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LEGISLATION NOTES

NEW CONSUMER CREDIT REFORMS IN ILLINOIS

Since Hammurabi's written code of law,[1] organized societies have recognized the need to provide the consumer with legislative protection from the unscrupulous seller or lender. Initially this protection came in the form of usury laws prohibiting the extraction of excessive interest charges.[2] This early concern for the consumer is reflected in the Bible, which repeatedly condemns usurious practices with money lending,[3] the only form of consumer credit then in existence. In early Anglo-Saxon jurisprudence interest was totally prohibited,[4] but this restriction was later relaxed permitting lenders to charge up to ten percent interest and thus allowing some flow of credit.[5] Today all states have usury statutes regulating interest rates, ranging from six percent per annum in Delaware[6] to twenty-one percent per annum in Rhode Island.[7]

It was through these ursury statutes that legislatures first recognized the inadequacy of competition alone to regulate a seller's behavior. A consumer's immediate and dire need, ignorance, or other factors have often led to a breakdown of the market function and placed him in an unequal bargaining position. To prevent an unscrupulous seller from taking advantage of a consumer's misfortune, the ordinary forces of supply and demand needed to be supplemented with legislation such as ceilings on interest charges. But as commerce increased, the consumer's need for protection took on additional dimensions. Often these new needs were slow to be recognized because of the legislature's hesitancy to tamper with free trade. However, a variety of legislation was gradually enacted to help equalize the consumer's position.

[1] WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 88-90 (West's ed. 1928).

[2] For an historical analysis of usury see NEIFELD, MANUAL ON CONSUMER CREDIT (1961).

[3] *Deuteronomy* 23:19,20: "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything lent upon usury." *See also Leviticus* 25:35-37. For references to the New Testament *see generally* Smith, *Usury in the New Testament*, 20 PERS. FIN. L.Q. 79 (1966).

[4] 11 Hen. 7, c. 8 (1495).

[5] 37 Hen. 8, c. 9 (1545). *See generally* Berger, *Usury In Installment Sales*, 2 LAW & CONTEMP. PROB. 148 (1935).

[6] DEL. CODE ANN. tit. 6, § 2301 (Supp. 1966).

[7] R.I. GEN. LAWS ANN. § 6-26-2 (Supp. 1966). *See generally* CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 226-43 (1965).

The first of these measures was the small loan acts. Usury statutes had all but obliterated the legitimate small loan business because such a business could not be carried on profitably within the prescribed rates. Therefore, these acts were passed in all states, except Arkansas,[8] to provide exceptions to the usury statutes and to attract legitimate lenders into a field then totally dominated by loan-sharks.

An unfortunate English case[9] distinguished between the lending of money and the extension of vendor's credit, holding that only the former came within the provisions of the usury statute. This view was followed by a majority of American courts,[10] leaving consumer credit, extended for the sale of goods, totally without regulation. To fill this gap many states passed retail installment sales acts, the first being Indiana in 1935[11] followed by Wisconsin during the same year.[12] By 1965, only eight states had not enacted some form of a retail installment sales act,[13] and the other states had acts which varied greatly in severity and application.[14] In general, these acts concern themselves with regulation of interest and finance charges, mandatory disclosure of certain key terms, and prepayment controls. They are a substantial improvement over the unprotected situations of the past, but their coverage has been slow and sporadic.[15] Illinois, for example, did not pass its retail installment sales act until 1957.[16]

To supplement the retail installment sales act, Illinois passed a Consumer Fraud Act,[17] designed to prevent abuses centered around misleading adver-

[8] CURRAN, *supra* note 7, at 16.

[9] Bette v. Bindgood, 108 Eng. Rep. 792 (K.B. 1827) where the court initiated the time sales doctrine stating that the seller may charge one price for a cash sale and a higher price for a sale with payments extended. This activity was said not to be within the usury statute because it was neither a loan nor a forbearance.

[10] *See* Hogg v. Ruffner, 66 U.S. (1 Black) 115 (1861). *See generally* 91 C.J.S. *Usury* § 18 (1955), 55 AM. JUR. *Usury* § 21 (1946).

[11] Ind. Sess. Laws 1935, ch. 231.

[12] Wis. Sess. Laws 1935, ch. 479.

