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Sales: Minnesota Statute Regulates Consumer Notes and Limits Rights of Assignee--Minn. Stat. 325.940-.941 (1971)

Minn. L. Rev. Editorial Board

Statutory Comment

Sales: Minnesota Statute Regulates Consumer Notes and Limits Rights of Assignee—MINN. STAT. § 325.940-.941 (1971)

The typical consumer installment credit arrangement has many of the characteristics of an adhesion contract.[1] Unequal bargaining power allows the merchant and the finance agency to which the paper will later be assigned to impose terms highly favorable to themselves, and the confusing arrangement and complexity of the papers the consumer is asked to sign often result in a failure to appreciate the implications of his bargain.[2] Many conditional sales contracts contain clauses waiving any defenses the consumer might have against either the seller or the assignee finance agency. In addition to the contract, the consumer typically signs a note which is later negotiated, giving the transferee finance agency the rights of a holder in due course (freedom from defenses available to the prior parties among themselves and the right to enforce payment of the instrument against all parties liable thereon).[3] Once the average consumer's note is negotiated or the consumer has signed a waiver of defenses clause, he no longer has any self-help remedy and therefore pays even if he has not received an acceptable product.[4] In an attempt to remedy these problems, a new Min-

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1. Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 472 (1968); Littlefield, *Preserving Consumer Defenses: Plugging the Hole in the New UCCC*, 44 N.Y.U.L. REV. 272, 278 (1969); Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125, 281 (1962).

2. Kripke, *supra* note 1, at 472; Vernon, *Priorities, The UCC and Commercial Financing*, 4 B.C. IND. & COM. L. REV. 53, 548 (1963).

3. The consumer can still assert the "real" defenses, *e.g.*, duress, incapacity or misrepresentation. *See* MINN. STAT. §§ 336.3-.305 (1969). These cause the instrument to be void—the consumer never actually consented to be bound and thus the instrument lacked legal efficacy at its inception—but they obviously would occur infrequently, and even then the defense would be vulnerable to estoppel. W. HAWKLAND, COMMERCIAL PAPER 77-78 (1959).

4. Case law in Minnesota allows consumers to avoid the holder in due course shield only where the assignee actively participates in the transaction from its origin. *See* International Finance Corp. v. Rieger, 272 Minn. 192, 137 N.W.2d 172 (1965), holding that an assignee so participating had acquired knowledge of the conditional liability of the

nesota statute (MINN. STAT. §§ 325.94, 325.941 (1971))[5] appears

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purchaser and therefore could not become a holder in due course. The decisive factor in finding a close enough connection between the finance agency and seller to defeat the holder in due course shield was that the *agency* demanded an installation certificate signed by the buyer. A consumer, in order to avail himself of this defense to the holder in due course shield, must carry the difficult burden of proving the requisite relationship between the seller and the finance agency. Attorney's fees and the inconvenience of a suit deter many consumers.

5. The statute is effective as to consumer credit sales entered into on or after July 1, 1971, and reads as follows:

325.94 Definitions

Subdivision 1. As used in this section and section 325.941, the following terms shall have the meanings assigned to them.

Subd. 2. "Consumer credit sale" means a sale of goods or services in which

(a) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind;

(b) the buyer is a natural person; and

(c) the goods or services are purchased primarily for a personal, family or household purpose, and not for commercial, agricultural, or business purpose.

Subd. 3. "Goods" means all tangible personal chattels, but not including money, things in action or intangible personal property other than merchandise certificates or coupons as herein described. The term includes such chattels which are furnished or used, at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property so as to become a part thereof whether or not severable therefrom. The term also includes merchandise certificates or coupons, issued by a retail seller, not redeemable in cash and to be used in their face amount in lieu of cash, in exchange for goods or services sold by such seller.

Subd. 4. "Services" means work, labor, or services of any kind.

Subd. 5. "Sale of goods" includes, without limitation, any agreement in the form of a bailment or lease of goods if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with his obligations under the agreement.

325.941 Restrictions

Subdivision 1. Instruments. In a consumer credit sale, the seller or lessor may not take a negotiable instrument other than a check as evidence of the obligation of the buyer or lessee. A holder is not in good faith if he takes a negotiable instrument with notice that it is issued in violation of this section.

