

1970

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Minn. L. Rev. Editorial Board

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Recommended Citation

Editorial Board, Minn. L. Rev., "Limitations on Creditors' Practices and Remedies under the UCCC" (1970). *Minnesota Law Review*. 2981.

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Limitations on Creditors' Practices and Remedies Under the UCCC

I. INTRODUCTION

This section of the Consumer Credit Symposium considers specific practices of creditors in transactions with consumers. In particular, it will outline provisions common to consumer credit contracts, consider their appropriateness in consumer transactions and compare their present treatment in Minnesota with their treatment under the Uniform Consumer Credit Code¹ in order to evaluate the degree of protection afforded consumers. Various remedies available to creditors upon default by a consumer will then be analyzed to illustrate how present regulation would be affected by adoption of the UCCC. Where applicable, the Federal Consumer Credit Protection Act² and the Uniform Commercial Code³ will be considered.⁴

It must be kept in mind that the Code provisions are applicable only in transactions involving consumers, specifically, consumer credit sales, consumer leases and consumer loans.⁵ Since many of the existing collection laws, contractual provisions and other creditors' remedies that the Code attempts to regulate were developed long before consumer credit became widespread, their present inappropriateness is not surprising.⁶ Equality of bar-

1. Official Text with Comments (1969) [hereinafter cited as UCCC].

2. 82 Stat. 146, 15 U.S.C. §§ 1601-1665 (Supp. IV, 1968) [hereinafter cited as FCCPA]. Section 1633 exempts credit transactions where state regulation is "substantially similar."

3. Enacted in Minnesota as MINN. STAT. § 336 (1969) [hereinafter cited as UCC].

4. See generally Hogan, *Integrating the UCCC and the UCC—Limitations on Creditors' Agreements and Practices*, 33 LAW AND CONTEMP. PROB. 686 (1968); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968); Kripke, *Consumer Credit Regulations: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1 (1969); Richter, *The Uniform Consumer Credit Code of the National Conference of Commissioners on Uniform State Laws*, 24 BUS. LAW. 183 (1968).

5. UCCC § 2.104 defines consumer credit sale; UCCC § 2.106 defines consumer lease, and UCCC § 3.104 defines consumer loan. Consumer credit transactions "primarily for an agricultural purpose" are specifically excluded from UCCC §§ 2.403, .404A, .404B, .405, .409 & 3.402, and will not be discussed in this Note.

6. It would have been an astonishing coincidence if the nineteenth century system of collection laws—garnishment, wage assignments, deficiency judgments, default judgments, repossessions, and so forth—which was conceived long before

gaining power and freedom of contract characterize the typical commercial transaction and underlie both traditional creditor practices and many provisions of the UCC.⁷ These concepts, however, do not accurately describe the typical consumer credit transaction which is instead characterized by "disparity in bargaining power between the two parties . . . coupled with the average consumer's almost total lack of understanding of the legal implications of the transaction."⁸ It is not unnatural, therefore, for the creditor to continue using traditional practices, particularly when they operate to his advantage.⁹ In addition, the consumer credit industry strongly encourages credit purchases with little or no consideration of the individual consumer's total indebtedness or general financial condition.¹⁰ In light of the advantages that traditional commercial practices afford the creditor and the increasing volume of consumer credit transactions, self-regulation seems unlikely. The UCCC offers the alternative of comprehensive and uniform regulation by the state.

II. MAKING THE AGREEMENT: PROVISIONS CORRELATING EFFECTIVE RATE AND DISCLOSURE REGULATION

In order to offset the present advantages enjoyed by creditors, consumer-oriented legislation¹¹ strictly limits the use of many traditional creditor practices in making a consumer-credit agreement. For example, the UCCC correlates its regulation of

the consumer entered the credit arena, had been found appropriate in the hard-sell, easy-credit mass consumer market of the latter third of the twentieth century. These creditors' remedies are the product of an age when easy credit terms were not available, and community attitudes toward use of credit were strict, credit was reluctantly extended and warily accepted. Credit transactions were entered into with somewhat more equality of bargaining power and economic sophistication than is the case today, for the lower economic groups were not yet important participants in the credit market.

Jordan & Warren, *supra* note 4, at 433.

7. *Id.* See also Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1472 (1966). "Traditionalists 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." *Id.*

8. Ziegel, *Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint*, 68 COLUM. L. REV. 488, 490 (1968).

9. "A second factor in the need for comprehensive legislation is the natural tendency of business to follow the line of least resistance and its well documented inability to police itself." *Id.* at 491.

10. *Id.* at 492.

11. *E.g.*, 1969 National Consumer Act (First Final Draft 1969).

rates and disclosure with regulation of the actual credit agreement including form of payment, additional charges and notice requirements, plus strict supervision of particular types of credit sales. The interrelation of these provisions favors comprehensive and uniform legislation rather than the continuing stream of piecemeal measures.

A. FORM OF PAYMENT

1. *Multiple Agreements*

Multiple agreements are a form of payment available for use in credit agreements even though potentially inconsistent with regulation of rates and disclosure. A graduated system of interest rate ceilings, like that in the UCCC,¹² provides a creditor with great incentive for dividing a single sale or loan into two or more agreements without informing the debtor of the true purpose. As explained in the UCCC's comment to section 2.402, the highest rates are allowed

on amounts financed up to \$300 and the next highest rates on amounts financed up to \$1,000. In order to achieve maximum rates, a seller might arbitrarily divide a sale into two or more agreements in order that the amount financed under each is within the \$300 amount on which the highest rate can be charged.

The UCCC's exemption from disclosure of annual percentage rates for minimum charges¹³ offers another possible impetus for using multiple agreements. An unsophisticated consumer may thus enter into the agreement unaware of what he must actually pay or of the fact he is paying more than the ordinary interest charge. To avoid this situation, the UCCC forbids such "multiple agreements."¹⁴ On the other hand, Minnesota state law imposes no limitation on multiple agreements; therefore, only the FCCPA provides protection in Minnesota¹⁵ to the extent that "[a] creditor may not divide a consumer credit sale into two

12. UCCC §§ 2.201 & 3.508. See notes 35-42 and accompanying text in Note, *Rate Regulation Under the UCCC*, 55 MINN. L. REV. 525 (1971).

13. UCCC § 2.306(2)(k). "The seller shall give to the buyer the following information: . . . (k) rate of the credit service charge . . . except in the case of a credit service charge which does not exceed \$5 when the amount financed does not exceed \$75 or \$7.50 when the amount financed exceeds \$75"

14. UCCC §§ 2.402 & 3.402. There is no mention of consumer leases since such a provision would be irrelevant.

15. FCCPA operates unless state legislation is submitted and found to be "substantially similar." See note 2 *supra*.

or more sales to avoid the disclosure of an annual percentage rate"¹⁶ Since the FCCPA is explicitly directed only at disclosure, a multiple agreement that sufficiently discloses the annual percentage rate may be acceptable even though it avoids the state's system of interest rate ceilings.

2. *Balloon Payments*

Contracts containing a series of small installment payments followed by a very large final, or "balloon," payment are common in credit arrangements with consumers. The consumer may be induced to enter into the credit agreement by the seemingly manageable size of the installment payments with little or no notice of the final payment, thus frustrating the purposes of disclosure. At the end of the contract, the debtor may be unprepared to meet the often unexpected balloon payment and thus be forced to default.¹⁷ The UCCC gives the consumer the right to refinance without penalty any credit sale or loan payment that is "more than twice as large as the average of earlier scheduled payments."¹⁸

The UCCC also restricts balloon payments in consumer leases by stating, "[t]he obligation of a lessee upon expiration of a consumer lease . . . may not exceed twice the average payment allocable to a monthly period under the lease."¹⁹ As suggested by the UCCC's comment,²⁰ this section protects against an additional abuse available in consumer leases—the "open end" lease.