[13] Alabama, Arkansas, Georgia, Oklahoma, Rhode Island, South Carolina, West Virginia, and Wyoming. *See generally* CCH INSTAL. CRED. GUIDE.

[14] *See generally* CURRAN, *supra* note 7, at 254-255; Hogan, *A Survey of State Retail Legislation*, 44 CORNELL L.Q. 38 (1958); Ziegel, *Retail Installment Sales Legislation: A Historical and Comparative Survey*, 14 U. TORONTO L.J. 143 (1962) (comparing legislation in Canada, U.S., Eng., and Australia); Note, *Retail Installment Sales Legislation*, 58 COLUM. L. REV. 854 (1958).

[15] Jordan, *Consumer Credit: Some of the Major Problem Areas in Modern Consumer Credit Statutes*, 20 PERS. FIN. L.Q. 13 (1965).

[16] ILL. REV. STAT. ch. 121½, 223 (1965). *See* Britton and Ulrich, *The Illinois Retail Installment Sales Act—Historical Background and Comparative Legislation*, 53 NW. U.L. REV. 137 (1958). The Illinois Act was recently amended by the 75th Illinois General Assembly (1967), S.B. 28.

[17] ILL. REV. STAT. ch. 121½, §§ 261-71 (1965).

tising, chain referral sales, and the consequences of violation.[18] In July, 1967, the Act was then amended to curb some of the more serious abuses. Included in the new amendments is a home solicitation provision and new requirements limiting negotiation of consumer paper. These new provisions are a significant advance in providing adequate consumer protection and a bold step toward balancing the market positions of consumer and merchant.

The use of consumer credit has immensely expanded in recent years, bringing about the need for regulatory legislation such as "truth-in-lending" bills.[19] This increased use of credit also brought about an increase in consumer buying and consequently the need for controlling not only lending practices but also selling methods and procedures. The viciousness of fraudulent sales practices today are far greater than the old "con games," which have always been legislated against, because they affect not only the present wealth of the individual but also his future earnings. Unscrupulous business practices most frequently victimize the poor, for it is they who are most gullible and who most often fall for the sophisticated high pressure selling techniques.[20] In fact, current Illinois law places the consumer at a disadvantage, especially those laws which allow confessions of judgment[21] and negotiation of consumer paper.[22]

Unscrupulous practices often rely entirely upon judicial enforcement for their effectiveness. For example, an itinerant salesman can pressure a person into buying something he neither needs nor can afford and can have him sign a contract containing a cognovit clause. The salesman can then confess judgment on the contract if the buyer defaults. The only procedure then open to the buyer is to petition the court to open the judgment by proving he has a defense.[23] Usually the victim neither has the money nor the knowledge necessary to pursue this possibility, so he reluctantly pays. Then too, a merchant can discount a promissory note given as payment with a finance company immmediately after the sale is consummated. The finance company then becomes the holder in due course, taking the note free of any defense the consumer may have against the seller, save, for example, fraud in the execution, forgery, or alteration.[24] The consumer must pay on his note despite non-delivery of the goods or other failure of consideration.

[18] ILL. REV. STAT. ch. 121½, §§ 262A, 263-71 (1965).

[19] *See generally* Note, *Consumer Credit—Proposed Truth-in-Lending Legislation*, 16 DE PAUL L. REV. 464 (1967).

[20] *See generally* Willging, *Installment Credit: A Social Perspective*, 15 CATHOLIC U.L. REV. 45 (1966).

[21] ILL. REV. STAT. ch. 110, §§ 8, 50 (1965).

[22] ILL. REV. STAT. ch. 26, § 3-105(b) (1965).

[23] ILL. REV. STAT. ch. 26, § 3-110, §50(4) (1965).

[24] UNIFORM COMMERCIAL CODE §§ 3-305, 3-401, 3-407.

To equalize the consumer's position, positive legislation was needed beyond "truth-in-lending" laws.[25]

The 1967 Illinois amendments to the Consumer Fraud Act grant the consumer the right to rescind a sales contract made with a door-to-door salesman. They also place additional requirements on a transferee of a consumer's promissory note from becoming a holder in due course, if such note was used as payment of the purchase price. The purpose of this note is to explore the nature and extent of these amendments and to analyze their effectiveness in light of recent similar legislation.