Subd. 2. Provision restrictions. No contract or obligation relating to a consumer credit sale shall contain any provision by which:

(a) The consumer agrees not to assert against an assignee any claim or defense arising out of the transaction;

(b) In the absence of consumer's default, the holder may arbitrarily and without reasonable cause, accelerate the maturity of any part or all of the amount owing thereunder;

(c) A power of attorney is given to confess judgment in this state, or an assignment of wages is given;

(d) The seller or holder of the contract or obligation, or a to deny holder in due course status to holders of consumer paper[6] and prohibits the insertion into it of clauses which waive the consumer's defenses against either the seller or assignee.[7]

The statute does not expressly state that holder in due course status may not be achieved with consumer paper, but an analysis of Subdivision (1) of Section 325.941 leaves one with that conclusion. The first part of the subdivision states that "the seller or lessor may not take a negotiable instrument other than a check" in a consumer credit sale. A literal reading of this provision might indicate that a merchant is absolutely precluded from taking an instrument that has the appearance of negotiability, that such instruments are void, and that present consumer credit practices are illegal. But this interpretation is unreasonable if only because the statute does not provide any active criminal or civil sanctions for violation. A better reading, and one apparently demanded by the second part of the subdivision, is that while consumer paper is still transferable,[8] the transferee may not attain holder in due course status. Thus no change in the form of the consumer credit sale is legally required.

Further, Subdivision (1) also states that "A holder is not in good faith if he takes a negotiable instrument with notice that it is issued in violation of [the statute]." "Good faith" is, of course, a prerequisite to holder in due course status. The offi-

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person acting on his behalf, is given authority to enter upon the consumer's premises unlawfully or to commit any breach of the peace in the repossession of the goods;

(e) The consumer waives any right of action against the seller or holder of the contract or obligation, or any other person acting on his behalf, for any illegal act committed in the collection of payments under the contract or obligation or in the repossession of goods;

(f) The consumer relieves the seller from any liability for any legal remedy which the consumer may have against the seller under the contract or obligation or any separate instrument executed in connection therewith.

Subd. 3. Claims and defenses. Any assignee of the contract or obligation relating to the consumer credit sale shall be subject to all claims and defenses of the consumer against the seller arising from the sale, notwithstanding any agreement to the contrary. Provided, however, that the assignee's liability under this subdivision shall not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. The rights of the consumer under this subdivision can only be asserted as a matter of defense to or set off against a claim by the assignee.

6. MINN. STAT. § 325.941(1) (1971).

7. MINN. STAT. § 325.941(2) (1971).

8. Statement of Robert W. Herr, Assistant Attorney General, before the Minnesota Senate's Commerce Committee, April 15, 1971; Project, *Retail Installment Sales Regulation*, 7 U.C.L.A.L. REV. 618, 744-58 (1960).

cial comment to Section 2.403 of the Uniform Consumer Credit Code, which contains the same language as Subdivision (1), interprets the statement to mean that a finance agency normally will be unable to meet the good faith requirements of Uniform Commercial Code Section 3-302 to become a holder in due course since notice that the transaction was with a consumer will arise from the appearance of the instrument and the agency's credit investigation. The comment points out that in rare instances second or third takers may still achieve holder in due course status if they are not persons who generally would understand the consumer origin of the paper.[9] This part of Subdivision (1) then is most reasonably read to place upon the assignee of consumer paper the burden of showing that he was not on notice.[10] Finance agencies will, of course, find this difficult, but the intent of the statute clearly is to make the seller or the assignee the moving party and place the consumer in a defensive posture.[11] Thus, if the paper, on its face,[12] indicates facts that would alert a commercially honest finance agency, an agency taker should be held to be on notice and to have the duty to investigate. Both merchants and finance agencies will soon know of the statute, and this very knowledge will make it difficult to defend a failure to investigate.

The statute provides additional protection by not allowing consumers to waive claims or defenses against the assignee that

9. *See, e.g.*, Fresno Loan & Thrift v. Roberts, 207 Cal. App. 2d 899, 25 Cal. Rptr. 624 (1962); Project, *supra* note 8, at 744-58.

10. MINN. STAT. § 336.1-201(25)(c) (1969) broadly defines notice: "A person has 'notice' of a fact when . . . from all the facts and circumstances known to him at the time in question he has reason to know it exists." This definition is important since showing actual notice is difficult. *See* Westfield Investment Co. v. Fellers, 74 N.J. Super. 575, 181 A.2d 809 (1962); Project, *supra* note 8, at 755, 756 n.725.

