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CONSUMER CREDIT SALES and the OKLAHOMA UNIFORM CONSUMER CREDIT CODE

The thirty-second session of the Oklahoma Legislature, after a great deal of controversy and publicity, passed House Bill 1001, The Uniform Consumer Credit Code.¹ The Oklahoma act is a modified version of the Uniform Code² prepared by the National Conference of Commissioners on Uniform State Laws for introduction in state legislatures and for submission to the Board of Governors of the Federal Reserve System for the requested exemption from the Consumer Credit Protection Act³ (commonly called the Federal Truth in Lending Act).

The Uniform Code is designed to replace the piecemeal legislation that has developed over the years⁴ due to a changing environment of credit and the various pressure groups

¹ Law of May 8, 1969, ch. 352, §§ 1-101 to 9-103, [1969] Okla. Sess. Laws 533 (codified as title 14A) [hereinafter cited as the Okla. U3C, an unofficial designation for the consumer credit code which has been adopted by a number of writers].

² UNIFORM CONSUMER CREDIT CODE [hereinafter cited as UCCC]. The Uniform Code was approved by the Uniform Commissioners on July 30, 1968 and by the ABA on August 7, 1968.

³ Federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-77 (Supp. IV 1969). [hereinafter referred to as CCPA]. This Act provides that the Board of Governors of the Federal Reserve System may exempt from certain provisions credit transactions in a state which has substantially similar requirements. 15 U.S.C. §§ 1633, 1675 (Supp. IV 1969).

⁴ The OKLA. U3C § 9-102 provides for the repeal of:

- (a) The Oklahoma Small Loan Act of 1941, OKLA. STAT. tit. 15, §§ 280.1-29 (1961).
- (b) The Oklahoma Retail Installment Sales Act, OKLA. STAT. tit. 15, §§ 701-12 (Supp. 1968).
- (c) OKLA. STAT. tit. 15, §§ 261, 264, 267-70, 273 (1961).
- (d) And any other laws or parts of laws in conflict.

operating within this environment and will place all the laws dealing with consumer credit in one code. Since it is presented as a uniform law, decisions from other jurisdictions may help speed the development of a reliable interpretation of its provisions. However, the degree of such aid will be dependent upon any variance from the Uniform Code.

The growth of importance of consumer credit in our society has raised a considerable question about the possible excessive use of credit, its effect upon the economy, its costliness, and the need for control. Among writers on the subject opinion varies greatly as to the need for and the nature of controls on consumer credit, ranging from favoring strict federal control to *laissez faire*. The Uniform Code has been the subject of numerous articles pro and con since it became a formal project of the Uniform Commissioners in 1963.⁵ These articles have taken divergent views regarding the propriety of consumer credit as a subject for uniform legislation as well as the desirability of the Code's treatment of specific provi-

For an exhaustive analysis of state laws concerning credit see B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* (1965). See also Curran, *Legislative Controls as a Response to Consumer Credit Problems*, 8 B.C. IND. & COM. L. REV. 409 (1967).

⁵ Buerger, *Project on Retail Installment Sales, Consumer Credit, Small Loans and Usury*, 18 PERS. FIN. L.Q. REP. 110 (1964).

⁶ A sampling of various articles shows that the U3C has been viewed as a

good compromise between conflicting viewpoints of the industry and the consumer, see Robinson, *The Uniform Consumer Credit Code: A New Way of Life for the Consumer Loan Industry*, 22 PER. FIN. L.Q. REP. 118 (1968);

"Uniform Chaos Confounded Code", a bombshell which should be detonated before it's too late, see Denonn, *The Uniform Consumer Credit Code Bombshell*, 22 PERS. FIN. L.Q. REP. 125, 130 (1968);

sions.⁶ The entrance of the federal government into the consumer credit field has added the controversy of state versus federal control. The Uniform Code may or may not be the answer to consumer credit problems, but it is at least an indication of the growing awareness of the part credit plays in the lives of the American public⁷ and the need for changes in this area of law.

