "The only real difference between pre- and post-1943 financing in New Mexico was that the financing institutions of the state required the retailer to establish a larger reserve to take care of possible warranty defenses." Vernon, *Priorities, the Uniform Commercial Code and Consumer Financing*, 4 B.C. IND. & COM. L. REV. 531, 547 (1963).

55. For a general discussion of this project, see Dunham, *Research for Uniform Consumer Credit Legislation*, 20 BUS. LAW 997 (1965).

56. The draft on which these remarks are based is the Second Tentative Draft [Working Draft No. 4].

to consumer installment loans, so both subjects are treated, albeit sometimes in different ways.

We do not regard it as our function here to attempt a critique of the provisions of the proposed Credit Code, and we recognize that the provisions of the draft are subject to further change. Nevertheless, it may be appropriate to note briefly some of the topics dealt with. There are, for example, provisions typical of installment sales statutes requiring disclosure of certain kinds of credit information.[57] Presumably if such information is made available to the consumer, he will be able to shop more wisely for his credit. But the draftsmen have recognized that consumer education and disclosure of credit information are only small steps toward the goal of equalizing the bargaining power of the parties—at best, they are long range solutions. Consequently, there are also provisions which tend to limit the extent to which the parties may bargain. Among these are provisions for maximum rates which may be charged by the seller or lender,[58] provisions regulating the length of terms of small consumer loans,[59] provisions giving the consumer prepayment rights,[60] and provisions restricting the use of contractual terms calling for balloon payments.[61]

The draftsmen borrowed a provision on unconscionability directly from the Uniform Commercial Code, but its terms will expressly apply to sales of services and to consumer leases as well as to sales of goods.[62] The draftsmen have also grappled with waiver clauses and negotiable notes which, as we have seen, can have the effect of freeing a seller's financer from defenses which the buyer could have asserted against the seller. The draft provides that waiver clauses in consumer credit sales or leases are unenforceable and that the taking of negotiable notes in consumer credit sales and leases is prohibited.[63]

The proposed Credit Code's tentative provisions dealing with the taking of collateral in consumer sale or consumer loan transactions extend far beyond the restrictions imposed by section 9-204 (4)(b) of the Uniform Commercial Code. The taking of security interests in real estate in connection with small consumer loans and consumer credit sales is largely prohibited.[64] As a general rule, an

57. CREDIT CODE §§ 2.301-.311 (consumer credit sales) & 3.301-.310 (consumer loans).
58. *Id.* §§ 2.201-.208 (consumer credit sales), 3.201-.208, 3.508 & 3.602 (regulated loans and other than consumer loans).
59. *Id.* § 3.512.
60. *Id.* §§ 2.401 & 3.401.
61. *Id.* §§ 2.405 & 3.402.
62. *Id.* § 2.412, dealing with unconscionability, applies to a "consumer credit sale" which is defined by § 2.104 to include a sale of services.
63. *Id.* §§ 2.403 & .404.
64. *Id.* §§ 2.407 & 3.510.

installment seller's taking of a security interest in goods other than the goods sold in that particular sale also is prohibited, but an important exception is made for cross collateral: the Credit Code would permit a seller of goods to secure the debt arising from the present sale with goods he had previously sold to the buyer if the seller holds an existing security interest in them. Goods sold in a present sale also could be made security for a debt owing under a previous sale. However, the pro-rating formula for determining when a security interest in particular goods is released is more favorable to the consumer than the one involved in *Williams*, although not as favorable as the formula used in at least one present installment sales law.[65] The assignment of wages as security for the payment of a debt arising out of a consumer credit sale or lease or out of a consumer loan is prohibited.[66]

The proposed Credit Code would make important changes in remedies as well. The Credit Code recognizes, for instance, that in many situations it would be to the installment buyer's advantage to limit the seller's remedy to realization on the buyer's collateral. The Credit Code proposes to do this by a provision stating that, if the unpaid balance at the time of repossession is $500 or less, the seller has no right to hold the buyer personally liable for the unpaid balance, but he may recover damages if the buyer wrongfully damaged the collateral or, after default, wrongfully failed to make the collateral available to the seller upon proper demand.[67] Wage garnishments prior to judgment would be prohibited and, perhaps more important, would in all cases be restricted to earnings of the debtor in excess of a specified amount in any calendar week.[68]

Certain home solicitation sales would also be subjected to regulation.[69] Here, a controversial provision has been proposed which would give the buyer a right to cancel the sale. Although the right would have to be exercised by midnight of the second calendar day

65. See *id.* §§ 2.407 to .409. The pro-rating formula set forth in § 2.409 states that the payments made subsequent to the debt consolidation are deemed to have been applied to the debts arising from the various sales in the same proportion as the original debts arising from those sales bear to one another, instead of in the proportion that the amounts still owing at the time of each payment bear to one another. The latter seems to have been the formula applied by the seller in *Williams*. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (1965). Another possible formula is used in the Massachusetts installment sales act. MASS. ACTS 1966, ch. 284, § 18B provides that "payments made under the consolidated agreement shall be applied toward the unpaid amounts in the order of the purchase of the goods or services."

66. CREDIT CODE §§ 2.410 & 3.403.

67. *Id.* § 5.103.

68. *Id.* §§ 5.104 & .105.

69. *Id.* §§ 2.501 to .506.

after the day on which the buyer signed the agreement, and a cancellation charge would be made, the provision would give the buyer an important cooling-off period in which to reconsider a bargain which he may have entered under considerable pressure. The proposed Credit Code would also regulate credit insurance,[70] and regulate and require the licensing of debt-counseling agencies.[71]

It is evident that the diverse provisions of the proposed Uniform Consumer Credit Code would not have fit comfortably within the confines of the Uniform Commercial Code. It is also clear that the Credit Code's proposals, addressed as they are to specific problems, can provide much more effective protection for the consumer than that afforded by the possible invocation of section 2-302 of the Uniform Commercial Code in extreme cases. It remains to be seen how effective the final provisions of the Credit Code will be, and how widely it will be adopted. One can hope, however, that the sponsors and draftsmen will succeed in their goal of ridding the credit industry of the harmful practices of the minority while at the same time encouraging the use of legitimate sources of credit.[72] If this comes to pass, and the Credit Code is widely adopted, the retrenchment by the draftsmen of the Uniform Commercial Code from their early consumer-oriented position may well have been a blessing in disguise to the consumer.

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70. *Id.* §§ 4.101 to .207.

71. *Id.* §§ 7.101 to .114.

72. See REPORT OF SPECIAL COMMITTEE ON RETAIL INSTALLMENT SALES, CONSUMER CREDIT, SMALL LOANS AND USURY TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 10 (1965).