Under such an agreement, the parties contract that at the expiration of the lease the article leased, usually an automobile, will have a certain depreciated value and will be sold. If it brings less than the agreed depreciated value, the lessee is liable for the difference; if it brings more, the lessee is entitled to the surplus.²¹

Such a practice violates the purposes of disclosure because the consumer may not know how much the lease will actually cost him, and also "if the lessor sets an unrealistically high depreciated value the contingent liability of the lessee will increase

16. 15 U.S.C. § 1638(a) (7) (Supp. V, 1969). See also 34 Fed. Reg. 2002 (1969), as amended 34 Fed. Reg. 5326, 13410, 18242 (1969).

17. *Ruona v. Freeway Dodge*, 285 Minn. 23, 171 N.W.2d 212 (1969), provides an example of a balloon payment. See text accompanying note 26 *infra*. The harshness of such contract provisions is often compounded by the broad range of remedies available to creditors on default by the debtor. See Part III of this Note.

18. UCCC §§ 2.405 & 3.402.

19. UCCC § 2.406.

20. *Id.*, Comment.

21. *Id.*

accordingly, and the seller can offer deceptively low rental payments to a gullible customer."²²

Presently, Minnesota's only statutory regulation of balloon payments is found in the Motor Vehicle Retail Installment Sales Act,²³ which requires that unequal or irregular payments fall within the time-price differential.²⁴ The Motor Vehicle Act establishes a table of allowable interest rate differentials depending upon the period of time over which payments are spread.²⁵ The ineffectiveness of this restriction was recently shown in *Ruona v. Freeway Dodge*.²⁶ The Minnesota Supreme Court was asked to determine whether a final installment payment of \$1,527.84, following 35 monthly payments of \$80.00 each, was within the allowable time-price differential. In upholding the credit arrangement, the court reasoned that because such a large amount of the contract price was to be paid at the end, the consumer had the use of a greater amount of money for a longer time and thus the allowable effective rate of interest was higher than if the payments had been equal. Seeking to justify its decision, the court stated:

This interpretation, in our opinion, is consistent not only with the express terms of the act, but also with its basic purpose of consumer protection and of stabilization of the finance industry. While the "effective rate" of 19.57 percent permitted on plaintiff's contract seems quite high, it is for the legislature and not for this court to strike the balance between protecting the consumer and permitting legitimate finance companies to earn a profitable return on high risk used-car installment sale contracts.²⁷

With respect to the FCCPA, Regulation Z²⁸ requires that, "if any payment is more than twice the amount of an *otherwise regularly scheduled equal payment*, the creditor shall identify the amount of such payment by the term 'balloon payment'"²⁹ Thus, in *Ruona*, the final payment would not have been included in determining if it were a balloon payment and disclosure would have been required. The UCCC also requires disclosure and excludes the final payment in its determination. But the UCCC goes

22. *Id.*

23. MINN. STAT. §§ 168.66-.77 (1969) [hereinafter cited as Motor Vehicle Act].

24. MINN. STAT. § 168.72(c) & (a) (1969). See Note, *supra* note 12, at 533 & n. 65.

25. *Id.*

26. 285 Minn. 23, 171 N.W.2d 212 (1969).

27. *Id.* at 31-32, 171 N.W.2d at 217-18 (emphasis added).

28. 12 C.F.R. §§ 226.1-226.12 (1970).

29. *Id.* (emphasis added).

further than the FCCPA to permit refinancing.³⁰

B. ADDITIONAL CHARGES

Not uncommon in consumer credit contracts are provisions for additional charges upon late payment or nonpayment of an installment. Such charges are often excessive and unexpected by the consumer and thus contrary to the purpose of the disclosure regulations. Also a major purpose of rate regulation is to protect the consumer debtor from hidden charges which in effect increase the rate of interest.

1. Attorneys' Fees

One type of additional charge is a provision in the contract which places the expense of attorneys' fees incurred in the collection of the debt upon the defaulting debtor. The UCCC provides two alternative treatments of this charge. Alternative A³¹ prohibits a provision for attorneys' fees in a consumer purchase or loan contract on the theory that such collection costs are part of business overhead.³² Considering the widespread use of collection agencies, the continuing relationship most sellers and lenders have with attorneys, the predictability of a certain percentage of late payments or nonpayments and the inability of many defaulters to pay anything, such an approach seems realistic.³³ On the other hand, the cost of credit may rise and, more important, the credit market may tighten in an attempt by creditors to avoid as many defaulting debtors as possible. In these circumstances it is the poor who would suffer most and for whom the approach of Alternative A may be inadequate.

Alternative B illustrates the more common theory that attorneys' fees ought to be borne—at least in part—by the default-

30. UCCC §§ 2.405 & 3.402. See notes 19-23 *supra* and accompanying text.

31. UCCC §§ 2.413A & 3.404A. See also UCCC § 3.514 for a similar treatment of loans under \$1,000.

32. *Id.* § 2.413A, Comment.

33. Kripke, *supra* note 4, at 29. In support of Alternative A, one commentator has stated:

This provision recognizes the striking braking effect the presence of such a clause has when the debtor is either unable or unwilling to pay. Even when the debtor has an honest belief that he has a right to refuse to pay, the potential additional liability for a substantial lawyer's fee makes him hesitant to assert his claim. When the debtor is unable to pay, the added liability simply adds to the burdens of his insolvency or forces him to divert funds from necessities.

Hogan, *supra* note 4, at 704.

ing buyer who causes the seller to incur the expense.³⁴ Although the UCCC as proposed to Minnesota's legislature in 1969 contained Alternative A,³⁵ Alternative B³⁶ is very similar to the treatment of attorneys' fees in Minnesota's Motor Vehicle Act. The Motor Vehicle Act provides a maximum allowance for attorneys' fees of "15% of the amount due and payable under such contract . . ." and requires ". . . an attorney not a salaried employee of the holder of the contract . . ."³⁷ Both Alternative B and the Motor Vehicle Act eliminate the most blatant abuses of a contract provision for attorneys' fees.

Besides the Motor Vehicle Act, Minnesota has enacted the Uniform Commercial Code which provides that upon default in a secured transaction, the secured party may sell the collateral and apply the proceeds to "reasonable attorney's fees and legal expenses incurred by the secured party . . ."³⁸ Although the UCC applies only to secured sales and loans, these are common in consumer transactions. Consequently, the lack of any provision establishing a maximum for attorneys' fees may work a harsh result upon the consumer in a secured transaction, since even reasonable attorneys' fees may be high.

Thus, other than the maximum established in the Motor Vehicle Act, Minnesota leaves the question of attorneys' fees unregulated. Alternative B provides some relief by extending the 15 percent maximum beyond motor vehicle sales whereas alternative A provides much greater relief by placing the total burden on the creditor who can more easily prepare for default. The present possibility of an excessive and unexpected charge for attorneys' fees illustrates the need for comprehensive limitations and the UCCC appears to offer feasible alternatives.

2. *Default Charges*

Attorneys' fees are only one type of additional charge avail-

34. See UCCC § 2.413B, Comment. Compare UCCC § 5.202(8) which allows the court to include attorneys' fees in the debtor's award when the creditor is found to have violated the UCCC. See Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 BOST. U.L. REV. 559, 570-76 (1968).