Minnesota case law heretofore has created a presumption that an assignee of what appears to be a negotiable instrument is prima facie a holder in due course. Gordon v. Oberle, 183 Minn. 188, 235 N.W. 875 (1931) (interpreting statute); Cummings v. Thompson, 18 Minn. 228 (1872).

11. This avoids putting the consumer in the difficult position of having to show that the assignee had notice. *See, e.g.*, Pennington Cty. Bank v. First State Bank of Moorhead, 110 Minn. 263, 125 N.W. 119 (1910); *cf.* King, *The Unprotected Consumer-Maker Under the Uniform Commercial Code*, 65 DICK. L. REV. 207, 209-10 (1960).

12. Negotiability is determined by the face of the instrument alone. MINN. STAT. § 336.3-119(2) (1969); First National Bank v. Compo Board Mfg. Co., 61 Minn. 274, 63 N.W. 731 (1895); Western Sur. Co. v. Friederichs, 241 Minn. 492, 63 N.W.2d 565 (1954). The name of the merchant payee and the amount are two factors which may indicate consumer origin of a note on its face.

arise out of the sale transaction.[13] This prohibition includes *all* waivers, whether directed to defenses against the seller or the assignee and whether or not they are in the contract itself. Subdivision (1) of Section 325.941 specifically prohibits the insertion of waiver clauses pertaining to assignees into consumer contracts, and Subdivision (3) states that the assignee of a "contract or obligation relating to the consumer credit sale shall be subject to all the claims and defenses of the consumer against the seller arising from the sale, notwithstanding any agreement to the contrary."[14] In opting for an absolute prohibition of these cut-off devices, the Minnesota legislature wisely rejected the "delay of cut-offs" approach. Under delay statutes,[15] when the finance agency buys consumer paper it notifies the consumer, who must then notify the agency within a certain period[16] of any defenses he has in order to retain them.[17] The alternative adopted

13. MINN. STAT. §§ 325.941(2)(a), (3) (1971).

MINN. STAT. § 336.9-206 (1969) states that a waiver of defenses clause protecting an assignee is enforceable unless there is a state statute or decision which makes a different rule for consumer transactions. Since Minnesota has no decision establishing a different rule (*see* comment following MINN. STAT. ANN. § 336.9-206 (1966)), waiver of defenses clauses were validated by Section 336.9-206 prior to the enactment of this statute. The fact that the legislature made the change is important since at least one state supreme court has read Section 9-206 of the Uniform Commercial Code to mean that only decisions establishing a different rule made *prior* to the adoption of the Code were intended to control, and thus held that it did not have the power to prohibit waivers itself. Jennings v. Universal C.I.T. Credit Corp., 442 S.W. 2d 565 (Ky. 1969); 58 KY. L.J. 850, 852-54 (1970). The statute must also be read in conjunction with Sections 3-302 and 3-304 of the Uniform Commercial Code, which define "holder and due course" and "notice to purchaser."

14. The word "claims" is apparently used in order to indicate that any valid claim the consumer has against the seller can be asserted against the assignee and that set-offs are not limited to the traditional defenses. The most important defenses that will be allowed are failure of consideration and breach of warranty. Fraud in procurement, illegality, collateral agreement, mistake and duress should also be available. The consumer still runs the risk of estoppel to assert these defenses, but the clear policy of the statute to retain consumer defenses should influence a court in deciding whether estoppel should apply.

15. *E.g.*, ILL. ANN. STAT. ch. 121 1/2, § 262D (Supp. 1972); PA. STAT. ANN. tit. 69, § 1402 (Supp. 1971); TEX. CIV. STAT. ANN. art. 5069-6.07 (1971).

16. Five, 45 and 30 days respectively, in the statutes cited in note 15 *supra*.

17. The device is intended to eliminate defenses made in bad faith by defaulting buyers. Littlefield, *supra* note 1, at 292; Project, *supra* note 8, at 757-58. The device is based on the mistaken theory that the consumer will read the finance agency's notice, understand the legal jargon it contains, discover any product defects within the time period,

in Subdivision (3) is very similar to the Uniform Consumer Credit Code's Section 2.404, Alternative (*A*). That section makes it clear that the assignee does not have greater rights than the merchant to recover on a claim against the consumer. But it also makes it clear that the consumer does not have as great a right to recover against the finance agency as he does against the merchant. He can use his claim or defense only as a set-off, not to exceed the amount outstanding when the set-off is asserted. The consumer thus is provided with an incentive to early discovery and notification of defenses since the size of the potential set-off decreases as payments are made on the installment obligation. Since the consumer cannot recover payments already made, the agency still retains partial protection of its investment.

