

1972

Enforcing Security Interests in Consumer Goods: Some Notes on the Vicious Cycle

Richard E. Speidel

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Commercial Law Commons](#)

Recommended Citation

Richard E. Speidel, *Enforcing Security Interests in Consumer Goods: Some Notes on the Vicious Cycle*, 7 U. Rich. L. Rev. 187 (1972).
Available at: <http://scholarship.richmond.edu/lawreview/vol7/iss2/2>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

UNIVERSITY OF RICHMOND LAW REVIEW

VOLUME 7

WINTER 1972

NUMBER 2

ARTICLES

ENFORCING SECURITY INTERESTS IN CONSUMER GOODS: SOME NOTES ON THE VICIOUS CYCLE

*Richard E. Speidel**

I. INTRODUCTION

THE Uniform Commercial Code (UCC), now effective everywhere except Louisiana, is conspicuously neutral on consumer protection issues, leaving these matters to other laws, if any, in the adopting state.¹ In the past few years, considerable pressure for reform of the consumer credit transaction has been manifested. One example of proposed reform is the Uniform Consumer Credit Code (UCCC), approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, and recommended for adoption by the several states.² The UCCC, enacted with variations in six states³

*Doherty Professor of Law, University of Virginia. A.B., Denison University, 1954; J.D., University of Cincinnati, 1957; LL.M., Northwestern University, 1958. While the author is a member of the Virginia Consumer Credit Study Commission, the views expressed herein are his own and not those of the Commission or any of its members.

¹ While acknowledging the presence of consumers (see UNIFORM COMMERCIAL CODE §§ 2-302, 9-507(1), 9-109(1), 9-307(2) [hereinafter cited as UCC]) the UCC, with some justification, avoids confronting most consumer protection issues. See, e.g., UCC §§ 9-201, 9-203(2), 9-206; Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1469-70 (1967).

² The final draft of the UCCC, approved in the Summer of 1968, was revised slightly in 1969 to conform to the federal Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-77 (Supp. 1972); 18 U.S.C.A. §§ 891-96 (Supp. 1972). See Roisman, *Truth in Lending: Regulation Z—Its Limitations and Applicability*, 37 GEO. WASH. L. REV. 1154 (1969).

³ As of September, 1972, states enacting the UCCC with effective date were: Oklahoma (July 1, 1969); Utah (July 1, 1969); Idaho (July 1, 1971); Wyoming (July 1,

and studied in many more, including Virginia,⁴ takes a cautious approach to the problems. A key assumption of the UCCC is that the average consumer with adequate information is capable of making rational choices, and that market choice is an effective weapon with which to combat excessive finance charges. Thus, the UCCC combines required disclosure of finance charges with the easing of entry into the credit market for more sellers and lenders in the hope that informed shopping and the laws of supply and demand will keep the cost of credit well below the generous ceilings that have been established. This approach is supported by an effort to eliminate or control specific creditor practices thought to be most abusive, to limit certain creditor remedies, and to regulate the various forms of credit, property, and liability insurance most frequently involved. The primary responsibility for enforcement rests with an administrator who has power to investigate alleged violations, issue administrative enforcement orders, seek injunctive relief and bring civil actions against creditors.⁵ On the whole, the UCCC reflects a balanced approach to regulation in the consumer credit market. Compared with the hodgepodge of Virginia credit law,⁶ it is rationality personified.

1971); Indiana (October 1, 1971); and Colorado (October 1, 1971). 1 CCH CONSUMER CREDIT GUIDE ¶ 4770.

⁴ The study was conducted by the Consumer Credit Study Commission, created by S. J. RES. No. 41, adopted at the 1970 Regular Session of the General Assembly of Virginia and a Subcommittee appointed by the Virginia Code Commission to implement H. J. RES. No. 106, adopted at the 1970 Regular Session of the General Assembly, directing the Code Commission to undertake a study of the "desirability of adopting, in whole or in part, the Uniform Consumer Credit Code." Both groups recommended against adopting the UCCC at this time.

⁵ The UCCC applies, generally, to consumer credit sales and loans, defined as a sale or loan made by a person regularly engaged in the business of selling or making loans in which the buyer or debtor is a person other than an organization, the goods are purchased or the debt is incurred primarily for a personal, family, household or agricultural purpose, either the debt is payable in instalments or a credit or loan service charge is made and the amount financed or principal does not exceed \$25,000. UNIFORM CONSUMER CREDIT CODE §§ 2.104(1) and 3.104(1) [hereinafter cited as UCCC]. For expositions of the UCCC which are basically favorable, see Braucher, *Consumer Credit Reform: Rates, Profits and Competition*, 43 TEMP. L.Q. 313 (1970); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968); Curran, *Administration and Enforcement Under the Uniform Consumer Credit Code*, 33 LAW & CONTEMP. PROB. 737 (1968). Cf. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1 (1969).

⁶ Peters, *Uniform Consumer Credit Code—A Prospect for Consumer Credit Reform in Virginia*, 28 WASH. & LEE L. REV. 75 (1971). For similar studies in other states, see Clark, *The Uniform Consumer Credit Code: Assessing Its Impact upon One State and*

The UCCC, however, has received many critical if not hostile reviews and faces an uncertain future. Criticism has come from those regulated and those for whom the legislation was drafted, the consumer. A casual survey of the literature reveals the range of criticism involved,⁷ and that almost no one appears to be totally satisfied with the final product.⁸ These undercurrents highlight the difficulty of developing reform legislation which will be both effective and likely to be enacted into law.

The uncertain future of the UCCC is accentuated by events other than critical reviews. A pending study by the New York Law Revision Commission, the pressure for federal legislation,⁹ and the potential impact of the Constitution of the United States¹⁰ highlight the probable evolution of the UCCC as a legislative package. But of utmost importance, the UCCC has an active rival in the National Consumer Act

Plugging Its Loopholes, 18 U. KAN. L. REV. 277 (1970) (Kansas); Spanogle, *Advantages and Disadvantages—A Comparison of the Present Maine Law and the U3C*, 22 MAINE L. REV. 295 (1970).

⁷ See, e.g., Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53 (1969) (creditor viewpoint); James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V & VI*, 57 GEO. L.J. 923 (1969); Littlefield, *The Plight of the Consumer in the Uniform Consumer Credit Code: A 1971 Perspective*, 48 DEN. L.J. 1 (1971); Murphy, *Lawyers for the Poor View the Uniform Consumer Credit Code*, 44 N.Y.U. L. REV. 298 (1969) (qualified support—better than nothing); Willier, *A Uniform Consumer Creditor's Code*, 54 MASS. L.Q. 53, 61 (1969) (fundamentally inadequate).

⁸ Paul Moo has suggested that the absence of any group completely "for" the UCCC may be its "best endorsement." Moo, *Commentary*, 24 BUS. LAW. 223, 226 (1968).

⁹ See, e.g., Felsenfeld, *Competing State and Federal Roles in Consumer Credit Law*, 45 N.Y.U.L. REV. 487 (1970).

¹⁰ In *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), a Wisconsin statute permitting a creditor to obtain a pre-judgment garnishment of wages without prior notice to or an opportunity for a hearing by the debtor was held to deny "due process" under the 14th amendment to the Constitution. See Kennedy, *Due Process Limitations on Creditor's Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U. L. REV. 158 (1970). Subsequent efforts by consumers to persuade federal and state courts to extend *Sniadach* to the enforcement process in consumer credit transactions met with mixed results. Clark, *Default, Repossession, Foreclosure, and Deficiency, A Journey to the Underworld and A Proposed Salvation*, 51 ORE. L. REV. 302, 322-331 (1972). In the cases which reached the Supreme Court in the October, 1971 Term, confession of judgment statutes in Ohio and Pennsylvania barely survived a constitutional attack (*infra* note 52) and a Florida replevin statute was held to deny due process when used by a secured creditor to repossess personal property without first giving the debtor notice and an opportunity for an evidentiary hearing on the issue of entitlement. *Fuentes v. Shevin*, 92 S.Ct. 1983 (1972).

