Consumer Protection

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CONSUMER PROTECTION

Michael I. Swygert*

The dynamic reform movement in the consumer protection area, spearheaded by consumer advocates and aided by new-found consumer awareness, has culminated this year in significant judicial and legislative developments affecting rights and obligations of consumers. Professor Swygert describes this consumer revolution through an analysis of the recent repossession cases, the Magnuson-Moss Warranty Improvement Act, and Truth-in-Lending developments. Professor Swygert provides a tool with which to study the response of Congress and the courts to these complex forces. In addition, he maps the operation of the Pro Se Branch of the Circuit Court of Cook County, and discusses Illinois' recent replevin amendments. Underlying the discussion of these developments is a continuing inquiry: are these measures effective, or are they merely a consumer palliative?

INTRODUCTION

During this past year there have been many significant developments in the law affecting rights and obligations of consumers. This article will discuss several of those developments.

Part One analyzes the important ruling of the United States Court of Appeals for the Ninth Circuit which overturned a lower federal court decision which had declared self-help repossession without a hearing under California’s UCC section 9-503 to constitute deprivation of a consumer’s rights to the use and enjoyment of property without due process of law. The Supreme Court now has an opportunity to decide this issue.

Part Two is an assessment of the Pro Se Branch of the Circuit Court of Cook County, which has been in operation for only eighteen

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The author gratefully acknowledges the research and writing assistance of DePaul students Pamela Platt, Michael Dahlen, George Drake, Susan E. Loggans and Donald Spak. In addition the author thanks the students in his consumer protection seminars who conducted the Pro Se Court Study during 1972-73. Finally, the author acknowledges the extraordinary work of former DePaul students Wendy Larsen and Shane Anderson in preparing for and testifying with the author at hearings before the Federal Trade Commission on its proposed “related-creditor” rule.
months. On the basis of an in-depth survey and assessment, several recommendations are made to increase the pro se court's accessability for the many citizens who presently are foreclosed from its use due to cultural and other factors.

Part Three comments on the recently passed Magnuson-Moss Warranty-FTC Improvement Act which is still awaiting action in the United States House of Representatives. The Act, unfortunately, does nothing to destroy the myth that freedom of contract is operative in the consumer realm, yet does grant significantly greater enforcement powers to the Federal Trade Commission.

Part Four turns to a few recent developments relating to Truth-in-Lending disclosure requirements under Regulation Z of the Federal Reserve Board and the Federal Consumer Credit Protection Act.

Part Five comments on the revised Illinois replevin statute enacted in response to the Supreme Court ruling of *Fuentes v. Shevin*.

Part Six discusses a proposed Federal Trade Commission Deceptive Practice Rule applicable to credit card and "related creditor" sales to consumers. The proposed rule would limit the operation of waiver-of-defense clauses even further than *UNICO v. Owen* and the close-connection doctrine in consumer credit transactions.

Finally, Part Seven briefly discusses confessions of judgment, the Federal Product Safety Act, product liability, and amendments to Illinois statutes affecting a consumer's recission rights, and deceptive practices related to automotive repairs. The article concludes by making some observations about broad movements in consumerism during this past year.

**PART ONE**

**THE CONSTITUTIONALITY OF SELF-HELP REPOSSESSIONS UNDER UCC 9-305**

In an eagerly awaited decision, the United States Court of Appeals for the Ninth Circuit on October 4, 1973 upheld the constitutionality of self-help repossession and subsequent sale of collateral authorized by sections 9-503\(^1\) and 9-504 of the Uniform Commercial Code.\(^2\)

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1. § 9-503. Secured Party's Right to Take Possession After Default. Unless otherwise agreed a secured party has on default the right to take
In so doing, the Ninth Circuit overturned the *Adams v. Egley* decision of the United States District Court for the Southern District of California which, in 1972, had held that self-help repossession of collateral and subsequent sale are acts taken "under color of state law" and therefore involve significant "state action" so that procedural due process requirements of the fourteenth amendment to the Constitution become applicable and actionable.

In the Ninth Circuit's opinion in *Adams v. Southern California First Nat'l Bank*, the three-judge panel in its two-to-one decision articulated the issue as whether "prejudgment self-help repossession of secured property, as provided for in the security agreements between the creditors and the debtors and as authorized under sections 9-503 and 9-504 of the California Commercial Code, involves sufficient state action to establish a federal cause of action" brought under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

Jurisdictionally, the plaintiffs had to allege an invasion of their rights taken "under the color of state law" to come to court. As the Ninth Circuit pointed out, citing the *Civil Rights Cases*, if the repossession was "not state action but only an individual invasion of individual rights, then the remedy is not the subject of the Fourteenth Amendment." However, before setting out the Ninth Cir-

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2. UCC Section 9-504 permits the secured party to sell the collateral and apply the proceeds to the debtor's outstanding indebtedness provided the sale or foreclosure is done in a commercially reasonable manner.


7. Section 1 of the fourteenth amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive
cuit's reasoning, it is necessary to review the facts and articulate the wider interests at stake.

The opinion was the consolidation of two earlier cases. In the first, plaintiff Adams, a San Diego resident, in need of money to pay medical bills, borrowed $1,000 from a local bank, and executed chattel paper creating an Article Nine security interest in specific collateral to secure the loan's repayment. The collateral consisted of three used Volkswagens.

For over two years after obtaining the loan, Adams was able to meet all payments. Subsequently, he became unemployed and fell behind in making his payments. At the date of his unemployment, Adams had repaid nearly $900 of the original $1,000 loan. After his subsequent default, however, the bank decided to take possession of the vehicles. Adams' outstanding indebtedness at the date of the decision to take possession amounted to $217.45.

Only two days after making its decision to foreclose, the bank repossessed two of the motor vehicles in which it had a perfected security interest. Subsequently, the vehicles were sold by the bank for a net recovery of $219. At the time of the resale, Adams' outstanding indebtedness was $220. The $1 deficiency was cancelled by the secured party. The net result was that Adams lost his automobiles in addition to having paid over $900 for a $1,000 loan.

In the second case, consolidated for appeal with Adams, the plaintiff Hampton had purchased a used Buick from a dealer, and had executed a retail installment sales contract which the dealer then assigned (probably for a discount) to the Bank of California. The chattel paper called for 30 monthly payments of $118.30 each. After having paid over $2,600 (or 22 monthly installments), Hampton was late in making his 23rd payment. Hampton claimed the bank agreed he could make it up at a later time as long as he kept current on the rest of his payments. The bank disagreed with this claim. He tendered the next month's (24th) installment which the bank returned. Shortly thereafter, the bank foreclosed and took possession of the Buick, and notified Hampton it would sell the car unless he paid the entire outstanding balance due under the accele-

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.
ration clause plus collection charges, totalling nearly $950. Hampton then filed a class action challenging the constitutionality of summary self-help repossession without prior judicial hearing. This class action was subsequently dismissed by the United States District Court for the Northern District of California, claiming it lacked jurisdiction over the subject matter under 42 U.S.C. § 1983.

The facts in the two consolidated cases squarely raise the issue as to how far the federal courts are willing to go in interpreting the state-action concept as to a class of consumers, especially in light of the related Supreme Court decisions of Sniadach v. Family Finance Corp., 8 and Fuentes v. Shevin. 9

In 1972, the Adams v. Egley federal district court opinion, written by Judge Leland Nielsen, concluded that California's enactment of section 9-503 was a state validation of private acts of repossession, and that any recitations in security agreements as to a secured party's repossession rights following a debtor's default flowed out of the state validation, and did not, therefore, rest solely on the private agreement of the parties. 10 Adams was the first due process repossession case decided under section 9-503. The floodgates then opened. Within nine months of the Adams decision, eight reported and two unreported decisions on the same point were issued. The courts going against Adams and finding insufficient state action included the Federal District Court for the Northern District of California, 11 a New Jersey superior court, 12 a federal district court in Colorado, 13 and the Superior Court for Santa Clara County, California. 14 At the time of the Ninth Circuit's opinion in October 1973, the "box

10. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). The court cited Reitman v. Mulkey, 387 U.S. 369 (1967) in which the Supreme Court held that a California constitutional provision adopted in a state-wide referendum significantly involved the state in racial discrimination in the sale or rental of housing. The state constitutional provision standing by itself was held to constitute significant state involvement in sanctioning discriminatory private conduct. It was upon this reasoning that the Adams v. Egley decision was built.
score" was nine against a finding of state action in pre-judgment, 9-503 repossessions; three courts finding the requisite state action, and several decisions pending. In Illinois one such case is Chrysler Credit Corp. v. Gillaspie, an appeal argued and waiting decision at the time of this writing, in the First District Illinois Appellate Court.\textsuperscript{15} In addition, other recent cases on this issue have been decided, some finding the requisite state action and others not finding state action.\textsuperscript{16}

In October 1973, the Ninth Circuit's eagerly awaited decision was rendered. The news was good to the board rooms, but disappointing to some, although not all, consumer advocates. The repossession issue—the right of a secured party to strike without warning, without even an opportunity for a hearing—is not as simple an issue as a few have claimed. The broad social and economic issues are multifaceted and, as suggested in an extraordinary amicus brief filed in behalf of the UCC Permanent Editorial Committee by Professor Soia Mentschikoff,\textsuperscript{17} the economic issues, the commercial interests, indeed, the social ramifications transcend the mechanistic state action analysis to which most legal commentators, and in particular the Ninth Circuit, have confined their discussions.\textsuperscript{18}

In the explosion of published commentaries on Adams v. Egley,\textsuperscript{19} Fuentes v. Shevin,\textsuperscript{20} and Sniadach v. Family Finance Corp.,\textsuperscript{21} one

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\textsuperscript{15} Chrysler Credit Corp. v. Gillaspie, Gen. No. 58307 (Appellate Ct., 1st Dist., 3rd Div., Ill. 1972).


\textsuperscript{17} Brief for the PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE as Amicus Curiae, prepared by Professor Soia Mentschikoff, including an unpublished appendix by Dr. Robert Johnson of Purdue University titled: Denial of Self-Help Repossession: An Economic Analysis [hereinafter cited as Amicus Brief].

\textsuperscript{18} A notable exception is William B. Davenport of the Chicago Bar who has discussed the constitutional issues in the context of a secured party's desire "to minimize realization expenses." Davenport, Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code, 7 VAL. U.L. REV. 265 (1973). See also Fein, Yes, a Secured Party May Still Repossess Personal Property in Illinois, 54 CHICAGO BAR RECORD 110 (1972).


\textsuperscript{20} 407 U.S. 67 (1972).

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rarely finds an attempt to identify meaningfully all of the interests affected by a decision on the repossession issue, combined with a choice of preferred interests to serve as a priority framework when the interests collide. What follows will be an attempt to list various consumer interests which are significantly affected by any decision on self-help, summary repossessions.

From the consumer-debtor's perspective, surely the consumer's dependence on the collateral for his or her well-being is significant.\textsuperscript{22} An automobile to drive to one's employment, absent available alternative transportation, is simply a necessity, whereas a fully automatic, 42-key electric organ for most people is a luxury. Should all collateral be viewed equally? Do all forms and species of collateral deserve equal protection of the laws?

Secondly, the consumer's hardship resulting from being deprived of one's property (closely related to the first interest above) as weighed against the reasonable possibility of meeting deferred obligations—a concept of cure\textsuperscript{23}—is significant not only from the consumer's interest of economic necessity but also from a commercial perspective in saving transactions whenever possible, in maintaining good will, and in opting for order versus disruption, which repossession represents.

Thirdly, the consumer's reason for defaulting may be a lawful versus economic one, for example, the merchant-creditor's dishonoring of a warrant. In such cases the consumer should have the opportunity to assert this status before, rather than after being dispossessed.\textsuperscript{24}

Fourth, the consumer in a repossession situation is often put into a state of emotional agitation, potentially harmful to himself and to

\textsuperscript{22} See Justice Douglas' language in Sniadach v. Family Finance Corp., 395 U.S. 337 (1967), where he discusses wages as a special species of property, noting that the freezing of wages before judgment works an extreme hardship on the poor.

\textsuperscript{23} The concept of cure is old in commercial transactions, especially in sales. See, e.g., UCC § 2-614 (substituted performance); UCC § 2-611 (retraction of anticipatory repudiation); and especially UCC § 2-508 (cure by seller of improper tender).

\textsuperscript{24} The root defect with pre-judgment takings of one's property is that it reverses the traditional and reasonable notion that one is innocent until proven guilty (or liable) when remedies will then first lie absent extraordinary circumstances. In self-help repossessions, on the sole word of the creditor, a debtor's interest in his property is cut off. The burden to litigate the issue then falls on the consumer, the party with the least resources, and least knowledge regarding the institution of legal actions.
The consumer has been repeatedly told that in a
government of laws, no one can take the law into his or her own
hands. To the consumer a repossessor appears to be doing just that.

To recapitulate, the interests of a consumer affected by a non-judicial
repossession can be varied. They can range from the definite
impact on fourteenth amendment rights, through obvious economic
hardships imposed, to the prospect of inflicting emotional distress.

These are not, however, the only consumer interests involved. Under
the principle of stare decisis, it is important to look at the
interests of all consumers; not just the individual consumer plaintiff.
It is in this larger focus that the fog can begin to obscure the
consumer's clear arguments demanding procedural due process, sub-
stantial justice and fair play. The fog rolls in when one is told to
consider only the possible impacts on consumer financing resulting
from a judicial pronouncement that there must be notice, followed
by a judicial hearing in which there is an opportunity to raise de-
fenses or to seek a more equitable settlement than the one-sided dras-
tic repossession—foreclosure—deficiency judgment course desired by
the secured party.26

Here Soia Mentschikoff and others “go to town.” The beauty of
reposessions, they say, is that there are so few; that the few are fast;
that the value of the collateral between default-repossession and
sale falls far less than would surely occur in the protracted default-
notice-hearing-replevin and sale route: that, since collateral such
as motor vehicles depreciate so rapidly, that, even with good-in-
tentioned, well expedited court procedures, the inevitable delays
would seriously limit the value of motor vehicles as collateral; that
such low prospects of repossession would mean that lenders would
either require higher collateral-to-loan ratios when extending credit,

25. To be sure, UCC § 9-503 demands that self-help repossessions be done
“without breach of the peace.” The tests are many. But if a creditor has retained a
key for a motor vehicle in which the creditor has a security interest and the debtor
defaults on the underlying obligation, and if the car is in the debtor's driveway or
on a public street, the debtor's verbal protests generally will not be deemed
sufficient to make the creditor's taking a breach of the peace.

26. The creditor's non-judicial course of action extends to the filing of a de-
cency action, permitted in certain circumstances under UCC § 9-504. It is a
self-help course of action, free of judicial supervision and control. Although the
private foreclosure is to be done in a commercially reasonable manner one cannot
be certain that it is, absent the commencing of a law suit against the secured party.
or it would mean higher interest charges to cover the added costs caused by delay, and by attorney and court fees, or it might even result—if higher marginal repossession costs exceed marginal higher interest revenues—in drying up consumer loans for automobile purchases.

Note that in any of the above circumstances, the consumer loses—the consumer must either put up more collateral (often an economic impossibility), pay considerably higher finance charges, or go without. The basic theory asserted is that consumer protection is predicated on a competitive, free market. Following this logic, the argument concludes that the most anti-consumer protection action would be to outlaw self-help summary repossessions. Indeed, consumers "as a class" will be worse off. In short, it is the old "class" versus "individual" argument. Our laws are in certain constructs, such as repossession, utilitarian-premised after all.

The argument that to disturb in any way the existing creditor-debtor relationship will tip the scales to dry-up credit heretofore available fails because it logically cannot be proven. At best, the effect is speculative. Yet, this limiting-of-credit theme is repeated so often that it has become the "national security" refrain of the credit industry. In addition to being unproveable conjecture, the argument assumes that there could be no positive public "benefit" resulting from limiting credit availability from the virtual no-limitations-regardless-of-economic-condition type of consumer credit.

So the first of the major anti-Adams v. Egley policy arguments is tendered as pro-consumer "class" justification for summary repossession versus prior notice and hearing self-help repossession.

A second major policy argument in favor of nonjudicial self-help may be described as the "clout" theory. Soia Mentschikoff, in her brief, underscored the relative paucity of repossessions versus the number of secured transactions terminating without the necessity for the self-help remedy. The reason for so few actual repossessions, so it is claimed, is due to the "threat" of repossession. Indeed, the

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27. The "free market theory" is supportive of consumer protection, but the questions are to what extent are consumer markets truly competitive and to what extend does there exist the requisite consumer choice?

28. Amicus Brief, supra note 17.
"evil of the dishonest debtor who 'skips' would be increased," so the amicus brief states. More careful scrutiny in credit extensions, however, would obviate this possibility.

The final argument for the credit industry, especially automobile financers, who in 1972 held over $40 billion dollars of credit outstanding, forcefully raised in the Amicus Brief can be called "we-got-you-over-the-barrel-anyway" theory. It is really that simple.

Indeed, to quote from this extraordinary brief, Professor Mentschikoff writes that the number of cases in which a debtor dealing with a secured party would have a defense "is infinitesimal in view of the limitation of remedies involved in the sale of new cars and the limited warranties which are customary for used cars."\(^{29}\) Incredible, when you think about it. The Uniform Commerical Code validates limitations of remedies,\(^{30}\) validates full disclaimer of warranty liability,\(^{31}\) and permits freedom of contract.\(^{32}\) What more could a dealer-financer desire?

The fact that the UCC is pro-banking, pro-merchant (vis-a-vis the consumer) comes as no particular surprise. But to build an argument that the Code has the consumer buyer over a barrel because it validates a merchant's or finance company's freedom of contract and not mention adhesion or unconscionability as counter-weights, and to conclude that any hearing prior to repossession would be meaningless is in reality saying the consumer has few, if any, rights at all. Judges might not be as easily convinced of the wisdom of the barrel argument in such a straightforward form.

The automobile buyer today generally has no right to withhold payments as leverage due to the disclaimer clauses, assignment clauses, waiver-of-defense provisions, and the limitation of remedy provisions typically contained in the retail installment contract, which must be executed if he desires to make the purchase. Truly, the freedom of contract in the consumer setting is a myth.