Both the Uniform Code and the Oklahoma U3C separate the provisions dealing with consumer credit sales⁸ and consumer loans⁹ into two articles. The Special Committee of the National Conference on Retail Installment Sales, Consumer Credit, Small Loans and Usury, who drafted the Uniform Code, felt this division was necessary in order to preserve the

proposal unsatisfactory to the National Association of Consumer Credit Administrators, see 22 PERS. FIN. L.Q. REP. 131 (1968);

consumer credit code for lenders, see CONSUMER REPORTS 121 (Mar. 1969);

substantial improvement over the present system, see Felsenfeld, *Uniform, Uniformed and Unitary Laws Regulating Consumer Credit*, 37 FORDHAM L. REV. 209 (1968);

workable balance between protection of the consumer and the right of the creditor to have debts repaid and to make a reasonable profit in his business, see Bailey, *The Substantive Provisions of the Uniform Consumer Credit Code: 20th Century Consumer Protection in a Free Enterprise System*, 29 OHIO ST. L.J. 597 (1968).

⁷ The Federal Reserve Board reported installment credit outstanding at the end of February, 1969 at 89.4 billion dollars and total consumer credit was reported at 111.6 billion dollars. Its estimates include loans to individuals for household, family and other personal expenditures, excluding real estate mortgage loans. 55 FED. RESERVE BULL. A52 (April 1969).

⁸ Article 2 also deals with consumer leases, but for the most part the Code treats sales and leases in the same way.

⁹ Okla. U3C art. 3.

time-price doctrine¹⁰ in those states which had not adopted the Code. The draftsmen felt there would be serious consequences¹¹ to both consumer and credit grantor if any encouragement were given to the courts of a non-code state to rely upon the provisions which reject the time-price doctrine.¹² Many of the provisions of the two articles are the same, merely substituting the words "consumer loan" for "consumer credit sale." The main force behind making the distinction between sales and loans appears to have been the fear of the extra-territorial effect of rejecting the time-price doctrine and the historical differences in regulation of credit sellers and money lenders.¹³

Because of the length and complexity of the Uniform Consumer Credit Code, the scope of this article will be restricted to the provisions of Article 2 of the Code which place limitations on agreements and practices which may be used in consumer credit sales and the provisions of Article 5 dealing with creditor and debtor remedies. This article will not discuss the provisions of Article 2, dealing with disclosure and maximum rates of credit service charges; Article 3, dealing with loans; Article 4, dealing with insurance in consumer credit transactions; and Article 6, Administration.

¹⁰ Under the time-price doctrine a sale on credit can be made at a higher price than a sale of the same item for cash and the price difference is not within the ambit of usury law limitations on rates of interest. OKLA. STAT. tit. 15, § 702(8) (1961); e.g., *Cobb v. Baxter*, 292 P.2d 389 (Okla. 1956); *Mondie v. GMAC*, 178 OKLA. 584, 63 P.2d 708 (1937).

¹¹ See Richter, *The Uniform Consumer Credit Code of the National Conference of Commissioners on Uniform State Laws*, 24 BUS. LAW. 183 (1968).

¹² The Code defines credit service charge to include any time-price differential. Okla. U3C § 2-109(1).

¹³ See Felsenfeld, *Uniform, Uniformed and Unitary Laws Regulating Consumer Credit*, 37 FORDHAM L. REV. 209, 238 (1968).

LIMITATIONS ON AGREEMENTS AND PRACTICES
IN CONSUMER CREDIT SALES

A number of current practices are limited in consumer credit sales.¹⁴ These practices are regarded as inherently abusive or have been the subject of substantial abuse in the past.¹⁵

Multiple Agreements

Multiple agreements may not be used by the credit seller with the intent to obtain a higher credit service charge than permitted.¹⁶ This is to cover the situation where a seller, authorized¹⁷ to charge a maximum of 30% per year on the amount financed which is \$300 or less, tries to charge that rate on an amount financed of \$600 by making two separate \$300 sales. This provision is essentially the same as it was in the Retail Installment Sale Act¹⁸ and does not provide any new protection for the consumer.

Certain Negotiable Instruments Prohibited

The use of negotiable paper has been subject to much abuse in the area of consumer sales. Here the consumer has often realized only too late that he must pay to a third party even though the goods are defective or there is absence or failure of consideration by the seller. The consumer may never have contemplated having to pay a third party for the goods or services he has purchased, but if the third party has maintained a relationship (more appropriately, a lack of

¹⁴ See note 8 *supra*.

¹⁵ For a general discussion of abuse in the area of consumer credit and selling, see D. CAPLOVITZ, *THE POOR PAY MORE* (1963).

¹⁶ Okla. U3C § 2-402.

¹⁷ Okla. U3C § 2-201 (2) (a).