(NCA), the First Final Draft of which was recently issued by the National Consumer Law Center.¹¹

To say that the NCA marches to a different tune would be an understatement. Viewing the problem from the perspective of the consumer least able to protect himself, the NCA rejects many of the market assumptions underlying the UCCC and is far more inclusive in the scope of regulation. At each critical juncture, greater controls are imposed upon creditor practices and remedies, more power is given the Administrator, and a broader array of private remedies, individual and collective, is provided. One commentator has suggested the NCA's main fault may be its own "overzealousness."

In attempting to fortify the consumer against unscrupulous creditors, it has put too many restrictions on the legitimate lender. The result of such limitations might well be the discontinuance of consumer loans by such institutions.¹²

Reserving judgment on this argument for the moment, it seems clear that the NCA provides an important pro-consumer philosophy for evaluating current and proposed consumer credit laws. This philosophy, simply stated, is that the force of regulation should be directed at those creditors most prone to abuse various strategic and economic bargaining advantages to protect those consumers least capable of fending for themselves in that setting. Whatever the impact upon the cost or availability of credit, it must be absorbed by all consumers in the interest of meaningful reform. Rejected is the notion that effective protection from abuse can be achieved by compromise, by dependence upon informed consumer choice in the credit market, or by excessive reliance upon private remedies in courts to deter abusive practices.¹³ In short, the minimum conditions for engaging in the business of extending credit are higher and the penalties for deviation are greater in the NCA than the UCCC.¹⁴

¹¹ The National Consumer Act (first final draft 1969) [hereinafter cited as NCA], sponsored by the National Legal Aid and Defenders Association and the National Consumer Law Center at Boston College Law School, was drafted in response to criticisms of the UCCC. (As this article went to press, a "second" final draft of the NCA was in preparation.) For a brief description of the background of the UCCC and the NCA, see Comment, 12 B. C. IND. & COMM. L. REV. 889, 890-93 (1971).

¹² Comment, *supra* note 11 at 915.

¹³ Rice, *Remedies Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968).

¹⁴ According to Lon L. Fuller, a primary task of law is to locate the point where the

II. THE CYCLE IDENTIFIED

This apparent difference in regulatory philosophy prompts a more particularized inquiry. Assume that a retailer has sold expensive goods on credit to a consumer and has created and perfected under UCC Article 9 a purchase money security interest in the goods sold and a security interest in other household goods to secure the unpaid contract price. The written security agreement spells out the acts or omissions of the debtor which, in addition to non-payment, will constitute default; contains an acceleration clause which permits the secured party, if default occurs or he deems himself insecure, to accelerate the monetary obligation and enforce the security interest; and contains an agreement for the benefit of any assignee of the monetary obligation or security interest that the debtor will not assert defenses good against the secured party against the assignee. These terms are offered to the debtor on a "take-it-or-leave-it" basis. The debtor also signs a negotiable installment note which contains, among other things, the acceleration clause and a term authoring the payee or his order to confess judgment on the instrument if it is not paid when due.¹⁵ The security agreement and installment note together constitute chattel paper; we may assume that the agreement has been assigned and the note negotiated by the secured party to a third party bank or finance company for value.¹⁶

"morality of duty," *i.e.*, the "basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain goals must fail," ends and the "morality of aspiration," *i.e.*, where society leaves the individual free to pursue the "challenge of excellence," begins. "Deciding where duty ought to leave off is one of the most difficult tasks of social philosophy." L. FULLER, *THE MORALITY OF LAW* 3-32 (1963). Without question, the legislative and judicial trend is to impose more "basic rules" upon professional sellers and lenders as they deal with individual consumers in credit transactions where the choice is, essentially, "take it or leave it." Some of the reasons for and difficulties posed by this trend are discussed in the following articles: Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Slawson, *Standard Form Contracts and Democratic Control of Law Making*, 84 HARV. L. REV. 529 (1971); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

¹⁵ These terms do not affect the negotiability of the promissory note. UCC §§ 3-109(1)(c), 3-112(1)(d).

¹⁶ Chattel paper is defined as a writing or group of writings which, taken together, evidence both a monetary obligation and a security interest in specific goods. The security interest is created by a security agreement and the monetary obligation may be evidenced by a negotiable instrument. UCC § 9-105(1)(b). Cf. UCC § 3-119. The assignee of a perfected security interest succeeds to the status of the assignor. UCC §§ 9-302(2), 9-405. The instrument is easily negotiated to the assignee, who may qualify as a holder in due course. UCC §§ 3-202(1), 3-301, 3-302, 3-305. A consumer, who as

A primary purpose of security is to permit the secured party, upon default, to satisfy the underlying monetary obligation from the debtor's property in which the security interest was created. If the proceeds upon disposition of the collateral are inadequate to satisfy this obligation, the secured party or his transferee has, traditionally, been able to sue on the note and recover any deficiency. By establishing a reliable system of security, the legal system enables sellers and lenders to extend credit in cases where business risks may dictate otherwise. While never a substitute for sound evaluation practices, the fact of security tends to expand rather than limit the extension of credit.¹⁷ By permitting the secured party to assign the security interest and negotiate the note for present, discounted value, and protecting the transferee from certain defenses which may exist between the original parties, the legal system also encourages banks and other lending institutions to finance retail sellers. This, in turn, further supports the extension of relatively low cost credit to consumers. All things being equal, security and negotiability are important legal events in a healthy credit economy.¹⁸

The health of an economy, however, may also be gauged by who has what power and how it is exercised. Consider the power the secured party or his transferee possesses upon default by the consumer. Considerations of voluntary restraint aside, the remedies conferred by the agreement and indorsed under traditional commercial law permit certain actions to be taken without resort to legal processes.

First, relying on a broad definition of default in the security agreement, the creditor *may* declare the debtor in default and accelerate the monetary obligation without regard to the reason for default or the possibility of extension or refinancing.

Second, the creditor *can*, by self-help, repossess the specific personal property in which the security interest has been created.

Third, after repossession the creditor *may* conduct a private sale of the collateral, using the proceeds to defray various expenses and to satisfy the basic obligation.

part of one transaction, signs both a negotiable instrument and a security agreement makes an agreement not to assert defenses against the assignee. UCC § 9-206(1).

¹⁷ R. SPEIDEL, R. SUMMERS & J. WHITE, *COMMERCIAL TRANSACTIONS: TEACHING MATERIALS* 84-85 (1969).

¹⁸ *But see* Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375 (1971), calling for a critical examination of the assumption that the concept of negotiability helps the flow of commerce.

Fourth, if and only if a deficiency exists after the resale, the creditor *may* confess judgment on the note and take appropriate action through garnishment or execution to reach other property of the debtor.

Fifth, whether enforcing the security interest or the note, the creditor, if an assignee-holder, *may* claim immunity to defenses between the debtor and the original secured party and proceed to full satisfaction.¹⁹

The striking feature of this cycle of default, acceleration, repossession, disposition, and deficiency is that the creditor's need to invoke formally the aid of the legal system is minimized. To the creditor who has slighted the credit investigation or tends toward irresponsibility, the benefits in speed, efficiency, and economy through these non-judicial remedies may be irresistible.²⁰ If the consumer is unable or unwilling to seek early legal protection against abuse in the cycle, his valid defenses, if any, will first be assertable after the fact. In short, the opportunity to defend on either the security agreement or the note may first be available when the debtor is looking down the barrel of an action for deficiency.