The issue discussed by the Ninth Circuit was considerably less broad—is there significant state action in repossessions under UCC section 9-503? This clearly presents an issue one can brief, argue,

\(^{29}\) Id. at 13.
\(^{30}\) See UCC §§ 2-316(1), (2) and (3).
\(^{31}\) See UCC § 2-316(4).
\(^{32}\) See, e.g., UCC § 9-501(3).
and decide by never going outside Supreme Court opinions. That constitutes a lawyer’s issue. The Amicus brief was extraordinary, even though it may confuse many lawyers. It raised the issues of decisional impact, of the interests of the credit industry, indeed, of expediency, of paternalism, of commercial pragmatics. The brief raised the overall anti-consumer bias of the UCC. Although this writer disagrees with the arguments proffered in the brief, he is nonetheless pleased that they were raised.

In the narrower decisional construct, the Ninth Circuit held that the State of California was not “so significantly involved” in self-help repossession so as to constitute action taken under color of law. In using the Supreme Court’s “significantly involved” test for state action set forth in Moose Lodge, the Ninth Circuit noted that the test as applied in equal protection contexts does not necessarily apply to due process, but went on to apply the test anyway.

“The test,” the court stated, “is not state involvement, but rather is significant state involvement.” That this qualification may beg the question was not recognized. For if the court is saying that it is a qualitative versus a quantitative standard, how are such parameters distinguished? Quantity is in this instance a qualitative factor. It reminds us of the confusion in conflicts law which developed when the courts went to the “center of gravity,” or “grouping of contacts” formula for determining choice of law. More confusion is created than eliminated by amorphous standards which result from adjectives such as “significant.” Such standards place the legal community in a veritable maze. “Significant” must be measured by impact. The Ninth Circuit, however, ignored this path since it pointed to the “practical consideration that a great deal of human behavior conforms to state law.” The court added that by “merely putting into statutory form existing private remedies,” the state did not conclusively and significantly involve itself in the repossessions. The court concluded that there were no direct benefits to the state as a result of the repossessions, that consequently, there did not

36. Id. at 67,312.
exist the symbiotic relationship which had been present in Burton v. Wilmington Parking Authority.\textsuperscript{37}

Even the more nominalistic basis for a finding of significant involvement—the existence of an extensive system of state regulation—was rejected by the Ninth Circuit though done with more difficulty in view of the recent wave of private utility service termination cases.\textsuperscript{38}

In response to the plaintiffs' contention that the repossessors were "clothed under color of state law," the court distinguished the Supreme Court case of Williams v. United States,\textsuperscript{39} by noting that the private detective in Williams held and used a special Police Officer's card issued by the City of Miami, and that no comparable badge of authority was involved in the repossession context. Finally, mentioning Fuentes\textsuperscript{40} in one brief paragraph, the majority simply stated that there was no question about state action in that pre-judgment replevin context.\textsuperscript{41}

Consequently, the majority reversed Adams v. Egley and affirmed Hampton v. Bank of California. However, the issue is not yet settled. The Supreme Court of the United States undoubtedly will be called on to speak. In support of the probability of the Court's granting certiorari is the dissenting opinion in Adams by Judge William M. Byrne.\textsuperscript{42}

Judge Byrne would read the case of Reitman v. Mulkey\textsuperscript{43} as controlling as did the district judge in Adams v. Egley.\textsuperscript{44} In noting that even the creditor conceded a violation of due process by deprivation of property without any hearing provided there is the requisite state action, Judge Byrne aptly points out that California deliberately chose to follow a state policy of encouraging repossession and sales without a judicial hearing which the state embodied in sections 9-503

\textsuperscript{37} 365 U.S. 715 (1961).
\textsuperscript{39} 341 U.S. 97 (1951).
\textsuperscript{40} 407 U.S. 67 (1972).
\textsuperscript{41} Adams v. Southern California, CCH SECURED TRANSACTIONS GUIDE ¶ 52,216, at 67,316.
\textsuperscript{42} Id.
\textsuperscript{43} 387 U.S. 369 (1967).
\textsuperscript{44} 338 F. Supp. 614 (S.D. Cal. 1972).
and 9-504. He then concluded that the state, by encouraging repossessions and sales, by formulating and authoritatively rendering a policy choice, "became significantly involved within the meaning of Reitman v. Mulkey." Judge Byrne struck the mark squarely. The state did act, did involve itself significantly because the impact (unconstitutional private conduct) was significant. As Michael Spak stated in a recent article:

There is a persuasive analogy between the Reitman case and the case of an ordinary automobile repossession. In Reitman, a state constitutional amendment was found to be state action because its effect caused outright involvement of the state in the encouragement of discrimination. Similarly, in a repossession case, the secured creditor repossesses the auto without due process under the authority of section 9-503 of the UCC: In both cases the state's enactment has encouraged individuals to commit acts that they may have refrained from doing in the absence of a statute authorizing their actions. It is reasonable to believe that one would hesitate to break into another's car unless he knew both that he had a statutory right to do so and that such a right would shield him from arrest as a car thief.

State encouragement of conduct which otherwise would not likely have taken place, conduct which causes private hardships, certainly is significant involvement, for what more involves state action than sanctions which motivate and protect private action? Shelley v. Kraemer lives!

PART TWO

ASSESSMENT OF THE PRO SE COURT OF COOK COUNTY

The Special Pro Se Branch of the Small Claims Division of the Circuit Court of Cook County was established May 15, 1972, by an order issued by the Honorable Eugene L. Wachowski, presiding judge of the first municipal district. The creation of the pro se

45. See notes 1 and 2, supra.
49. "EFFECTIVE MAY 15, 1972, there shall be established a Special Pro Se Branch of the Small Claims Court in the First Municipal District of the Circuit Court of Cook County, in Room 1307, Chicago Civic Center, at 3:00 P.M. each day, until further order of the Court . . . ." GENERAL ORDER No. 72-8, Circuit
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Court (as it is commonly called) was supported by many Chicago jurists and attorneys. Although many persons deserve recognition for supporting the principle of a consumers' forum, most credit goes to members of the Young Lawyers Section of the Chicago Bar Association who made the realization of a pro se court in Chicago a cause celebre.50

Unlike many other small claims forums, the pro se branch was set up to assure that the court would not be turned into a corporate collections court. This corporate foreclosure is achieved in part through Rule 4A which prohibits any plaintiff from filing more than three actions within any twelve month period.51 Indeed, this rule is illustrative of the historical justification for the establishment of small claims courts: "[T]o provide for disposing quickly, inexpensively, and justly of the litigation of the poor . . . ."52

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50. On February 28, 1972, John J. Held, Jr. and Fredric B. Weinstein, members of the Legal Assistance Committee of the Young Lawyers Sections of the Chicago Bar Association submitted a written "Proposal for the Establishment of a Separate Small Claims Division in the First Municipal District" to Judge Wachowski and Judge Francis X. Poynton, of the Municipal Division of the First District. The proposal was based on the results of a committee study on small claims courts established in other large cities. The written proposal cited two earlier writings: Robinson, A Small Claims Division for Chicago's New Circuit Court, 44 Cm. B. REC. 421 (1963), and Fox, Small Claims Revisions—A Break for the Layman, 20 DePaul L. Rev. 912 (1971).

The Young Lawyers Section proposal won the support of the Honorable John S. Boyle, Chief Judge of Circuit Court of Cook County. The May 1, 1972 enabling order issued by Judge Wachowski included the following language based partly on the data set out in the Young Lawyers written proposal:

A study of Small Claims Courts indicates that many individuals (as opposed to corporations, partnerships and associations) oftentimes cannot economically justify the employment of an attorney, either to prosecute a small claim (as defined herein, a claim of $300 or less) or to present a meritorious defense. The establishment of a pro se Small Claims Court with the sole object of providing substantial justice between the parties will offer a forum wherein individuals can obtain a prompt and a relatively inexpensive hearing and adjudication of their small claim.

GENERAL ORDER.

51. No Plaintiff is allowed to file more than three actions in the Special Pro Se Branch within a 12 month period.

The complaint shall be accompanied by the affidavit of the plaintiff verifying that he has not filed more than three complaints during the calendar year.

GENERAL ORDER Rule 4(A).

52. R. Pound, ORGANIZATION OF COURTS 260 (1940). For an excellent discussion of how the small claims forum development failed to achieve its laudable
In spite of this laudable purpose, the history of small claim adjudication has generally been unsatisfying. The most frequent criticism is that small claim adjudication becomes essentially a collection forum. In addition, appeals are, as a practical matter, not available to small claim litigants. An extensive recent survey of small claims courts has been published by one of Ralph Nader’s study groups. The study concludes that small claim adjudication has generally been a great disappointment.

Has the Cook County pro se branch within its short period of existence (approximately 18 months) fulfilled its purpose as envisioned by its proponents? Indeed, has the pro se court realized its stated objective of providing “substantial justice” in a forum where “individuals can obtain a prompt and relatively inexpensive hearing and adjudication of their small claim.”

To attempt to answer these questions, several DePaul University College of Law students observed the pro se court in session and examined its public court files. The period of in-session observations covered approximately twelve weeks during the winter and early spring of 1973. The student-observers kept detailed logs of what they witnessed and their recorded data was subsequently assembled and evaluated.

Overall, the assembled data serves to indicate the variety of complaints filed, the categories of plaintiffs, the categories of defendants, the procedural dispositions, the satisfaction of judgment problems, as well as the sex, age and race of plaintiffs. Unfortunately, no statistic...
tics were compiled as to the residence of the plaintiffs either within Chicago's neighborhoods or within Cook County at large.\footnote{59}

In practice, plaintiffs begin their pro se experience by being interviewed by a law clerk connected with the pro se branch. One such employee-clerk, Donald Spak, a senior DePaul law student, explained that this initial screening interview is crucial since it serves two critical functions. First, the screening interview permits the law clerk to attempt to dissuade filings where, in the law clerk's judgment, there is no legal basis for the complaint alleged by the potential plaintiff. Mr. Spak emphasizes that he never refuses to assist in the drafting of a pro se complaint, but does suggest to certain persons that their chances for success are minimal, for example, when objectionable conduct is not legally actionable.

The second function of the law clerk's pre-filing interview is to provide expertise in drafting the complaint which requires the litigant to succinctly state the legal basis for the action. This is particularly helpful to both the trial judge and the defendants. So in reality, the pro se branch is really quasi-pro se, since assistance in reviewing complaints and in drafting the initial pleading is furnished by the court through employee and volunteer law clerks. In the DePaul study of the pro se branch, there were no statistics compiled as to the number of potential litigants dissuaded from filing as a result of these initial law clerk interviews.

Although the pro se court's rules limit actions filed to claims for $300 or less,\footnote{60} the average claim filed during the period of observation amounted to $195. As to the categories of claims filed, the largest number involved consumer complaints arising out of sales and service transactions.\footnote{61} In fact, of all the complaints filed, 38 per-

\footnote{59} This oversight is being corrected where possible by a review of court files.

\footnote{60} Rule 1 specifies that a small claim means "any claim which does not exceed $300, exclusive of costs." \textit{General Order} Rule 1.

\footnote{61} Sales transactions in the context of this pro se study include sales for personal, household or family use whether for cash or on credit. Service transactions, however, include not only alleged breaches of warranty by merchants, but also disputes arising from any service situation in which one party is an individual and in which transaction the service is to be performed for a personal, family or household benefit. Consequently, service transactions include disputes arising out of product-repair service contexts and also controversies originating in professional service contexts, for example, medical, legal, or dental services.
cent fell within this consumer complaint category. This 38 percent figure can be further broken down into: complaints filed by consumers under retail installment or other sales contracts, 15 percent of all complaints filed; complaints filed by consumers against merchants, professional people and others involving disputes as to services other than chattel repairs, also 15 percent of all complaints filed; and complaints filed by consumers involving disputes over chattel repairs (for example, breach of warranty claims, negligence or breach of contract repairs, etc.), 8 percent of all complaints filed.

Given the stated objective of institutionalizing a forum for the adjudication of consumer small claims, the above figures justify the existence of the pro se court.

An analysis of the remaining 62 percent also supports the conclusion that the pro se branch is fulfilling its purpose. Of the complaints filed, 16 percent were by individuals seeking recovery of security deposits under lease arrangements; 17 percent were for damages sustained to property resulting from automobile or other vehicular collisions; 2 percent involved claims for personal injuries; while 4 percent were for non-payment of wages due; 9 percent involved non-merchant private disputes, for example, controversies over loans, stop payment orders and personal notes; and 3 percent involved claims for damages to real property.

On the other hand, 3 percent of all complaints filed set out claims by merchants against consumers for money owed, while only 2 percent involved counter-claims by banks, finance companies, and service personnel for money due. Approximately 5 percent of the claims were classified by the observers as miscellaneous. For example, there were some bailment disputes and encroachment disputes, neither of which were frequent enough to consider as a separate category. Clearly, consumers with small claims have been

62. Placing the figures in a table reveals the magnitude of the consumer claim as the dominant action filed. Indeed, the following table illustrates that individual complaints filed by consumers and tenants against merchants and landlords typify the subject matter controversies heard during an average afternoon in the pro se court.

SUBJECT MATTER OF COMPLAINTS FILED

| 1. Suits For Property (no personal-injury claims) | 16% |
| 2. Suits For Recovery of Security Deposits and/or Rental Payments | 17% |
using the new adjudicatory machinery available in Cook County, Illinois. However, the drafting and filing of a complaint and the payment of necessary fees are only the first steps in any judicial proceeding. To assess the success of the plaintiffs in recovering under their claims, we now focus on the manner and variety of dispositions in the pro se court.

A plaintiff's initial court contact, that is, his appearance before a judge, usually comes about 62 days after filing the pro se complaint. The court hearing assumes the successful service of the complaint and summons. The assembled data reveals, however, that in 13 percent of all cases filed, service was never accomplished. In those instances lacking in personam jurisdiction over the defendants, the court had no choice but to dismiss the action. On the other hand, service by a first certified mailing was accomplished in 56 percent of all services attempted and was successful in 4 percent of the cases of a second certified mailing, while 27 percent of all services attempted were successfully performed by the county sheriff.

Consequently, in no more than one out of ten actions were the claims dismissed for failure of service. As to the majority of ac-

<table>
<thead>
<tr>
<th>Description</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>3. Consumer Complaints Arising Out of Sales Contracts</td>
<td>15%</td>
</tr>
<tr>
<td>4. Consumer Complaints Arising Out of Service (non-repair) Contexts</td>
<td>15%</td>
</tr>
<tr>
<td>5. Private Disputes Over Money Owed (e.g., loans, notes, checks) Where Neither Litigant is a Merchant or Financial Party</td>
<td>9%</td>
</tr>
<tr>
<td>6. Consumer Complaints Arising out of Repair Contexts (e.g., automobile repairs and/or servicing)</td>
<td>8%</td>
</tr>
<tr>
<td>7. Suits For Wages Earned and Withheld</td>
<td>4%</td>
</tr>
<tr>
<td>8. Suits For Damages to Real Property</td>
<td>3%</td>
</tr>
<tr>
<td>9. Suits by Merchants Against Consumers or Purchasers</td>
<td>3%</td>
</tr>
<tr>
<td>10. Suits For Payment of Services</td>
<td>2%</td>
</tr>
<tr>
<td>11. Suits For Personal Injuries</td>
<td>2%</td>
</tr>
<tr>
<td>12. Suits for Rents Due</td>
<td>1%</td>
</tr>
<tr>
<td>13. Miscellaneous</td>
<td>5%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

63. The cost of filing a pro se complaint in room 602 of the Chicago Civic Center is $8.00. Service by mail costs an additional $1.50, while service by the Sheriff of Cook County will cost an additional $6.00 fee, plus 16 cents a mile from the Civic Center. For persons unable to pay the filing and service fees, they may go to Room 1301 in the Civic Center and appear before a judge and request pauper status.

64. The defendant is required to go to room 602 in the Civic Center on the "Return Date" specified in the summons which day will be at least 28 days but no more than 40 days after the date of filing. The trial is scheduled for two weeks after the return date in room 1307 at 3:00 P.M.
tions not dismissed at this early stage, their dispositions may be summarized as follows: ex parte default judgments not subsequently vacated by the court, 22 percent of all actions filed; ex parte default judgments subsequently vacated with other dispositions, for example, dismissal by the court and dismissal by party stipulation, 14 percent of all actions filed; dismissal for want of prosecution, a surprisingly small 7 percent; involuntary dismissal by the court, 5 percent; dismissal by stipulation of the parties (often following a court suggested "compromise"), 18 percent; judgment entered for the plaintiff, 11 percent; and judgment entered for the defendant, 10 percent.

It should be stressed that even though substantial files were checked by the record searching group and numerous procedures observed by the investigating team of law students, any eleven week period is still a relatively short span of time to collect data which will reliably typify long-term situations. But it also should be stated that during the period of examination, the above figures do produce an exact dispositive profile of the pro se court.

To recapitulate, procedural dispositions in the pro se court break down as follows:

1. No service, 13%;
2. Ex Parte defaults not vacated, 22%;
3. Ex Parte vacated, 14%;
4. Involuntary dismissals, 5%;
5. Dismissals for want of prosecution, 7%;
6. Stipulations of dismissal, 18%;
7. Plaintiffs' judgments, 11%; and
8. Defendant judgments, 10%.

It would, of course, be erroneous to conclude from these figures that a plaintiff "succeeds" in only 11 percent of all cases filed. First, there is a high number of default judgments which are later vacated and which, therefore, can subsequently serve as the basis for bank garnishment or wage deduction actions against assets of the default-judgment debtor.65

65. The investigation of the pro se court did not include the critical determination of the success or lack of success of plaintiff in ultimately obtaining satisfaction for judgments entered.

One of the problems with small claims, pro se proceedings is that litigants
Second, there is a relatively high number of in-court settlements. Nearly 20 percent of all actions filed and 33 percent of all "trials," culminate in the parties stipulating dismissals. These often result from the court suggested "compromise," which the students in attendance concluded to be one of the noteworthy features of the pro se branch. Given that the initial joint appearance of the defendant and the plaintiff before the court typically will serve as a preliminary hearing, pre-trial conference, and trial all wrapped into one expedited proceeding, it is to be expected that court prompting of non-judgment accords takes place.