35. J. of the House 10-105, Tuesday, May 13, 1969 (91st day).

36. UCCC §§ 2.413B & 3.404B.

37. MINN. STAT. § 168.71(a)(3) (1969). See also UCCC §§ 2.413B & 3.404B which require a non-salaried attorney as well as limiting the charge to "15 percent of the unpaid debt after default . . ." This UCCC language more clearly specifies that the amount paid is subtracted before the fee is computed.

38. UCC § 9-504(1)(a) (1962 Official Text).

able to creditors upon default. Default charges are used by creditors to conceal certain costs and are thus inconsistent with rate and disclosure regulation. Except for specified delinquency charges,³⁹ the cost of realizing on collateral⁴⁰ and attorneys' fees,⁴¹ the UCCC prohibits default charges, making such a provision in a consumer credit contract unenforceable.⁴²

Minnesota takes a similar approach in the Motor Vehicle Act where "[t]he holder of a retail installment contract may, if the contract so provides, collect a delinquency and collection charge on each installment in arrears for a period not less than ten days in an amount not in excess of five percent of each installment or \$5, whichever is less."⁴³ Minnesota's Bank Installment Loan Act also allows limited delinquency charges, but unlike the UCCC and the Motor Vehicle Act, does not regulate attorneys' fees.⁴⁴ Thus, allowable additional charges are specified in two major areas of consumer credit, but other credit sales and non-bank loans remain subject to unlimited default charges. The UCCC would uniformly apply to all transactions involving consumers and thus eliminate the present deficiencies in Minnesota law.

C. RIGHT OF NOTICE

1. Notice of Assignment

The notice of assignment provision appearing in both the credit sales and the loans sections of the UCCC⁴⁵ is derived from a very similar section of the UCC.⁴⁶ The notice provision protects the account debtor from incurring liability for late payment or nonpayment when he mistakenly pays his original creditor after an assignment of the account has been made. Until the account debtor receives notice reasonably identifying the rights assigned, he is authorized to pay his original seller, lessor

39. UCCC § 2.203.

40. UCC § 9-504 (1962 Official Text).

41. UCCC §§ 2.413B & 3.404B. Alternative A prohibits a provision for the payment by debtor of attorneys' fees. See text accompanying notes 28-36 *supra*. UCCC § 3.514 does the same as Alternative A when a consumer loan is under \$1,000.

42. UCCC §§ 2.414 & 3.405. Leases are not covered.

43. MINN. STAT. § 168.71(a)(3) (1969). UCCC § 2.203(1) is the same.

44. MINN. STAT. § 48.155 (1969).

45. UCCC §§ 2.412 & 3.406.

46. *Id.*, Comments. These sections are very similar to UCC § 9-318(3) (1962 Official Text). Although Article 9 only applies to secured transactions, comments to the UCC admit that the section is largely a clarification of existing contract principles.

or lender. In addition, the debtor may request reasonable proof of the assignment before paying the assignee. By including the Uniform Commercial Code's notice of assignment provision in the UCCC, the UCCC re-emphasizes the importance of this general principle of contract law in consumer transactions.

2. *Notice of Changes in the Terms of Revolving Charge Accounts*

Revolving charge and revolving loan accounts are rapidly expanding areas of consumer credit transactions, and have recently been the subject of much criticism and concern.⁴⁷ The UCCC contains the following definition of a revolving charge account:

[A]n arrangement between a seller and a buyer pursuant to which (1) the seller may permit the buyer to purchase goods or services on credit either from the seller or pursuant to a seller credit card, (2) the unpaid balances of amounts financed arising from purchases and the credit service and other appropriate charges are debited to an account, (3) a credit service charge if made is not precomputed but is computed on the outstanding unpaid balances of the buyer's account from time to time, and (4) the buyer has the privilege of paying the balances in installments.⁴⁸

The UCCC, recognizing the fact that such accounts will be the subject of continued growth,⁴⁹ attempts to provide the creditor with a feasible method of giving customers reasonable notice of changes in credit terms. The Code requires that in order to make a change in credit terms effective as to customer balances in a revolving account both before and after notice, the creditor must give the customer written notice at least six months before the change is to take effect and repeat the notice twice during the six month period.⁵⁰ Uniform regulation by the state of this rapidly expanding area of consumer credit is desirable and the UCCC's coverage appears to be reasonable and complete.

D. SALES TECHNIQUES

Particular sales techniques used in dealing with consumers

47. See generally Buerger, *Revolving Credit and Credit Cards*, 33 LAW & CONTEMP. PROB. 707 (1968).

48. UCCC § 2.108. Substantially the same definition is used for revolving loan accounts. UCCC § 3.108.

49. Minnesota's only legislation in this area concerns criminal liability for unauthorized uses of credit cards. See MINN. STAT. § 325.931 & .932 (1969); 2 CCH CONSUMER CREDIT GUIDE ¶ 4640 (1970).

50. UCCC §§ 2.416 & 3.408. Note that general contract limitations also apply. See Buerger, *supra* note 47, at 715-16.

have resulted in such obvious abuses that authorities have been uniformly critical.⁵¹ The only question is how the abuses can be most effectively remedied.

1. Referral Sales

A referral sale involves a purchase of consumer goods or services at a specified price accompanied by an agreement to reduce the balance due or to compensate the buyer for each actual customer he refers to a seller.⁵² The abuse lies in the sales tactics employed by sellers to represent the usually original, inflated price as manageable, a bargain, and even free after referrals. If used with moderation, for example, by limiting the number of referrals any one buyer could make, the referral sales technique could benefit both buyer and seller and not violate rate and disclosure regulations.⁵³ But sellers have not been moderate, and considering the high profit margin available on referral sales, change is unlikely.⁵⁴ Statutory limits on the number of referrals allowed would not only be almost impossible but also very impractical since the reasonable maximum may vary according to the transaction, the locality and the individual personality of the buyer. Instead, the UCCC makes referral sales or lease agreements unenforceable and allows "the buyer or lessee, at his option, [to] rescind the agreement or retain the goods delivered and the benefit of any services performed, without any obligation to pay for them."⁵⁵ This is an unusually harsh remedy but seems justified because of the potential abuses which result from use of the referral sales technique and from the difficulty of regulation, short of absolute prohibition.⁵⁶

51. See generally Jordan & Warren, *supra* note 4, at 442.

52. Dodge, *Referral Sales Contracts: To Alter or Abolish?*, 15 BUFFALO L. REV. 669, 673-74 (1966).

53. *Id.* See also Baird, *Let the "Seller" Beware—Another Approach to the Referral Sales Scheme*, 22 U. OF MIAMI L. REV. 861; Hogan, *supra* note 4.

54. Dodge, *supra* note 52, at 672.

55. UCCC § 2.411.

56. UCCC § 2.411, Comment. See Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 442 (1968); Hogan, *Integrating the UCCC and the UCC—Limitations on Creditors' Agreements and Practices*, 33 LAW & CONTEMP. PROB. 686, 702 (1968):

Referral transactions are treated so harshly precisely because they are themselves so harsh and deceptive. Like chain letters they depend upon people who do not perceive that the group "of friends and neighbors" needed as new customers will increase in a geometric progression until the entire population of the world must buy freezers to satisfy the bonus promises made to a relatively small number of initial buyers.