When remedial power of this sort is exercised with restraint, the cycle described above becomes no worse than any other legal device designed to protect businessmen against risk. When the power is abused the cycle becomes vicious and difficult to justify on any ground. Whether the power is abused and, if so, the proper controls to be applied, are hard questions for which no adequate data now exists. Nevertheless, based upon contrasting views on the probability of abuse and the adequacy of current protection, the UCC, the UCCC, and the NCA impose different legal controls upon creditors at varying stages of the cycle. A brief comparison of these statutes will determine wherein the differences lie in protection afforded the consumer.²¹

¹⁹ For an objective discussion of the "cycle" prior to and after promulgation of the UCC, see Hogan, *The Secured Party and Default Proceedings Under the Uniform Commercial Code*, 47 MINN. L. REV. 205 (1962).

²⁰ Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 1-19, 22-24 (1970).

²¹ Along this same line, see Clark, *supra* note 10; Hogan, *Integrating the UCCC and the UCC—Limitations on Creditors' Agreements and Practices*, 33 LAW & CONTEMP. PROB. 686, 692-704 (1968); Note, *The Uniform Consumer Credit Code and Article 9 of the Uniform Commercial Code*, 65 NW. U. L. REV. 838 (1970); Comment, *An Analysis of the Uniform Consumer Credit Code and the National Consumer Act*, 12 B.C. IND. & COM. L. REV. 889 (1971); Comment, *Consumer Protection Under the UCC and the NCA—A Comparison and Recommendations*, 12 ARIZ. L. REV. 572 (1970).

III. THE CYCLE REGULATED: LEGAL CONTROLS AND REMEDIES UNDER THE UNIFORM COMMERCIAL CODE, THE UNIFORM CONSUMER CREDIT CODE AND THE NATIONAL CONSUMER ACT.

In this section, the various steps of the cycle will be identified and discussed with reference to the controls and remedies available to consumers under the UCC, the UCCC, and the NCA. In the next section, the differences noted will be evaluated against the difficulties of consumer credit reform.

A. *Definition of Default and Power to Accelerate*

UCC. Under UCC 9-501(1), the definition of default is a matter for agreement and can best be described as being "whatever the security agreement says it is."²² Upon default, the acceleration clause usually gives the secured party an option to accelerate the installment obligation and enforce the security agreement.²³ Pre-Code decisions in Virginia and other states required the secured party to manifest by notice or otherwise a decision to exercise the option, and permitted the debtor to cure any default by tendering the past due amount before exercise of the option.²⁴ UCC 1-208 provides that an option to accelerate when the creditor "deems himself insecure" shall be "construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment . . . is impaired." The burden of establishing bad

²² 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.3 (1965). See *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969) (in absence of agreement specifying events, default occurs only when debtor fails to pay on time).

²³ In the absence of an acceleration clause, UCC § 2-709 may not support an action for more than the particular installment due, even though the buyer has repudiated. R. NORDSTROM, LAW OF SALES § 178, n.52 (1970).

²⁴ *Florence v. Friedlander*, 209 Va. 520, 165 S.E.2d 388 (1969) (where notice of acceleration and tender of payment are simultaneous, conflict resolved in favor of debtor). *Accord*, *United States v. Myers*, 308 F. Supp. 859 (D. Md. 1970); *Grozier v. Post Publishing Co.*, 342 Mass. 97, 172 N.E.2d 266 (1961); *Peter Fuller Enter., Inc. v. Manchester Sav. Bank*, 102 N.H. 117, 152 A.2d 179 (1959). *But see* *Baader v. Walker*, 153 So. 2d 51 (Fla. App. 1963) (acceleration automatic upon default). If the option has been exercised properly, foreclosure may still be blocked if the debtor redeems by tendering the entire amount due, *United Benefit Life Ins. Co. v. Holman*, 177 Neb. 682, 130 N.W.2d 593 (1964), or the default is waived when the creditor accepts a part payment, *Trudeau v. Lussier*, 123 Vt. 358, 189 A.2d 529 (1963). An acceleration clause may be treated as a penalty provision if the creditor seeks to recover a substantial amount of unearned interest, *A-Z Servicenter v. Segall*, 334 Mass. 672, 138 N.E.2d 266 (1956), and denied effect if the default was caused by the creditor's unconscionable or inequitable conduct. See *Jacobson v. McClanahan*, 43 Wash. 2d 751, 264 P.2d 253, 5 A.L.R.2d 968 (1953).

faith is "on the party against whom the power has been exercised."²⁵ Thus, the UCC authorizes a direct attack upon the exercised "deemed insecure" option, and a recent decision has extended the good faith duty to an option exercised after the consumer actually had missed one or more payments.²⁶ The attack, however, will invariably be made in court after the cycle is well underway.

UCCC. There is no attempt to define default in the UCCC, nor are there explicit limitations imposed upon agreements which define default or permit acceleration. Under UCCC 6.111(1)(a), however, the Administrator is authorized to seek injunctions against creditors who engage in a "course of . . . making or enforcing unconscionable terms or provisions of consumer credit sales." The section states that a relevant factor is whether the creditor believed at the time of the sale "that there was no reasonable probability of payment in full of the obligation of the debtor."²⁷ Thus, the practice of extending credit to consumers likely to default under agreements broadly defining default and containing acceleration clauses might be enjoined by the Administrator.

NCA. NCA 5.103(2) provides that "no cause of action shall accrue in favor of the creditor with respect to the obligation of the consumer except by reason of his default as defined." Default is defined as a substantial unjustified failure to pay, such as the failure to make "three successive installments within the period of time allowed by this Act."²⁸

²⁵ For a good discussion of when UCC 1-208 applies, the definition of good faith, and difficulties created by placing the burden of proof on the debtor, see Comment, *Acceleration Clauses in Sales and Secured Transactions: The Debtor's Burden Under Section 1-208 of the U.C.C.*, 11 B.C. IND. & COM. L. REV. 531 (1970). See also *Klingbiel v. Commercial Credit Corp.*, 439 F.2d 1303 (10th Cir. 1971) ("deemed insecure" acceleration clause construed to require notice and demand as condition precedent to repossession).

²⁶ *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971) (exercise of option to accelerate, repossess, and sell car not in good faith where debtor, after repossession, tendered amount far in excess of amount due but not enough fully to satisfy outstanding obligation). Cf. *Margolin v. Franklin*, 270 N.E.2d 140 (Ill. App. 1971) (default waived by secured party).

²⁷ UCCC § 6.111(3)(a). The injunction will be issued only if the court finds that the "respondent has made unconscionable agreements or has engaged or is likely to engage in a course of unconscionable conduct" or that the "agreements or conduct has caused or is likely to cause injury to consumers." UCCC § 6.111(2). The "private" unconscionability defense, based upon UCC § 2-302, makes no effort to spell out factors relevant to the determination. UCCC § 5.108. Cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (sale of expensive stereo to woman on relief, coupled with "add-on" clause, may be unconscionable).

²⁸ NCA § 5.103(1)(a).

Thus, the creditor in good faith cannot initiate the cycle by relying upon the "deemed insecure" language of an acceleration clause or upon insubstantial acts of default.

B. *Property in Which Security Interest May be Created*

UCC. Upon default, the secured party may enforce a security interest created in any personal property of the consumer, whether it be the goods sold or other household items. UCC 9-204(3) provides that a "security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement." However, when consumer goods other than accessions are given as additional security, UCC 9-204(4)(b) provides that an after-acquired security interest will not attach "unless the debtor acquires rights in them within ten days after the secured party gives value."