Third, it is likely but not data-provable that in a significant number of actions dismissed for want of prosecution, the defendant following receipt of service reached an out-of-court settlement or accord with the plaintiff.

Thus, on the basis of this statistical assessment, plaintiffs, as a class, appear to be reasonably successful in obtaining either judgments or partial satisfactions through court and out-of-court settlements. Of course, this assessment is predicated only on quantitative procedural data. No attempt was made to make a qualitative assessment of dispositions—for example, the percentage of moneys recovered as against the total amount of damages pleaded.

Turning to the categories of plaintiffs and defendants, individuals predominate over firms as plaintiffs—as anticipated under pro se branch rule 4A. Firms, however, slightly outnumber individuals as defendants.66

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<table>
<thead>
<tr>
<th>SEX OF INDIVIDUAL LITIGANTS</th>
<th>PLAINTIFF</th>
<th>DEFENDANT</th>
</tr>
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<tbody>
<tr>
<td>Male</td>
<td>70%</td>
<td>74%</td>
</tr>
<tr>
<td>Female</td>
<td>30%</td>
<td>26%</td>
</tr>
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An attempt was made to ascertain if sex status was a factor in plaintiffs' success
As to the race of the litigants, in-court observations recorded appearances by more white plaintiffs than black plaintiffs. Similarly, more appearances by white defendants than blacks were observed. To be precise, 40 percent of the plaintiffs and 37 percent of the defendants were blacks. Although these statistics may have little probative weight, they, in addition to other data support the staff’s overall conclusions regarding the courts; to wit, that blacks within Chicago either do not take advantage or do not have access to the pro se branch to the same extent as do whites.

More specifically, a follow-up study by another group of DePaul law students during the summer months of 1973, indicates that Chicago residents generally are not aware of the pro se court’s existence. Moreover, this level of unawareness is appreciably higher within the predominantly black areas of the city.

This unawareness differential in part is explained by the fact that the most extensive news feature about the pro se court appeared in a Sunday edition of the Chicago Tribune which we assume has a decidedly lower circulation among Chicago’s blacks than among the city’s whites vis-a-vis the Chicago Sun-Times.

The 1973 summer “pro se awareness study” disclosed that less than one out of seven persons responding to the question, “Have you heard of the pro se court?”, had in fact heard of it prior to being asked the question. The survey group found this figure surprising since they had anticipated a much smaller positive response. Unfortunately, the sample was random with no scientific or methodological basis of selection. While the randomness does detract from rate, or the rate of claims ending in partial or total recovery. The sample was too small in light of the minor percentage difference (which favored the female plaintiff) to draw any conclusions given all the other variables (type of action, class of defendant, presiding judge, etc.).

67. Again, an attempt was made to ascertain if there existed any clear linkage between success rate and race of plaintiff. And again, the same conclusion was reached; the sample was too small to draw any legitimate conclusions in view of the multifarious variables that operate in the United States other than race.

68. This project conducted during the months of July and August, 1973, was undertaken by five DePaul University College of Law students as part of a course requirement in consumer protection law taught by the author.

69. The article, titled A New Court for the Little Guy, was written by Jack Star and appeared in the January 21, 1973 edition of the Magazine Section of the Sunday Chicago Tribune. According to personnel in the Civic Center connected with the pro se branch, filings went up noticeably after the article’s publication.
CONSUMER PROTECTION

the authoritative impact of the survey it is at least an indicator of public awareness.

The students did, however, attempt a second approach to ascertain the level of pro se court awareness, by drafting a questionnaire and having it published in two predominantly black readership Chicago newspapers: the Chicago Defender and the Independent Bulletin.70

The readers were asked to fill out the questionnaire and mail it to the DePaul University College of Law in Chicago. Not surprisingly, only forty-one were returned. This figure represents an infinitesimally small percentage of the total readership of the two papers. But the responses of this sample were virtually uniform, thirty-nine of the forty-one respondents had not heard of the pro se court.

A third attempt, also non-scientific, at ascertaining citizen awareness of the pro se court's existence and function was made by dis-

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70. The questionnaire was published in August, 1973. The questionnaire published contained only eight questions. A sample follows:

**QUESTIONNAIRE**

1. Have you ever heard of the Cook County pro se Court where people may file a claim for under $300 without a lawyer?
   - Yes
   - No

2. Do you know that in Cook County you can sue to collect debts or recover damages up to $300 without an attorney?
   - Yes
   - No

3. Do you believe that you may have a claim for $300 or less against someone now?
   - Yes
   - No

4. If you answered question 3 "yes," would you go to the Civic Center in downtown Chicago and file your own claim with the assistance of the pro se court staff?
   - Yes
   - No

5. Would you be more likely to file a claim in the pro se court if the court was located in your neighborhood?
   - Yes
   - No

6. Would you be willing to help get the pro se type of court located in your neighborhood?
   - Yes
   - No

7. Would you like to see this court opened in the evenings and on Saturdays (currently the Court is open from 3:00 p.m. to 5:00 p.m., Monday through Friday)?
   - Yes
   - No

8. In what area of the City do you live?
   - North
   - Northwest
   - West
   - Southwest
   - South
   - Southeast
tributing copies of the drafted awareness questionnaire\(^71\) to legal aid societies in Chicago, asking the societies to have those people coming into their offices fill them out. A total of sixty-five completed questionnaires eventually found their way back to DePaul. Again, the figures indicated an overwhelming **unawareness** of the special pro se court, sixty-two of the sixty-five respondents claiming they had never heard of the court. Surprisingly, this response comes over one year after the court's creation and after extensive Chicago area media features on the pro se court.

Legal clinics in Chicago, such as the Mandel Legal Aid Clinic at the University of Chicago, have attempted to inform the public of the pro se forum by distributing informational sheets explaining what the pro se court does and telling how and where to file a complaint.\(^72\)

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71. An identical questionnaire to the one that was published in the newspapers was distributed.

72. The one distributed by the Mandel Clinic follows:

**INSTRUCTIONS FOR FILING SMALL CLAIM COMPLAINT**

Small claims court is set up for persons not represented by lawyers to file claims for not more than $300. The cases are heard downtown in the Chicago Civic Center at Randolph and Dearborn Streets at 3 p.m. in room 1307.

In order to file a suit you must file a complaint and have a summons served on the opposing party. The total cost is $9.50. The suit is filed in room 602 of the Chicago Civic Center. The procedure is as follows:

1. **Preparing the Complaint**

   Fill in the blanks in the attached complaint. Make an original (for the court) and two copies (one for you and one for the person you're suing). Make sure that the complaint lists your name, address, and phone number at the bottom. If your claim is based on something in writing (like a receipt or a contract), you should make three xerox copies and attach one to each complaint. \(^2\) Keep the original for the trial. If you have any questions, ask the clerks in room 602 to help you.

2. **Preparing the Summons**

   Fill in the blanks on the form summons. Make an original plus three copies. One copy will be sent by certified mail to the defendant at the address you list on it. It orders the defendant to appear in room 602 on a certain date, which you have to fill in. Fill in the date when you file the case for a day not less than 28 nor more than 40 days after you file the case. Make sure it is on a week day.

3. **Filing the Case**

   Take the completed forms to the Civic Center at Randolph and Dearborn Streets downtown. Go to room 602 on the sixth floor and file the papers with the cashier. The cashier will take your money and will put the case number on all the papers you file. She will give you some of the papers back for you to bring to court. If you have any questions, ask the clerks in room 602.

   The clerk will send a copy of the complaint and summons to the de-
Given all the surveys together, the point seems inescapable that even though consumers and other individuals are using the pro se branch to litigate small claims, the potential usefulness of such a forum has yet to be fully realized. This conclusion is underscored by responses in the questionnaires to the question of whether the respondent believed that he or she had an existing small claim against an individual business. Of a total of 106 questionnaires completed and returned, seventy-six marked "yes" in answer to that question.

Although the sample is small and random, the figures essentially indicate the pervasive volume of minor wrongs routinely taking place. In the past there has been no adequate or accessible legal forum for minor conflict resolutions. Indeed, the answers to the questionnaires contain a clear message: Thousands, perhaps tens of thousands of persons in Chicago have been wronged in small ways. As a consequence these people have been damaged but their claims are not worth consideration by the vast majority of attorneys. Moreover, most of these small claim plaintiffs are unaware that there

...
exists a judicial forum where they, without a lawyer, can pursue their claim with a reasonable chance of successful recovery.\textsuperscript{73}

The analysis now turns to a related factor—the location of the pro se branch, since many persons indicated on their questionnaire that they desired the pro se branch to conduct hearings throughout the city of Chicago. Presently, the special pro se branch sits in only one location.

As part of the civil court structure of Cook County, the pro se branch is located on the thirteenth floor of the Civic Center in the heart of downtown Chicago. It should come as no surprise to the legal establishment that as viewed by many of Chicago's citizens, the "Loop" appears as foreign soil where predominantly rich, white, middle-class suburbanites spend their days inside 100-story skyscrapers.

To many of the economically and racially oppressed people of the city, and to many of the non-English speaking people as well, going to the thirteenth floor of the Civic Center is undoubtedly a psychologically distressing undertaking.\textsuperscript{74} Not fully understanding where they are going or what might happen to them, and surrounded by a new and strange environment, they often enter the Civic Center unsure, afraid, ready to turn and run at the first discourteous remark.\textsuperscript{75} While being a bit dramatic such feelings are legitimate and

\textsuperscript{73} A distinction must be made between fostering litigation by making people aware of forums for adjudicating legitimate claims, and encouraging litigation by making people believe they have justiciable claims which will probably be successful in litigation when, in fact, the law does not support such claims. The former encouragement is within the highest traditions of the legal profession, while the latter, if not actionable as an abuse of process, at least contributes to the further politicizing of legal processes.

\textsuperscript{74} There are two "barriers to entry" to the pro se branch—lack of education and emotional resistance. The educational void, that is, awareness of the court and knowledge of how to invoke its forum for small claim resolution, can likely be overcome by "walk-through" manuals. Emotional resistance is not so easily removed as a barrier. Naturally, the existence of neighborhood branches of the pro se court would decrease the emotional resistance of many people. The resistance to going into court downtown with an attorney is often severe. One can easily imagine the resistance level increasing in the case of individuals entering a downtown courtroom alone, without the crutch of an attorney to lean on.

\textsuperscript{75} Having talked with various legal aid attorneys about the frequency of "no shows" at scheduled office appointments, let alone the more serious "no shows" at scheduled court hearings, this writer believes that the natural tension present in any conflict situation becomes overpowering to many plaintiffs who can only escape their anxiety by "dropping the matter."
as such they stress the point which the questionnaire responses stress: Why should neighborhood people have to go to the corporate structure in the heart of Chicago's political/financial district to litigate a $200 "fender-bender?" Why should a small claims court be unable to come to the neighborhoods, if not on a sustained basis, at least at regular intervals?

Indeed, Judge J. Skelly Wright has raised the same questions. The people of Chicago are expressing the same feelings as Judge Wright. The 106 questionnaires compiled dealing with the pro se court indicated a preference that branches of the pro se court be located throughout Chicago's neighborhoods. Recall, that to many poor, racially and economically oppressed people there exists a real fear of entering the center city and its fortified court tower. However, fear cuts both ways, which is to note that cultural disfunctionality affects all people. The trouble is that most people often exaggerate imaginary or insignificant fears while failing to fear that which is real—injustice.

Although the establishment of a pro se court is a significant step on the path of justice, the branching out of the forum into the city's multifarious neighborhoods would represent a significant breakthrough in small claims settlement. Accessability, awareness, and resulting utilization of the pro se forum would skyrocket.

As to the preference for holding evening and Saturday pro se court sessions, an overwhelming majority of 103 out of 106 of those returning the questionnaires responded affirmatively. Time off from work is very costly for most wage earners. It should be noted, however, that students observed pro se judges often taking into consideration the wages which were lost by the plaintiff due to the prosecution of the claim when entering judgment or when prompting an in-court settlement. But the fact remains that given the expense
and time required to be downtown by 3 P.M. to attend a trial, an afternoon's wages are often lost. People wishing to utilize the pro se court may often be financially unable to take the time off. As noted previously, the objective in establishing the special pro se branch was to provide "substantial justice" in the expedited adjudication of small claims of individuals.\textsuperscript{79} It is probable that as the community's general awareness of the pro se forum increases, its popularity and use will correspondingly increase. Indeed, this has already begun to happen. Earlier projections of 3,000 to 4,000 annual filings have been far surpassed. A current projection foresees as many as 8,000 to 9,000 claims being filed in the period from May 15, 1973 to May 15, 1974 which is the second year of the court's existence.

This large case volume without question creates significant court administrative problems, and the volume of cases undoubtedly will continue to increase. It is submitted, however, that these administrative problems must be solved \textit{not} at the cost of limiting the accessibility and effectiveness of the forum, for example, by permitting a backlog of claims to develop, by using diverting "administrative arguments" as the basis for declining to branch out into the neighborhoods, by limiting the courts' sitting hours or refusing to lengthen the hours when demand warrants, or by limiting the number and availability of assigned judges to the pro se branch.\textsuperscript{80}

Rather, additional judges should be added if necessary and assigned to join Judge Poynton and other jurists in administering small claims justice. For although the monetary value of the claims may seem small, the human and societal import is great. In fact, the ultimate issues involved in the effective workings of a small claims court surely include notions of community purpose and well being, respect for law, faith in the deliberative formal processes of conflict resolution, and the highest belief in human dignity with a respect for proprietyship in property. In short, these notions are the necessary ingredients for faith in the "system."

\textsuperscript{79} See Fox, note 52 \textit{supra}.

\textsuperscript{80} This is not to suggest that any of the listed responses have actually occurred, but pressures for such limiting measures could undoubtedly increase in the future.
True, this list is expansive, but the notions included in the list underlie the effectiveness of the entire legal process. If the small claims forum can strengthen the citizenry's faith in the role of law in the community it serves, the pro se branch will become the single most important court in the city. The legal community has continually asserted that courts should be readily available for all persons; yet these conflict-resolution forums continue to be inaccessible to a large portion of Chicago's population.

The need for a workable small claims forum has long been recognized yet longer still in becoming a reality. The Circuit Court of Cook County has now taken the splendid first step by establishing the special pro se branch. To make the court more effective, both the Chicago Council of Lawyers and the Young Lawyers Section of the Chicago Bar Association have been preparing litigants' manuals designed to walk plaintiffs through every step required to prosecute their claims. Indeed, the Chicago Bar Association has already completed a pro se court manual in a "walk-through" format which will be of invaluable assistance to plaintiffs. Consequently, "second steps" are being taken.

Despite the pro se forum's establishment, despite rules preventing it from being transformed into a collection court, and despite its enabling order allowing the judges to relax strict evidentiary rules,

81. As of September 1, 1973, a pro se handbook titled, How to File a Lawsuit in the Special Pro Se Branch of the Small Claims Court had been put into a thirteen page draft version by the Young Lawyer's Section of the Chicago Bar Association under the direction of Frederic B. Weinstein, Patrick Stodola and John J. Held, Jr. The draft appears to be well written in simple, generally comprehensible language. "Legalese" is laudably kept to a minimum but a few terms are not adequately explained, for example, "filing an appearance."

82. The Chicago Bar Association draft, although written in plain, simple language, is not written in pedestrian, "street" language or in Spanish, and both additional "translations" are recommended to serve legitimate audiences.

83. Rule 6 of the pro se branch reads as follows:

**NATURE OF HEARING**

On the trial date the court shall proceed with the trial of the cause or enter any and all appropriate orders. For the purpose of obtaining substantial justice, the rules of evidence shall be liberally construed and the court may admit any evidence it deems material and proper. It shall be the duty of the court to develop all of the facts in the particular case and to decide the claim in accordance with the rules and principles of substantive law. In the exercise of this duty, the court may propound any questions of any witness or party to the suit or upon its own motion may summon any party to appear as a witness in the suit as in the discretion of the court appears necessary.
despite an increasing public awareness of its existence, and despite the publication and distribution of walk-through manuals for plaintiffs, the long-term success of the special pro se branch remains in doubt.

The pro se idea has proven itself to be a workable one. However, the existing court, located in the Civic Center and meeting in the afternoon should not be considered a panacea. Neighborhood pro se courts holding evening and Saturday sessions would bring the forum to the people who in many instances are today foreclosed access to it due to economic, social and psychological factors.

Even if the pro se court "goes to the people," and establishes neighborhood branches, its long-term success in attaining "substantial justice" in a critical, qualitative manner will depend most of all on the sensitivity of the presiding judges to human hopes and aspirations; to human feelings, including fear, anger, frustration, and disappointment; and to human failing.4

In the last analysis, it is the judges own patience, compassion and experience which will effectuate the goals set for the pro se court; the law will be used to further promote a more idealistic concept of justice.85

This is said in part because of an interesting, unanticipated find-

GENERAL ORDER Rule 6. For additional rules which tend to relax the formalism of the traditional courtroom procedure, see GENERAL ORDER Rules 2, 3, 4(D) and 5(A), (B).

84. See generally J. FRANK, LAW AND THE MODERN MIND (1930), and K. LLEWELLYN, THE COMMON LAW TRADITION (1960). The late Judge Learned Hand perhaps unwittingly sounded the alarm when he wrote:

Judges are usually taken from that part of the bar which has distin-
guished itself in the field of action. They are likely to be men of strong will, set beliefs and conventional ideals.


85. This writer starts with the jurisprudential view that law (rules, authorita-
tive decisions, and authoritative decision processes) is neutral. That law is a mechanism capable of great justice but capable of great injustice, for example, the legal sanctioning of acts against humanity by officials of the Third Reich. And legal processes, which produce adjudication, which for economic or other reasons are generally final and non-reviewable, as in the case of a small claims court, can easily become arbitrary, expedited decisional processes only. It is suggested that in certain high-volume traffic-type courts throughout the country such blurring of purpose and shodiness of decision have resulted. Judges must constantly remind themselves that "right" decisions are immeasurably more important than decisions per se—that judicial efficiency should always be subordinate to the search for jus-
tice and truth in each case.
ing that came out of the pro se court study. Each of the DePaul
law students observing the pro se court sessions independently formed
an identical opinion—the particular judge makes all the difference as
to whether the court's process is used to attain substantial justice or,
on the other hand, the proceeding is a "wasted-motion" presenta-
tion. In short, the student observers concluded that if the judge
listens to and cares for the litigants, if the judge realizes that much
more is at stake than a $195 claim for damages, the pro se court ac-
accomplishes its goal. If, however, an assigned judge considers the
pro se assignment as tantamount to kitchen patrol, then the pro se
court experience may result in promoting distrust and bitterness among
the participants.