The UCCC's referral sales provision is in effect in Minnesota as a 1969 amendment to the prevention of consumer fraud section of Minnesota's statute regulating manufacturing and sales.⁵⁷ The result is to prohibit all referral sales in Minnesota and the statute includes the stringent remedy found in the UCCC.⁵⁸

2. Home Solicitation Sales

Home solicitation sales, like referral sales, have been subject to much criticism, largely because of the high pressure sales tactics employed.⁵⁹ The UCCC defines home solicitation sales as

. . . a consumer credit sale of goods, other than farm equipment, or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him.⁶⁰

The UCCC requires that the buyer be given a three day "cooling-off period"⁶¹ during which the buyer may cancel by giving or mailing to the seller a "written notice of cancellation."⁶² By setting out the required "Buyer's Right to Cancel" clause, the UCCC also regulates the form of the agreement.⁶³ In light of the possibility of nondelivery of a mailed notice of cancellation, the buyer should be warned that he has the burden of proving that the notice was properly mailed.⁶⁴

If the buyer cancels, the seller is permitted to keep up to five percent of the cash price as a cancellation fee, provided this amount does not exceed the cash down payment.⁶⁵ This provision illustrates the UCCC's emphasis on balancing the new protections of the buyer with some protections for the seller. Con-

57. Ch. 1100, 1969, amending MINN. STAT. § 325.79. The only changes were the deletion of consumer before sale and lease which is understandable because of the section's title, and credit before sale. The deletion of credit extends the provision to cash deals.

58. The attorney general's office introduced most of the specific contract limitations and rate regulations of the UCCC as separate bills. This appears to be an undesirable approach considering the value of uniformity and the interrelatedness of the UCCC provisions.

59. See Jordan & Warren, *supra* note 56; Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 U.C.L.A.L. REV. 717 (1968).

60. UCCC § 2.501. Prior drafts of the UCCC contained the language "at a place other than a place of business of the seller," which seems to be broader. Jordan & Warren, *supra* note 56, at 442. The Code's Comment expresses an intent to avoid limiting the coverage of this section to sales consummated in the buyer's residence.

61. UCCC § 2.502(1).

62. *Id.* § 2.502(2).

63. *Id.* § 2.503(2).

64. *Id.* § 2.502, Comment 2.

65. *Id.* § 2.504(3).

sidering the potential pressures that a seller can exert on a buyer in the home solicitation situation, the UCCC's provisions are a major improvement over the current absence of any significant restrictions in Minnesota.⁶⁶

III. SAFEGUARDING THE CONSUMER UPON DEFAULT

After the consumer credit agreement has been made, the creditor-debtor relationship often does not run smoothly. If the goods or services in a credit sale are defective or otherwise unsatisfactory, the consumer-debtor may refuse to make future payments and/or seek a refund. Another possibility is that due to unforeseen circumstances the debtor may be unable to meet an installment payment of his consumer credit sale or loan. The debtor's failure to perform his legal duty operates as a default. The following sections discuss various practices available to creditors upon default by the consumer and how Minnesota, the FCCPA and the UCCC approach the situation.

A. RETENTION OF CONSUMER DEFENSES

In most jurisdictions, consumers are easily deprived of their defenses against their original creditor through either negotiation of consumer-made notes or waiver of defense clauses in sales and loan contracts. This loss of defenses has been generally criticized by commentators⁶⁷ and has produced a variety of judicial interpretations.⁶⁸

1. *Negotiability of Consumer-Made Notes*

It is a common practice for the creditor to discount consumer-

66. The FCCPA allows a three day cancellation period only ". . . in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended . . ." 15 U.S.C. § 1635(a) (Supp. V, 1969).

67. See generally Hogan, *supra* note 56, at 686-91; Jordan & Warren, *supra* note 56, at 433-38; King, *The Unprotected Consumer-Maker Under the Uniform Commercial Code*, 65 DICK. L. REV. 207, 209-11 (1961); Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 469-73 (1968); Littlefield, *Preserving Consumer Defenses: Plugging the Loophole in the New UCCC*, 44 N.Y.U.L. REV. 272 (1969); Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 414-18 (1966); Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1483-85 (1966).

68. Kripke, *supra* note 67, at 469.

made notes to financial institutions which usually take as holders in due course, a position which frees them from most defenses a consumer-debtor may have against his original creditor.⁶⁹ The UCC affords holder in due course protection to holders who take for value, in good faith and without notice.⁷⁰ Traditional commercial practices have been applied to the negotiation of consumer-made paper and the fact that the holder knew he was dealing with consumer-made paper has not been considered lack of good faith or notice. This implies that to lose his holder in due course status, the holder would have to have actual knowledge of the specific defense which the buyer might raise.

Some state courts have recently reacted against the harshness of the holder in due course doctrine as applied to consumer-made paper by holding that the financial institution was on notice or lacked good faith.⁷¹ But the cases are not consistent and the countervailing policy favoring negotiability has generally prevailed. To date, there has been no Minnesota decision interpreting the holder in due course issue to favor the consumer. Consequently, holders in due course are protected when taking consumer-made negotiable instruments.⁷² In an attempt to eliminate the source of the problem, the UCCC expressly prohibits the taking of "a negotiable instrument other than a check" in a consumer credit sale or consumer lease and provides that "a holder is not in good faith if he takes a negotiable instrument with notice that it is issued in violation of this section."⁷³ The UCCC Comment interprets this last phrase to cover the professional financier who knows he is dealing with consumer-made

69. The defenses retained are listed in UCC § 3-305 (1962 Official Text).

70. *Id.* § 3-302. See also Note, *supra* note 67, at 414. UCC § 1-201 (19) defines good faith as "honesty in fact" which is a subjective standard. The 1952 draft of the Code further defined good faith with the statement, "in good faith, including observance of reasonable commercial standards of any business in which the holder may be engaged." This was eliminated in the final 1957 version of the Code which is in effect in Minnesota. Although the above provision would allow the consumer to introduce objective facts to show that the financial institution knew it was dealing with consumer paper, "the difficulty of showing that there had been a deviation from 'reasonable commercial standards' made this measure of dubious value." King, *supra* note 67, at 209-10.

71. See Note, *supra* note 67, at 414-16; Littlefield, *supra* note 67.

72. MINN. STAT. § 336.3-302 (1969) has not been subject to judicial interpretation. See *Schauman v. Solmica Midwest, Inc.*, 283 Minn. 437, 168 N.W.2d 667 (1969), which illustrates that a consumer note is still an acceptable form of payment.

73. UCCC § 2.403.

paper.⁷⁴ In light of the differences in bargaining power and sophistication of the parties, to distinguish consumer transactions from commercial transactions is necessary and appropriate.

2. Waiver of Defense Clauses

Waiver of defense clauses provide the second avenue a creditor may take to deprive the consumer of his defenses. The Uniform Commercial Code permits waiver of defense clauses "[s]ubject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods"⁷⁵ To date Minnesota has had no decision holding that a different rule exists and so the impact of the UCC's exception for consumer goods remains an "open question"⁷⁶ and waiver of defense clauses are enforced.

The UCCC offers two alternative solutions. Alternative A completely prohibits waiver of defense clauses⁷⁷ and is greatly favored by commentators because the tendency of courts is to enforce such clauses as part of the bargain.⁷⁸ Alternative B permits waiver of defense clauses under certain circumstances.⁷⁹ An enforceable waiver of defense clause requires

. . . an assignee not related to the seller or lessor who acquires the buyer's or lessee's contract in good faith and for value, who gives the buyer or lessee notice of the assignment . . . and who, within 3 months after the mailing of the notice of assignment, receives no written notice of the facts giving rise to the buyer's or lessee's claim or defense.⁸⁰

An additional protection exists in the requirement that only claims or defenses which have arisen before the end of the three-month period after notice was mailed are waived.⁸¹

74. *Id.*, Comment. The Comment suggests that a second or third taker, unaware of the origin of the note, may qualify as a holder in due course, but that this would be very unusual. The strong policy favoring negotiability is being balanced against loss of consumer defenses. See Note, *Enforcement Under the UCCC*, 55 MINN. L. REV. 572, 577 & nn. 23-24 (1971).