The scope of the Minnesota statute is unusually broad, covering sales of services as well as goods,[18] and explicitly covering those goods and services used in the litigation-prone[19] home improvement and repair industry.[20] Further, it does not provide for an exemption where FHA financing is involved,[21] or allow merchants to avoid its provisions by using coupons redeemable for merchandise—they are included in the term "goods."[22] The statute also prohibits certain credit practices which tend to put the consumer at a legal disadvantage. It forbids the insertion of clauses in consumer credit contracts which: (1) give a power of attorney to confess judgments;[23] (2) accelerate all or any part

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and then notify the agency in writing. Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 435 (1968); Note, *Consumer Protection—The Role of the Cutoff Device in Consumer Financing*, 1968 WIS. L. REV. 505, 521. As far as the finance agency is concerned, the actual effect of delay statutes often may be to limit the merchant's warranty to the time period the law gives for notification. How long this period should be is difficult to decide since the consumer must have the goods long enough to see if they are acceptable, and yet the period cannot be too long or the statute is ineffective. Project, *supra* note 8, at 757.

18. MINN. STAT. § 325.94(2) (1971).

19. Matthews v. Aluminum Acceptance Corp., 1 Mich. App. 570, 137 N.W.2d 280 (1965); McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. IND. & COM. L. REV. 387, 401 (1967).

20. It should be noted that the Uniform Consumer Credit Code is not as explicit about home improvement coverage as the Minnesota statute. UNIFORM CONSUMER CREDIT CODE § 2.105(1) & (3) is limited by Section 2.102, which, by implication, might be read to exclude home improvements.

21. Other states exempt instruments that would pass in an FHA transaction. *E.g.*, MASS. GEN. LAWS ANN. ch. 255, § 12c (1968). Because of the statute, the FHA is now insuring consumer notes which do not give the taker a holder in due course shield under Minnesota law.

22. MINN. STAT. § 325.94(3) (1971).

23. MINN. STAT. § 325.941(2)(c) (1971). This is an exception to

of the debt without any reasonable cause;[24] (3) allow the assignment of wages;[25] (4) allow the seller or holder to enter the consumer's premises unlawfully or to commit any breach of the peace in the repossession of goods;[26] or (5) waive any claim against the seller or holder for illegal acts committed in the repossession of goods or collection of payments.[27]

The statute also prohibits the insertion of any clause which "relieves the seller of any liability for any legal remedy" arising out of the transaction which the consumer may have against the seller.[28] This provision is worded broadly, but should be read in the context of the problems the statute is designed to solve. The intent seems to be to allow the consumer to voice his defenses in court while not unreasonably restraining the seller's freedom to bargain. Thus, for example, the statute should not be read to limit a merchant's reasonable disclaimer of warranty, while it should prohibit blanket waiver clauses including all remedies against the seller.

One shortcoming of the statute is that it does not state the exact effect of the insertion of a prohibited provision on the rest of the contract or the consumer's obligations. While it might be argued that the whole contract becomes unenforceable,[29] in order to insure that the statute will be an effective deterrent, the most reasonable reading of these prohibitions is that any clause in vio-

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the Minnesota Confession of Judgments Statute, MINN. STAT. § 548.22 (1969), but does not specifically amend that statute. Confession of judgment is allowed under the Uniform Commercial Code if the state so legislates. UNIFORM COMMERCIAL CODE § 3-122(d). The Uniform Consumer Credit Code does not allow the practice. UNIFORM CONSUMER CREDIT CODE § 2.415. The United States Supreme Court is now deciding the constitutionality of confession of judgment statutes in consumer transactions. Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted,* 401 U.S. 906 (1971) (oral argument heard Nov. 16, 1971, 40 U.S.L.W. 3233). The acts are attacked as violating due process by not allowing a consumer his day in court. It is alleged the confession provision is signed due to unequal bargaining power and thus is not freely given.