HOME SOLICITATION PROVISION OF THE AMENDMENTS TO ILLINOIS CONSUMER FRAUD ACT

The most significant and radically new provision is the granting to the consumer of the right to cancel any sale of consumer goods made by a seller who has made an unsolicited call at the buyer's residence.[26] No traditional defense such as fraud or failure of consideration need be present. The mere fact that the impetus of the purchase came solely from the salesman is considered sufficient reason to afford the buyer time to reflect until a later date. This provision recognizes the disparity of positions between the high pressure, fast talking professional and the unsuspecting resident. The sale must merely be to a consumer and be a sale of "merchandise," defined as including all goods, services, and real estate situated outside of Illinois.[27] There is no requirement that the merchandise be sold under a contract calling for installment payments,[28] but rather, specifically states it is applicable whether the goods are sold under a single or multiple contract. The merchandise must have a price of at least fifty dollars in order for the buyer to have the right to cancel.[29] The consumer need merely notify the seller of his intention to avoid the sale within three full business days and return any merchandise delivered to him.

Illinois is not unique in providing a "cooling off" period. The earliest such provision in the United States was included in Pennsylvania's Home

[25] Some authorities have suggested regulation through uses of equity powers. *See* Alexander, *Fraudulent Installment Sales In Chicago*, 41 CHI. BAR REC. 285 (1960).

[26] Ill. Laws, 75th Gen. Ass. (1967), S.B. 25, § 2B, approved July 26, 1967 (hereinafter cited as Ill. S.B. 25).

[27] Ill. S.B. 25, § 1(b).

[28] Massachusetts, Georgia, Vermont, and Hawaii all require the contract to call for installment payments. See notes 32 and 34 *infra*.

[29] Vermont has a twenty-five dollar minimum, the only state which is lower. VT. STAT. ANN. tit. 9, § 2454 (3 CCH INSTAL. CRED. GUIDE ¶¶ 1121-47).

Improvement Act in 1963.[30] Michigan adopted a similar provision in 1965 which was modeled after the Pennsylvania Act.[31] However, these acts were very limited in scope, applying only to relatively expensive items of three hundred dollars or more which were to be installed by the seller and were to become a permanent fixture of the home. Although preceded by some Canadian provinces,[32] Massachusetts passed the first act of general application in the United States in 1966. This act allowed cancellation if a substantial part of the goods or service were neither delivered nor tendered, and the sale was consummated at a place other than at the seller's address.[33] Three other states, Georgia, Hawaii, and Vermont have followed the example of Massachusetts and passed home solicitation provisions in 1967, before Illinois enacted its statute.[34]

A Uniform Consumer Credit Code has been proposed by the National Conference of Commissioners on Uniform State Laws. Its purpose is to replace existing state laws regulating consumer credit, retail installment sales, and small loans and to substitute in all states a uniform code. The drafters of the second tentative draft of this "Uniform Consumer Credit Code" also included a provision for "Home Solicitation Sales." This provision is intended to apply to any credit installment sale of one hundred dollars or more where the seller engages in face-to-face solicitation at the home of the buyer.[35]

Under the Massachusetts Acts, a door-to-door salesman who can carry the commodity with him can easily avoid the "cooling off" restriction by delivering or tendering the goods immediately upon execution of the contract. However, under the Illinois statute, neither delivery nor tender of delivery removes the sale from the effects of the Act. Therefore, in addition to the giving of notice, the buyer must return to the seller, "in its original condition," any merchandise delivered to him under the contract or sale in order to avoid the contract.[36] This requirement appears to be a condition precedent

[30] PA. STAT. ANN. tit. 73, § 500-203 (Supp. 1966).

[31] MICH. STAT. ANN. § 19.417 (202(C)) (Supp. 1966).

[32] A home solicitation provision was included in Manitoba's "Consumer Credit Act," STAT. OF MAN., 14 Eliz. 11, 1965 ch. 15, §§ 6-11. *See also* Hughes, *Conditional Sales and Consumer Protection*, 2 MAN. L. REV. 15 (1966). This was followed by Ontario, 14 & 15 Eliz. 11, ch. 23 (1966); Alberta, STAT. OF ALTA. 1966, ch. 28; Nova Scotia, STAT. OF N. S., ch. 5, § 15 (repealed STAT. OF N. S. 1967 ch. 98).