UCCC. UCCC 2.408(1) provides that a seller who creates a purchase money security interest in goods sold may not create an additional security interest in other goods of the buyer to secure the primary obligation unless "as a result of a prior sale the seller has an existing security interest in the other property." Therefore, unless a cross-collateral arrangement exists, the security interest in additional household goods is void.²⁹

NCA. Except for the property sold, NCA 2.416 states that "no security interest other than a purchase money security interest may be taken in household furnishings, appliances and clothing of the consumer and his dependents." Cross-collateral arrangements, permitted by the UCC and UCCC, are prohibited unless two or more transactions, each with a valid security interest, are consolidated into one obligation.³⁰

C. *Method of Repossession*

UCC. Upon default by a consumer, a secured party may decide to enforce a valid security interest by repossessing the described collateral, either through legal processes, such as replevin (or detinue in Virginia³¹), or by self-help. Under UCC 9-503 a secured party, unless

²⁹ UCCC § 2.407(3). In a valid cross-collateral arrangement, payments received by the seller are "deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the debts arising from the sales first made." UCCC § 2.409(1).

³⁰ NCA § 2.417(1). See NCA § 2.207(1) (when consolidation is proper).

³¹ When using the judicial process to implement his right to possession under UCC § 9-503, the Virginia secured party must proceed in detinue under VA. CODE ANN. §§

otherwise agreed, has the "right to take possession of the collateral . . . without judicial process if this can be done without breach of the peace." Definition of "breach of the peace" is left by the UCC to the courts. While various courts have struggled to develop a standard for control, it seems clear that the secured party has considerable maneuvering room short of actual resistance by the debtor or forcible entry into a dwelling.³² One may question whether this control is sufficient to deter the skillful and determined repossessor.

UCCC. The UCCC is silent on methods of repossession, leaving the matter to UCC 9-503.

NCA. The NCA's First Final Draft imposes substantial restrictions upon the method of repossession. Except where the collateral is voluntarily surrendered, NCA 5.204 prohibits self-help or non-judicial repos-

8-585 through 8-595 (1957). Replevin is not available. A number of problems are posed by this action. First, it is harder to recover the property in detinue than in replevin, since the secured party must establish, in addition to default and an enforceable security interest, that the debtor is insolvent or that the collateral is about to be sold or materially injured. VA. CODE ANN. § 8-586 (1957). Cf. *Karp Bros., Inc. v. West Ward Sav. & Loan Ass'n*, 440 Pa. 583, 271 A.2d 493 (1970). Second, the debtor can, after possession has been taken by the public official, regain the property upon posting a bond. VA. CODE ANN. § 8-588 (1957). This could block a private or public disposition under UCC § 9-504(3). Third, the debtor can contest the secured party's right to possession in court, VA. CODE ANN. § 8-591 (1957), and, even if unsuccessful, is given the "election of paying the amount of such judgment or surrendering the specific property." VA. CODE ANN. § 8-593 (1957). While this seems to preclude, in some cases, the right to a deficiency judgment provided in UCC § 9-504(2), the secured party's fear is lessened by a general statement in VA. CODE ANN. § 8-593 (1957) that any inconsistency between "this section and any applicable provisions of Article 9 of the Uniform Commercial Code" shall be governed by the UCC. Finally, under *Fuentes v. Shevin*, *supra* note 10, use of detinue would deny due process if the debtor's property was taken without prior notice and a hearing on entitlement. See 23 OP. ATT'Y GEN. OF VIRGINIA 54 (Oct. 18, 1972). From the author's viewpoint, a more inappropriate statutory procedure for repossession under Article 9 cannot be imagined.

³² See, e.g., *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970) (peace breached where creditor takes property from private premises after confrontation with owner's representative who issued order to stop); *Renaire Corp. v. Vaughn*, 142 A.2d 148 (D.C. Mun. Ct. 1958) (under Virginia law, forcible entry into dwelling house while owner away breaches peace, even though entry authorized by security agreement); *Universal Credit Co. v. Taylor*, 164 Va. 624, 180 S.E. 277, 280 (1935) (creditor must resort to legal process when right to repossession is "denied or resisted by another.") See also Gilmer, *The Debtor's Duty Under UCC 9-503 to Deliver Collateral Upon Default*, 53 MARQ. L. REV. 33 (1970); White, *Representing the Low Income Consumer in Repossessions, Resales and Deficiency Judgment Cases*, 64 NW. U.L. REV. 808, 809-17 (1970).

session.³³ A judicial process is created in which the secured party must file a repossession complaint. The consumer is then entitled to an expedited hearing on such matters as whether a default has occurred or defenses exist before process can issue with regard to the collateral.³⁴ Thus, the cycle can be blocked by what emerges from hearing procedures governed by rudimentary due process³⁵—a hoop through which the secured party must jump in order to repossess the collateral.

D. *Cure, Refinancing, and Redemption*

To what extent can a consumer in default unilaterally block the cycle by agreeing to refinance or tendering an amount of money sufficient to "cure" the default or pay off the obligation?

UCC. Under UCC 9-506 the debtor may redeem the collateral at any time before disposition "by tendering fulfillment of all obligations secured by the collateral," plus the secured party's reasonable expenses incurred in enforcement, and reasonable attorney's fees.³⁶ Efforts to

³³ NCA § 5.202. Voluntary is not defined.

³⁴ NCA §§ 5.206 and 5.208.

³⁵ In the first final draft, it was stated that "the decision of the United States Supreme Court in *Sniadach* [*supra* note 10] . . . can be interpreted as holding there must be a preliminary hearing wherein the probable validity of the underlying claim must be established before the defendant can be deprived of his property interests." NCA § 5.208, comment. A substantial retreat from this position is reflected in a new section, 5.112, proposed in December, 1970. This section expressly permits repossession without judicial process "if possession can be taken without entry into a dwelling and without the use of force or other breach of the peace." Thus, a secured creditor under the revised NCA could use "self-help" or resort to the legal process, subject, of course, to the due process requirements of *Fuentes v. Shevin*, *supra* note 10. The recently enacted Wisconsin Consumer Act, effective March 1, 1973, is consistent with the NCA "first" final draft—an action to recover collateral which fully complies with due process is prescribed with sharply limited self-help exceptions. State of Wisconsin, 1971 Assembly Bill 1057, §§ 425.203 through 425.207.

Would a peaceful, self-help repossession which was authorized by the security agreement and UCC 9-503 deny due process? Compare *Adams v. Egley*, 338 F.Supp. 614 (S.D. Cal. 1972) (yes) with *Oller v. Bank of America*, — F.Supp. —, 10 U.C.C. Rep. Ser. 877 (N.D. Cal. 1972) (no state action). For a strong hint that a contractual waiver of due process rights is valid if "voluntarily, intelligently and knowingly" made but that this is not likely to occur in a "contract of adhesion", see *Fuentes v. Shevin*, 92 S.Ct. 1983, 2001-02 (1972).

³⁶ The redemption right may be waived by agreement only after default. UCC §§ 9-501(3), 9-506. See *Indianapolis Morris Plan Corp. v. Karlen*, 28 N.Y.2d 30, 268 N.E.2d 632 (1971). An inadequate notice by the Secured Party of the intention to dispose of the collateral under UCC § 9-504(3) may prevent exercise of the redemption right and entitle the debtor to remedies under UCC § 9-507(1). See *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968).