24. MINN. STAT. § 325.941(2)(b) (1971).
25. MINN. STAT. § 325.941(2)(c) (1971).
26. MINN. STAT. § 325.941(2)(d) (1971).
27. MINN. STAT. § 325.941(2)(e) (1971).
28. MINN. STAT. § 325.941(2)(f) (1971).
29. The California Supreme Court has held in an arguably analogous case that a contract in violation of a similar statute for the reason that it *omitted* a required clause is not binding on the buyer. City Lincoln-Mercury v. Lindsey, 52 Cal. 2d 267, 339 P.2d 851 (1959). But this raises the question of who gets the chattel when the contract becomes unenforceable as to the paying party because of the violation of the statute. Certainly it is not fair for the consumer to keep it without paying for it. *See* Project, *supra* note 8, at 760.

lation thereof is void, since the former remedy is so extreme that had it been intended by the legislature, it would have been explicitly stated.[30]

The broad coverage of the statute, noted above,[31] is not without its limits. True consumer loans, wherein the consumer borrows from a separate finance agency to make a cash purchase of goods, are not covered by the statute.[32] Finance agencies rightfully argue that they cannot be responsible for these goods, since they do not control what the consumer does with the money once he gets it. But it is important that there be some way to include the transaction which, although in the form of a consumer loan, is actually a consumer credit sale. Where, for example, the prospective buyer is told by the merchant to go to a certain finance agency, the merchant and finance agency already having arranged for such transactions, the money borrowed can only be used to purchase the merchant's product, and in reality this is the same as the merchant giving the customer credit and immediately discounting his note to the finance agency. The statute is certainly directed to the case where the merchant and the finance agency are this closely related. If a sale is in the *form* of a consumer loan, a court may interpose the consumer's defenses against the merchant in a suit by the lender without affecting the holder in due course doctrine[33] since there is no holder in due course. This solution already has been used in a Minnesota case,[34] but now a court may rely upon the statute as a statement of Minnesota policy on the question. Whether

30. California found it necessary to add a provision which made all such banned clauses void but which expressly went no further. CAL. CIV. CODE § 1804.4 (1971) ("Any provision in a contract which is prohibited by this chapter shall be void but shall not otherwise affect the validity of the contract.").

31. *See* text accompanying notes 18-28 *supra.*

32. The Uniform Consumer Credit Code similarly allows consumer loans as exceptions to its policy of retention of consumer defenses. When laws like this were passed in other states consumer loans became more prevalent. Nearly half of the responding finance agencies in a mail survey in Massachusetts reported a shift to direct loans. The amount of financing that actually changed to loans was not researched. Note, *supra* note 17, at 524-25. *But see* Hogan, *Integrating the UCCC and the UCC—Limitations on Creditors Agreements and Practices,* 33 LAW & CONTEMP. PROBS. 686, 690-91 (1968); Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period,* 78 YALE L.J. 618, 637-56 (1970).

33. *See, e.g.,* UNIFORM COMMERCIAL CODE § 3-104, Comment 3; Comment, 75 HARV. L. REV. 437, 439 (1961).

34. International Finance Corp. v. Rieger, 272 Minn. 192, 137 N.W. 2d 172 (1965). *See* note 4 *supra.*

interposition of defenses would be wise would depend upon the facts of the individual case. If a court were satisfied that the direct loan was only a sham, as where the bank's check was payable to the consumer and the merchant jointly, the policy of the statute should allow the consumer to assert all defenses against the finance agency. But determining the necessary degree of interrelationship between the finance agency and the merchant is a difficult problem. One possible solution would be to deny consumer defenses where the consumer has such dominion over the money that he may use it for a purchase other than that indicated to the lending agency.[35] In any case, although true consumer loans may increase when statutes such as Section 325.941 are enacted,[36] at least in the case of such loans sympathy for the consumer is not so aroused as in the credit sale-negotiation transaction since he normally is not under the impression that he need not repay the loan if the goods fail.[37]

Whether leases of goods are included within the terms of the statute is somewhat unclear. They are included within the definition of "sales of goods"[38] only if they are tantamount to a purchase of the goods. Yet Section 325.941(3), which subjects assignees to defenses valid against assignors, does not refer to lessors, but only to sellers, whereas Subdivision (1) of that section refers to both. One might take this to mean that assignees of lessors are exempt from the provision that all consumer defenses can be asserted against the assignee. However, it is more reasonable to assume that lessors' assignees are included, since the subject of Subdivision (3) is "consumer credit sale[s]," and these include the leases defined in the statute. "Leases" might better be defined by the character of the lessee than by the form of the transaction[39]—the essential factor should not be whether the lease is tantamount to a sale, but whether the lessee is a consumer.