In conclusion, the Pro Se Branch of the Circuit Court of Cook
County has made a good showing in its brief existence, having pro-
vided a forum for the inexpensive and prompt adjudication of small
claims by individuals and consumers.

The creation of the pro se branch was late in coming but to quote
the late Justice Felix Frankfurter: "wisdom so seldom ever comes
that one ought not reject it merely because it comes late."86

One brief word is in order concerning arbitration as an alternate
consumer relief. The number and intensity of suggestions that ar-
bitration settlement procedures be established for consumer com-
plaint resolution are increasing.87 Indeed, the Council of Better
Business Bureaus has advocated a national program of consumer
arbitration.88

It is suggested that should the Cook County pro se branch not be
expanded and introduced into Chicago's neighborhoods as recom-
mended, then a county-wide arbitration system might be established.
There is at least one such forum in operation today in Arlington
County, Virginia where in late 1971, the Arlington County Board
of Commissioners established by ordinance the Arlington Consumer
Protection Commission.89 This is a conciliation board, however, and

87. See, e.g., Rothschild and Davis, How to Protect Consumers Through Local
Regulation and Arbitration, 1 LOYOLA CONS. PROT. L.J. 26 (1972).
88. COUNCIL OF BETTER BUSINESS BUREAUS, ARBITRATION FOR BUSINESS AND
CONSUMERS (1972).
89. See ROTHSCHILD AND CARROL, CONSUMER PROTECTION REPORTING SERVICE
679 (text), and rules promulgated thereto 681-92 (1973).
is not empowered to conduct binding arbitration proceedings unless both parties, the consumer and the merchant, volunteer and agree. Although compulsory binding arbitration creates substantial legal problems in non-collective bargaining circumstances, with appropriate state enabling legislation, such compulsory arbitration procedures might afford certain advantages over even pro se judicial adjudication, especially regarding the intimidation effect of judicial proceedings.

The pro se branch of Cook County is not, nor should it ever be considered the final solution in creating an institutionalized forum for consumer relief. The pro se court is not located where the people are; it is, moreover, a judicial forum; it produces by its nature and location tremendous psychic resistance to its use among numbers of potential litigants. It is, frankly, an intimidating institution—a formal court in a formal building, in the foreboding, skyscraper filled, business-oriented Loop. It is in the territory of "the other side." It is separate from the people. All the rhetoric about the administrative problems in establishing a neighborhood forum cannot mask this one simple fact. Any court located in the Civic Center a block from the First National Plaza, two blocks from the Standard Oil Building and four blocks from the Sears Tower, just across the street from City Hall, a short block to LaSalle Street is going to have a hard time calling itself a "people's court." After all, that really is what a pro se, consumer court is—for at issue are people's interests—hopes and frustrations—human disappointments. The legal community needs to work more diligently to assure that conflict resolution forums designed for small consumer claims for relief are not in themselves conflict promotive which would act to foreclose access to those persons who may have the greatest need for the relief sought.

PART THREE
MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

On September 12, 1973, the United States Senate passed the Mag-
nuson-Moss Warranty-Federal Trade Commission Improvement Act. As of this writing, the Bill is pending in the House of Representatives, having been referred on September 13, 1973 to the House Committee on Interstate and Foreign Commerce.

The proposed statute attempts to cover a number of issues—notably, consumer product warranty disclosure; increased enforcement powers for the Federal Trade Commission; authorizations to the Comptroller of the Currency, Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration to each establish a separate division of consumer affairs; and finally, used-car warranty disclosure requirements.

The Bill's preamble sets out the congressional intent to "provide disclosure standards for written consumer product warranties against defect or malfunction; to define Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes."

The Bill, sadly, is another example of federal legislation regulating relatively trivial matters while leaving unaffected the basic "rights" of merchants to disclaim obligations, to limit liabilities, and to restrict remedies. This weakness is reflected in the most significant language in the Magnuson-Moss bill, found in Section 102(b)—there is no requirement that any product or part be warranted.

92. Id. §§ 101-114.
93. Id. §§ 201-211.
94. Id. § 301.
95. Id. §§ 401-404.
96. Id. § 1.
97. The full text of § 102(b) reads:
   Nothing in this title shall be deemed to authorize the Commission to
   prescribe the duration of warranties given or to require that a product or
   any of its components be warranted except that the Commission may pre-
   scribe rules pursuant to section 553 of title 5, United States Code, that the
   term of a warranty or service contract shall be extended to correspond
   with any period in excess of a reasonable period (not less than ten days)
   during which the purchaser is deprived of the use of a product by reason
   of a defect or malfunction. Except as provided in section 104 of this
   title, nothing in this title shall be deemed to authorize the Commission to
   prescribe the scope or substance of written warranties.

S. 356, 93d Cong., 1st Sess. § 102(b) (1973).
In essence, the "right to disclaim," implied warranties as authorized by section 2-316 of the Uniform Commercial Code remains

98. UCC § 2-314. Implied Warranty: Merchantability; Usage of Trade.
(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the good shall be fit for such purpose.

99. UCC § 2-316. Exclusion or Modification of Warranties.
(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)
(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to de-
absolute. The new law only goes to the manner of disclaiming and to the manner of warranting. It is, in short, cosmetic. In form, the legislation pretends to be pro-consumer, but a brief view of Title I exposes the effort as a sham. However, before pursuing this thesis a prefatory note concerning private autonomy is in order.

The Uniform Commercial Code's affirmative warranty provisions applicable to sales of goods (§§ 2-312—2-315) impose on a seller responsibilities as to the quality and characteristics of merchandise sold in the stream of commerce. Even if the parties remain silent as to quality of goods at the time of contracting, the Code, invariably enacted as state law, imposes an implied warranty of merchantability on the sellers. Antithetical to this ideal, is the persistent common law tradition of contract law; that commercial law has developed largely through private ordering predicated on private autonomy—that parties can agree to do (and to be responsible for) whatever they please. Given this strong, pervasive historical private autonomy principle, it is no wonder that non-consensual obligations in private sale transactions seem out of place. And implied warranty liability is certainly predicated on theories other than private autonomy. So to fit warranty obligations into the private autonomy scheme, the draftsmen of the Code included section 2-316, which simply allows a party to avoid all warranty liability through the insertion of a disclaimer clause, appropriately worded, in the original contract.

The “freedom to contract” theory has thus been the basis for the freedom to disclaim any responsibility for a products' quality when selling that product in the marketplace. But given a look at the underlying premise—that freedom of contract is a fundamental right, it becomes clear that the right to be free from personal, economic, and psychological harm resulting from the use of defective or unmerchantable products is a fundamental principle as well.

A merchant should clearly not be permitted to place a “new” product into the stream of commerce which turns out to be unfit for its

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ferts which an examination ought in the circumstances to have revealed to him; and
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).
ordinary use and then avoid responsibility for the unfitness because
the law affords the merchant the "freedom of contract" to initially
disclaim any responsibility. The consumer does not, in fact, have
this fundamental freedom of contract. Today, we have a take-it-or-
deal-it consumer marketplace. Few otherwise intelligent persons
even know that they have the power to bargain with a merchant over
a printed clause on a sales form; fewer do; fewer still do so success-
fully. This is not a barter society. The consumer's marketplace
vocabulary consists of two phrases only: "I'll take it," and "no
thank you." On the one hand, the merchant voluntarily enters the
marketplace and is allowed the relative freedom to choose his mar-
et, to pick his supplier, to induce demand for his wares through ad-
vertising; all in the name of profit. In the process, he is allowed to
turn around and deny all responsibility for the product after it leaves
his hands, provided he properly disclaims further responsibility.
The buyer, on the other hand, is given no meaningful choice other
than to buy with the disclaimer or not to buy at all. The net effect
of this process is to put the merchant in a citadel surrounded by
a deep moat of legal powers, rights and privileges.

So then, one asks, what does the Magnuson-Moss bill do? It does
what Title One of the Federal Consumer Credit Protection Act,
otherwise known as Truth-in-Lending, does. It requires specific
language, specific terminology, to be disclosed in conspicuous fashion
when warranting or when disclaiming. To the extent that the leg-
islation requires such explicitness, it is probably well-intended. In-
deed, were it not for the escape clause in section 102(b)\textsuperscript{100}
this could have been significant legislation. The framework for promul-
gation of warranty disclosure requirements is set out in section 102
(a) which authorizes the FTC to issue rules which may:

(1) prescribe the manner and form in which information with respect
to any written warranty shall be clearly and conspicuously presented or
displayed when such information is contained in advertising, labeling, point-
of-sale material, or other representations in writing; and

(2) require the inclusion in any written warranty, in simple and readily
understood language, fully and conspicuously disclosed, items of information
which may include, among others:

(A) clear identification of the name and address of the warrantor;

\textsuperscript{100} See note 97 and accompanying text, \textit{supra}.
(B) identity of the class or classes of persons to whom the warranty is extended;

(C) the products or parts covered;

(D) a statement of what the warrantor will do in the event of a defect or malfunction—at whose expense—and for what period of time;

(E) a statement of what the purchaser must do and what expenses he must bear;

(F) exceptions and exclusions from the terms of the warranty;

(G) the step-by-step procedure which the purchaser should take in order to obtain performance of any obligation under the warranty, including the identification of any class of persons authorized to perform the obligations set forth in the warranty;

(H) on what days and during what hours the warrantor will perform his obligations;

(I) the period of time within which, after notice of malfunction or defect, the warrantor will under normal circumstances repair, replace, or otherwise perform any obligations under the warranty;

(J) the availability of any informal dispute settlement procedure offered by the warrantor and a recital that the purchaser must resort to such procedure before pursuing any legal remedies in the courts; and

(K) a recital that any purchaser who successfully pursues his legal remedies in court may recover the reasonable costs incurred, included reasonable attorneys' fees.\(^{101}\)

Note first that the Commission is not required to promulgate regulations covering all of the items listed. Also, it is possible to speculate that should the FTC promulgate especially detailed disclosure rules, many former warrantors will begin to use the considerably safer total disclaimer disclosure permitted under sections 102(b), and 108 of the bill, which are validated by section 2-316 of the UCC.\(^{102}\) In short, section 108(a) makes it clear that one can only disclaim implied warranties when one has not made any written express warranties. The lesson is clear to the supplier or merchant: negate all warranties.

Section 108 is titled “Limitations on Disclaimer of Implied Warranties.”\(^{103}\) The title is misleading since the limitations noted above


102. See note 99, supra.

103. The full text of § 108 reads:

(a) There shall be no express disclaimer of implied warranties to a purchaser if any written warranty or service contract in writing is made by a supplier to a purchaser with regard to a consumer product.

(b) For purposes of this title, implied warranties may not be limited as to duration expressly or impliedly through a designated warranty in
really arise only when there is an express warranty combined with an express disclaimer of implied warranties—in other words, where there is a conflict. And section 2-317 of the UCC operates to make ineffective an implied warranty disclaimer as against an express warranty covering the same product quality or characteristic.\textsuperscript{104}

Moreover, subsection (b) of section 108 of the Magnuson-Moss Bill limits a merchant's ability to limit the duration of an implied warranty.\textsuperscript{105} In truth, few merchants do so. Generally the merchant is either silent as to implied warranties so that they automatically attach to the transaction or they expressly negate them so that the warranties never attach. Rarely does one give a six-month implied warranty.

As to different "types" of warranties, the Magnuson-Moss Bill distinguishes, first, between what it calls a "full warranty,"\textsuperscript{106} second, a written warranty incorporating the uniform federal standards and third, a "limited warranty,"\textsuperscript{107} or one which does not incorporate the uniform federal standards.

The "Uniform Federal Standards for Written Warranty" are set out in section 104(a) which obligates a warrantor of a consumer product as defined in the bill.\textsuperscript{108}

\textsuperscript{104} UCC § 2-317. Cumulation and Conflict of Warranties Express or Implied. Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
(b) A sample from an existing bulk displaces inconsistent general language of description.
(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

\textsuperscript{105} See note 103, supra.

\textsuperscript{106} The definitional section of the Magnuson-Moss Bill provides:
"Full warranty" means a written warranty which incorporates the uniform Federal standards for warranty set forth in section 104 of this title.

\textsuperscript{107} "Limited warranty" means
written warranty subject to the provisions of this title which does not incorporate at a minimum the uniform Federal standard for warranty set forth in section 104 of this title.

\textsuperscript{108} "Consumer product" means
any tangible personal property which is normally used for personal, fam-
(1) to repair or replace any malfunctioning or defective consumer product covered by such warranty;
(2) within a reasonable time, and
(3) without charge.\textsuperscript{109}

The section goes on, however, to provide that the duties extending to the consumer "shall not be required of the warrantor . . . if he can show that damage while in the purchaser's possession or unreasonable use (including failure to provide reasonable and necessary maintenance) caused any warranted consumer product to malfunction or become defective."\textsuperscript{110} Many interpretative problems will surely ensue under the amorphous language of this section.

Section 103 requires that written warranties be conspicuously and clearly designated. If such a warranty follows the uniform federal standards for written warranty and does not limit the liability of the warrantor then it shall be designated as "full." Alternatively, while meeting federal standards, liability for consequential damages may be limited, leaving the remedy as free repair or replacement.\textsuperscript{111}

\textsuperscript{109} The full text of § 104(d) provides:

The performance of the duties enumerated in subsection (a) of this section shall not be required of the warrantor if he can show that damage while in the possession of the purchaser or unreasonable use (including failure to provide reasonable and necessary maintenance) caused any warranted consumer product to malfunction or become defective.

\textsuperscript{111} Sec. 103. (a) Any supplier warranting in writing a consumer product shall clearly and conspicuously designate such warranty as provided herein unless exempted from doing so by the Commission pursuant to section 109 of this title:

(1) If the written warranty incorporates the uniform Federal standards for warranty set forth in section 104 of this title, and does not limit the liability of the warrantor for consequential damages, then it shall be conspicuously designated as "full (statement of duration)" warranty, guaranty, or word of similar meaning. If the written warranty incorporates the uniform Federal standards for written warranty set forth in section 104 of this title and limits or excludes the liability of the warrantor for consequential damages as permitted by applicable State law, then it shall be conspicuously designated as "full (statement of duration)" warranty, guaranty, or word of similar import. "(Liability for consequential damages limited; remedy limited to free repair or replacement within a reasonable time, without charge)", or as otherwise prescribed by the Commission pur-
If the warranty does not comport with federal standards, it must be designated so as to indicate its limited scope.

Section 110 interestingly provides for private remedies by encouraging consumer-supplier arbitration, although not using the term. This is accomplished by a declaration of congressional policy in subsection (a). It reads in part:

Sec. 110. (a) Congress hereby declares it to be its policy to encourage suppliers to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. Such informal dispute settlement procedures should be created by suppliers in cooperation with independent and governmental entities pursuant to guidelines established by the Commission. If a supplier incorporates any such informal dispute settlement procedure in any written warranty or service contract, such procedure shall initially be used by any consumer to resolve any complaint arising under such warranty or service contract. . .

Section 110 goes on to provide for private actions in federal district courts subject to the jurisdictional requirements of 28 U.S.C. § 1331, but only after there has been an opportunity for the supplier to cure the alleged breach, and following utilization of any informal mechanism earlier agreed upon pursuant to section 110(a) for resolution. The effective date of this new law will be six months after enactment.

Undoubtedly of greater significance to the consumer than the Title One warranty disclosure provisions is Title II of the Magnuson-Moss Bill, entitled "Federal Trade Commission Improvements." This added consumer benefit results from section 202, which would amend section 5(a) of the Federal Trade Commission Act to permit the Commission to initiate civil actions in United States district courts against persons or firms charged with an unfair or deceptive suant to section 109 of this Act.

113. Id.
114. The private remedies section provides, in relevant part:

Prior to commencing any legal proceeding for breach of warranty or service contract under this section, a purchaser must have afforded the supplier a reasonable opportunity to cure the alleged breach and must have used the informal dispute settlement mechanisms, if any, established under subsection (a) of this section. . .

S.356, 93d Cong., 1st Sess. § 110(b) (1973).
115. Id. § 114.
116. Id. §§ 201-11.
practice in order to obtain a civil penalty of not more than $10,000 for each violation.118 Thus, the Commission's remedies and options for section 5(a) violations enforcement are considerably expanded and strengthened, this in addition to the stricter penalties prescribed by the Act.

Of even greater consumer significance, however, is the proposed new subsection (8) of section 5(a) which permits the Commission after issuing a cease and desist order which has become final, to institute civil actions in federal district courts "to obtain such relief as the court shall find necessary to redress injury to consumers" caused by the 5(a) violation, including rescission or reformation of contracts, refund of money, return of property and the payment of actual damages.119 In short, the FTC may in effect initiate a quasi-consumer class action for relief.120 Note, however, that the Commission's authorization to bring civil suits for consumer relief is discretionary and not mandatory.121

Title IV of the Magnuson-Moss Bill, returns to the warranty problem but this time in a narrower context—used car warranties.122

119. Sec. 203. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a) ) is amended by inserting after paragraph (7) as added by section 202 of this title the following new paragraph:

"(8) After an order of the Commission to cease and desist from engaging in acts or practices which are unfair or deceptive to consumers and proscribed by section 5(a)(1) of this Act has become final as provided in subsection (g) of this section, the Commission, by any of its attorneys designated by it for such purpose, may institute civil actions in the district courts of the United States to obtain such relief as the court shall find necessary to redress injury to consumers caused by the specific acts or practices which were the subject of the proceeding pursuant to subsection (b) of this section and the resulting cease-and-desist order, including, but not limited to, rescission or reformation of contracts, the refund of money or return of property, public notification of the violation, and the payment of damages, except that nothing in this section is intended to authorize the imposition of any exemplary or punitive damages. The court shall cause notice to be given reasonably calculated, under all of the circumstances, to apprise all consumers allegedly injured by the defendant's acts of the pendency of such action. . . ."