¹⁸ This Act stated that "No seller may induce a buyer to become obligated at substantially the same time under more than one retail installment contract or obligation for the purpose of obtaining a higher service charge than would apply to one obligation." OKLA. STAT. tit. 15, § 706.2 (Supp. 1968).

relationship) with the seller so as to qualify as a holder in due course, the consumer will have to pay him.¹⁹ The Code's remedy for this is a prohibition against the use of negotiable instruments (except checks) in consumer credit sales. It provides that a subsequent holder is not in good faith if he takes with notice that the negotiable instrument arose out of a consumer credit sale transaction.²⁰ It was the opinion of the drafters of the Uniform Code that since the prohibition would be known in the financial community, the professional financiers could not qualify as holders in due course. However, the rare case of a holder far enough removed from the transaction to qualify as a holder in due course and the possible inequities which could arise was the drafters' justification for not completely eliminating this doctrine in consumer credit sales.²¹

Waiver of Defenses

Similar to the problems arising in negotiable instruments is the waiver of defenses when a contract has been transferred by the seller.²² Oklahoma adopted, with some revision, Alternative B of the Uniform Code,²³ the more creditor oriented viewpoint. Where the Uniform Code had provided for a

¹⁹ OKLA. STAT. tit. 12A, § 3-302 (1961); e.g., *James Talcott, Inc. v. Finley*, 389 P.2d 988 (Okla. 1964).

²⁰ Okla. U3C § 2-403. An exception is a sale or lease primarily for agricultural purposes. The Retail Installment Sales Act specifically allowed the use of negotiable contracts. OKLA. STAT. tit. 15, § 701(c) (Supp. 1968).

²¹ See UCCC § 2.403, Comment. Possibly a better way to have handled the matter would have been to require any instrument of a negotiable nature to be marked plainly non-negotiable and to provide that if a seller violated the provision, the subsequent taker would have a remedy against the seller.

²² Okla. U3C § 2-404.

²³ Alternative A had provided that an assignee of the Rights of the seller was subject to all the defenses of the buyer despite any agreement to the contrary. However, the assignee's liability was limited by the amount owed at the

three-month period, the Oklahoma U3C provides only a 30-day notice period. After this period an agreement by the buyer to not assert a claim or defense arising out of the sale becomes enforceable by the assignee as to claims which arose against the seller prior to the end of the 30-day period. The Oklahoma U3C²⁴ provides that an agreement is enforceable only if the assignee is not related to the seller, acquires the contract in good faith and for value, gives the buyer the required notice and does not receive written notice of the facts giving rise to the buyer's defense before the 30 days are up. The Code also provides that an assignee does not take in good faith if he had knowledge or notice of substantial complaints about the seller's business practices specifically regarding the seller's failure to honor his contracts or to promptly remedy his defaults.²⁵ Under this alternative, the buyer's claim is limited to the amount owing at the time the claim is asserted and only by way of defense or set-off to the assignee's claim. It is unfortunate for consumers that the notice period was cut from 3 months to 30 days. The speed with which sellers often assign their contracts may make it more difficult for the buyer to discover the grounds for a claim prior to the end of the period. However, the provision may encourage those who handle consumer paper to make a closer inspection of the assignors' business practices in order to further protect themselves.²⁶

time the defense was asserted and the buyer could not assert his rights under the section except as a matter of defense or set-off against the claim of the assignee. UCCC § 2.404 Alt. A.

²⁴ Okla. U3C § 2-404(1).

²⁵ Okla. U3C § 2-404(2).

²⁶ Of course "a financier may discount with or without recourse and may withhold discount proceeds in a reserve fund to cover off-sets arising from buyers' defenses." Bailey, *The Substantive Provisions of the Uniform Consumer Credit Code: 20th Century Consumer Protection in a Free Enterprise System*, 29 OHIO ST. L.J. 597, 618 N. 139 (1968).

Balloon Payments

The Oklahoma U3C does not prohibit "balloon payments" (a payment which is more than twice as large as the average of earlier payments), but it gives the buyer the unqualified right to refinance that payment on terms that are no less favorable than the original agreement and to do so without penalty.²⁷ In the case of a consumer lease, other than one primarily for agriculture, a special provision prohibits balloon payments at the end of the lease period which exceed twice the average payment allocable on a monthly basis.²⁸ The Retail Installment Sales Act had provided, with respect to unequal payments, only that the installment contract contain the information that the debt was not repayable in equal installments and that it state the amount of the larger installment and its due date.²⁹ This provision of the Oklahoma U3C gives considerably more protection to the consumer than previously afforded by mere disclosure under the Retail Installment Sales Act. Since the use of balloon payments has been subject to abuse³⁰ by some creditors in the past, it seems to be an appropriate remedy which is not likely to substantially affect the scrupulous seller and the practical effect may well be to end the use of balloon payments. There does not appear to be much value to the seller if he is required to refinance the payment on the same terms as the original agreement.