75. UCC § 9-206(1) (1962 Official Text).

76. MINN. STAT. ANN. § 336.9-206 (1966), Minnesota Code Comment.

77. UCCC § 2.404A. Alternative A was in the UCCC as introduced in Minnesota.

78. See Kripke, *supra* note 67, at 470-71; Hogan, *supra* note 67, at 689-90. "The concern for the buyer in such cases suggests that the enactment of alternative B may actually impede the case-by-case development of a rule more favorable to the buyer." *Id.* at 690.

79. UCCC § 2.404B.

80. *Id.* § 2.404B(1).

81. *Id.*; see Hogan, *supra* note 67, at 688-89.

As with negotiability of consumer-made paper, some courts have found waiver of defense clauses unenforceable against consumer-debtors by arguing that such clauses are unconscionable, unfair and contrary to public policy.⁸² But reliance on the discretion of the courts is unsatisfactory since it does not provide the uniformity essential in the area of consumer protection. In comparison, the UCCC's alternatives provide a comprehensive and explicit solution for consumer transactions without stretching the traditional contract principles of the UCC governing commercial transactions. As with negotiable instruments, to distinguish between consumer transactions and commercial transactions in the area of waiver of defense clauses seems appropriate considering the differences in bargaining power and sophistication of the parties.

But a possible loophole exists in the UCCC because neither the waiver of defense provision nor the prohibition of consumer-made notes provision is found in the article dealing with consumer loans.⁸³ Thus, in a consumer credit sale, a dealer may enter an agreement with a finance company in order to have two transactions involved in every consumer credit sale: first, a sale by the retail seller and second, an installment loan by the financing agent. One commentator believes that this loophole must be eliminated before consumer defenses can be adequately preserved.⁸⁴

Other commentators have supported the UCCC's different treatment of consumer sales and consumer loans in the negotiability and waiver of defense provisions. One argument is that the relationship of the financial institution to the buyer and the seller in the case of assignment of consumer paper is different than the relationship between the parties in making a consumer loan.⁸⁵ Another argument is that "[i]t is hard to believe that the industry will sacrifice the assurance of a regular flow of business from the seller to the sales financier to protect itself from the risk of claims or defenses arising in favor of the buyer."⁸⁶ Fi-

82. Littlefield, *supra* note 67, at 278; see also Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. MIAMI L. REV. 11, 66-67 (1968).

83. No provision in Article 3 corresponds with UCCC §§ 2.404A & B.

84. Littlefield, *supra* note 67, at 292. The author proposes an amendment to the UCCC. *Id.* at 293-94.

85. Jordan & Warren, *supra* note 56, at 437-38. The recent innovation of bank credit cards may destroy the validity of this distinction.

86. Hogan, *supra* note 56, at 690.

nally, courts should be able to strike down such devices if they would arise.

3. Result

The opponents of the UCCC's limitations on waiver of defense clauses and the negotiability of consumer-made notes claim that these provisions will hinder the normal flow of business and tighten available credit.⁸⁷ The contrary view is that considering the size and continued growth of the consumer credit industry, it is unlikely that limitations like those in the UCCC would have a major adverse impact. In the opinion of one commentator, although the cost of credit will probably increase, the product will be better.⁸⁸ Another argument in favor of imposing these two limitations on creditors is that such freedom from customer defenses has never characterized the commercial world where bargaining power is more equal. The financier in normal commercial transactions assumes a policing role and refuses to do business with a merchant who has a history of customer complaints and returned goods.⁸⁹ These factors lead to the conclusion that a reputable merchant would have no problem assigning his consumer accounts. The UCCC's provisions protecting consumer defenses would place the financial institution in this type of policing role in the consumer credit area.⁹⁰

B. PROTECTION OF THE CONSUMER'S PROPERTY

1. *The Extent of Security Rights Allowed*

The UCCC has limited the seller's and lessor's right to security in consumer sales, depending upon the manner in which the obligation arose. In a sale of goods, a security interest may be taken in the goods sold, but not in other goods unless they become closely connected with the goods sold.⁹¹ For example, the mechanic who puts a new engine into the consumer's car would probably be able to take a security interest in the whole car. To take a security interest in other goods, the transaction must, however, meet the additional requirement that the debt secured be substantial. The Code defines "substantial" as \$300 for a security interest in goods and \$1,000 for a security interest in land.⁹²

87. Littlefield, *supra* note 67, at 286.

88. *Id.*

89. Kripke, *supra* note 67, at 472.

90. Jordan & Warren, *supra* note 56, at 436.

91. UCCC § 2.407(1) & Comment 1.

92. *Id.*

When the sale is for services, the security interest may be taken only in land or goods maintained or improved by such services. Again there is a \$300 and \$1,000 substantial debt requirement.⁹³ A sale of land gives rise to a security interest only in the land sold and is treated as a consumer credit sale only if the credit service charge exceeds ten percent.⁹⁴ This summary illustrates that where the seller may obtain a security interest in goods beyond the goods sold, the relation of the additional goods to the origin of the debt is the important factor.

2. *Limitations on Use of Cross-Collateral*

In addition to limiting the property in which the creditor may take a security interest, the UCCC also seeks to limit the use of cross-collateral, another form of additional collateral.⁹⁵ Where there have been previous sales by the seller to the buyer, the seller may take a security interest in goods from prior sales in which he has an existing security interest. Also, a contract may be made allowing the seller to take a security interest in goods he sells to the buyer in the future.⁹⁶ The UCCC correlates the use of cross-collateral to rate regulation by stating that the rate of credit service charge "may not exceed that permitted if the balances so secured were consolidated"⁹⁷ This prevents the creditor from using cross-collateral agreements in order to avoid rate regulation.⁹⁸ Finally, payments on debts collaterally secured are specifically allocated to the earliest purchase first un-

93. *Id.* § 2.407(1) & Comment 2.

94. *Id.* § 2.407(1) & Comment 3. In addition the UCCC prohibits a lessor from taking a security interest in the property of a lessee. UCCC § 2.407(2) & Comment 4. In a sale for agricultural purposes, the seller is allowed to take a security interest in other property. UCCC § 2.407(1) & Comment 5. Security interests in loans are unrestricted except for UCCC § 3.510(1) which prohibits taking a security interest in land when the loan is for \$1,000 or less.

95. UCCC § 2.408.

96. *Id.* § 2.408(1).

97. *Id.* § 2.408(2).

98. *Id.*, Comment 2 uses this illustration:

If a buyer who owes a seller a \$275 balance from one sale makes a subsequent \$250 purchase, the seller may consolidate these debts under Section 2.206(1) so that the credit service charge would be calculated on the sum of the refinanced balance of the first sale, e.g., \$260, and the amount financed under the second sale, \$250, or a total of \$510. Under section 2.201, the seller may then charge a maximum rate of 36% on the first \$300 and 21% on the next \$210. However, if the debts were kept separate, the seller might charge the maximum of 36% on both the \$275 and \$250 balances.