"cure" the default or refinance, however, must be agreed to by the secured party.³⁷

UCCC. While UCCC 2.209 and 2.309 permit the consumer to "prepay in full the unpaid balance . . . at any time without penalty," and contain elaborate provisions on rebates, refinancing, consolidation and delinquency and deferral charges,³⁸ post-default adjustments short of payment in full depend upon consent by the secured party—he must be persuaded to forbear in continuing the cycle.

NCA. There are three distinct ways in which the consumer may unilaterally block the cycle. First, where the consumer is not in default but has failed to make an installment payment within ten days after its due date, NCA 2.203(2) requires the creditor to mail promptly a written notice informing the consumer (1) of the delinquency, (2) that a delinquency charge will be imposed if previously agreed, and (3) that he may elect either to enter into a deferral agreement, refinance the unpaid balance, or consolidate the unpaid balance.³⁹ The consumer may unilaterally block the cycle by any election and the creditor "has no choice in the matter."⁴⁰ If minor delinquency ripens into default without an election, a second device is available to the consumer. Within fifteen days after a complaint seeking repossession has been served, he may still cure the default by "tendering fulfillment of his current obligation to the creditor," *i.e.*, the aggregate of all installments due at the time of the tender, plus any unpaid delinquency or deferred charges.⁴¹ If the default is not cured before process issues, the consumer still has thirty days within which to redeem the collateral by tendering his current obligation, "together with the court costs incurred by the creditor, and a performance deposit, not to exceed the total of three installments, equal to one-third of the total obligation remaining with respect to the consumer credit transaction."⁴² Unless the consumer exercises the option to prepay the entire obligation, each of the three devices, election, cure, and redemption, maintains the credit transaction

³⁷ A tender sufficient to cure the default before the option to accelerate is exercised, however, is effective. See note 24 *supra*. Cf. UCC § 2-508.

³⁸ See, *e.g.*, UCCC §§ 2.203 through 2.206, and 2.210.

³⁹ NCA § 2.203(1).

⁴⁰ NCA § 2.203, comment 2.

⁴¹ NCA § 5.207.

⁴² NCA § 5.209(1). Upon redemption, "the process under which the collateral has been held shall be dissolved, the action shall be dismissed, and the goods shall be returned." NCA § 5.209(2).

at essentially the same point that existed before the delinquency or default.

E. *Method of Disposition and Entitlement to Deficiency*

UCC. Upon repossession of consumer goods, a secured party has two basic choices: (1) keep the collateral in full satisfaction of the obligation without a duty to account for any surplus,⁴³ or (2) dispose of the collateral by public or private sale and sue the debtor on the underlying obligation for any deficiency.⁴⁴ Under UCC 9-505(1), however, the first choice is not available if a purchase money security interest has been created, and the debtor has paid sixty percent of the cash price and has not waived his rights after default—the secured party must dispose of the goods under 9-504 within ninety days after possession is taken. If disposition is required or elected, the debtor is entitled, with some exceptions, to “reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale . . . is to be made.” Under 9-504(3), “every aspect of the disposition, including the method, manner, time, place and terms, must be commercially reasonable.”⁴⁵ Failure to comply with these requirements will normally not affect the rights of a purchaser for value in the disposition⁴⁶ but may, under a developing line of cases, preclude the secured party from recovering any deficiency.⁴⁷

⁴³ The “strict foreclosure” option is conditioned upon notice to and lack of objection from specified secured parties and the debtor. UCC § 9-502(2).

⁴⁴ The proper allocation of proceeds upon disposition is established in UCC § 9-504(1) and the liability of the debtor for any deficiency is preserved in UCC 9-504(2). It has been stated that the “intent of the Code was to broaden the options open to a creditor after default rather than to limit them under the old theory of election of remedies.” *Michigan National Bank v. Marston*, 29 Mich. App. 99, 185 N.W.2d 47, 51 (1970).

⁴⁵ For a full discussion of the problems in this area, see White, *supra* note 32, at 817-25. With regard to notice in the case of consumer goods, the Permanent Editorial Board for the Uniform Commercial Code has recommended amendments to UCC §§ 9-501(3) and 9-504(3) permitting the debtor to sign “after default a statement renouncing or modifying his right to notification of sale.” The 1962 version, while providing that notice need only be sent to the debtor where consumer goods were involved, did not authorize post-default agreements. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PROPOSALS FOR CHANGES IN ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE AND RELATED CHANGES IN OTHER ARTICLES 57, 60 (December 20, 1971).

⁴⁶ Under UCC § 9-504(4), a purchaser at a private sale who acts in good faith, “takes free of all . . . rights and interests even though the secured party fails to comply with the requirements . . . [of UCC § 9-504(3)].”

⁴⁷ Despite the argument that UCC § 9-507(1) limits the debtor’s remedies to pre-disposition restraint and post-disposition damages for failures of the secured party to

UCCC. Under the UCCC the cash price of the goods sold is critical. If the cash price is more than \$1,000, the secured party may, upon default, repossess, dispose of the goods, and sue for any deficiency under Article 9, Part 5 of the UCC. If the cash price is \$1,000 or less, the secured party is required to choose between two inconsistent options: (a) repossess the collateral, whereupon he is not entitled to any deficiency but may retain the collateral in full satisfaction of the obligation; or (b) sue for the full amount due on the installment note, whereupon he may not repossess the collateral or subject it to "levy or sale on execution . . . pursuant to the judgment."⁴⁸

NCA. Here the amount of the unpaid balance at the time of default is critical. If that amount is \$2,000 or more, the secured party may elect between enforcing the installment note or taking possession of the collateral. Two consequences flow from the election to take possession: (a) under NCA 5.210, the secured party shall "take all rights and interests in the collateral" without any duty to dispose of it by sale or otherwise, and (b) the secured party is entitled to any deficiency measured by deducting the fair market value of the collateral from the unpaid balance due.⁴⁹ If the unpaid balance is less than \$2,000, the secured party may still choose between enforcing the installment note and taking possession of the collateral. If the latter option is exercised, however, he must keep the collateral in full satisfaction of the obligation and is not entitled to any deficiency.⁵⁰

F. *Enforcing the Installment Note*

UCC. The UCC is silent on the rights and procedures involved when a secured party seeks to enforce an installment note to recover

comply with Article 9, part 5, recent decisions have denied deficiency liability where the resale under UCC § 9-504(3) was defective, *see e.g.*, *In re Bro Cliff, Inc.*, 8 UCC Rep. Ser. 1144 (W.D. Mich. 1971); *In Re Rouse*, 8 UCC Rep. Ser. 578 (E.D. Tenn. 1970). *See Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 276 A.2d 402 (1971) (where notice is defective burden on secured party to prove that resale produced fair value which was applied to debt); *White*, *supra* note 32, at 828-34.

⁴⁸ UCCC § 5.103(2). The student critics have been harsh with this approach. Note, 65 Nw. U.L. REV. 838 (1970); Note, 2 CONN. L. REV. 202 (1969).

⁴⁹ NCA § 5.212(1).

⁵⁰ NCA §§ 5.211(1) and 5.210. The use of "unpaid balance" rather than the UCCC "cash price" is justified by the drafters in terms of equity: the creditors who need protection are those selling "big ticket" items or making large loans and who must deal with default early in the payment schedule.

a balance due or an allowable deficiency.⁵¹ In Virginia, the holder of the note may confess judgment against the maker if the statutory form requirements are met⁵² and have a garnishment summons issued, subject to recent limitations imposed by the General Assembly to conform with federal law.⁵³ The debtor is entitled to notice of judgment within ten days after entry and may, by a motion alleging a defense made within twenty-one days after receiving notice, set aside the confessed judgment and have the case set for trial.⁵⁴ These procedures and the usual creditor's remedies in obtaining satisfaction apply whether or not the debtor is a consumer.