Security Interests

Under the Oklahoma U3C the seller can take a security interest in goods sold or in goods upon which services are per-

²⁷ Okla. U3C § 2-405.

²⁸ Okla. U3C § 2-406.

²⁹ OKLA. STAT. tit. 15, § 703(5) (k) (Supp. 1968).

³⁰ "Its use allows the creditor to quote unusually small installment payments, leaving the debtor with a final payment so large that it may force him to default." Helstad, *Consumer-Credit Legislation: Limitations on Contractual Terms*, 8 B.C. IND. & COM. L. REV. 519, 526 (1967).

formed or to which the goods sold are annexed,³¹ if the secured debt is for \$200 or more.³² The seller can take a security interest in land only if the debt is for \$1,000 or more,³³ and the goods sold are affixed to the land or the land is improved, maintained or repaired as a result of the sale of goods or services.³⁴ On the whole this policy toward restricting the taking of real estate as collateral seems proper in that it prevents the clouding of title to real property for a small credit transaction. It is also designed to prevent overreaching by creditors in situations in which deceptive practices have occurred in the past. Likewise, the limitation on a security interest in personalty is designed to prevent the loss of larger items because of failure by the debtor on smaller credit transactions.

Cross-Collateral

The taking of a security interest as cross-collateral is limited except where as a result of a prior sale the seller has an existing security interest in the property.³⁵ Or, as security for a previous debt, the seller may take a security interest in property subsequently sold.³⁶ The Code also provides for a first-in-first-out arrangement in the event of cross-collateral or consolidation of the debt. Payments are applied to the debt owed on goods purchased first and the security interest in such goods is terminated when the debt applicable to that sale is paid.³⁷ If two or more sales were made the same day by the same seller to the same buyer the payments are applied first to the smaller debt.³⁸

³¹ Okla. U3C § 2-407 (1).

³² The UCCC provides that the debt secured must be \$300 or more. UCCC § 2.407 (1).

³³ Okla. U3C § 2-407 (1).

³⁴ *Id.*

³⁵ Okla. U3C § 2-408 (1).

³⁶ *Id.*

³⁷ Okla. U3C § 2-409 (1).

³⁸ Okla. U3C § 2-409 (3).

The provision for allocation of payments is different than the allocation provisions of the Retail Installment Sales Act³⁹ which had provided that after consolidation the amounts paid would be applied to each of the various purchases on the basis of the same ratio as the original cash sales price bore to the total of all. Earlier drafts of the Code had used this method.⁴⁰ From the creditor's viewpoint it is not clear what justification can be given for adopting a method which allows the latter purchase to retain the original amount of debt despite the declining value of the collateral. The Code's method has been criticized⁴¹ as an over reaction to the method whereby payments are allocated on a ratio of debt remaining at the time of consolidation. This method is particularly abusive because it allows all the collateral to be tied up until all debts are repaid.⁴²

Referral Sales

The referral sales scheme is prohibited in consumer credit sales.⁴³ Any agreement involving a referral sales scheme, where the buyer is induced to purchase because of the scheme, is unenforceable by the seller and the buyer may rescind the agreement or retain the goods delivered and the benefit of any services performed without obligation to pay for them.⁴⁴

³⁹ OKLA. STAT. tit. 15, § 703(13) (c) (Supp. 1968).

⁴⁰ UCCC Working Draft #4, § 2.409 (June, 1969).

⁴¹ One author suggests that the proper solution is the practice provided by most retail sales act which "keeps the amount of the debts harmonious in relation to the original amounts of debt and values of the collateral, and it releases the first collateral after the associated debt should be deemed to be retired." Kripke, *Consumer Credit Legislation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 475 (1968).

⁴² This method was deservedly questioned as unconscionable in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

⁴³ Okla. U3C § 2-411.