121. The key phase in § 203, rendering its use discretionary, is that the "Commission . . . may initiate Civil actions . . . ." S.356, 93d Cong., 1st Sess. § 203 (1973).
122. Id. §§ 401-404.
Section 402 prescribes that no dealer to a consumer without a written warranty which conforms with the detailed disclosure requirements of section 403, unless the contract for sale contains in conspicuous type the notice: "ALL REPAIRS ARE THE RESPONSIBILITY OF THE BUYER." In addition for one to disclaim effectively all warranty liability, it appears that one must also comply with both Title I of the Magnuson-Moss Bill and section 2-316 of the Uniform Commercial Code.

Yet even should a dealer sell a used motor vehicle without any warranty as permitted and as prescribed in Title IV, the dealer still will have to comply with the requirements of section 403(a) and (b), mandating him prior to the signing of any contract to furnish the purchaser with a written statement containing:

1. a complete description of such used motor vehicle, including, but not necessarily limited to—
   (A) the make, model, year of manufacture, and any identification or serial numbers of such vehicle;
   (B) a statement of any mechanical defects known to such dealer on the basis of his examination and evaluation of the vehicle prior to his acquisition of such vehicle or which otherwise becomes known to him while in his possession, and any repairs made by or under the direction of such dealer following his acquisition of such used motor vehicle;
   (C) a statement of the written warranty coverage of the used motor vehicle, except that if the used motor vehicle is sold without a written warranty, the dealer shall enter the words "As Is—all repairs are the responsibility of the buyer" in the space provided for warranty coverage;

123. See note 99, supra.
(D) the date on which such vehicle will be delivered to such purchaser and the maximum number of miles which will appear on the odometer on such date; . . .\textsuperscript{127}

In conclusion, should the House pass the Magnuson-Moss Bill in the version passed by the Senate, the new law would become effective in six months after date of enactment. Passage however may be something of a mixed blessing. On one hand, the Bill will have the effect of regulating warranty disclosures. Yet, on the other hand, it will probably dramatically increase disclaimers in consumer sales transactions. The Bill permits disclaimers, while at the same time it places burdensome obligations upon the manner in which affirmative warranties may be created.

But as to the increased enforcement powers, Commission initiated consumer relief actions, added remedies and enforcement options delegated to the Federal Trade Commission under Article Two, one can only say well drafted, well enacted, well done. Let the House follow the path of wisdom.

PART FOUR

TRUTH-IN-LENDING

On April 24, 1973, the Supreme Court handed down its first decision, \textit{Mourning v. Family Publications Service},\textsuperscript{128} interpreting the limits of the authority which Congress delegated to the Federal Reserve Board under section 105 of the federal Truth-in-Lending Act.\textsuperscript{129} Specifically at issue was whether the Board had exceeded its authority in promulgating the so-called "Four-Installment Rule," one portion of the Board's enforcement regulation commonly called Regulation Z.\textsuperscript{130}

The Four-Installment Rule is found in section 226.2(k) of Regulation Z, which defines the term "Consumer Credit" to include any extension of credit for personal, family, household or agricultural purposes for which a finance charge is imposed, or "which,

\begin{itemize}
\item \textsuperscript{127} S.356, 93d Cong., 1st Sess. § 403 (1973).
\item \textsuperscript{128} 411 U.S. 356 (1973).
\end{itemize}
pursuant to an agreement, is or may be payable in more than four installments."\textsuperscript{131}

At this point it is important to review the facts before turning to the Supreme Court's resolution of the issue. A salesperson for a corporation which solicits magazine subscriptions called on a 73 year-old widow and induced her to subscribe to four magazines for a five-year period. She agreed to pay $3.95 immediately, and $3.95 per month for 30 months. Thus, the total expenditures for the four subscriptions came to $122.45. The sales contract contained both a non-cancellation clause and an acceleration clause which would have the effect of making the entire balance due upon the default of any installment.\textsuperscript{132}

The contract signed by the purchaser did not contain either the total purchase price of the subscriptions ($122.45) or the total amount financed ($118.50). Of course, there was no recitation of any finance charge since there appeared to be none, that is, the total deferred payment price of $122.45 was identical to the cash price had the purchaser opted to pay the entire contract at the outset.

After making the down payment and after beginning to receive the magazines, the subscriber defaulted. The magazine-solicitation firm then declared the entire balance due ($118.50) pursuant to the acceleration provision of the contract and threatened legal action.

Subsequently the purchaser took the offensive by filing suit against the magazine firm in a Florida federal district court. She alleged that the firm had failed to comply with the disclosure provisions of the Truth-in-Lending Act. Upon cross-motions for summary judgment, the district court, relying upon the Four-Installment Rule of Regulation Z, held in favor of the purchaser, and granted her motion for summary judgment. As a finding of fact, the district court declared that the seller, Family Publications Service, Inc., had extended credit to the buyer, Leida Mourning, which by agreement was payable in more than four installments.\textsuperscript{133}

The United States Court of Appeals for the Fifth Circuit subse-

\textsuperscript{131} 12 C.F.R. § 226.2(k) (1973).
\textsuperscript{132} The contract signed by the purchaser was similar in many respects to retail installment sales contracts which typically contain a default-acceleration provision.
\textsuperscript{133} 411 U.S. at 362.
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quently reversed the Florida district court’s ruling, holding that the Federal Reserve Board had exceeded its statutory delegation of authority in promulgating the Four-Installment Rule. The Fifth Circuit believed that the rule conflicted with section 121, the general disclosure requirement provision of the enabling statute. The Fifth Circuit also held, as an alternative ground for its decision, that the Four-Installment Rule created a conclusive presumption that payments exceeding four in number included a finance charge, and that such an irrebuttable presumption of fact violated the due process clause of the fifth amendment to the Constitution.

Given this factual situation, the Supreme Court was faced with its first opportunity to interpret the scope of the Truth-in-Lending disclosure requirements. Initially, the Court reviewed the policy reasons which supported the passage of the Truth-in-Lending Act. In what can only be described as an understatement, the Court noted that by the time of passage in 1968, “it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate.”

The Court pointed to the astonishing figures, which indicated that from 1946 to 1967 consumer credit had grown from $5.6 billion to nearly $100 billion, representing a growth rate of more than four and one-half times that of the economy as a whole. By stressing the magnitude of consumer credit, the Court was underscoring the magnitude of the social and economic interest underlying Truth-in-Lending. These interests are partially mentioned in section 102 of the Act, where Congress declared the positive benefits to be derived from the “informed use of credit” which results from

135. 15 U.S.C. § 1631 (1970); which reads:
   General requirement of disclosure.
   (a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.
137. 411 U.S. at 363.
a consumer's awareness of credit costs.\textsuperscript{139}

Having briefly noted the pro-consumer policies underlying Truth-in-Lending, the Court next pointed out that a creditor could circumvent the objectives by "burying the cost of credit in the price of goods sold."\textsuperscript{140}

There can be no doubt that a merchant (one who predominantly sells hard, durable goods such as furniture) who is located in a neighborhood of a city where most customers are unable to make sizeable cash purchases, will likely make most sales on a credit-installment basis. Often what is significant to the prospective buyer, however, is the amount of the periodic payment rather than the total cash price of the goods.\textsuperscript{141} Rather than quote a low or even competitive (vis-a-vis some other dealer's) cash price along with a substantially larger deferred "time price" (the difference between which the Truth-in-Lending Act declares to be the "Finance Charge" or the "time-price differential"), a merchant might elect to raise the "cash price" to the deferred time price level. Does this mean that there is little or no time-price differential? Does this mean that there is no finance charge? Does this mean that if there is no finance charge, that disclosure of all terms required by Truth-in-Lending need not be made?

 Merchants hoped so. The Family Publications Service of Florida hoped so. For if a merchant is not required to disclose the entire amount of all payments, for example, arguably more customers at the point of sale will agree willingly to pay a "cash price" on a "no-

\textsuperscript{139} 15 U.S.C. § 1601 (1970): The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaging in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the costs thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

\textsuperscript{140} 411 U.S. at 366.

\textsuperscript{141} The Federal Trade Commission 1966 study on retail installment sales practices within the District of Columbia clearly shows that merchants operating in economically depressed sections of the city marked up the "cash" prices of durables far above the average mark ups put on identical products by "downtown" merchants who sold proportionately more items on a cash basis than did the ghetto area merchant. FTC, Economic Report on Installment Credit and Retail Sales Practices of District of Columbia (March 1968).
finance" deferred, installment-sale basis, not realizing or understand-ning that the finance charge has been hidden. That is exactly what happened to the purchaser in the *Mourning* case. Fortunately, the Supreme Court recognized this "burial" of the finance charge in the inflated cash price of the goods sold.¹⁴²

In writing the majority opinion in *Mourning*, Chief Justice Burger quoted from Senator Paul Douglas', remarks in Senate Hearings on the Truth-in-Lending Bill where the Illinois Senator pointed out that if a merchant tries to hide a finance charge by burying it in a high cash price, then, provided there is the requisite disclosure of *both* the total price and total finance terms, "the purchaser can shop on price just as on the finance charges."¹⁴³

The Federal Reserve Board in its original draft of Regulation Z included the Four-Installment Rule. In an early advisory letter, the Board noted that the Four-Installment Rule was "imperative" so as not to encourage the burying of the finance charge in the cash price.¹⁴⁴

With this clear Congressional concern revealed, the stage was set for the application of the traditional delegation of authority standard: that the agency "may 'make . . . such rules and regulations as may

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¹⁴². In a footnote, the Court set up the following illustration of the burial of finance charges through an inflated cash-price markup:

For example, two merchants might buy watches at wholesale for $20 which normally sell at retail for $40. Both might sell immediately to a consumer who agreed to pay $1 per week for 52 weeks. In one case, the merchant might claim that the price of the watch was $40 and that the remaining $12 constituted a charge for extending credit to the consumer. From the consumer's point of view, the credit charge represents the cost which he must pay for the privilege of deferring payment of the debt he has incurred. From the creditor's point of view, much simplified, the charge may represent the return which he might have earned had he been able to invest the proceeds from the sale of the watch from the date of the sale until the date of payment. The second merchant might claim that the price of the watch was $52 and that credit was free. The second merchant, like the first, has forgone the profits which he might have achieved by investing the sale proceeds from the day of the sale on. The second merchant may be said to have "buried" this cost in the price of the item sold. By whatever name, the $12 differential between the total payments and the price at which the merchandise could have been acquired is the cost of deferring payment.


be necessary’ . . . will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’”145 The Supreme Court held that not only is the Board empowered to regulate hidden or buried finance charges, but that the measure chosen, the Four-Installment Rule, is reasonably related to its objectives. Moreover, the Court noted that “[t]he burdens imposed on creditors are not severe, when measured against the evils which are avoided.”146

Turning to the fifth amendment due process argument, the Court simply stated that the Four-Installment Rule contains no irrebuttable presumption since it “does not presume that all creditors who are within its ambit assess finance charges, but, rather, [it] imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class.”147

Chief Justice Burger then observed that the Truth-in-Lending Act reflects a transition in congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose.148 He is right, of course, as evidenced by the Fair Packaging and Labeling Act,149 the Flammable Fabrics Act,150 the Wool Products Labeling Act,151 the Fur Products Labeling Act,152 the Federal Food, Drug and Cosmetic Act153 and the Federal Cigarette Labeling and Advertising Act154 where all require significant disclosures, designed to increase the knowledge of consumers so that they will be able to make wiser decisions in the consumer marketplace. Truth-in-Lending155 is only one of a series of legislative tamperings with the classical conception of the consumer marketplace. Moreover, Truth-in-Lending, like the Magnuson-Moss Warranty Bill is not as paternalistic as their opponents claim. The freedom to extend credit, to go into debt,
to buy "luxuries" and to "over-extend" remains unchallenged and undisturbed. In any event, Chief Justice Burger commented in *Mourning* that the respondent's fear that the Four-Installment Rule reflects a "paternalistic concern for the consumer is beside the point."\(^{156}\)

Thus, the Supreme Court upheld the Federal Reserve Board's "Four-Installment Rule" in *Mourning* and made it clear in doing so that the Board indeed has the authority to promulgate rules reasonably related to the objectives of Truth-in-Lending. The decision is to be applauded.

The Supreme Court decision also has the effect of upholding Judge Will of the United States District Court for the Northern District of Illinois, who upheld the Four-Installment Rule two years earlier in a nearly identical factual context in the case of *Strompolos v. Premium Readers Service*.\(^{157}\) Judge Will held that the Four-Installment Rule of Regulation Z was valid. In this case the defendant was also a broker of magazines. The plaintiff was a representative for a class of persons purchasing magazine subscriptions from the defendant. Judge Will concluded that the Four-Installment Rule was not only sensible but "necessary to prevent the Truth-in-Lending Act from being a hoax and delusion upon the American public."\(^{158}\)

Turning to other developments relating to Regulation Z and Truth-in-Lending, it is important to note briefly a few amendments about to go into effect. On November 1, 1973, amendments to sections 226.2(u), 226.6(a), 226.10(c) and 226.10(d), relating to the *advertising* of credit are to become operative.\(^{159}\) The amendments reduce the amount of information a creditor must include in advertising open-ended credit plans such as revolving retail charge accounts or bank card plans. Creditors still must include certain minimum Truth-in-Lending disclosures in their advertising—the Annual Percentage Rate (APR), any free-ride period, the method of determining finance charges, and balances on which finance charges are imposed. The advertising of "no down payment" is

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156. 411 U.S. at 377.
158. *Id.* at 1103.
eliminated, however, as a triggering term for disclosure of all other required terms.\textsuperscript{160}

Effective January 1, 1974, Section 226.8(b) of Regulation Z is amended so as to require creditors who do not grant rebates of the unearned portion of the finance charge upon prepayment of a precomputed installment credit to disclose this fact on the Truth-in-Lending disclosure form.\textsuperscript{161} This amendment, moreover, requires disclosure of the method of computing a refund of unearned interest on prepayment of any credit transaction. The amendment would seem to end the recent speculation as to whether the famous "rule of 78ths" need be disclosed.\textsuperscript{162}

Without question, the most significant proposed amendments to Truth-in-Lending since its enactment five years ago are contained in a bill known as "Truth-in-Lending Act Amendments of 1973."\textsuperscript{163} As of this writing, the Bill has passed the Senate (July 23, 1973), and is awaiting action by the House of Representatives.\textsuperscript{164}

Title I, known as the "Fair Credit Billing Act," would add a substantial new element to Truth-in-Lending—the regulation of billing practices, including the disclosure of "fair billing rights,"\textsuperscript{165} proce-

\begin{footnotesize}
\begin{itemize}
\item[160.] Id. at 18457-58.
\item[(b)] Disclosures in sale and non-sale credit.
\item[(7)] Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.
\item[162.] See Smith, Disclosure of Prepayment Rebates Required by Truth-in-Lending: Recent Developments Involving Rule of 78th, 27 Personal Finance L.Q. 66 (1973). The "rule of 78ths" method of computing that portion of interest which is unearned upon payment before maturity (whether precomputed, add-on or discount) is derived from the fact that in a twelve month period, if the total of the digits of all twelve months were added, the sum would be 78.
\item[163.] S.2101, 93d Cong., 1st Sess. (1973).
\item[165.] S.2101, 93d Cong., 1st Sess. § 104 (1973).
\end{itemize}
\end{footnotesize}
dure for the correction of billing errors, as well as the setting out of specified rights of credit card customers.

Title II of the proposed amendments includes a requirement that advertisements of credit repayable in more than four installments, if no finance charge is imposed, must clearly and conspicuously state that "the cost of credit is included in the price quoted for the goods and services." The civil liabilities and penalties, moreover, are significantly increased under the proposed Title II amendments.

Perhaps of greatest significance is Title III of the proposed amendments, titled "Equal Credit Opportunity," which if enacted will be known as the Equal Credit Opportunity Act. The Act would amend Truth-in-Lending by adding a new Chapter 5—"Prohibition of Discrimination Based on Sex or Marital Status." Specifically, the Act would declare it to be unlawful for any creditor or credit card issuer to discriminate on account of sex or marital status against any individual, (1) with regards to the approval or denial of any extension of consumer credit or with respect to any terms of the credit, or (2) with respect to the approval, denial, renewal, continuation or revocation of any open-ended consumer credit account or any terms thereof.

This prohibition of discrimination in credit extension on the basis of sex is long overdue. There is no justification in modern society to treat women as inferior in any area of human interaction. It is sad to realize that the Equal Credit Opportunity Act is not yet the law, and that it was introduced as late as 1973. Again, wisdom is late in coming.

PART FIVE
FUENTES AND THE ILLINOIS REPLEVIN STATUTE

Creditors' default remedies have recently become subject to numerous constitutional challenges. In particular, the remedy grant-
ing a creditor the right of summary seizure of property without an opportunity for hearing or notice has been challenged on fourteenth amendment due process grounds, as discussed in Part One.\textsuperscript{173} Such constitutional deficiencies as lack of notice and opportunity to be heard, wrongful deprivation of a vendee’s property interest between the time of the vendor’s taking possession and entry of final judgment, and the lack of an overriding governmental or public interest justifying the exercise of state involvement in summary seizure, must be considered in analyzing the constitutional challenge to summary seizure of property. This discussion deals not with self-help seizure, but rather with seizures pursuant to a judicial writ of replevin.