UCCC. The UCCC invalidates an authorization by the debtor to "any person to confess judgment,"⁵⁵ prohibits the pre-judgment garnishment of unpaid earnings,⁵⁶ severely limits post-judgment garnishment,⁵⁷ and regulates the amount of legal fees that can be recovered as part of the debtor's agreement.⁵⁸

NCA. The NCA also prohibits the confession of judgment and pre-

⁵¹ The procedural advantages from suing on an instrument are stated in UCC § 3-307. See VA. CODE ANN. § 8-509 (1957).

⁵² A confession of judgment, or warrant, made part of a note need not be acknowledged but "shall specifically name therein the attorney or attorneys or other person or persons authorized to confess such judgment and the clerk's office in which the judgment is to be confessed." VA. CODE ANN. § 8-359 (1957). This procedure, while not unconstitutional on its face, does not foreclose a constitutional objection based upon the lack of informed assent. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972) (confession of judgment statutes permitting informed assent not invalid on face; effect contract adhesion not resolved). The confession of judgment is prohibited in transactions subject to the Small Loan Act. VA. CODE ANN. § 6.1-283 (1966).

⁵³ See VA. CODE ANN. § 34-29 (1970) (maximum portion of disposable earnings subject to garnishment).

⁵⁴ VA. CODE ANN. §§ 8-362, 8-357 (Cum. Supp. 1972). The confessed judgment will not be a lien against the debtor's principal residence until the 21 day period has elapsed. VA. CODE ANN. § 8-358 (Cum. Supp. 1972).

⁵⁵ UCCC §§ 2.415, 3.407.

⁵⁶ UCCC § 5.104.

⁵⁷ UCCC § 5.105. See Comment, *Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code*, 38 U. CINN. L. REV. 338 (1969).

⁵⁸ In supervised loans where the debt is \$1,000 or less, the lender cannot require the debtor to pay any of the attorney's fees necessary to collect the debt. UCCC § 3.514. In other consumer transactions, alternatives are provided for adopting states. Alternative A prohibits agreements requiring debtors to pay attorney's fees and Alternative B permits such agreements to the extent of 15% of the unpaid debt. UCCC §§ 2.413, 3.404. In Virginia, an agreement requiring the debtor to pay reasonable attorney's fees if collection is necessary is enforceable. See, e.g., *Parksley Nat'l Bank v. Accomac Banking Co.*, 166 Va. 459, 186 S.E. 38 (1936).

judgment attachment⁵⁹ and, additionally, provides special procedures for venue, pleading, and stay of enforcement.⁶⁰ It also exempts a wide range of consumer property from levy, execution, and sale. Included in this exempt property are unpaid wages,⁶¹ thereby prohibiting wage garnishment as a method of realization.

G. *Defenses Available Against Assignee or Holder of Instrument*

UCC. When sued on an installment note, the consumer-maker may attempt to set up defenses arising from the transaction with the secured party-seller, such as breach of warranty, fraud, failure of consideration, usury, and the like. These defenses, if established, are valid against that secured party. If, however, the instrument has been negotiated to a holder in due course, or an assignee of chattel paper is protected by the consumer's agreement not to assert defenses, the defenses may not be set up under the UCC.⁶² Put another way, the holder-assignee is protected in enforcing both the note and the security interest, unless the consumer has "real" defenses.⁶³ Virginia embraces this traditional view and there is no evidence of a judicial trend toward narrowing the holder-in-due course doctrine, developing a "close relationship" test, or invalidating agreements not to assert defenses.⁶⁴

⁵⁹ NCA §§ 2.404 (confession of judgment), 5.105 (pre-judgment attachment).

⁶⁰ NCA § 5.104.

⁶¹ NCA § 5.106(1)(a). NCA § 2.410(1) provides that "no term of a writing may provide for the payment by the consumer of attorney's fees" and that violations are subject to penalties, *i.e.*, "twenty percent of the transaction total . . . or \$200, whichever is greater." NCA §§ 2.410(2), 5.303.

⁶² See UCC §§ 3-302 through 305, 9-206. An example of hardline application in a consumer transaction is *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196, N.E.2d 847 (1964). For a good discussion, see Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 U. So. CAL. L. REV. 48 (1966); Navin, *Waiver of Defense Clauses in Consumer Contracts*, 48 N.C.L. REV. 505 (1970); Comment, *Unico v. Owen: Consumer Finance Companies as Holders in Due Course Under the UCC*, 54 VA. L. REV. 279 (1968). Cf. VA. CODE ANN. § 8.3-304(7) (1965) (special definition of notice).

⁶³ UCC § 3-305(2) (infancy, defects making obligation a nullity, misrepresentation inducing signing of instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms).

⁶⁴ Recent cases, reinforced by concern for the consumer, have used several approaches to increase protection without the need for new legislation. One approach has been to find that the payee of the note and the party to whom it was negotiated are so closely related in an ongoing business relationship that the holder must be treated as if he dealt with the consumer and was, therefore, subject to defenses. See, *e.g.*, *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Jones v. Approved Bancredit Corp.*, 256 A.2d 739 (Del. 1969). Cf. UCC § 3-305(2) (holder not free from defenses of party with

UCCC. The UCCC limits the scope of this third party protection with provisions which are both complicated and controversial.⁶⁵ UCCC 2.403 states that a seller in a consumer credit sale "may not take a negotiable instrument other than a check as evidence of the obligation of the buyer." However, if a seller takes a negotiable instrument in violation of this provision and negotiates it to a holder in due course who has no knowledge of the violation, the consumer's defenses may not be raised. Alternate A to UCCC 2.404 invalidates agreements not to assert defenses and provides that consumer defenses can be asserted as a matter of setoff against claims by the assignee and cannot exceed the amount owing to the assignee at the time. Alternate B to UCCC 2.404, a compromise position, states that an agreement not to assert defenses is enforceable "only by an assignor not related to the seller . . . who acquires the buyer's contract in good faith and for value, who gives the buyer . . . notice of the assignment . . . and who, within 3 months after the mailing of the notice of assignment, receives no written notice of the facts giving rise to the buyer's claim or defense." Even so, the defense must have arisen "before the end of the three-month period after notice was mailed." The balance of Alternative B deals with the

whom he has dealt). Another approach has been to engage in expansive or sympathetic interpretations of the applicable UCC provisions. See *General Investment Corp. v. Angelini*, 58 N.J. 396, 278 A.2d 193 (1971) (good faith requires inquiry when circumstances raise doubt about whether work was completed). Other courts have invalidated waiver of defense clauses, see e.g., *Fairfield Credit Corp. v. Donnelly*, 158 Conn. 543, 264 A.2d 547 (1969), or made it clear that once a consumer has raised a defense in an action on the note, the burden is on the holder to prove that he is in due course. *Geiger Finance Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971). Beneath these trends lurks the view that the holder rather than the consumer is in the best position to assess and protect against the payee's default and that "[i]f any hardship results from the rule we adopt, it is only that hardship inherent in the insistence of the law that honesty and enterprise must remain compatible." *Vasquez v. Superior Court*, 4 Cal. 3d 800, 825, 484 P.2d 964, 980, 94 Cal. Rptr. 746, 812 (1971). For interesting comments on the *Vasquez* case, see *Symposium*, 18 U.C.L.A. L. REV. 1041-99 (1971).