⁴⁴ *Id.*

This method of inducing a purchase,⁴⁵ most often used in door-to-door selling,⁴⁶ is particularly disreputable because the supply of potential customers is exhausted in a very few rounds.⁴⁷ Even if the seller had intentions of living up to the glowing terms represented (an unusual situation) the mathematics of the scheme would prevent it. Referral sales have been successfully attacked under various theories.⁴⁸ In some jurisdictions they have been struck down as lotteries within the mean-

⁴⁵ Basically the scheme involves the potential purchaser being told that if he will submit a certain number of names of potential customers who might be interested in purchasing, he will receive a commission, prize or a discount against his debt to the seller.

⁴⁶ Referral sales are usually made in door-to-door sales because in their own home the buyer can be subjected to high pressure tactics. Making it sound as if the buyer is getting something for nothing will increase the sellers chance of selling a product that the buyer knows he could not afford to go purchase. In *Norman v. Worldwide Distrib. Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963), the buyers were told that they would make enough off the plan to pay for the purchase (price—\$1080, fair retail price—\$216) plus send their daughter through college. The buyers did receive \$80 for referrals, however they supplied a list of names and should have received \$300 according to the representations made. 195 A.2d at 116. In *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966), there was testimony by various consumer-witnesses that representations were made that participants could, earn as much as \$9,000, pay off the house, and that earnings were limitless. 275 N.Y.S.2d at 313.

⁴⁷ Testimony by the Chief Accountant of the Bureau of Consumer Frauds of the Office of the New York Attorney General showed that as a matter of "mathematical certainty" and "economic feasibility" the plan was doomed to failure. Because of the geometric progression, at the seventh level it would involve millions of purchasers. *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303, 315 (Sup. Ct. 1966).

⁴⁸ *E.g.*, *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. Nassau County 1966), *rev'd in part*,

ing of state constitutional provisions and statutes prohibiting them.⁴⁹ Although these schemes have been attacked in Oklahoma as lotteries, such attacks have not met with success. This is despite a statute⁵⁰ which seemingly makes them illegal. Two 1963 cases held that the referral sales scheme did not fall within the purview of the statute (prohibiting certain selling plans as lotteries) because it was not shown that the buyer had *agreed* to secure others to participate but had only been extended the *privilege* of so doing.⁵¹ The provision of the Oklahoma U3C should effectively remedy the problems caused by the use of referral sales as inducements to purchase. Since the Code does not apply to the use of referral schemes as long as it is not used to induce the purchase, it does not destroy the basic idea which might have economic merit in limited situations not dealing with credit sales.⁵²

54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term 1967). The court found the referral sale to be unconscionable. The defendant had been induced to purchase a \$348 refrigerator for \$1,145 by being told he could pay for it by the commissions he would receive from sales to persons he could refer the salesman to.

⁴⁹ See e.g., *M. Lippincott Mortgage Inv. Co. v. Childress*, 204 So. 2d 919 (Fla. App. 1967); *Yakima, Inc. v. Leach*, 67 Wash. 2d 630, 409 P.2d 160 (1965). See generally Comment, *Referral Sales Contracts: To Alter or Abolish*, 15 BUFFALO L. REV. 669 (1966); Comment, *Let The Seller Beware—Another Approach to the Referral Sales Scheme*, 22 U. MIAMI L. REV. 861 (1968).

⁵⁰ OKLA. STAT. tit. 21, § 1066 (1961).

⁵¹ *A. A. Murphy, Inc. v. Taylor*, 383 P.2d 648 (Okla. 1963) (stereo sold on referral scheme); *Krehbiel v State*, 378 P.2d 768 (Okla. 1963) (vacuum sweepers sold on referral scheme).

⁵² Generally this would be in a cash sale situation where more even bargaining terms would exist and the buyer would not have to deal later with a finance company.

Miscellaneous Limitations

The Oklahoma U3C provides that an assignment of earnings for payment or security for payment of debts arising from a consumer credit sale is unenforceable⁵³ and an authorization to confess judgment against the buyer is void.⁵⁴ Although neither of these prohibitions is new in the regulation of consumer credit sales,⁵⁵ their retention is of considerable benefit to the consumer. Except for reasonable expenses in realizing on a security interest, any agreement to pay default charges, other than provided by the Act, is unenforceable.⁵⁶

The Code provides that the buyer may continue to pay the seller until he receives the required notice of assignment.⁵⁷ If a seller on a revolving charge wishes to change his terms he must comply with specific notice requirements.⁵⁸

Home Solicitation Sales

In the case of home solicitation sales, the buyer is given until midnight of the third business day after the agreement is made in which to cancel any agreement or offer to purchase.⁵⁹ This so-called cooling off period is directed more toward disreputable selling practices than it is to credit transactions, but the purpose is to give the buyer a chance to think over the purchase of goods which are very likely to be inferior, overpriced and sold under high pressure tactics.⁶⁰ Experience has shown however that these sales are tied into

⁵³ Okla. U3C § 2-410.