[33] MASS. GEN. LAWS ch. 255 D, § 14 (1966). *See also* Wilkins, *The New Massachusetts Retail Installment Sales Act*, 51 MASS. L.Q. 205, 228-33 (1966).

[34] UNIFORM CONSUMER CREDIT CODE § 2.501 (Tentative Draft, 1966).

[35] Ga. Laws 1967, Act No. 413 (1A CCH INSTAL. CRED. GUIDE ¶¶ 1202-51); Vt. Laws 1967, tit. 9, ch. 69 (3 CCH INSTAL. CRED. GUIDE ¶¶ 1121-47, 1160-65); Hawaii Laws 1967, Act No. 285 (1A CCH INSTAL. CRED. GUIDE ¶¶ 1101-37).

[36] Ill. S.B. 25 § 2B.

to the right of cancellation. But although return of the merchandise is essential, it should not be construed as a condition precedent but rather as a concurrent condition either to redeliver or to hold the goods for the seller's benefit. Often redelivering is expensive or impossible. If cancellation could only be accomplished by first redelivering the goods, the effectiveness of the Act would be greatly curtailed since an unscrupulous seller of bulky items could merely deliver the goods after consummation of the sale. A consumer might then be hesitant to bear the expense of reshipment and would likely be forced to comply with a contract that he would have otherwise have cancelled.

To be within the provisions of the Illinois Act the sale must have resulted from an unsolicited call or contract at the buyer's residence. No protection is given to a sale consummated at any other place. This limits the scope of protection from itinerant salesmen considerably more than other similar acts. For example, the Massachusetts provision extends protection to include any sale not made at the seller's address.[37] This however appears to be too broad, for it includes sales made at the buyer's office or place of business, as long as the sale was made under a retail installment sales contract. Vermont goes even further and allows rescission of any retail installment transaction as long as a substantial portion of the goods have not been received.[38]

British Columbia has the most realistic and detailed provision defining the scope of protection. This act grants the right of rescission to "all contracts of fifty dollars or more of which payment of full consideration is not made at the time of contracting" and then lists numerous exceptions.[39] These exceptions are designed to exempt from the act, sales made in the ordinary course of trade, sales made to persons not needing protection, or sales of perishable goods which by their nature do not lend themselves to a right of rescission.

[37] MASS. GEN. LAWS ANN. ch. 255D, § 14 (Supp. 1966).

[38] Vt. Laws 1967, tit. 9, ch. 69, § 2453 (3 CCH INSTAL. CRED. GUIDE ¶¶ 1121-47, 1160-65).

[39] STAT. OF B. C. 1967, ch. 14, § 4. "This part does not apply:
a) to a contract solicited, negotiated or concluded at
 (i) the seller's or salesman's normal business premises, or
 (ii) a market place, auction, trade fair, agricultural fair, or exhibition;
b) to a contract for the sale of goods being purchased for resale;
c) to a contract under which a retailer is the buyer of goods intended to be used in his business but not for resale;
d) to a contract under which a buyer is a corporation;
e) to a contract negotiated, solicited and made without any dealings in person between the seller and the buyer or any salesman and the buyer; or
f) to a contract under which the goods to be delivered consist only of food or food products in a perishable state at the time of delivery; or
g) to a contract solicited, negotiated, or concluded by a seller or a salesman of the seller who occasionally carries on business outside of his permanent place of business located in a commercial premises in the Provinces."

Notice need not be given in Illinois in any particular manner nor need it be in writing. The consumer has three full business days following the day the transaction was completed, the longest period of any act. The period does not begin to run until he is supplied with an address or phone number at which such notice to seller can be given. All other states which have home solicitation acts require written notice by certified mail postmarked either by five P.M. or midnight depending upon the act.[40] In these cases notice is deemed effective when mailed. Since Illinois is most liberal as to the manner that notice may be served, notice by mail will most probably be construed, in Illinois, as effective when sent especially since the purpose of the provision is to protect the consumer, not the seller.