See also Hogan, *supra* note 56, at 698-99.

til it is completely paid, or, if sales are made on the same day, to the smallest first.⁹⁹ This prevents the seller from repossessing all items when one payment is missed.¹⁰⁰

3. *The UCC and Minnesota*

Article 9 of the UCC represents essentially all of Minnesota's law governing security interests.¹⁰¹ The policies underlying Article 9 have been summarized by one commentator as follows:

1. To remove technicalities.
2. To make personal property security transactions simple, safe and inexpensive.
3. To eliminate any differences of substance based on form.
4. On default, to realize the value of the security by sale or other disposition by the secured party himself with as little recourse to legal process or to court procedure as possible.¹⁰²

These policies indicate the need in commercial transactions to find a solution quickly and easily, but not necessarily fairly. The UCC, recognizing that consumer transactions may involve different policies, contains many disclaimers of intent to replace state consumer credit legislation.¹⁰³ The Minnesota legislature

99. UCCC § 2.409(1) & (3) apply to credit sales. These same regulations apply to payments made on a revolving charge account where various security interests exist. UCCC § 2.409(2).

100. The facts of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), dramatically illustrate the problems. In the *Williams* case a furniture dealer sold a stereo set for \$514.95 on credit to a woman who was receiving welfare payments of \$218 per month for herself and seven children. The dealer had knowledge of the consumer's financial status. The consumer owed the dealer \$164 as the balance of her prior purchases when she bought the stereo, and she had made purchases totaling \$1,800 over the years from this dealer. The security agreement under which she bought the stereo provided that her payments would be prorated over the purchase price of the stereo and over all other purchases made by her. Each new purchase automatically became subject to a security interest arising out of her previous purchases, and upon default in her payments, the dealer had the right to repossess all of the goods purchased. The consumer defaulted and the dealer sought to replevy all of her purchases.

101. MINN. STAT. § 336.9 (1969).

102. Richter, *Article 9 of the Uniform Commercial Code—A Roundup*, 7 PERS. FIN. Q. 36 (1953).

103. Hogan, *supra* note 56, at 693. The following sections of the UCC contain special reference to consumer goods or sales: 9-109(1), 9-203(1), 9-204(4)(b), 9-206(1), 9-307(2), 9-401(1)(a), 9-505(1) and 9-507(1). Also the comment to 9-101 states:

Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. Many states now regulate such loans and sales. . . . While this article applies generally to security interests in consumer goods, it is not designed to supercede such regulatory legislation.

has not yet acted to limit creditors' rights in secured consumer transactions and Minnesota courts continue to apply general contract law to consumer transactions.¹⁰⁴

Examination of the UCC's approach to consumer transactions in relation to both consumer defenses and secured transactions illustrates the great inadequacies of the Uniform Commercial Code as a source of consumer protection. Even so, one author does believe that the UCC, if flexibly used by the courts, makes the adoption of separate consumer legislation unnecessary.¹⁰⁵ Some courts have taken the initiative by exercising broad discretion—with great emphasis on unconscionability—to protect the consumer. This judicial protection, however, is neither reliable nor evident in Minnesota Supreme Court decisions. Enactment of comprehensive consumer protection legislation would make judicial gymnastics unnecessary and would preserve the UCC's policies in commercial transactions where they are appropriate.

C. PRESERVING THE CONSUMER'S WAGES

Determination of the extent to which a consumer's wages should be preserved involves a balancing of many policies. On one hand, preservation of an individual's right to his future wages is premised upon the rationale that people need a certain amount of income in order to survive and are motivated to work when assured of actually receiving what they earn.¹⁰⁶ On the other hand, the consumer credit industry, even in middle-class contexts, strongly relies on the proposition that the buyer will pay for a present benefit from his future income.¹⁰⁷ In addition, it is argued that the individual has the right to dispose of his property and earnings as he sees fit since freedom of contract is a basic premise of our contract law. Until recently, the latter, traditional arguments have prevailed.

1. *Assignment of Earnings*

The UCCC strictly limits assignment of earnings. In consumer credit sales, leases and loans, irrevocable assignments of earnings are unenforceable by the assignee and revocable by the

104. See, e.g., *Ruona v. Freeway Dodge*, 285 Minn. 23, 171 N.W.2d 212 (1969).

105. Murray, *supra* note 82, at 70.

106. Hogan, *supra* note 56, at 695-96.

107. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. Rev. 1, 28 (1969).

buyer, lessee or debtor.¹⁰⁸ Thus, the debtor is given an opportunity to have his debt determined by a court before any creditors can reach his earnings against his will.¹⁰⁹

Minnesota permits irrevocable assignments of wages if certain procedures are complied with. Written notice and a copy of the assignment must be given to the employer within three days of the assignment and the employer then consents in writing.¹¹⁰ A further limitation provides that a wage assignment is void if due in whole or part more than 60 days after making the contract.¹¹¹ In addition to the above restrictions, Minnesota's small loan statute invalidates wage assignments "unless the amount of the loan is paid to the borrower simultaneously with [the assignment's] execution,"¹¹² and limits the amount to "ten per cent of the borrower's salary, wages, commissions, or other compensation."¹¹³

Both the UCCC and Minnesota recognize that the freedom of contract theory is inappropriate in consumer credit transactions since the contracting parties are in unequal bargaining positions.¹¹⁴ Minnesota's approach illustrates a compromise between complete preservation of the consumer's wages and the individual's right to dispose of his property. When an irrevocable assignment of earnings has been made, the Minnesota consumer still has the burden of initiating litigation if he has a defense against the creditor. For the unsophisticated and poor consumer such action is usually unfeasible and/or impractical and the UCCC would afford greater protection.

2. Garnishment

The criticisms and abuses involved in separating the consumer from his future wages are even more apparent in wage garnishment.¹¹⁵ For example, the recent increase in the number

108. UCCC §§ 2.410 & 3.403.

109. *Id.* § 2.410, Comment. It is implied that the creditor must take the initiative in any litigation to establish the debt.

110. MINN. STAT. §§ 181.04 & .05 (1969). The UCCC's use of "earnings" rather than wages may make it broader.

111. MINN. STAT. § 181.06 (1969).

112. MINN. STAT. § 56.17 (1969).

113. *Id.*

114. See notes 6-10 *supra* and accompanying text; Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 933 (1969).

115. Garnishment is a statutory collection device whereby a debtor's assets in the hands of a third party are subjected to a judgment or potential judgment against the debtor. Note, *Federal Restrictions of Wage Garnishments: Title III of the Consumer Credit Protection Act*,

of consumer bankruptcies has been largely attributed to wage garnishment.¹¹⁶ Although authorities tend to agree that wage garnishment often operates unfairly on the consumer, there is little agreement as to possible remedies and solutions.¹¹⁷

The FCCPA limits the maximum amount available to creditors and restricts discharge for garnishment.¹¹⁸ Minnesota extensively amended its garnishment statute in 1969¹¹⁹ to include essentially the same language as the FCCPA except that the amount exempted from garnishment is increased to the greater of 75 percent or 40 times the minimum wage¹²⁰ rather than the greater of 75 percent or 30 times the minimum wage as in the FCCPA.¹²¹

One recurring problem has been that the employer, unwilling to become involved in the garnishment process, discharges the employee when the latter's wages are garnished. The FCCPA offered a solution by providing that "[n]o employer may discharge an employee by reason of the fact that his earnings have been subjected to garnishment for any *one* indebtedness."¹²² The Federal Act further provides for a fine and/or imprisonment for any such unwarranted discharge of garnished employees.¹²³ Minnesota enacted a stricter provision which prohibits discharge for garnishment "unless there have been more than three garnishments within a 90 day period involving more than one indebtedness."¹²⁴ Minnesota also eliminates the criminal penalty, instead allowing the debtor a civil action to recover twice the wages lost plus reinstatement.¹²⁵ The UCCC prohibits any discharge "for the reason that a creditor of the employee has sub-

44 IND. L.J. 267 (1969); Comment, *Garnishment Action Without Notice and Hearing is Denial of Due Process*, 54 MINN. L. REV. 853 (1970).