⁵⁴ Okla. U3C § 2-415.

⁵⁵ The Retail Installment Sales Act prohibited both of these practices. OKLA. STAT. tit. 15, § 706(1) (b) (Supp. 1968).

⁵⁶ Okla. U3C § 2-414.

⁵⁷ Okla. U3C § 2-412; see OKLA. STAT. tit. 12A, § 9-318(3) (1961).

⁵⁸ Okla. U3C § 2-416.

⁵⁹ Okla. U3C § 2-502(1).

⁶⁰ See Sher, *The "Cooling-Off" Period In Door to Door Sales*, 15 U.C.L.A. L. REV. 717 (1968).

financing arrangements and are therefore a proper subject of credit legislation. A prerequisite to the running of the three-day period is that of giving the required notice of the buyer's right to cancel.⁶¹ This notice must be in a signed and dated written agreement or offer, unless the buyer has requested the goods or services on an emergency basis, and must contain the specific language directed by the Code.⁶² The buyer does not have the right to cancel the purchase of goods or services requested on an emergency basis if the seller has in good faith substantially begun to perform or if the goods cannot be returned.⁶³ The seller may retain up to 5% of the cash price, not to exceed the cash down payment, as a cancellation fee when the buyer exercises his right to cancel under this section.⁶⁴ However, the seller must restore to the buyer any payment in excess of the cancellation fee and any note or other evidence of indebtedness within ten days after the rescission.⁶⁵ Following the rescission the buyer must return, upon demand of the seller, any goods delivered by the seller. Failure of the seller to demand return of the goods within a reasonable time, deemed to be forty days, results in the goods becoming the property of the buyer without any obligation to pay for them.⁶⁶ If the seller performed services prior to the rescission he is entitled to no compensation other than to keep up to 5% of the price as a cancellation fee.⁶⁷ The result of this provision is to supply the consumer with a non-judicial remedy which is free of the expense of litigation. Often the expense of litigation operates as a deterrent to consumers seeking relief. This is true not

⁶¹ Okla. U3C § 2-503.

⁶² *Id.*

⁶³ Okla. U3C § 2-502(5).

⁶⁴ Okla. U3C § 2-504(3).

⁶⁵ Okla. U3C § 2-504(1).

⁶⁶ Okla. U3C § 2-505(1).

⁶⁷ Okla. U3C § 2-505(3).

⁶⁸ For examples of the problems of low income purchasers see D. CAPLOVITZ, *THE POOR PAY MORE* (1963)

only to low-income buyers but also to those who do not have a large enough sum at stake to justify the expense.

Opponents have criticized the cancellation provision as unfair to the seller because it allows the buyer to cancel capriciously and also violates basic contract theories by delaying a binding agreement.⁶⁹ Although this is true, the end sought seems to justify the means used. The reputable seller who gives value for value will not likely be adversely affected because if the buyer does use the time period to do any comparison shopping, one of the objects of the Code provision,⁷⁰ he will find that he is getting his money's worth and will not exercise his right to cancel. Those who continue to sell door-to-door will probably require at least a 5% down payment to cover in full the allowable cancellation fee and will delay delivery of the goods until the three days are up. However this may be, the consumer should have the chance to think over his purchase. Even the loss of 5% of the sales price will usually be better for the buyer than to be stuck with the purchase of an overpriced, poor quality piece of merchandise which he may not have really wanted in the first place.

REMEDIES AND PENALTIES

Article 5 of the U3C deals with remedies and penalties and applies to actions to enforce rights arising from consumer credit sales, consumer leases and consumer loans, and, to extortionate extensions of credit.⁷¹

Limitations on Creditors' Remedies

In the case of a consumer credit sale the Code provides that if the seller repossesses or accepts voluntary surrender

⁶⁹ See Note, *Consumer Protection: The Proposed Cooling Off Period*, 2 VALPARAISO U. L. REV. 338, 347 (1968).

⁷⁰ See Comment, *Consumer Legislation and the Poor*, 76 YALE L. J. 745 (1967).