The Supreme Court in \textit{Fuentes v. Shevin}\textsuperscript{174} held that prejudgment replevin proceedings violate the fourteenth amendment's flexible due process requirements of notice and hearing. In the wake of the Court's pronouncement, analogous replevin procedures in 39 states, including Illinois, were in need of amendment to conform to the constitutional mandate of \textit{Fuentes}.\textsuperscript{175}

\begin{footnotesize}
\begin{enumerate}
\item[173.] See discussion in Part I of this Article, \textit{supra}.
\item[174.] 407 U.S. 67 (1972).
\item[175.] The following jurisdictions had provisions for prejudgment recovery of chattels prior to \textit{Fuentes}: ALA CODE tit. 9, §§ 93-97 (1958); ALASKA STAT. § 88 (1968); ARIZ. REV. STAT. ANN. §§ 12-1301 to -1302 (1956); ARK. STAT. ANN. §§ 34-2101 to -2104 (1962); CAL. CODE CIV. PRO. §§ 509-512 (West 1967); CONN. GEN. STAT. ANN. §§ 52-515 to -531 (1960); D.C. CODE ENCYCL. ANN. § 16-3701 (1966); IDAHO CODE §§ 8-301 to -312 (1948); ILL. ANN. STAT. ch. 119, §§ 1-27 (Smith-Hurd 1954); IND. ANN. STAT. §§ 3-2701 to -2713 (1968); IOWA CODE ANN. § 643.10 (1950); KAN. STAT. ANN. § 60-1005 (1964); KY. REV. STAT. § 425.120 (Supp. 1972); ME. REV. STAT. ANN. tit. 14, § 7301 (1964); MASS. GEN. LAWS ANN. ch. 247, § 7 (1959); MICH. STAT. ANN. § 27A.7309 (1962); MINN. STAT. ANN. § 565.01 (1947); MISS. CODE ANN. § 2841 (1957); MO. ANN. STAT. §§ 533.010 to -230 (1953); MONT. REV. CODES ANN. § 93-4101 (1964); NEB. REV. STAT. §§ 25-1093 to -10,110 (1965); NEV. REV. STAT. § 31840 (Supp. 1971); N.H. REV. STAT. ANN. §§ 536:1 to 536:8 (1955); N.J. REV. STAT. § 2A:59-1 (Supp. 1952); N.M. STAT. ANN. §§ 22-17-1 to -17-21 (1954); N.C. GEN. STAT. § 1-472 (1969); N.D. CENT. CODE § 32-07-01 (1960); OHIO REV. CODE ANN. § 2737.01 (Anderson 1954); OKLA. STAT. ANN. tit. 12, § 1571 (1961); ORE. REV. STAT. § 29.810 (1969); R.I. GEN. LAWS ANN. § 34-21-1 (1970); S.C. CODE ANN. § 10-2501 (1962); S.D. COMPIL. LAWS ANN. §§ 21-15-1 to -15-8 (1967); TENN. CODE ANN. §§ 23-2301 et seq. (1956); UTAH R. CIV. P. 64B (1953); VT. STAT. ANN. tit. 12, § 12-5371 (1958); WASH. REV. CODE ANN. §§ 7.64.010 et seq. (1961); WIS. STAT. ANN. § 265.01 (1957); WYO. STAT. ANN. CODE CIV. P. §§ 1-693 to -707 (1957); W.VA. CODE ANN. tit. 5, § 211 (1967). Shortly after the decision in \textit{Fuentes} the Tennessee replevin statute, TENN. CODE ANN. §§ 23-2301 to -2328 (1956) was declared unconstitutional insofar as they authorized a deprivation of property without the right to a prior opportunity to be heard before chattels were taken from their possessor. \textit{See} Mitchell v. State, 351 F. Supp. 846 (W.D. Tenn. 1972).\end{enumerate}
\end{footnotesize}
In light of those developments, an examination of the decision in *Fuentes* with a view toward understanding its place in the development of procedural due process standards, and a look at the relative compliance of the recent Illinois Amendment to its replevin statute with the constitutional mandate of *Fuentes* follows.

In *Fuentes*, the Supreme Court reviewed the decisions of two federal district courts which had upheld the constitutionality of the Florida and Pennsylvania replevin laws. These statutes authorized summary seizure by ex parte application for a writ of replevin. One appellant, Mrs. Fuentes, had purchased a gas stove and stereo phonograph pursuant to a conditional sales contract with accompanying service policies from the Firestone Tire and Rubber Company. The seller retained title to the goods and was given the right by contract to repossess the merchandise in the event the purchaser defaulted in any of her payments. For over a year, Mrs. Fuentes remitted her payments until a dispute arose over the quality of the stove. She then defaulted on her stove payments, but paid the remaining balance due on the stereo. This latter payment was treated by the retailer as a pre-payment on the *entire* contract and the non-payment was treated as a default on the *entire* contract. The seller subsequently obtained from the clerk of the court a writ of replevin and the merchandise was summarily seized from her home by the local sheriff. There was no question about state action under these circumstances.

The writ of replevin was obtained by Firestone in a small claims action merely by claiming its right to possession of the disputed property and posting a security bond. Under the Florida statute, notice of replevin was sent to the debtor who received it. The defaulting purchaser had an opportunity for a hearing only after the goods had been seized and could recover the goods before the hearing only by filing a security bond equal to double the value of the item. The

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177. The first case that the Court reviewed was Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970). The other case consolidated for review by the Court was Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971).

178. **FLA. STAT. §§ 78.01, 78.07, 78.10, 78.13 (Supp. 1972).**
Pennsylvania statute, while varying slightly, was nearly the same as Florida's.\textsuperscript{179}

The Pennsylvania and Florida replevin statutes, moreover, were similar to the then existing Illinois statutory scheme.\textsuperscript{180} The Illinois statute merely required the plaintiff to file a verified complaint which states that the complainant is the owner of the described property and that such property is wrongfully retained by the defendant.\textsuperscript{181}

When executed, the ex parte application for replevin resulted in the vendees' dispossession of the chattel without any prior hearing to determine probable cause for the issuance of the writ of replevin. Following the application under the pre-\textit{Fuentes} Illinois procedure, a writ was issued to the sheriff,\textsuperscript{182} directing him to deliver the property to the plaintiff.\textsuperscript{183} After issuance of the writ the plaintiff was required to post a security bond. The notice of the replevin was received by the debtor simultaneously with the taking, as authorized by the Florida and Pennsylvania statutes.

Therefore, the issue before the \textit{Fuentes} court was whether such statutory schemes typified by the Illinois replevin statute violated due process. As the Supreme Court viewed the issue, \textit{Fuentes} presented the question of "whether procedural due process . . . requires an opportunity for a hearing before the state authorizes its agents to seize property in the possession of a person upon the application of another."\textsuperscript{184} The Court essentially concluded that the right to a

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\item \textsuperscript{179} PA. STAT. tit. 12, § 1821 (Supp. 1972); PA. R. CIV. P. 1073, 1076, 1077. The Pennsylvania law did not require an opportunity for a hearing. The creditor was only required to (1) file an affidavit of value for the property sought to be replevied, (2) execute an ex parte application, and (3) post a bond for twice the value of the property sought to be replevied. The writ was executed by summary seizure without notice or hearing on the issue of possession.
\item \textsuperscript{180} ILL. REV. STAT. ch. 119, §§ 8-26 (1971).
\item \textsuperscript{181} \textit{Id.} § 4.
\item \textsuperscript{182} \textit{Id.} § 6.
\item \textsuperscript{183} \textit{Id.} § 7. The writ of replevin required the sheriff, or other officer to whom the writ was directed, to take the property from the possession of the defendant and deliver it to the plaintiff unless the defendant executed a bond and security as provided in the statute. This action on the writ summoned the defendant to answer to the plaintiff in the action, or in the event that the property was not found and delivered to the sheriff or other officer, to answer to the plaintiff for the value of the same.
\item \textsuperscript{184} 407 U.S. 67, 80 (1972).
\end{itemize}
hearing before property was taken under color of state law was a basic principle of due process, and then said that "[t]he Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle." \textsuperscript{185}

Initially, the \textit{Fuentes} Court, defined the nature of the property interests deserving fourteenth amendment protection. It made clear that the Constitutional protection extends to all types of property, not merely property deemed "necessities,"—a distinction seemingly drawn in previous decisions. Indeed, \textit{Sniadach v. Family Finance Corp.}\textsuperscript{186} and \textit{Goldberg v. Kelly}\textsuperscript{187} may be interpreted to say that a due process violation depends in part on the type of property subject to summary seizure.

In \textit{Sniadach}, a creditor had obtained a prejudgment wage garnishment against the debtor's wages under a Wisconsin procedure which made no provision for notice and hearing before the garnishment order was executed.\textsuperscript{188} The effect of the garnishment was to "freeze" the debtor's wages while the creditor pursued his action on the debt. The Court held that the freezing of these wages deprived the defendant of due process, since no notice or hearing was provided.

It would appear that the broad principle set forth in \textit{Sniadach} would be applicable to any state-involved deprivation of property, subject to scrutiny on due process. The Court, however, expressly noted the deleterious effects of wage garnishments, viewing one's wages as a specialized type of property presenting distinct problems in our economic system.\textsuperscript{189} That certain property interests deemed "necessities" were alone protected by the Constitution seemed to be amplified by the Court in \textit{Goldberg v. Kelly}.\textsuperscript{190} In \textit{Goldberg}, the Court held that due process requires that welfare recipients be given an evidentiary hearing before the termination of public assistance benefits. However, \textit{Goldberg}, like \textit{Sniadach}, left the impression that welfare payments, too, were a specialized type of property, perpet-

\textsuperscript{185} 407 U.S. 67, 83 (1972).
\textsuperscript{186} 395 U.S. 337 (1969).
\textsuperscript{188} Wis. Stat. § 265.01 (1957).
\textsuperscript{190} 397 U.S. 254 (1970).
tuating the negative inference that non-specialized property taken under color of state law may not involve due process violations.

After *Sniadach* and *Goldberg* the lower courts had to consider whether the Supreme Court had made the due process clause generally applicable to summary seizure of any type of property or applicable only to those takings which involved specialized types of property deemed necessities, the taking of which would pose a special hardship. There ensued a division of opinion on this issue in the lower courts.\(^{191}\)

The issue was finally resolved when the Supreme Court in *Fuentes* laid to rest the "necessities" distinction by rejecting the narrow interpretations of *Sniadach* and *Goldberg*. The Court stated:

> No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."\(^{192}\)

Not only did the Court adopt the broader interpretation of *Sniadach*, it also placed the right of prior hearing so firmly on due process grounds that any purported exception or justification for deprivation of the right to a hearing would have to be of great magnitude to be sanctioned by the Court. Indeed, the Court went on to reiterate

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earlier justifications for departures from strict compliance with minimal due process requirements. These included: attachment of property to secure a judgment in a state court, seizure of property to collect federal taxes, seizure of misbranded drugs and seizure of contaminated food.

More generally, the Court reiterated its “exceptional circumstance” principle validating a legitimate non-due process exercise of a state’s seizure power; to wit, where it is necessary to secure an important governmental or general public interest, or where a special need for very prompt action can be shown.

The Court next rejected the argument that the appellants lacked legal title to goods because they made their purchases under conditional sales contracts. The Court noted that a property interest protected by the fourteenth amendment has never been interpreted to safeguard the rights of only those having undisputed ownership. Indeed, the use and possession of property pursuant to a contract was deemed a sufficient possessory interest deserving of protection of the due process clause.

Next, the Court held that it made no difference that the taking of property under a prejudgment writ of replevin might only be temporary or that the party deprived of the property could recover it by later posting a bond. Even a temporary taking of property is a “deprivation” in fourteenth amendment terms. The Court added that the length and severity of a deprivation were factors, however, in determining the appropriate form of the hearing, but in no case was it decisive of the basic right.

Further, the Court found that: the statutes served no important governmental or general public interest in allowing summary seizure when only private gain was directly at stake; the takings were not limited to situations which demanded prompt action; and no mean-

197. 407 U.S. at 91.
198. Id. at 86-87.
199. Id. at 84-85.
200. Id. at 86.
ingful standards were enunciated through which the state exercised its control. Private parties serving their own interests would unilaterally invoke state power to redeem goods from another.\textsuperscript{201} Further, no meaningful forum for the evaluation of the merits of the allegation of the complainant was provided. Hence, the replevin statutes were constitutionally defective for not providing effective control over the state monopoly of legitimate force.

The Court lastly considered whether the signing of a conditional sales contract containing language providing for the seller's repossession upon the buyer's default constituted an effective waiver of due process rights. The Court, citing \textit{D.H. Overmyer Co., Inc. v. Frick Co.},\textsuperscript{202} acknowledged that due process rights may be contractually waived, if the waiver is voluntarily, intelligently and knowingly made. The Court indicated that in determining whether due process rights have been waived, it will look to the facts and circumstances surrounding each case.

The effect of \textit{Fuentes} on state prejudgment replevin statutes is far reaching. Of the 48 states having some form of prejudgment replevin statute, the validity of some 39 state statutes was called into serious question by the \textit{Fuentes} decision.\textsuperscript{203}

The direct consequence of \textit{Fuentes v. Shevin} in Illinois, initially, was to question the validity of the Illinois summary repossession provisions, (sections 4 through 7) which failed to require hearings prior to repossession.\textsuperscript{204} Shortly after \textit{Fuentes} was decided, the Cook County Circuit Court entered an order prohibiting the issuance of writs of replevin.\textsuperscript{205} In the interim period, the General Assembly

\textsuperscript{201} Id. at 91.
\textsuperscript{202} 405 U.S. 174 (1972).
\textsuperscript{203} See discussion at note 175, supra.
\textsuperscript{204} \textsc{Ill. Rev. Stat.} ch. 119, §§ 4-7 (1971).
\textsuperscript{205} On the basis of the \textit{Fuentes} decision, the Circuit Court of Cook County added the following paragraph to the general orders which deal with replevin actions:

\textit{REPLEVIN AND GARNISHMENT ACTIONS}

(a) The Clerk of the Circuit Court of Cook County shall not accept actions in replevin for filing and shall not issue writs of replevin.

(b) The Clerk of the Circuit Court of Cook County shall not accept an affidavit for a non-wage garnishment and shall refuse to issue summons in such proceeding based upon a judgment by confession unless such judgment is confirmed after service of process.

\textsc{General Order of the Circuit Court of Cook County,} § 6.4 (Aug. 24, 1972).

In connection with the order, the office of the state's attorney issued an opinion
considered numerous amendment proposals to the replevin statute. One such amendatory bill was enacted on August 13, 1973.\textsuperscript{206}

The legislature's amendments essentially bring Illinois replevin procedure into compliance with the mandate of \textit{Fuentes}. The basic mandate of \textit{Fuentes} is that the person in possession of goods sought to be replevied should be given the opportunity to contest the issuance of the writ at a hearing scheduled before the writ is issued. This requirement expresses itself in the notion of notice and opportunity to be heard, and is implemented through section 4(a) of the amendment, requiring a five-day notice of a hearing to contest the issuance of the writ.\textsuperscript{207}

An action in replevin is commenced by filing a verified complaint which: describes the property to be replevied; states that the plaintiff in the action is the owner of the property so described; declares that the property is wrongfully detained by the defendant; and states that the property has not been taken pursuant to the legitimate exercise of governmental power.\textsuperscript{208} Such information must be provided in the verified complaint in order for the defendant to receive adequate notice of the issues which will be heard, thus giving such defendant the opportunity to test the factual basis of allegations underlying any claim to possession. In short, the requirement of notice prior to hearing appears to be in accordance with the Court's mandate in \textit{Fuentes}.

Recall that the Court noted there could be "extraordinary situations" which would justify postponing the notice and opportunity for hearing, but indicated that these situations must be truly unusual.
Under the revised Act, such extraordinary situations have been codified in section 4(b) of the amendment. The Fuentes Court suggested that cases in which a creditor could show immediate danger of a debtor destroying or concealing disputed goods might justify seizure before notice and an opportunity for a hearing. Thus, the replevin amendment allows summary seizure where there is immediate impending harm resulting from: imminent removal of the disputed property from the state; the perishable nature of the disputed property; imminent sale, transfer or assignment of the disputed property, such transaction being fraudulent or in derogation of plaintiff's rights in the property; and where a defendant has obtained possession by theft. The notion of exceptional circumstances justifying summary seizure has been long codified in Illinois' attachment statute. These standards for summary seizure appear to comply with Fuentes, where the statutory structure was struck down for not enunciating meaningful standards through which the state exercised its control over replevin proceedings. The Court indicated, however, if effective control could be exercised through the setting forth of meaningful standards, summary seizure by the state could be sanctioned in justifiable instances. The Court added that the need for prompt action exhibited in the “exceptional circumstances doctrine” could be grounds for the valid exercise of state control in summary seizure situations. The standards for summary seizure are drawn with such particularity in the Illinois replevin amendment that it obviates any argument that it is overly broad or lacking in meaningful standards.

One of the weaknesses of the Fuentes opinion is the lack of direction concerning the form and nature of a probable cause hearing required prior to the issuance of a writ of replevin. The Court did not indicate the form that the hearing would have to take, stating that the question was now appropriate for legislation, not adjudication. The decision did, however, contain a few clues regarding the form of hearing required.

Initially, the Court talked of a flexible standard, indicating that due process is a variable concept, dependent on the nature of the

211. ILL. REV. STAT. ch. 11, §§ 1 et seq. (1971).
They stated that the hearing must consider "the importance of the interests involved," matters such as the length and severity of the deprivation, and the simplicity of the decisiveness. While noting that the form of the hearing could be legitimately open to many potential variations, the Court cautioned that the hearing must be aimed at "establishing the validity, or at least the probable validity, of the underlying claim of the party seeking the writ of replevin."

Illinois legislative action structured and clarified the form of the replevin hearing. Under the revised Illinois replevin statute, there is ample opportunity for the allegations of the particular parties to be examined. Initially, one may appear in an ex parte hearing to determine the issue of whether notice is required or whether there is an effective waiver. At the hearing the court examines the evidence on each element required by the section, providing an initial opportunity for the court to review any claim to the right to immediate repossession.

A second hearing is provided on the issuance of the writ of replevin—arising either from a contest on the issue of notice or by an ex parte hearing pursuant to a determination in the first hearing that notice is not required or a valid waiver of right was executed. In either case, at this second hearing evidence must be presented establishing a superior right to possession. Clearly, there is ample opportunity in such proceedings for a court to review the surrounding circumstances in each case. Clearly, the revised Illinois procedure is in accord with the flexible notions of due process. The hearing must have a distinct focal point, as noted by the Court in *Fuentes.* Although the hearing is not a trial on the merits, there is the requirement in Illinois that the plaintiff establish a prima facie case to a superior right to possession of the disputed property. The plaintiff must also demonstrate to the court the probability that he will ultimately prevail on the underlying claim to possession. Therefore, the

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212. 407 U.S. at 82.
213. *Id.*
214. *Id.* at 86.
215. *Id.* at 87 n.18.
216. *Id.* at 97.
plaintiff must establish the validity of his underlying claim to supe-
rior possessory interest before a writ may issue.