116. See generally Kripke, *supra* note 107, at 29-32; McLean, *The Federal Consumer Credit Protection Act*, 24 BUS. LAW. 199, 202-05 (1968).

117. Hogan, *The Uniform Consumer Credit Code*, 25 BUS. LAW. 159, 161 (1969). See text accompanying notes 134-38 *infra* for a discussion of the UCCC's treatment of garnishment before judgment.

118. 15 U.S.C. §§ 1671-76 (Supp. IV, 1969). See Note, *Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code*, 38 U. CIN. L. REV. 338 (1969).

119. Laws 1969, Chapter 1142. See Comment, *supra* note 115.

120. MINN. STAT. § 550.37(13) (1969). These maximums are the same as those in UCCC § 5.105. MINN. STAT. § 550.37(1) (1969) goes further to completely exempt certain property from garnishment.

121. 15 U.S.C. § 1673 (Supp. IV, 1969).

122. 15 U.S.C. § 1674(a) (Supp. IV, 1969) (emphasis added).

123. 15 U.S.C. § 1674(b) (Supp. IV, 1969).

124. MINN. STAT. § 571.61(1) (1969).

125. MINN. STAT. § 571.61(2) (1969).

jected or attempted to subject unpaid earnings of the employee to garnishment"¹²⁶

The UCCC, as proposed to the Minnesota Legislature in 1969,¹²⁷ left Minnesota's garnishment statute dealing with dismissal unaffected, so both would apply if the UCCC were adopted.¹²⁸ This dispenses with the criticism that the UCCC would only apply to consumer credit transactions, but it also may pose a problem in how the number of indebtednesses will be counted when both consumer based garnishments and non-consumer based garnishments are being executed against a single debtor. In order to discharge the employee under the Minnesota statute, at least four garnishments would be required and they would have to originate from non-consumer credit transactions.

Since Minnesota's garnishment provisions would appear to qualify as "substantially similar"¹²⁹ to the FCCPA provision, the qualification of the state statutory scheme plus the UCCC would be no problem and the state, therefore, would be exempt from federal regulation. The passage of the amendments to the Minnesota garnishment statute raises doubts as to the necessity of adopting the UCCC's provisions, particularly since further protection for consumers could be accomplished through additional amendments to the existing law. Favoring the UCCC provisions would be the correlation of the UCCC's protection of the consumer's wages to the other protections the UCCC provides. Uniformity may be lost by cutting parts out of the UCCC and adopting separate though similar provisions.

An alternative remedy to the abuses created by garnishment would be the elimination of the garnishment process entirely. In support of this solution it is argued that states which have abolished wage garnishment have not experienced a decrease in the amount of consumer credit available.¹³⁰ On the other hand,

126. UCCC § 5.106.

127. J. of the House 10-105, Tuesday, May 13, 1969 (91st day), lists which sections of Minnesota statutes would be repealed or amended by adoption of the UCCC.

128. UCCC § 1.103.

129. 15 U.S.C. § 1675 (Supp. V, 1970):

The Secretary of Labor may by regulation exempt from the provisions of section 1673 (a) of this title garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 1673(a) of this title.

130. Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1234-38 (1965).

one author strongly criticizes this reasoning and states that "garnishments do result in collection."¹³¹ Most authors have rejected complete elimination of garnishment. It is the poor who would be most harshly affected by denial of credit but there are no conclusive figures to predict the exact result.¹³² A denial of credit to the poor may have very little impact on a statistical analysis of the consumer credit industry.

The most feasible alternative to complete abolition of garnishment is statutory limitation, and combining the new Minnesota statute with the UCCC provisions seems to eliminate most of the problems in wage garnishment.¹³³

D. THE CONSUMER'S DAY IN COURT

A problem mentioned in relation to the preservation of consumer defenses, consumer property and consumer wages was the consumer's right to a judicial determination of the existence and the extent of his debt. Following is a discussion of other creditor practices commonly used to deprive the consumer of his day in court and of the protections offered by the relevant statutes.

1. Garnishment before Judgment

Another UCCC provision dealing with garnishment prohibits attachment of the debtor's unpaid earnings before judgment has been entered.¹³⁴ Prejudgment garnishment has been severely criticized because, in order to contest the validity of the debt, the consumer is forced to initiate suit which is often too expensive or time-consuming.¹³⁵ The recent Supreme Court decision in *Sniadach v. Family Finance Corp.*¹³⁶ took a harsh view of prejudgment garnishment even though most state garnishment statutes permit the procedure.¹³⁷ In 1969, Minnesota responded to

131. Kripke, *supra* note 107, at 31. Kripke criticizes Brunn, *supra* note 130, because "his conclusion necessarily follows from his question-begging assumptions." See Note, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 772 n. 160 (1968).

132. See Note, *supra* note 131.

133. See generally Note, *supra* note 118. An additional provision in the UCCC prohibits garnishment before judgment and thus dispenses with the constitutional issue raised in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). See text accompanying notes 134-38 *infra*.

134. UCCC § 5.104.

135. See Note, *Enforcement Under the UCCC*, 55 MINN. L. REV. 572 (1971), for additional problems of consumer litigation.

136. 395 U.S. 337 (1969).

137. Comment, *supra* note 115, at 856.

Sniadach and eliminated prejudgment garnishment except in a few unusual situations.¹³⁸ Considering the burden of litigation and the other abuses inherent in garnishment before judgment, the UCCC's complete prohibition appears desirable.

2. Confession of Judgment

A confession of judgment clause in an agreement authorizes the creditor or his nominee to obtain judgment against the debtor upon future default, usually without service of process or notice to the debtor. In light of the contracts of adhesion common in consumer credit transactions and the expense, time and uncertainty of litigation, these clauses are a source of great hardship for the unsuspecting consumer-debtor.¹³⁹

The problem often arises when a confession of judgment clause is attached to a consumer-made note. The UCC, as effective in Minnesota, provides that unless otherwise illegal,¹⁴⁰ "[t]he negotiability of an instrument is not affected by . . . (d) a term authorizing a confession of judgment on the instrument if it is not paid when due . . ."¹⁴¹ Since Minnesota has no statute prohibiting confession of judgment clauses on consumer-made notes, courts continue to uphold them so long as a separate

138. MINN. STAT. § 571.41(2) & (3) (1969):

Subd. 2. Garnishment shall be permitted before judgment in the following instances only:

- (1) For the purpose of establishing quasi in rem jurisdiction
 - (a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors or to avoid service or keeps himself concealed with like intent; or
 - (b) the defendant is a resident individual who has departed from the state, or cannot be found therein; or
 - (c) the defendant is a nonresident individual, or a foreign corporation, partnership or association.
- (2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

Subd. 3. In the instances where garnishment is permitted before the entry of judgment the parties for the purposes of this act will be known as judgment debtor or judgment creditor respectively.

The FCCPA contains no mention of prejudgment garnishment. Garnishment is simply defined as "... any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(c) (Supp. IV, 1969). Thus, where the state's legal or equitable procedure allowed garnishment before judgment, the FCCPA would not interfere.