⁷¹ Okla. U3C § 5-102.

of goods which he sold or in which he had a security interest in order to secure a debt arising from a consumer credit sale, and the cash price was less than one thousand dollars, the buyer is not personally liable for the unpaid balance.⁷² If the seller elects to bring an action against the buyer for the unpaid debt he may not also repossess the collateral, nor is the property subject to levy or sale on execution of a judgment.⁷³ This provision forces the seller to make an election of remedies and has been criticized.⁷⁴ However, this provision seems appropriate in the situation where the buyer has paid a substantial part of the debt on goods such as furniture, clothing and appliances which have a notoriously slight resale value. The resale value of articles such as these does not generally come close to reflecting the practical value to the buyer. The economic loss, when the goods are repossessed and resold leaving the buyer still liable for the difference, is more than can be justified for protecting the creditor. The answer to Mr. Kripke's question⁷⁵ is that the buyer will still have the goods which he will have paid for in full. If this is unfair to the creditor because it forces him to "speculate as to whether it is more worthwhile to repossess or to institute legal action on the debt,"⁷⁶ then it might be to the creditor's best interests to put more thought into his "speculation" of whether or not to extend credit to the prospective debtor in

⁷² OKLA. U3C §§ 5-103(2), (3). Compare with the Uniform Commercial Code, OKLA. STAT. tit. 12A, § 9-504 (1961). In case of conflict the Okla. U3C controls. Okla. U3C § 1-103.

⁷³ Okla. U3C §§ 5-103(6) (a), (b).

⁷⁴ See Felsenfeld, *Some Ruminations About Remedies in Consumer—Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 557 (1967); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 477 (1968). Kripke criticizes it as being a faulty approach and asks what the value is to the consumer when a personal suit on the obligation is permitted.

⁷⁵ See Kripke, *supra* note 74.

⁷⁶ See Felsenfeld, *supra* note 74, at 558.

the first place. This provision should force the creditor to exercise more restraint in granting credit, particularly when the collateral has low resale value. Since the seller should be unwilling to risk extension of credit on the basis of collateral alone, more weight will be given to the other "C's" of the "Four C's" of credit.⁷⁷ If this results in a consumer being unable to obtain credit or obtaining it only at a higher rate than his more creditworthy neighbors, then economically speaking this is the way it should operate.

It is, of course, recognized that no matter how cautious the credit grantor may be, that debtors will default. This happens in consumer credit even with the best of credit risks because consumer credit is usually granted on the faith in future earning power which may not materialize through no fault of the debtor or creditor.⁷⁸ And then there is always the debtor who can pay but won't and the debtor who uses fraudulent means to build up debts. There is probably no amount

⁷⁷ T. BECKMAN, CREDITS & COLLECTION, MANAGEMENT & THEORY (1962). The "Four C's" of credit are Character, Capacity, Capital and Conditions. Character comprises the qualities of a credit risk which make him want to pay when the debt is due normally the most important. Capacity, the ability to pay when the debt is due, is generally more important than Capital (which is usually collateral in consumer transactions) since credit should be granted on the premise that the debt will be repaid, not on the basis of having to repossess or replevin the item. Conditions, the economic environment in which the risk exists, is always a factor in creditworthiness. *Id.* at 63.

⁷⁸ "One survey concerning the relative importance of installment credit standards disclosed that occupation and permanence of employment held first place. This would reflect the emphasis placed upon the debtor's continued earning power, and it is suggestive of the fact that this is often the factor first to be regarded in consumer open-credit, as well as in installment credit." *Id.* at 64.

of legislation which can prevent this.⁷⁹ Although the provision on deficiency judgments may be criticized, it appears to be wholly in line with one of the purposes of the Code: To protect the consumer against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.

Garnishment

The Code restricts the use of garnishment as a remedy in consumer credit transactions. It prohibits garnishment before judgment⁸⁰ and provides a limit on the part of a wage earner's pay which is subject to garnishment.⁸¹ The maximum part of an individual's disposable earnings (meaning gross pay less deductions required by law) subject to garnishment may not exceed the lesser of (1) 25% of disposable earnings or (2) thirty times the federal minimum hourly wage.⁸² This provision is the same as the CCPA which limits garnishment effective July 1, 1970,⁸³ except that the CCPA will cover garnishment for any purpose, whereas the Okla-

⁷⁹ "We in Oklahoma had an extensive number of hearings before our legislative council in which a large number of debtors appeared and complained of the collection practices of their creditors. It became apparent, as one legislator observed, that what they really object is to collection." Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 480 n. 102 (1968) quoting from Commissioner Baggett's testimony, *Hearings On The Uniform Consumer Credit Code Before the NCCUSL* (August, 1967) at 440.