⁶⁵ A bone of contention has been a supposed "loophole" in the UCCC, i.e., that a seller can arrange for a buyer on credit to obtain a direct loan from a bank or other financing institution to pay the price, leaving the buyer obligated on a note to a payee who is neither the seller nor the holder of a note negotiated by the seller. Compare *Littlefield, Preserving Consumer Defenses: Plugging the Loophole in the New UCCC*, 44 N.Y.U.L. REV. 272 (1969), with *Miller, Alternative Response to the Supposed Direct Loan Loophole in the UCCC*, 24 OKLA. L. REV. 427 (1971). For a favorable report on the UCCC provisions, see *Murphy, Another "Assault Upon the Citadel:" Limiting the Use of Negotiable Notes and Waiver of Defense Clauses in Consumer Sales*, 29 OHO St. L.J. 667 (1968).

quality of notice, a definition of good faith, and limitation on the amount to be set off.⁶⁶

NCA. In a move that by this time should surprise no one, NCA 2.405 flatly prohibits all negotiable instruments in consumer credit transactions, making it clear that no holder of any consumer obligation can take free of defenses. With equal certitude, NCA 2.407 provides that notwithstanding any agreement to the contrary, "an assignee of the rights of the creditor is subject to all claims and defenses of the consumer, up to the amount of the transaction total."⁶⁷

H. Remedies

As in the scope of control over the cycle, sharp differences exist between the UCC, the UCCC, and the NCA concerning the nature and quantum of remedies available.⁶⁸

UCC. Since there is no administrative system established to implement the UCC, consumers must rely upon private remedies when abuses in the cycle occur.⁶⁹ The key provision, UCC 9-507(1), spells out two basic remedies: (a) where it is established "that the secured party is not proceeding in accordance with this part disposition may be ordered or restrained on appropriate terms and conditions," and (b) where a disposition has occurred which fails to comply with "the provisions of the part," the debtor may recover from the secured party "any loss caused." If the collateral is consumer goods, the "debtor has a right to recover in any event an amount not less than the credit

⁶⁶ An assignee does not acquire a buyer's . . . contract in good faith . . . if the assignee has knowledge or, from his course of dealing with the seller . . . or his records, notice of substantial complaints by other buyers . . . of the seller's . . . failure or refusal to perform his contracts with them and of the seller's . . . failure to remedy his defaults within a reasonable time after the assignee notifies him of the complaint. UCCC § 4.404(2), Alternative B.

⁶⁷ In short, the NCA's answer to Professor Rosenthal's question, "Negotiability—Who Needs It?" is: "No one," in the consumer credit transaction. See note 20 *supra*.

⁶⁸ One of the best discussions of the overall problem is Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968). While there is some support for the UCCC remedial package, *see, e.g.*, Curran, *Administration and Enforcement Under the Uniform Consumer Credit Code*, 33 LAW & CONTEMP. PROB. 737 (1968), telling criticisms have been made. *See, e.g.*, James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V & VI*, 57 GEO. L.J. 923 (1969).

⁶⁹ *But see* Kugler v. Romain, 58 N.J. 522, 279 A.2d 640, 647-50 (1971), where the attorney general was permitted, under other consumer protection legislation, to sue on behalf of defrauded consumers and attack unconscionable business practices under UCC § 2-302.

service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price." Thus, the consumer could seek to restrain the cycle before disposition but the probabilities are that he will be seeking damages by way of response to the secured party's suit for a deficiency. As previously noted, some courts have held that a failure to comply with Article 9, Part 5 precludes a deficiency judgment and, in an appropriate case, may entitle the consumer to punitive damages.⁷⁰

UCCC & NCA. While both the UCCC and NCA feature a mix of public and private remedies, including criminal sanctions where violations are wilful,⁷¹ important differences exist where the cycle is concerned. First, the NCA purports to regulate more steps of the cycle than does the UCCC. Thus, those areas not covered by the UCCC, such as default definition and the method of repossession and disposition, are left to private remedies under the UCC. Second, there are differences of substance in the available public and private remedies. A few examples will suffice.

Under NCA 6.106(1) the Administrator may investigate when he has "reason to believe" that a person has engaged in an act subject to action, while the UCCC Administrator under UCCC 6.106(1) must have "probable cause." Under NCA 6.109, the Administrator "shall promulgate rules and regulations declaring specific practices . . . to be unconscionable and prohibiting the use thereof." The UCCC Administrator has no such power. In addition, the NCA Administrator has broader power to seek injunctive relief against violations and may, in a class action, seek the relief to which class members would be entitled under the NCA.⁷²

With regard to private remedies, both acts state numerous situations where creditor action is prohibited, unenforceable, or void. Where the cycle is involved, however, private affirmative remedies under the UCCC are sparse indeed; penalties are strictly limited⁷³ and no class

⁷⁰ See note 47 *supra*.

⁷¹ UCCC §§ 5.301, 5.302 (limited to impropriety in making of loans or disclosure violations); NCA §§ 5.401, 5.402 (includes disclosure violations and "any person who willfully engages in any conduct or practice in violation of this Act"). Under both statutes, the violations are misdemeanors.

⁷² NCA § 6.111(1). Under UCCC § 6.113, the Administrator may bring a civil action relating to transactions with more than one debtor "against a creditor for making or collecting charges in excess of those permitted by this Act." This is as close as the UCCC comes to a class action.

⁷³ With regard to the cycle, if the seller has violated the limitation imposed upon

action is permitted.⁷⁴ Under the more comprehensive NCA, however, the remedial objectives of compensation and deterrence are blended into a potentially explosive package; an aggrieved consumer may, in an individual or class action, recover penalties varying in amount with the nature of the violation⁷⁵ and reasonable attorney fees if he prevails.⁷⁶ In addition, the consumer may bring a civil action to restrain, permanently or temporarily, violations of the act.⁷⁷ Finally, the effect of void terms or transactions is spelled out with provision for the consumer, when the transaction is void, both to retain what he has received without obligation and to recover "any sums paid to the creditor . . . pursuant to the transaction."⁷⁸

IV. SOME NOTES UPON THE METHODOLOGY OF REFORM

To summarize, enactment of the NCA would accomplish the following objectives. First, by defining default as a material non-payment and guaranteeing consumers opportunities to cure and refinance, the NCA requires the creditor restraint which is reputed to occur as a matter of good business practice.⁷⁹ Regardless of the quality of the initial credit decision, the creditor must take that "extra" step in ex-

the taking of a negotiable instrument, UCCC § 2.403, the debtor is not obligated to pay any credit service charge and may recover "a penalty in an amount determined by the court not in excess of three times the amount of the credit service charge or loan service charge." UCCC § 5.502(1). Except for potential civil penalty liability to the Administrator for willful violations of the UCCC, see UCCC § 6.113(2), this is the only penalty provision available to a debtor abused in the cycle.

⁷⁴ This decision is defended in Freese, *Legislative Overview of the Uniform Consumer Credit Code: A 1971 Perspective*, 48 DEN. L.J. 27, 37-43 (1971). See also, Starr, *Class Actions*, 49 B.U.L. REV. 211, 407 (1969); Note, 18 U.C.L.A.L. REV. 1002 (1971).

⁷⁵ See NCA §§ 6.111(1) and 5.308 (class actions); 5.302-5.304 (penalties for certain violations); 7.303 (punitive damages for violations of debt collection controls in Article 7, part 2). See Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969).

⁷⁶ NCA § 5.307(1).

⁷⁷ NCA § 6.110.

⁷⁸ NCA § 5.305.

⁷⁹ As stated in a recent decision:

For those who make an earnest effort to maintain their payment schedules and default due to circumstances beyond their control, creditors have traditionally exercised considerable flexibility and have exhausted every reasonable alternative before resorting to the drastic and expensive remedy of repossession. Adams v. Egley, 338 F. Supp. 614, 622 (S.D. Cal. 1972).