139. See King, *The Unprotected Consumer-Maker Under the UCC*, 65 DICK. L. REV. 207, 208 (1961).

140. UCC § 3-112(2) (1962 Official Text).

141. *Id.* § 3-112(1) (d).

statement signed by the defendant authorizing confession of judgment is filed and procedural requirements are met.¹⁴² In Minnesota's Motor Vehicle Act and Small Loans Act, confessions of judgment are specifically made unenforceable,¹⁴³ but these cover only two areas of consumer transactions. All confessions of judgment are invalid under the UCCC.¹⁴⁴ Thus, the creditor cannot use this procedure to place the burden of initiating litigation on the debtor, or to avoid the rights and defenses of the debtor which are explicitly protected in other provisions of the UCCC. The UCCC also invalidates clauses by which the debtor consents to the application of the law of another state, the jurisdiction of another state's courts or the fixing of venue.¹⁴⁵ Combined with the prohibition of garnishment before judgment, these UCCC provisions return to the consumer his rights of notice and due process.

3. *Restrictions on Deficiency Judgments*

Under the usual procedures of the Uniform Commercial Code, upon default in a secured credit transaction, the creditor has the right to take possession, without court approval of the goods secured or of other goods in which he may have a security interest.¹⁴⁶ The creditor may then sell the collateral after giving the debtor reasonable notice,¹⁴⁷ and the debtor remains personally liable for any deficiency.¹⁴⁸ Considering the rapid depreciation and over-pricing¹⁴⁹ of consumer goods, the emphasis on price is much less valid in consumer sales than in commercial

142. MINN. STAT. § 548.22 (1969) and Minnesota Comments to the UCC.

143. MINN. STAT. § 168.71(a)(2) (1969): "No provisions for confession of judgment or power of attorney therefor contained in any retail installment contract or contained in a separate agreement relating thereto, shall be valid or enforceable." MINN. STAT. § 56.12 (1969), reads: "No licensee shall take any confession of judgment or any power of attorney."

144. UCCC §§ 2.415 & 3.407.

145. UCCC § 1.201(1).

146. UCC § 9-503 (1962 Official Text).

147. *Id.* § 9-504(1) & (3) and Comment.

148. *Id.* § 9-505. As stated in the Comment, "In the case of consumer goods where 60% of the price or obligation has been paid the disposition must be made within 90 days after possession taken." See generally Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 440-41 (1968).

149. See also Jones, *The Role of National Companies: Ghetto Development, Redress of Denied Opportunities, Growth and Profit Maximization or Black Capital*, 25 BUS. LAW. 146-51 (1969); Hogan, *Integrating the UCCC and the UCC—Limitations on Creditors' Agreements and Practices*, 33 LAW AND CONTEMP. PROB. 686, 694 (1968).

transactions between merchants. Also, added to the inequality of bargaining, contracts of adhesion and other creditor practices and remedies discussed so far, the burden on the consumer is indeed heavy.¹⁵⁰

Minnesota has not yet attempted to provide special treatment for consumer credit transactions and so the UCC with its many inadequacies still controls. Upon default in a secured consumer credit sale of \$1,000 or less,¹⁵¹ the UCCC restricts the creditor either to repossession of the secured property or to a personal judgment against the debtor for the balance due.¹⁵² Because the UCCC does not require the creditor to resell if he elects to retake the collateral,¹⁵³ the UCCC should be amended to provide a notice procedure whereby the consumer is notified of the creditor's intent to retake so payment of the balance due can be arranged.¹⁵⁴

Considering the effect that limiting deficiency judgments may have on pricing, one commentator takes the position that the UCCC approach

should force the seller to assure himself that he will be able to recapture the balance owed from the goods themselves. This will make for a more realistic relationship between the rate of depreciation of the goods and the schedule of payments.¹⁵⁵

Conversely, it is argued that such a limitation will "boomerang," frightening the responsible creditors, causing higher credit charges and refusal of credit to marginal debtors. The marginal debtors will be forced to resort to illegitimate creditors.¹⁵⁶ Also, where the goods were overpriced or are of slight resale value, the creditor can still go against the debtor personally for the whole amount, so denial of the creditor's rights against the collateral may be useless.¹⁵⁷

150. Hogan, *supra* note 117, at 162. "Perhaps the most significant protection for the debtor is the limitation on a sales creditor's rights to obtain a deficiency judgment. It is this lingering liability for the price of goods sold even after they have been repossessed that has often led to garnishment of wages among the poor."

151. The UCCC as proposed in Minnesota increased the maximum price of sales covered from the UCCC's \$1,000 to \$5,000. J. of the House 10-105, Tuesday, May 13, 1969 (91st day).

152. UCCC § 5.103. Section 1.103 states that the UCCC controls where there is conflict with the UCC.

153. UCCC § 5.103(2). This section is contrary to the 60 percent limitation of UCC § 9-505.

154. Hogan, *supra* note 149, at 693-94.

155. Hogan, *supra* note 117, at 162; Hogan, *supra* note 149, at 694.

156. Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 469-73 (1968).

157. *Id.* at 477.

IV. CONCLUSION

A. THE USE OF UNCONSCIONABILITY

Special treatment of consumer contracts, absent special legislation, has often been tied to the unconscionable clause of the UCC. Proponents of the UCCC or other consumer oriented legislation are critical of the unreliability and unpredictability of this approach. On the other hand, a "minority of one"¹⁵⁸ takes the position that

[t]he relatively small number of consumer cases arising under the unconscionability rule of the Code have been favorable to the consumer, indicating that the courts have not had as much trouble with the Code as have the academic critics. It is believed that the unconscionability and good faith rules of the Code are sufficiently broad to enable the courts to police oppressive sales and credit sales to consumers. We ought to give the Code a sufficient trial period before we decide that it does not protect the consumer.¹⁵⁹

But the UCC and traditional contract practices purport to establish rules governing commercial transactions. To stretch these concepts from the commercial field into the consumer credit area may be undesirable. Also, to rely heavily on the courts to protect consumers may adversely affect the uniformity of UCC application.¹⁶⁰ In addition, the UCCC also contains an unconscionable clause¹⁶¹ almost identical to that of the UCC. Some of the criticisms mentioned above are avoided by an additional section in the UCCC which lists three situations in which an injunction may be obtained against unconscionable conduct and five factors that must be considered.¹⁶²

B. UNIFORMITY

Largely because of the existing varieties in state law, not only among, but also within most individual states, there is no valid consumer folklore, or instinctive understanding, of what one's rights, benefits and problems are in obtaining credit. In large measure this is also true of the small businessman. Whatever general understanding exists is largely inaccurate.¹⁶³

This Note has presented an overview of the variety of contract

158. Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. OF MIAMI L. REV. 11, 70-71 (1968).

159. *Id.*

160. See text accompanying note 102 *supra*. See also Spanogle, *Unconscionability Problems*, 117 U. PA. L. REV. 931, 935 (1969).

161. UCCC § 5.108.

162. *Id.* § 6.111. See Note, *supra* note 135, at 595-96 & nn. 135-43.

163. Felsenfeld, *Uniform, Uninformed and Unitary Laws Regulating Consumer Credit*, 37 FORDHAM L. REV. 209, 223 (1968).

provisions and creditor remedies presently available as an illustration of the superior legal position occupied by creditors when dealing with consumers. In light of the lack of progress and the piecemeal approach to consumer protection legislation in Minnesota, a uniform and comprehensive statute like the UCCC appears to be the most appropriate and beneficial form of action at this time. "As uniformity develops, we may expect both the ordinary consumer and his legal representatives to increase their understanding of this area of the law."¹⁶⁴ Legislation is needed and the UCCC is the best solution proposed thus far.

164. *Id.*