CONSEQUENCES OF CANCELLATION

The Illinois Act is not very explicit as to the effects of rescinding a contract. It merely states that if the required notice is given and the merchandise is returned, the seller is required to return any payment made or consideration given. It should be noted that the seller has the right to have his goods in their original condition. But the sales contract is totally void, relieving both parties from further liability. No fines or liquidated damages are imposed on the buyer for exercising his right to avoid the contract. In contrast, Georgia allows the seller the "right to charge buyer five percent of the gross sales price of the merchandise, or twenty-five dollars, whichever is less, as liquidated damages."[41]

Merchandise is defined by the Illinois Act as including services, yet the Act is silent as to whether the right of cancellation still exists after the services have been partially or fully performed. Georgia's Act specifically prohibits such cancellations.[42] This enables fraudulent repairmen to run rampant as long as the services are rendered immediately. An adequate compromise would be to allow the consumer to avoid liability for the contract price but require him to pay fair market value for the work performed. Custom made goods, or goods which have been so altered so as to make them unfit for resale, should also be exempt from right of cancellation.[43] Although some risk to the consumer will result, the injury to seller by allowing cancellation would be greatly disproportionate to the protection granted. In Illinois however, the seller can protect himself, as he can in

[40] *E.g.*, Ga. Laws 1967, Act No. 473, § 6(a) approved April 18, 1967 (1A CCH INSTAL. CRED. GUIDE ¶ 1202).

[41] *Id.* at § 6(d).

[42] *Id.* at § 6(e).

[43] *E.g.*, *id.*

Massachusetts, by merely waiting for the expiration of the "cooling off" period since in Illinois this period begins upon execution of the contract if the seller's address or phone number is supplied to the consumer.

CRITICISMS OF THE ILLINOIS PROVISION

Although the Illinois amendment is a welcome step in retreat from our historical position of *caveat emptor* and provides well needed protection, it does have shortcomings. For one, the scope of protection given the consumer from transient solicitation is far too narrow. People lay prey to the professional salesman at many places other than their residence. It would be far more effective to extend protection to as many areas as, for example, British Columbia's Act[44] which represents a realistic balance between buyer's need for protection and seller's right to have his contract enforced as made. Also, notice that such rights exist should be required to be given in the mandatory disclosure provisions of the contract itself; for, the people who would most need this protection would probably be ignorant of the fact that this right exists.[45]

Another improvement would be to extend the right of cancellation for non-receipt of the goods to include a right to rescind the contract after the three day limit has expired. This new provision could be modeled after the British Columbia Act which provides that if the goods are not delivered within thirty days of the date specified in the contract, or within 120 days if none is specified, the buyer has the right to rescind the contract even though the three day period has elapsed.[46] Added to this should be a provision such as Georgia has which requires the buyer to pay actual costs, up to fifty dollars, for pick-up of the goods if delivered.[47] This seems to be a realistic attempt to restore both parties to their original position without the seller taking advantage of the situation.

A further flaw is that the Illinois Act makes no special mention of how to handle trade-ins. Although they must be returned since they constituted part of the consideration given, credit should be allowed to the seller for any reasonable expense incurred, by making the trade-in ready for resale. Conversely, the seller should be made to bear extra liability if the goods are not redelivered to the consumer in the same condition as given.[48] Also,

[44] MASS. GEN. LAWS ch. 255(D), § 14 (1966).

[45] Manitoba's Consumer Credit Act required that every contract shall "clearly and conspicuously state" that the purchaser may serve notice on the vendor and thereby cancel the contract. STAT. OF MAN. 1965, 14 Eliz. 11, ch. 15, § 7(1).

[46] STAT. OF B. C., 1967, ch. 14, § 7(3).

[47] Ga. Laws 1967, Act No. 473, § 6(E), *supra* note 35.

[48] MASS. GEN. LAWS ch. 255(D), § 14(C) (1966).

a time limit in which to make the return of the consideration given should also be included to increase the certainty of the consequences of rescission.[49]