Some duplication of effort may be required in introducing evi-
dence on the merits of the basic claim when the underlying case is
litigated, but the protection afforded the individual through a fair
hearing before issuance of the writ counterbalances such concern.
Likewise, appropriate steps can be taken by the judiciary to mini-
mize this duplication. In many cases, the defendant may forego the
opportunity of further litigation, while in others, it may be possible
to have the evidence presented at the full trial. Nevertheless, the
safeguard afforded through a full hearing on the underlying claim
outweighs any claim to duplication of effort.

The Fuentes decision was disappointing in that it did not delineate
the relative rights of the creditor and debtor to procedural safe-
guards at such pre-writ hearings. This weakness appears to be re-
flexed in the Illinois replevin amendment, ultimately leaving ques-
tions unanswered under the Illinois statute, such as what defenses
may be raised by the debtor at the hearing since the proceeding is
not a trial on the merits.

Finally, the Supreme Court discussed the question of whether the
defendant could contractually waive his right to prior notice and
hearing. The Court, citing D.H. Overmyer Co., Inc. v. Frick Co., acknowledged that due process rights may be contractually waived
if the waiver is voluntarily, intelligently, and knowingly given. The
question ultimately concerns what constitutes such a valid waiver,
voluntarily, knowingly and intelligently given.

For instance, the Court in Fuentes indicated that many factors
may interfere with the tendering of a valid waiver. The absence of
the actually bargained-for contractual terms, the purchaser's relative
disadvantage in bargaining position, a showing that the weaker con-
tracting party had no awareness of the significance of waiver, are
all factors suggesting substantial doubt as to whether a properly
worded waiver would be enforceable against a party to an "adhe-
sion contract."

Certain Illinois court decisions have indulged in the presumption
against the waiver of constitutional rights in such circumstances.

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For example, in *Scott v. Danaher*, the Federal District Court for the Northern District of Illinois suggested that whether the execution of a cognovit clause in a promissory note amounts to an independent and voluntary waiver of the debtor's constitutional right to notice of hearing upon the subsequent confession of judgment, is a question to be decided upon the facts of the particular case. Such factors as the debtor's intelligence, state of mind and bargaining power all play a part in the determination.

The Illinois replevin amendment codified the inherent presumption against the waiver of constitutional rights by one in a relatively disadvantageous bargaining position. Section 4(a) provides that the right to notice and hearing may not be waived by any consumer, a "consumer" being defined as an individual who obtained possession of property for personal, family, household or agricultural purposes. With respect to those in an equal bargaining position, a waiver is allowed provided the safeguards mentioned by the Court are followed.

It must be noted that the Illinois legislature has not only complied with the mandate of *Fuentes*, but may have gone beyond the Court's message in recognizing that a consumer may, in fact, be unable to execute a valid waiver.

The *Fuentes* decision, although directly affecting only replevin statutes, might arguably be applied in other contexts. Clearly the *Fuentes* decision has left other summary remedies of relief in Illinois subject to constitutional attack.

In *Collins v. Viceroy Hotel Corporation*, the federal district court held that the Illinois Innkeeper Laws, authorizing a hotel proprietor to seize property without any notice or hearing, were unconstitutional. The court reasoned that since the hotel guests were not granted a hearing at which to contest the underlying claim, they were denied due process. As a result, other statutory lien remedies in Illinois, which similarly do not provide for a hearing or notice before the lien attaches, may be constitutionally defective.

One important area not specifically dealt with by the *Fuentes* decision concerns non-judicial repossession of goods as authorized by

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section 9-503 of the Uniform Commercial Code. While it has been argued that the *Fuentes* decision makes such self-help repossessions unconstitutional as discussed in Part One of this article, self-help runs into the section 1983 roadblock requirement that the constitutional deprivation take place under the “color of state law.”222

The efficacy of declaring unconstitutional the summary replevin practices, will ultimately be judged by evaluating the practical consequences flowing from the decision. Mr. Justice White’s dissenting refrain in *Fuentes*—that every additional protection gained by consumers will be reflected in one way or another in increased costs for goods, services, or credits—must be answered. This concession to economic reality has formed the basis of much of the criticism of recent consumer protection developments. The critics of such consumer developments pose the argument that the availability of consumer credit, especially for low income consumers may rapidly decline since the creditor’s security also will have been diminished.

This argument may be countered on several bases. Evidence suggesting that, finance companies and banks would cease loaning to credit risks if such safeguards were instituted is speculative, at best. A recent article sets forth an empirical survey of banks and retail establishments. The data suggests that the *Fuentes* safeguards will have little impact on the credit market behavior.

An analysis of these overall results indicates that there is no need for the credit market to be unduly concerned with the possible effects of *Fuentes* and *Adams*. Default occurs in only a small percentage of total loans made. Creditors stated that in many of these defaults repossession as a collection remedy is not feasible and in those few defaults where repossession is feasible, the vast majority of debtors will voluntarily give up the collateral. This greatly diminishes the number of defaults where involuntary repossession is an important collection remedy. Thus, *Fuentes* and *Adams* will affect only a minute portion of the credit markets’ transactions.223

The point is that *Fuentes* may not be as far-reaching in the real world as in the legal world. On the other hand, it is the very essence of due process that time be taken to consider any objections which

222. See discussion in Part I of this Article, supra.

might be made to the exercise of state power over the liberty or property of an individual before that power is exercised. Further, these safeguards will provide meaningful standards through which the state may exercise its legitimate summary replevin remedies. No longer are self-serving creditors allowed unilaterally to invoke state power to seize goods by replevin from a consumer. In the last analysis of the real benefit of *Fuentes* is its support of the system of due process of law—the curtailment of state authoritative, monopoly power vis-a-vis the consumer in behalf of the creditor. It is less important that consumers, as a class, will not benefit economically than the fact that consumers, as a collective group, will benefit politically. In this sense *Fuentes* is a decision in the conservative Burkenian tradition.

**PART SIX**

**PROPOSED FTC TRADE REGULATION RULE RELATING TO PRESERVATION OF BUYERS' CLAIMS AND DEFENSES IN CONSUMER INSTALLMENT AND CREDIT CARD SALES**

On January 26, 1971, the Federal Trade Commission, pursuant to its enabling act and rules of practice, issued a proposed trade regulation rule concerning the preservation of buyers' claims and defenses in consumer installment sales. Hearings were held in Chicago, Washington and New York during 1971.225

As a result of testimony received at these hearings, the Commission subsequently issued a revised proposed rule on January 5, 1973, and announced a new round of public hearings. The proposed revised rule would permit a consumer to defend his non-payment of installments allegedly due to a merchant or creditor when the merchandise or services obtained in an installment sale or financed by a "related creditor" prove unsatisfactory and the merchant offers no acceptable cure.

As such, the proposed rule represents a further extension of the close-connection doctrine which was born over thirty years ago in the

Arkansas case of Commercial Credit Co. v. Childs, and which was reinforced in the New Jersey case of UNICO v. Owen in 1967. The close-connection rationale works to limit the operation of the holder-in-due course doctrine when consumer-obligation paper is assigned and/or negotiated. The following should serve as a representative transaction.

Ben Taken goes to Lemon Motors and purchases a new car pursuant to a retail installment sales contract which Taken executes. Taken also signs a promissory note made payable to the order of Lemon Motors. A day or two later, Lemon Motors discounts these obligations, which the Uniform Commercial Code designates as “chattel paper,” to Friendly Bank. The bank notifies Ben Taken (the obligor of the paper and account-debtor under Article Nine of the UCC) of the assignment (discount). Incidentally, one can easily see why Friendly Bank may desire to purchase the consumer paper from the dealer rather than make a direct consumer loan since the bank, by purchasing the obligation at a pre-determined discount (so many percentage points off the total installment obligation or the face of the paper), in effect raises its yield in many cases far above what usury and small loan statutes would permit. In any event, the purchase of a dealer’s retail paper is economically attractive. Until recently, such a purchase has been legally attractive as well.

Shortly after the sale, Ben Taken’s new car fails to run properly, and subsequently he takes the car back to Lemon Motors which refuses to honor its warranty. Under these circumstances Taken naturally considers his “remedy” to be to withhold further payments until the dealer satisfactorily fixes the car. However, Ben Taken now owes his payment obligation to Friendly Bank which will inform Ben that any defense to payment which he could have raised against the dealer, Lemon Motors, cannot be raised against Friendly Bank.

228. 199 Ark. 1073, 137 S.W.2d 260 (1940).
229. 50 N.J. 101, 223 A.2d 405 (1967).
230. UNIFORM COMMERCIAL CODE § 9-105(1)(b) (1972 Official Text) [hereinafter cited as UCCI].
231. UCC § 9-105(1)(a).
232. For example, if an installment price is based on a twelve percent annual percentage rate calculated as the declining balance of the obligation, then the bank can purchase this obligation at ten points off its face, the effective yield could go as high as twenty percent.
The Bank, in short, claims to be a holder in due course (HDC) of Taken's promissory note, and also to have the rights of an HDC, even under the retail installment contract since the latter contained a "waiver of defense clause" whereby the obligor waived the right to raise those defenses assertable against the assignor as against any assignee of the paper. So Ben Taken's only real economic leverage to persuade Lemon Motors to honor its legal obligations has been destroyed by operation of law (the HDC doctrine).

Moreover, section 9-206 of the Uniform Commercial Code operates in such fashion as to expand the HDC defense in the transfer of consumer obligations. Recall that the rights afforded a holder in due course under section 3-305 apply only in the case of a negotiable obligation, the requirements for which are set out in detail in sections 3-104 through 3-111. (Chattel paper as defined by the Code can never meet the Article Three prerequisites for negotiability since such obligations on their face contain promises other than the buyers' promise to pay a sum certain). So, chattel paper transferee can never claim to be a HDC. But, if the transferor earlier agreed with the obligor (consumer) that any subsequent transferee could have the same rights as if the transferee were an HDC, then "freedom of contract" will validate a private law extension of a limited commercial paper doctrine. That is how the law developed, and, of course, the UCC gave this extension its blessing.

233. UCC § 3-305.
234. See UCC § 9-206.
235. UCC § 9-206 Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Agreement Exists
   (1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.
236. UCC §§ 3-104 to 3-111.
237. "A writing or writings which evidence both a monetary obligation and a security interest in or lease of specific goods." UCC § 9-105(1)(b).
238. See note 235, supra.
prisingly, it made such an extension presumptive by reason of the last sentence of section 9-206.239

The arguments for expansion of the HDC status in transferring commercial obligations is that such transferee protection is necessary to make such obligations marketable in the first place. However, that argument amounts to overkill. Since, (1) banks and finance companies will continue to buy high yield chattel paper, (2) the financial institutions can continue to protect themselves by being selective in purchasing consumer obligations (covert supervision over merchants) and (3) buying such that retains full recourse rights against the dealer-transferor should the obligor default for any reason.240 It is against this background of total transferee protection that the pendulum began to swing back in the Childs case241 and gain momentum in the 1967 UNICO case.242

In UNICO, the defendants, lured by a newspaper advertisement advertising a free stereo, agreed to purchase 140 record albums for $698 which paid for the records and for a "free" stereo. The purchasers signed a retail installment contract and note in their home. Total payments came to over $800. The same day the paper was executed it was assigned to Unico by the seller, Universal Stereo Corp. The Owens' ultimately received the stereo, but only twelve records. They subsequently withheld further payments and the assignee, UNICO, filed suit. UNICO pointed to a waiver of defense clause in the contract executed by the Owens and also claimed to an HDC of their note.

The New Jersey Supreme Court looked carefully at all the facts surrounding the sale and assignment and concluded that there was such an intimate, close relationship between Universal and UNICO that the latter would be subject to the defenses assertable against the former.243 The court viewed its decisional task as one of bal-

239. Id.
240. The purchasers of consumer paper by having and using full recourse rights against the assignor-merchant places pressure on the merchant to honor its obligations and to fully perform all consideration owing under the retail contracts, the payment rights of which have been assigned.
241. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940).
243. Id.
ancing the need to protect consumers against the commercial need to protect negotiability and marketability of commercial paper.

Upon viewing the "intimate" relationship between the assignor and assignee of the Owens' obligation, the court concluded that in the case of such intimacy public policy requires that the waiver of defense claim be inoperative in the retail installment contract, and that moreover, the close-connection raised an inference of bad faith in the negotiation of the note so that UNICO could not claim to be an HDC of the instrument, having not observed the section 3-104 good faith transfer standard.244

The case was warmly received by consumer advocates but there remained one difficulty to its serving as a model for other courts—the facts were strongly against the assignee, that is, the close-connection was overwhelming. Consider that (1) Universal created and formed UNICO, (2) Ownershipwise, UNICO was tied to Universal, (3) UNICO was formed for the sole and specific purpose of financing Universal, (4) UNICO drafted and furnished Universal with the retail contracts and promissory notes, (5) UNICO's name as indorsee was printed on the back of the promissory notes, (6) UNICO's name as assignee was printed on the retail installment contracts, (7) UNICO exercised considerable control over Universal through credit checks, inventory control, etc., (8) UNICO was Universal's inventory financer in addition to financing all of its retail sales and (9) UNICO had a thorough knowledge of Universal's business practices. Indeed, given these facts, the two firms can be said to have merged. Unfortunately this constitutes the one problem with the UNICO case—it can usually be distinguished since rarely would such a "merger" be present in typical consumer paper assignments and purchases.

Nonetheless, the close-connection doctrine gained acceptance and many courts245 and several state legislatures246 reacted by relying on

244. UCC § 3-104.
245. Swanson v. Commercial Acceptance Corp., 381 F.2d 296 (9th Cir. 1967); Commercial Credit Corp. v. Orange County Mach. Works, 34 Cal. 2d 766, 214 P.2d 819 (1950); Calvert Credit Corp. v. Williams, 244 A.2d 494 (D.C. 1968); International Finance Corp. v. Rieger, 272 Minn. 192, 137 N.W.2d 172 (1965); American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 866 (1968).
246. As of September 1, 1972, sixteen jurisdictions have eliminated by statute the effective use of waiver of defense clauses in consumer transactions. The statutes include: ALA. CODE tit. 5, § 320(a) (Supp. 1971); ALASKA STAT. §§ 45.10.140, 150 (1962); § 45.50.541(b) (Supp. 1971); CAL. CIV. CODE §§ 1804.1(a), 1804.2,
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and enacting a close-connection rule. The citadel of HDC doctrine as to consumer credit transactions soon came under full attack. The Uniform Consumer Credit Code came along and in section 2.403,\(^{247}\) prohibited the use of negotiable instruments (other than checks) in a consumer transaction. Moreover section 2.404\(^ {248}\) would either prohibit outright, or alternatively, restrict the operation of, a waiver of defense clause. Illinois has not enacted the Uniform Consumer Credit Code.

Despite all the court challenges to the HDC citadel and despite all the new statutory restrictions on waiver of defense clauses as typified by section 2.404 of the Uniform Consumer Credit Code, a serious "loophole" remains, as discussed in a marvellous article by Professor Neil O. Littlefield.\(^ {249}\) As Professor Littlefield points out, "there is no reason why dealers and finance companies are wedded to transactions in which the finance agency becomes either the transferee of a promisory note or the assignee of an installment contract."\(^ {250}\) He notes that the practice of setting up consumer loans separate

247. Section 2.403. Certain Negotiable Instruments Prohibited

In a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, 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. A holder in due course is not subject to the liabilities set forth in the provisions on the effect of violations on rights of parties (Section 5.202) and the provisions on civil actions by Administrator (Section 6.113).


248. Section 2.404 of the Uniform Consumer Credit Code contains two alternatives. Alternative A simply makes an assignee subject to all claims and defenses of the buyer against the seller available to the consumer obligor. Alternative B, however, in essence places a three-month limitation on the obligor's right to raise defenses. See Uniform Consumer Credit Code § 2.404 (1969 Official Text).


250. Id. at 292.
from consumer credit sales is on the increase, citing a 1968 Wisconsin Law Review project in support.251 The point is simple but dramatic—take away the protected status of an assignee financer and they will begin to make only direct consumer loans. This will encourage sellers to demand a cash price for the goods sold. However, recognizing the financial impossibility of obtaining such a cash price, sellers just prior to the sale consummation will direct (refer) the purchaser to a nearby neighborhood financial institution to obtain a loan. The bank or financial institution will probably pay the proceeds of the loan directly to the seller-merchant, to enable the bank to have a non-seller’s purchase money security interest in the consumer goods financed.252 Note that in such sale-loan situations, the “form” of the consumer credit transaction is changed from a consumer credit sale and subsequent assignment to a financer, to a direct consumer loan from the financer with the loan proceeds made payable to the merchant so that the sale of goods becomes a “cash” sale.

Professor Littlefield in his 1969 article suggests a method to plug this loophole. He would allow a consumer’s claims and defenses arising out of the sale of goods to be assertable against the direct lender in cases where the transaction is “interlocking,” that is, where the sale and loan transactions are closely related.253

Professor Littlefield’s suggestion was quickly seized upon by consumer proponents throughout the country, especially by the competent National Consumer Law Center connected with Boston University which drafted its own variation of a proposed statute to cover interlocking sales and services in its proposed model National Consumer Act (NCA). In a section entitled “Interlocking Loans and Sales,”254 the NCA proscribes that a creditor “shall be subject to all of the claims and defenses of the consumer” to the amount financed in a consumer loan transaction if the loan and sale are interlocking.255 The Act goes on to list seven “relationships” which are deemed to

251. Id. at 293 n.77.
252. See UCC § 9-107.
255. Id.
make a transaction an interlocking one so that the rule of "subject to all defenses" becomes applicable, to wit:

(2) Without limiting the scope of subsection (1), the creditor participates in or is connected with a consumer sale or lease transaction when:

(a) the creditor is a person related to the seller or lessor; or
(b) the seller or lessor prepares documents used in connection with the loan; or
(c) the creditor supplies forms to the seller or lessor used by the consumer in obtaining the loan; or
(d) the creditor makes 20 or more loans in any calendar year, the proceeds of which are used in transactions with the same seller or lessor, or with a person related to the same seller or lessor; or
(e) the consumer if referred to the creditor by the seller or lessor; or
(f) the creditor, directly or indirectly, pays the seller or lessor any consideration whether or not it is in connection with the particular transaction; or
(g) the creditor is the issuer of a credit card which may be used by the consumer in the consumer sale or lease as a result of a prior agreement between the issuer and the seller.²⁵⁶

The items which most upset the credit industry are subparagraphs (d), (e) and (f). The loud cry that the NCA provision would kill consumer credit, especially in communities with only a few money suppliers making consumer loans. If one believes the NCA has gone too far the proposed Federal Trade Commission rule reaches a zenith in perplexity.