As has been noted, the statute does not provide any criminal

35. Littlefield, *supra* note 1, at 296; *cf.*, 1956 MICH. ATT'Y GEN. BIENNIAL REP. No. 2784, at 768.

36. *See* note 32 *supra*.

37. Note, *supra* note 17, at 526.

38. MINN. STAT. § 325.94(5) (1971). This is a paraphrase of the federal Consumer Credit Protection Act's statement. 15 U.S.C. § 1602 (g) (1970).

39. *E.g.*, UNIFORM CONSUMER CREDIT CODE § 2.106(1) and Comment. If the lease is in reality a sale of goods, it is covered by Section 2.105(4).

or civil sanction for failure to comply.[40] Instead, Minnesota relies on the consumer to protect his own rights and puts financial rather than criminal or civil pressure on finance agencies. But without any active penalty merchants may still insert the forbidden clauses in their contracts[41] to frighten unrepresented and complaining consumers into paying. In order to protect the uninformed consumer the statute might have provided for suit by the state or the consumer in cases where a finance agency inserts clauses that are banned by the statute, allowing either fines or forfeiture of service charges as penalties.[42]

The primary purpose of the statute is to allow a consumer a real hearing before judgment is entered against him. The statute tends to equalize the consumer's legal position with that of the merchant or finance agency in order to avoid some of the evils of unequal commercial bargaining power. To do so it limits the rights of the seller and assignee and gives the consumer the self-help remedy of nonpayment. When a consumer now threatens nonpayment the finance agency and seller will pay serious attention because they realize a court at least will hear the consumer's defenses. If the merchant is not available to remedy a valid complaint, the consumer will not be required to continue payments.

Also, by removing the preferred status of the finance agency the statute creates an incentive for such agencies to assume a policing role over the consumer credit transaction. This is a proper role if only because the finance agencies are in the best position to do it.[43] They have the facilities to investigate a mer-

40. In contrast, many other states do provide such sanctions. *E.g.*, CAL. CIV. CODE §§ 1812.6, 1812.7 (West Supp. 1971); PA. STAT. ANN. tit. 69, § 637(b) (1965). *See also* Project, *supra* note 8, at 758-68. UNIFORM CONSUMER CREDIT CODE § 5.202 allows penalties in the form of judicially administered fines of up to three times the service charge in addition to forgiveness of the charge.

41. Experience has shown that the industry will tend to operate at the outer limits of consumer protection legislation. Littlefield, *supra* note 1, at 289-90.

42. California, for example, makes breach of a similar law a misdemeanor. CAL. CIV. CODE § 1812.6 (West Supp. 1971). It is punishable by forgiveness of the consumer's finance service charge and the possibility that the consumer might recover a like amount from the financer, in addition to the normal misdemeanor penalties. *Cf.* UNIFORM CONSUMER CREDIT CODE art. 6; Willier, *A Uniform Consumer Creditor's Code*, 54 MASS. L.Q. 53, 57 (1969).

43. *See* Mutual Finance Co. v. Martin, 63 So. 2d 649, 653 (Fla. 1953). *See also* Kripke, *supra* note 1, at 472; Littlefield, *supra* note 1, at 281; Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 417 (1966).

chant's products, sales techniques and servicing;[44] they maintain a continuing relationship with the merchant, as opposed to the consumer's single or episodic encounter; they can see that the failure of the merchant's product is absorbed as an enterprise risk and not made chargeable to unfortunate individual consumers; and they can protect themselves by intensifying credit checks and thereby lessening their own risks. The statute's reliance on finance agencies to police consumer credit transactions may avoid the difficulties of cumbersome government regulation.

There are several possible ways in which finance agencies may react to the statute. First, they may demand a higher discount rate on consumer paper due to their added risk,[45] raising the price of credit. A second and more likely response is that they will strengthen their recourse arrangements with the merchant. Under a recourse arrangement the finance agency retains an option to sell back to the merchant any consumer paper which in its opinion is difficult to collect. Since the merchant must buy back bad paper regardless of the merits of the consumer's complaint, he will be encouraged to avoid such complaints to the finance company. The easiest way to do this is by providing better products and service. The merchant also will seek to minimize the occurrences of recourse out of fear of losing his financier. Another benefit of this arrangement is that if recourse occurs, the suing party would be the merchant, the party with whom the consumer has a complaint and against whom he can assert all claims and defenses. Additionally, the consumer faces involvement in only one suit, whereas, in the situation where there has been no recourse, the finance agency sues the consumer who, if he chooses to take the risk, may sue the merchant to recover his loss.[46] Thus statutes like Section 325.941 are not so much an aid to litigation as a means of avoiding it altogether.[47]

A third finance agency reaction may be to increase the size of the merchants' reserve fund.[48] While this might limit the

44. Kripke, *supra* note 1, at 472.

45. Comment, *supra* note 33, at 437; Note, *supra* note 32, at 653-54.

46. Arguably, in order to go to court only once, the consumer could interplead the merchant in the finance agency's suit, but in reality his chances of doing so are slight. *E.g.*, United States v. De Haven, 113 F.R.D. 435 (W.D. Mich. 1953).