"[T]he risk who has either income or assets but who neglects, delays, or refuses to pay furnishes an entirely different picture. He is a troublesome subject. He must be watched and account followed carefully. He is a cause of collection expense and in many instances a reason for legally enforced collection." T. BECKMAN *supra*, note 77, at 63.

⁸⁰ Okla. U3C § 5-104.

⁸¹ Okla. U3C § 5-105(2).

⁸² *Id.*

⁸³ 15 U.S.C. §§ 1672, 1673 (Supp. IV 1969).

homa U3C limits it to a consumer indebtedness. The Oklahoma U3C goes one step further than the CCPA and not as far as the Uniform Code in limiting discharge from employment for garnishment. The Oklahoma U3C provides that an employer may not discharge an employee for garnishment unless he has been subjected to more than two such actions in one year.⁸⁴ The CCPA restricts discharge unless wages were subjected to garnishment more than once in a year⁸⁵ and the Uniform Code prohibits an employee from being discharged no matter how many times his wages are garnished.⁸⁶ There is no prohibition now (until the CCPA provisions come into force) unless the garnishment arose from a consumer credit transaction. Therefore, if the employer can determine that the garnishment did not so arise, he can discharge the employee without being subject to penalties.⁸⁷

The Code adopts the unconscionability provision of the Uniform Commercial Code,⁸⁸ applying it to consumer credit sales, leases, and loans.⁸⁹ It also adopts the provisions of the CCPA⁹⁰ dealing with what is termed extortionate extensions of credit and provides that the debt in that situation is unenforceable by the creditor.⁹¹

⁸⁴ Okla. U3C § 5-106.

⁸⁵ 15 U.S.C. § 1674 (Supp. IV 1969).

⁸⁶ UCCC § 5.106.

⁸⁷ Okla. U3C § 5-202(6) provides for reinstatement and up to six weeks lost wages.

⁸⁸ OKLA. STAT. tit. 12A, § 2-302. For a general discussion of this section of the Commercial Code, see Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967).

⁸⁹ OKLA. U3C § 5-108.

⁹⁰ 18 U.S.C. § 892 (Supp. IV 1969). This provision of the CCPA is aimed at organized crime which uses credit in its underworld business. U.S. CODE CONG. & ADM. NEWS, 90th Cong., Vol. 2, at 2029 (1968).

⁹¹ Okla. U3C § 5-107.

Debtors' Remedies

The Oklahoma U3C provides private remedies to the debtor if the creditor violates provisions of the Act.⁹² If a creditor violates the restrictions on the use of negotiable instruments,⁹³ the debtor does not have to pay the credit service charge and may recover a penalty against the seller or assignee of the seller's rights.⁹⁴ If a seller has made a charge in excess of that allowed, the debtor has a right to a refund⁹⁵ and a refusal within a reasonable time after demand subjects the seller to a penalty not to exceed the greater of the amount of the credit service charge or ten times the amount of the excess charge.⁹⁶ If the seller deliberately or recklessly makes an excess charge he is subject to the penalty even though he makes the refund.⁹⁷

In a consumer credit sale where the seller takes a security interest in the residence of the buyer, except a first lien for the acquisition of a dwelling, the buyer has until midnight of the third business day following in which to rescind transaction.⁹⁸ Upon rescission the buyer is not liable for any charges, has the right to be refunded any payment already made, and any security interest taken by the seller is void. The Act also provides for criminal penalties¹⁰⁰ for willfull violation of certain provisions.

The Oklahoma U3C is an attempt to remedy the problems arising out of consumer credit. Whether or not the Uniform Code has been changed enough to shift the delicate balance

⁹² Okla. U3C art. 5, part 2.

⁹³ Okla. U3C § 2-403.

⁹⁴ Okla. U3C § 5-202(1).

⁹⁵ Okla. U3C § 5-202(3).

⁹⁶ Okla. U3C § 5-202(4).

⁹⁷ *Id.*

⁹⁸ Okla. U3C § 5-204(1).

⁹⁹ Okla. U3C § 5-204(2).

¹⁰⁰ Okla. U3C §§ 5-301, 302; see Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable*, 29 OHIO ST. L. J. 624 (1968).