LIMITATION OF THE STATUS OF A HOLDER IN DUE COURSE

A second important provision in providing consumer protection of the new amendments to the Illinois Consumer Fraud Act is the attempt to prevent finance companies from becoming holders in due course of consumer paper.[50] This recognizes the idea that the consumer's defense against the seller should be preserved. In the past, despite flagrant misrepresentation, fraud, or non-delivery, the buyer would remain legally liable to the finance company on his promissory note, leaving as his only recourse an action against the seller who frequently could not be found or who had since gone bankrupt. The new provisions add two new elements to the traditional requirements needed to become a holder in due course. However, they are applicable only if a negotiable instrument is given by a consumer as payment for merchandise other than a motor vehicle before such merchandise is delivered. In such cases, negotiation of the instrument will not bar the consumer from asserting any personal defense unless the contract contains a printed "notice to the buyer" informing him of his right to give the seller notice of a defense within five days after delivery of the merchandise and such notice is not given by the consumer.[51] If such "notice to the buyer" is not given in the contract, the buyer can assert any defense he has against an assignee of the note, stripping him of his protection as a holder in due course. This is not a "cooling off" period nor does it give the buyer any right to avoid the sale. It merely prevents a seller from assigning away an installment sales note to a holder in due course where a known defense exists. Thus, only in this very limited situation is negotiability impaired. If, however, the consumer fails to give the necessary notice of a defense to the seller called for in the contract, this provision offers him no protection against a subsequent holder in due course. Although this amendment shows a recognition of the problem, the protection granted is quite inadequate in light of historical treatment of the problem and legislation in other states.

In the past the courts themselves have made some judicial inroads into the finance companies' fortress of protection. The first of these was *Commercial Credit Company v. Childs,* in which the Supreme Court of Arkansas held that where a finance company supplies the promissory note forms which contains a printed assignment to it, and prepares the instru-

[49] *E.g.*, ten days in Mass. *See, id.*

[50] Ill. S.B. 25, § 2D.

[51] Ill. S.B. 25, § 2D.

ment, they are so closely connected with the transaction as to be a party to it and not an innocent purchaser for value.[52] This active participation doctrine received some support,[53] but the majority of American courts, under the Uniform Negotiable Instruments Law, have held that the finance companies become holders in due course even if they furnished forms.[54] The Uniform Commercial Code requires actual knowledge of a defense to prevent one from becoming a holder in due course;[55] this freely allows finance companies to assume this status since participation in the transaction is mere constructive notice and therefore no impediment. This of course places the buyer at a disadvantage for he may have to continue paying on the note although he may never have received the goods or may have received defective goods.

The basic policy decision to be made is which of the two innocent parties, holder or consumer, must bear the risk of loss if the seller absconds or declares bankruptcy. Although protection must be given to the transferee of negotiable paper to insure its free acceptance as a money substitute, there is no overriding public interest for allowing consumer paper to be negotiable at all.[56] The drafters of the Uniform Commercial Code recognized this problem and included in the 1952 Edition of the Uniform Commercial Code an objective test of good faith by requiring compliance with the "reasonable commercial standard of any business in which the holder may be engaged."[57] This would have prevented a bank or finance company from blindly shutting their eyes to facts which indicated that there was fraud involved in the original transaction and still obtain the protection of a holder in due course. But the provision was deleted in the final draft because it was thought to reduce the certainty of negotiability. Illinois' old chattel mortgage statute provided that this type of credit instrument would not be negotiable as it was frequently used in the purchase of farm equipment and the legislature desired to preserve the farmers' defenses.[58] Seven states

[52] 199 Ark. 1073, 137 S.W.2d 260 (1940).

[53] *See* Commercial Credit Corp. v. Orange County Match Works, 34 Cal. 2d 766, 214 P.2d 819 (1950); Mutual Finance Co. v. Martin, 63 So. 2d 649 (Fla. 1953).

[54] *See generally* Comment, *Finance Companies and Banks as Holders in Due Course of Consumer Installment Credit Paper*, 55 Nw. U. L. REV. 389 (1960); Note, *Finance Company as Holder in Due Course*, 15 KY. L.J. 134 (1926).

[55] UNIFORM COMMERCIAL CODE § 1-201(25).

[56] *See* Mindell, *Some Major Legal Problems in the Installment Field*, 20 PERS. FIN. L.Q. 52 (1966); King, *The Unprotected Consumer-Maker Under the Uniform Commercial Code*, 65 DICK. L. REV. 207 (1961).

[57] UNIFORM COMMERCIAL CODE § 1-201(19) (1952 version).