The revised proposed FTC rule declares that it is a deceptive and unfair trade practice for a retail seller to obtain a note or instrument and fail to have inscribed upon the face of said note or instrument a statement indicating that any holder of the note, instrument or other writing evidencing a consumer debt takes subject to all the claims of the maker (consumer) on the contract under which the debt arose.²⁵⁷ Moreover, the proposed rule also declares it to be a deceptive practice for a retail seller to engage in any consumer sale transaction financed by a related creditor unless the financing arrangements between the consumer and the related creditor permit the consumer to "maintain against the related creditor any claims or defense arising out of the consumer transaction up to the full amount financed."²⁵⁸

²⁵⁶. Id. § 2.407(2).
²⁵⁸. Id.
Note that this an indirect method of attempting to force related creditors firstly, to contractually agree in their consumer loan contract to finance the purchase of a consumer sale or service, and secondly, to permit the assertion of claims and defenses arising out of the separate but related sale. The FTC, one must note, does not have any jurisdiction over banks to compel directly that which this rule attempts to coerce indirectly. This indirect regulation raises substantial problems as to the legality of the intrusion into the regulatory jurisdiction of other agencies, such as the Comptroller of Currency and the Federal Home Loan Bank Board. It also cannot help but cause sellers and financers to be apprehensive and uncertain about the "nature" of their relationships with merchants. This in part is due to the criteria set out in the proposed revised rule for a determination of "related creditor status." Nine situations are covered as follows:

**Related creditor.** Any person, partnership, corporation or association which is engaged in making loans to consumers to enable payment to be made for consumer goods or services and which either participates in or directly connected with the consumer transaction. Without limiting the scope of the immediately preceding language, there shall be a rebuttable presumption that a creditor is a related creditor under any one of the following circumstances:

1. the creditor is a person related by blood or marriage to the seller or to the seller's spouse.
2. the creditor prepared, supplied or furnished the seller with the forms or documents used to evidence or secure the consumer loan.
3. the seller prepared, supplied or furnished the creditor with the forms or documents used to evidence or secure the consumer loan.
4. the creditor is directly or indirectly controlled by, under common control of, or is otherwise affiliated with the seller.
5. the creditor and the seller are engaged in a joint venture to produce consumer obligations payable either directly or by transfer to the creditor.
6. the creditor directly or indirectly pays the seller any consideration for the referral of consumer borrowers.
7. the seller guaranteed the consumer loan or otherwise assumed the risk of loss by the creditor upon the loan.
8. the creditor made five or more loans within a one-year period the proceeds of which were used in transactions with the same seller following referral of the consumer to the creditor by the seller.
9. the creditor knew or had reason to know that the loan proceeds would be used in whole or in substantial part to pay the seller for an obligation of the consumer, and the creditor had notice that the seller
failed or refused to perform contracts with consumers, or failed to remedy complaints within a reasonable time.259

The proposed FTC Trade Regulation Rule must be considered one of the most potentially perplexing credit regulations coming from the Washington bureaucrats in quite a while. Realistically, however, it may well be designed to spur state enactment of interlocking sale-loan legislation. New York, for example, has recently enacted an interlocking statute.260 For an excellent discussion of the New York statute as well as other state and federal proposals dealing with interlocking sales and loans, one should consult the writings of Professor Littlefield, who without question, is the nation's most eminent expert on the topic.261

In conclusion it is sufficient to say that Illinois lags far behind much of the country in limiting HDC, waiver-of-defense, interlocking cut-off practices. In fact, the Illinois Appellate Court specifically validated waiver cut-offs in 1965.262 The proliferation of health clubs, dance schools, home improvement firms, correspondence and karate schools, continues to induce unsuspecting citizens into the web of retail installment paper. In a short time, these citizens will learn something they did not bargain for—they will learn of the commercial doctrine of holder-in-due-course. It is a lesson they likely will remember for a long time.

PART SEVEN
SELECTED DEVELOPMENTS IN CONSUMER LAW

This final segment, briefly discusses confessions of judgment, recent amendments to the Illinois Consumer Fraud Act, the Federal Consumer Product Safety Act and the Illinois Retail Installment Sales Act.

Confessions of judgment begins with the case of Babb v. Johnson,263 decided by the Illinois Third District Appellate Court in May,

263. 5 Ill. App. 3d 191, 282 N.E.2d 266 (1972).
1972, upholding a confession clause in a lease for a tavern. The court cited as authority the United States Supreme Court case of *D.H. Overmyer Co., Inc. v. Frick Co.*,\(^{264}\) and *Swarb v. Lennox.*\(^{265}\) Similarly, in *Ives v. May,*\(^{266}\) the Illinois appellate court also rejected the argument that such confessions were per se unconstitutional.

Only in the 1972 federal district court opinion of *Scott v. Danaher,*\(^{267}\) was a successful attack made on Illinois confession practice. There, a statutory three-judge federal court panel held that the Illinois garnishment statute, which permits judgment by confession, violates the fourteenth amendment.\(^{268}\) This case is discussed by Attorney Leonard M. Cohen in a recent article appearing in the *Illinois Bar Journal.*\(^{269}\)

Attention now turns to recent Illinois legislation. Two bills of the first regular session of the Seventy-Eighth Illinois General Assembly warrant mentioning, both involving amendments to the Illinois Consumer Fraud Act.\(^{270}\)

Senate Bill 1152\(^{271}\) proposes to amend paragraph 262B\(^{272}\) of the

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266. 5 Ill. App. 3d 193, 282 N.E.2d 193 (1972).
268. *Id.*
271. S.B. 1152, 78th Ill. Gen. Assembly (1973) [hereinafter referred to as S.B. 1152]. This Bill was introduced May 10, 1973, by Senators Nimrod, Harris, Graham and Howard K. Mohr. As of July 2, 1973, the Bill had not yet passed ("exempt from Senate tabling motion"). *See* 22 LEG. SYNOPSIS AND Dig. vol. 1, 78th Ill. Gen. Assembly 550 (1973).
272. ILL. ANN. STAT. ch. 121½, § 262B (Smith-Hurd 1971):

Where merchandise having a cash sales price of $25 or more is sold or contracted to be sold whether under a single contract or under multiple contracts, to a consumer as a result of or in connection with a salesman's direct contact with or call on the consumer at his residence (*without the consumer's soliciting the contact or call*), that consumer may avoid the contract or sale by notifying the seller within 3 full business days following that day on which the contract was signed or the sale was made and by returning to the seller, in its original condition, any merchandise delivered to him under the contract or sale. At the time the sale is made or the contract signed, the salesman shall furnish the *buyer* with a written receipt or contract a "Notice of Cancellation" informing the *consumer of his right to cancel the contract or sale as herein provided.* The *Notice of
Consumer Fraud Act which provides, in effect, that a sale to a consumer at his residence is subject to cancellation by the buyer within three full business days following the day on which the contract was signed. The first change eliminates the following provision: "without the consumer's soliciting the contract or call . . . " which affords the consumer protection although he may have invited the salesman to his residence. Second, one may "cancel" rather than "avoid" a contract and references to "buyer" have been amended to read "consumer", thereby making "seller" and "consumer" the only terms referring to the contracting parties. Third, the Notice of Cancellation has been amended so that its purpose is to inform "the consumer of his right to cancel the contract or sale as herein provided." Next, the three day period has been amended so that it "does not commence until the seller furnishes the consumer the Notice of Cancellation and the address or phone number at which such notice to the seller can be given." Finally, an additional clause has been inserted which prohibits the seller "(from failing) to comply with any of the provisions of this section. . . ."

Illinois is just one of several states that provides for the rectification of abuses arising out of home sales. Regulation Z of the Federal Truth in Lending Act has a similar provision. While the Illinois Consumer Fraud Act deals with "any" merchandise having a value of twenty-five dollars or more, the federal provision applies only to a credit transaction involving a security interest is held in real property which is the consumer's principal residence.

Cancellation may be sent by the consumer to the seller to cancel the contract. The 3 day period provided for in this Section does not commence until the seller furnishes the consumer the Notice of Cancellation and the address or phone number at which such notice to the seller can be given. If those conditions are met, the seller must return to the consumer the full amount or any payment made or consideration given under the contract or for the merchandise. It is unlawful practice within the meaning of this Act for a seller to fail to comply with any of the provisions of this Section or to refuse to make full refund as required by this Section or for a seller to use any undue influence, coercion, misrepresentation or any other willful act or representation to interfere with the consumer's exercise of his rights under this Section.

See S.B. 1152.


275. The federal Regulation Z of the Truth-in-Lending Act is more inclusive.
House Bill 741,270 passed June 22, 1973, adds section 262M to the Consumer Fraud Act. This section requires persons advertising factory authorized services to supply proof by manufacturer certification that such persons and services are factory authorized. This change, however, represents but a small inroad into the field of automobile repair legislation.

Numerous bills dealing with automobile repairs have failed to pass the Illinois House or Senate.277 Consumer fraud and deceptive practices in automobile repair presents a serious problem to consumers; faulty and negligent repairs and inflated charges are but a few of the abuses that frequently arise.278 Corrective legislation is overdue. A comprehensive administrative program establishing, among other

than any comparable Illinois provision. For example, unlike the Illinois provision, the federal provision provides for a waiver of right of rescission and exceptions to the general rule. See Bd. of Governors, Federal Reserve System, What You Ought to Know About Federal Reserve Regulation Z, Truth-in-Lending: Consumer Credit Cost Disclosure (1969).


277. See, e.g., H.B. 37, 78th Ill. Gen. Assembly (1973), entitled "The Motor Vehicle Repair Act" provided in part that repairmen before beginning any repair work submit a good faith written estimate of the cost of such repair and after completion a written itemized list of services made, repairs performed and parts and costs of each. The repairman is to tender the worn or defective parts removed. The Consumer Protection Division of the Office of the Attorney General would administer the Act and impose penalties for violations. It was recommended that the Bill not pass and thus was tabled on May 11, 1973. See H.B. 1297, 22 LEG. SYNOPSIS AND DIG. vol. II, 78th Ill. Gen. Assembly 39 (1973). The Bill Requires 3 month or 3,000 mile guarantee (whichever first occurs) to be given by persons selling automobile parts. Requires similar guarantee to be given for labor by persons performing labor for charge on automobiles and imposes liability on such persons for damages proximately caused by faulty labor.

H.B. 1391 "[m]akes void as against public policy and wholly unenforceable any contract or agreement for any repair of a motor vehicle in which an automotive repair dealer exculpates himself from liability for injury to persons caused by his negligent repair." See 22 LEG. SYNOPSIS AND DIG. vol. II, 78th Ill. Gen. Assembly 719 (1973). These two Bills were also tabled.

things, licensing requirements for mechanics and repairmen, administrative bodies and agencies to manage an effective program and possibly an administrative board\(^{279}\) to adjudicate repair cases is needed. Illinois legislation has yet to scratch the surface in this regard.\(^{280}\) Some states, however, have taken progressive steps toward ameliorating this situation.

California, for example, has enacted an Automobile Repair Act providing for the administration and licensing of automotive repair dealers.\(^{281}\) Several articles of the California Act in particular are worth noting. First, article two establishes a Bureau of Automotive Repair under the supervision and control of the Director of the Department of Consumer Affairs; the director investigates violations including complaints from the public against dealers and mechanics. A Bureau Chief is responsible for the enforcement and administration of the Act. A record of licensed automotive repair dealers (ARDs) is available to consumers upon request. A Bureau Board of nine members appointed by the Governor, five from the public and four from the automotive repair industry, meets at least twice a year to confer, advise and make any necessary recommendations to the bureau. Next, article three requires ARDs to be registered. All work is to be recorded on an invoice which must describe the service work done and parts supplied. ARDs are to furnish a written estimate price of the parts and labor and cannot charge in excess of the estimate. A superior court can issue an injunction or other appropriate orders to restrain conduct which violates the act.

Articles five through eight have additional provisions for the licensing and regulation of official lamp and brake adjusting sta-

\(^{279}\) This may be a more convenient, economical and effective measure for the consumer than filing complaints with the Fraud and Complaint Division of the Illinois State's Attorney's Office or the Consumer Protection Division of the Attorney General's Office would be. It would probably save time and expense involved in litigating in the small claims court or circuit courts. In any event, effective control is needed over this sector of business.

\(^{280}\) Chicago's Municipal Code has a "Motor Vehicle Storage, Repair and Sales Act" but it affords no consumer protection for faulty or negligent repair work. Its primary concern is zoning—to insure that neighborhoods remain residential. It deals with, among other things, health regulations, inspection, light and heating, ventilation and even toilet facilities—its lack of sanctions or remedies for faulty repairs makes the provision of little significance to the consumer. See, CHICAGO, ILLINOIS MUNICIPAL CODE §§ 156-1 et seq. (1973).

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tions and motor vehicle pollution control device installation and in-
pection stations. Finally, article nine provides for a misdemeanor
penalty of a fine up to one thousand dollars and six months in jail.
This act is not a panacea for consumers. For instance, many so-
called "minor services customarily done by a gasoline service sta-
tion" are excluded along with employees of ARDs; the bureau
board is merely advisory; and the act requires registration but not li-
censing of ARDs.

Connecticut also has enacted a statutory scheme for regulating
automobile repairmen. Connecticut classifies repairmen into
two categories according to the services performed: a "repairer" or "limited repairer." To qualify as a limited repairman an individ-
ual must meet one of several requirements: he must either be a
qualified mechanic, have a certificate of completion from an approved
service school, have been employed for three years by a licensed re-
pairer or have successfully passed a state examination. A re-
pairman must be licensed and he must receive a certificate approving
the location of his business.

There are also sections dealing with registration and special licens-
ing of automobiles owned or temporarily in his custody, loaned or
rented by a repairer. A repairman's license may be revoked or
suspended when, after a notice and hearing, it is determined that
there has been a violation of any provision in the article on licensing
or a false statement as to the condition of any motor vehicle repaired
has been given. The major shortcoming of the Connecticut Act
is that it gives no direct recourse to the consumer who is adversely
affected by a repairman's faulty or negligent work.

The point is, other states have already gone much further than
Illinois in attempting to regulate automotive repair practices for
the consumer's benefit.

Although space does not permit a thorough discussion, we must
briefly point to the enactment by Congress of the Consumer Product
Safety Act which went into effect on October 27, 1972. The Act

282. Id. § 9880.1(f).
284. Id. § 14-51.
285. Id. § 14-64.
is designed to (1) protect the public against unreasonable risks of injury associated with consumer products, (2) to assist consumers in evaluating the comparative safety of consumer products, (3) to develop uniform safety standards for consumer products and (4) to promote research and investigation into causes and prevention of product-related deaths, illnesses and injuries.\textsuperscript{287}

To accomplish these purposes, the Act established a five-person Consumer Product Safety Commission which has the power to promulgate rules and regulations for consumer products.\textsuperscript{288} The Act affords persons injured by reason of any \textit{knowing} violation of the Act the right to recover damages.\textsuperscript{289}

One problem that will undoubtedly be litigated in the future is the extent to which a manufacturer's showing of full compliance with applicable Commission standards can be raised as a defense in a product's liability suit. Certainly, one can see a number of briefs in the future being researched and written on that point.

The Act's full impact, of course, will not be felt until the Commission promulgates product regulations and standards. Court challenges to these promulgations will likewise surely ensue.

There have been several recent cases decided interpreting and applying the Illinois Retail Installment Sales Act.\textsuperscript{290} Of most significance is \textit{Overland Bond and Investment Corp. v. Howard}.\textsuperscript{291} This case and other significant decisions affecting consumer rights in retail installment sales are thoroughly and insightfully discussed by Professor Edward J. Benett elsewhere in this volume.\textsuperscript{292}

In the area of product liability, there also have been recent significant Illinois decisions, notably \textit{Meiher v. Brown},\textsuperscript{293} and \textit{Rios v.}

\begin{itemize}
\item \textsuperscript{287} Id. \$ 2(b).
\item \textsuperscript{288} Id. \$ 4(a).
\item \textsuperscript{289} Id. \$ 20(a)(1).
\item \textsuperscript{291} 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).
\item \textsuperscript{293} 54 Ill. 2d 539, 301 N.E.2d 307 (1973).
\end{itemize}
Niagara Machine Tool Works. The Meiher case is magnificently discussed and dissected by my colleague Professor Richard Turkington elsewhere in this volume. In Rios, the plaintiff was injured while operating a punch press. The movable part of the press descended on his hand when a safety device, added to the machine after its purchase from defendant, failed to work. Defendant argued that the machine's lack of a safety device when sold to the plaintiff's employer was not an unreasonably dangerous condition for which the defendant might be held strictly liable. The appellate court then made a potentially troublesome distinction: Where a machine has a single function, and is unreasonably dangerous in performing that single function, it is defective. On the contrary, the court added, where the machine is multifunctional, "no duty should be imposed upon the manufacturer to provide any safety devices before the machine leaves his control."

CONCLUSION

The past year has seen numerous developments in the law affecting consumer rights and obligations. Certainly, caveat emptor is becoming weathered, but is not yet an extinct concept.

So too, has there been an increase in public regulations in the consumer product field, both as to consumer sales warranties, and as to disclosure of credit terms in consumer transactions. All of these events represent significant marketplace tampering which will impinge upon consumer-creditor behavior in countless ways. Certainly, there will be more work for lawyers.

Yet, considering the basic notion of preserving the freedom of contract—a notion which subsumes within it prohibiting what has become established commercial practice, and making credit more easily available rather than restricting it—the cost analysis appears to suggest that poor people will not be significantly helped by the range of recent developments. On the other hand, perhaps the greatest ad-

297. Id. at 745, 299 N.E.2d at 91.
vance in this past year has been the working of the Cook County Pro Se Court. The writer sincerely hopes that the creation of small claims forums spreads throughout the United States.

Consumer interests can best be served by the proliferation of effective consumer forums, as well as by the creative activities of concerned courts and legislatures.