47. Utah and Oklahoma have statutes similar to the Minnesota statute which have never had litigation under them. OKLA. STAT. ANN. tit. 14A, §§ 2.403, 2.404 (1969); UTAH CODE ANN. §§ 70B-2-403, 70B-2-404 (1971).

48. The finance agency subtracts a small percentage from each

availability of credit to new merchants[49] and force established merchants to deal with one agency, it would give the agency greater leverage over the merchant.

As long as recourse agreements and reserve funds exist, there probably will be no impairment of negotiability or decrease in available consumer credit. Fears that assignee vulnerability to consumer defenses would impair transferability have generally proved unfounded in other states.[50] Fears that consumers might wait until the last few payments and adopt a "sue me" attitude have also proved unfounded. Most consumers do not complain unless there is a serious defect,[51] fearing non-payment will damage their credit ratings.[52] Also, where there is a lawsuit they still bear the difficult burden of proving a defense (*e.g.*, fraud) and avoiding the hazards of estoppel.[53] The statute may force out of business small merchants unable to meet finance agency demands for increased reserve accounts,[54] but the predatory merchants who have heretofore existed at the expense of the consumer may experience the same effect.[55]

Finance agencies may even benefit from Section 325.941 by an enhanced reputation since they no longer will be in the position of holding bad bargains together through a preferred legal position. Some may see this law as a first step towards allowing *all* claims and defenses against an assignee or claims and defenses up to the amount outstanding on the paper when it was transfered. But under the Minnesota statute, the consumer is limited

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sale of paper to fund a reserve account which the agency holds for the merchant. It serves as a guarantee against the merchant not being able to buy back bad consumer paper. When the fund reaches an agreed amount the finance agency ceases levying on transfers of paper. This device, combined with the recourse arrangement, makes it very difficult for the finance agency to lose on any transaction.

49. H. KRIPKE, CONSUMER CREDIT 260 (1971); Note, *supra* note 17, at 526; Note, *supra* note 32, at 655-56.

50. Note, *supra* note 17, at 524-25; Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38, 73 (1958); Jordan & Warren, *supra* note 17, at 436; Sutherland, *Article 3, Logic, Experience and Negotiable Paper*, 1952 WIS. L. REV. 230; Vernon, *supra* note 2, at 548. *But see* Note, *supra* note 32, at 630-56.

51. Littlefield, *supra* note 1, at 282.

52. H. KRIPKE, *supra* note 49, at 308.

53. Universal C.I.T. Credit Corp. v. Cyr, 160 Me. 152, 200 A.2d 213 (1964); Universal Credit Co. v. Enyart, 231 Mo. App. 299, 98 S.W.2d 120 (1936); *see* Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 482 (1963).

54. Note, *supra* note 32, at 642-50.

55. Note, *supra* note 43, at 418. Littlefield, *Preserving Consumer Defenses: Plugging the Hole in the New UCCC*, 44 N.Y.U.L. REV. 272, 281 & n.29 (1969).

to the assertion of set-offs,[56] and thus is provided with an incentive to assert his defense as soon as a defect occurs.[57] If claims were not restricted this might not be the case. Perhaps the most drastic step would be the first suggested alternative—to allow all claims (*e.g.*, down-payment) and defenses the consumer has against the merchant to be asserted against the assignee.[58] However, this may well be a risk that finance agencies could not accept without raising credit prices to a prohibitive level.[59]

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56. MINN. STAT. § 325.941(3) (1971).
57. *See* text following note 17 *supra*.
58. H. KRIPKE, *supra* note 49, at 261-62.
59. Littlefield, *supra* note 55, at 289; Malcom & Willier, *A Uniform Consumer Credit for Massachusetts?—A Dialogue,* 54 MASS. L.Q. 35, 50 (1969).