[58] ILL. REV. STAT. ch. 95 § 26 (1955). Later repealed by the adoption of the Uniform Commercial Code in 1961.

have included in their retail installment sales acts a total prohibition against the seller's requiring the buyer to execute a negotiable promissory note.[59] Hawaii requires that any note executed in conjunction with a retail installment contract have printed or written on its face the words "consumer note"[60] and is not to be considered negotiable paper. The proposed Uniform Consumer Credit Code prohibits the taking of a negotiable instrument as payment of a debt, but if a note is taken it may be enforced by a holder in due course according to its terms.[61]

PROTECTION GIVEN THE CONSUMER IS INSUFFICIENT

Under Illinois' new provision, a buyer can assert a defense to a negotiable instrument only if written notice is given to the assignee within the required five day period, after delivery of the goods. It seems strange, that at any time, a consumer can be required to continue to make payments despite the existence of a valid defense. The historical reason for negotiability, that of insuring the free flow of credit, is not applicable to consumer paper. Only rarely does such paper travel to anyone but a commercial company whose sole business is the discounting and collection of such paper. Often they have reserves for just such losses should they occur. As an Assistant Attorney General of New York writes:

> It is a sad commentary on commercial life that an assignee, holder of installment paper, must find it necessary to insulate himself from his own assignor's (dealer's) conduct. It is the financial institution which gives the dealer business life in the first place and then benefits from the sales transaction. Therefore it has a prime responsibility to the consumer of such dealer to bear the consequences of the sale.[62]

The imposition of such liability would force the banks and finance companies to make thorough investigations of the merchants with whom they deal. The legitimate dealer would not be harmed since he fulfills the duties required of him. But the effect would be to force the "shady operator" to conform to ethical business practices under threat of losing his source of financing. Under the new provision any defects arising after the five day period would be without a remedy. Too much affirmative action is required on the part of the consumer, for those who most need the protection are the most likely to be negligent in giving the required notice.

[59] *See* CURRAN, TRENDS IN CONSUMER LEGISLATION 312-22, chart 19 (1965).

[60] HAWAII REV. LAWS, Act 285 § 19 (1967).

[61] UNIFORM CONSUMER CREDIT CODE § 2.403.

[62] Mindell, *supra* note 56.

MISCELLANEOUS PROVISIONS

The new Illinois amendments also include much needed reforms in regulating collection methods and forfeitures. It provides that if any sale is conditioned upon the obtaining of a favorable credit rating and the seller rejects the buyer's credit application, the seller can no longer keep any of the down payment as liquidated damages or investigation fees.[63] This will eliminate the practice of taking a down payment from everyone and later rejecting a person for poor credit, but still keeping the down payment.

Badgering techniques used by collection agencies are also curtailed. A spouse of the debtor may not be contacted or further harassed unless the spouse actually co-signed the obligation, or the obligation is in default for thirty days or more, or unless the spouse would be liable to pay under other statutes or common law.[64] Nor can the debtor's employer be contacted unless he is in default for at least thirty days, and five days notice is given of such intention.[65] If this last provision is violated the consumer is given a right to civil damages, to compensate for the injury suffered. These attempts to eliminate some of the savage tactics used to collect a debt add much to the total protection given the consumer.

CONCLUSION

The Illinois amendment to its Consumer Fraud Act marks the end of a long trail of legislative efforts started, according to the Chicago Sun-Times, on February 6, 1960, when a Chicago west-side laborer took poison. He was reported to have told his friend that he intended to commit suicide "because he was tired of being hounded by his creditors."[66] In response to the uproar this incident created, these credit reform measures were enacted. They are a great step forward in equalizing the consumer's position and providing him with vital protection. But the measures are neither strict enough nor sufficiently inclusive. Besides rephrasing any other minor additions previously mentioned, the reform should go further and prevent consumer paper from becoming negotiable, and eliminate confessions of judgment. Illinois is one of the very few states allowing confession of judgment, the majority declaring them void as against public policy.[67] Most frequently these cognovit clauses are merely part of the fine print and not bargained for. There seems

[63] Ill. S.B. 25 § 2H.

[64] Ill. S.B. 25 § 2I.

[65] Ill. S.B. 25 § 2I.

[66] Chicago Sun-Times, June 27, 1967, p. 30, col. 1.

[67] *See* CURRAN, *supra* note 59.

little reason to put the consumer at such a procedural disadvantage.[68] Should these two amendments be enacted, Illinois' consumer protection laws would even more effectively abate fraudulent sales practices.

William Kucera

[68] Legislation was proposed in the 1967 session to eliminate confessions of judgment but it failed to pass. *See* S.B. 28, 75th Ill. Gen. Ass. (1967).