See Gifford, *The Debtor's Default Under Article 9 of the UCC: With Suggestions for Draftsmen*, 19 ALA. L. REV. 41 (1966), where it is stated that creditors will not lend if default by the consumer seems likely.

tending and refinancing the consumer. This would tend, for short periods, to stabilize the financial condition of consumer customers in times of general recession or where an unexpected personal crisis has occurred. Second, by conditioning repossession upon compliance with rudimentary procedural due process, the NCA insures the consumer an opportunity to raise defenses in court before the property is taken. By subjecting transferees and assignees of consumer paper to all defenses arising from the original transaction, the NCA provides increased substantive protection against third parties who finance retail sellers. This protects the consumer against improper repossessions, and forces the third-party purchaser of consumer paper to doublecheck the reliability of any retail seller being financed. Third, in other than "big ticket" transactions, the repossessing creditor must be satisfied from the consumer goods in which a purchase money security interest is created. No other property can be repossessed, and a deficiency judgment is prohibited. Further, a straight suit on the monetary obligation must proceed without confession of judgment or wage garnishment, and the judgment lien attaches to less personal property than previously. Since these changes reduce both the availability of security in and the feasibility of judicial enforcement of consumer transactions, creditors would seemingly be required to rely more upon the probability that consumers will voluntarily meet their obligations in full. Finally, a potentially powerful mix of public and private remedies promises that creditor violations may be more easily detected, redressed, and deterred. In short, the fangs have been removed from the vicious cycle.

Since the NCA requires legislative enactment, how should the conscientious legislator react to this reform approach? While his ultimate vote will be influenced by personal values, perspectives about consumer protection, and political realities, a series of empirical questions should first be asked and, hopefully, answered.

Initially, it is important to know whether the proposed legislation is responsive to a fair quantum of real rather than imaginary abuses. For example, do creditors in fact accelerate obligations for trivial defaults so infrequently that the proposal advocates a solution for which there is no problem?⁸⁰ The general absence of data on these questions is

⁸⁰ Determining whether there is in fact a problem of substance is thought to be an important objective of empirical research. See Dunham, *Empiricism, Law Reform and Consumer Protection*, 23 J. LEGAL ED. 153, 159 (1970).

reinforced in Virginia by the almost total lack of reported consumer protection litigation.⁸¹ The temptation to conclude that the absence of empirical data suggests that all is well, however, should be resisted until lower court files, state agencies charged with consumer protection, and legal aid lawyers have been consulted. Apparent silence in a low visibility arena with a high potential for abuse should be viewed with the suspicion normally generated by uncertainty. Nevertheless, what and how much abuse will always be difficult to quantify.

Next, assuming that real abuses exist in sufficient quantity for concern, the legislator must ask whether the NCA is likely to control them and, if so, will the impact costs, in the long run, exceed the projected gains in efficiency and social welfare? The short answer is that no one can tell for sure, although a more sophisticated model for analysis and assessment may soon be available.⁸² At this point, opponents of NCA type reform will invariably point out what economic theory predicts and impact research generally confirms: regulation of this sort will, in varying degrees, increase business costs that will, in turn, increase the cost and decrease the supply of consumer credit.⁸³ This, it is argued, is bad for the consumer, the economy⁸⁴ and, of course, the credit in-

⁸¹ An exception which offers little consolation to the consumer is *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967). A recent study of Virginia courts sheds no light on the quantity and nature of consumer credit litigation in the lower courts. See Lilly & Scalia, *Appellate Justice: A Crisis in Virginia*, 57 VA. L. REV. 3 (1971).

⁸² This model is developed by Professor George J. Wallace of the University of Iowa College of Law in an article entitled, *Toward a New Approach to Default—A Model of Constructive Credit Reform*, scheduled for Fall, 1972 publication in the Yale Law Journal.

⁸³ See Comment, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969). The Yale study is discussed in Dunham, *supra* note 80 at 156-57, and its methodology is criticized in Shuchman, *Empirical Studies in Commercial Law*, 23 J. LEGAL ED. 181, 183-84 (1970). See also, Shay, *The Impact of the Uniform Consumer Credit Code Upon the Market for Consumer Installment Credit*, 33 LAW & CONTEMP. PROB. 752, 761-63 (1968). On the utility of economic analysis in this area, see C. SHAW, *THE ECONOMICS OF THE GHETTO* 15-23 (1970); Olley, *Economic Methodology in the Search for Consumer Justice*, 23 J. LEGAL ED. 170 (1970).

⁸⁴ In this regard, Professor Kripke's articles repay careful study. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1 (1969); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM L. REV. 445 (1968). See also High, *Consumer Credit Regulation in Texas—A Rejoinder by an Economist*, 50 TEX. L. REV. 463 (1972); Leary, *Random Reflections on Remedies and Collections in the Consumer Credit Field*, 19 AM. U.L. REV. 189 (1971); Rothschild, *Consumer Protection at Last through Local Control of Retail Installment Sales Contracts*, 37 GEO.

dustry. At the same time, disagreement over the goals of reform is certain to appear. Should the proposed reform seek simply to realign power within the free market framework or to impose tight controls on credit volume and price? Should the proposed reform put top priority on "stamping out" unethical practices, preventing default,⁸⁵ minimizing the stress imposed upon consumers by the collection process, or what? The predicates of "hard core" economics, conflicting values, and the uncertainties produced by inadequate information are almost more than the system can bear.

Many legislators, therefore, are likely to search for apparently balanced solutions that minimize what we might call experimenting in the dark.⁸⁶ The temptation is to embrace the compromises worked out by private decision-makers in uniform legislation, such as the UCCC, especially when these proposals improve the position of the consumer in the particular state involved. In the alternative, one might opt for specialized responses to particular problems rather than comprehensive package deals that restructure the credit market. When these programs are coupled with continued efforts to improve consumer access to the legal system,⁸⁷ increase the flow of information,⁸⁸ maintain the "war" on poverty, and encourage the courts to perform creative, interstitial roles,⁸⁹ a healthier consumer credit market will probably result.

WASH. L. REV. 1067, 1098-115 (1969); Wenk & Moye, *Debtor-Creditor Remedies: A New Proposal*, 54 CORNELL L. REV. 249 (1969).

⁸⁵ In Great Britain, the Crowther Report concluded that "the basic principle of social policy must . . . be to reduce the number of defaulting debtors . . ." and within "a general policy of giving the consumer credit industry as much freedom as possible in the conduct of its affairs" specific regulation would be acceptable "if it could be shown that it would reduce the incidence of defaults." REPORT OF THE COMMITTEE, CONSUMER CREDIT 151 (1971).

⁸⁶ Two recent and relevant empirical studies are White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New-Car Buyers and Auto Loans*, 69 MICH. L. REV. 1207 (1971) (disclosure has little impact upon buying behavior); Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969) (availability of deficiency remedy impairs creditor incentive to obtain best price on disposition). For discussion of empirical studies in commercial law, see Shuchman, *supra* note 83; Wallace, Book Review, 66 Nw. U.L. REV. 404, 415-20 (1971).

⁸⁷ See, e.g., Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 Nw. U.L. REV. 281 (1971); Comment, *Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices*, 1969 DUKE L.J. 1011 (1969).

⁸⁸ See Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 36-46 (1970) (importance of information about collection to creditor).

⁸⁹ E.g., *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971). See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

Still, a nagging question remains. Is the UCCC a "cop-out" where the vicious cycle is concerned? Should the uncertainties produced by inadequate data concerning the amount of abuse or the impact of NCA-type reform be sufficient to justify inaction or to compel a compromise that leaves much of the potential for abuse intact? Despite the current spirit of "consumerism," a fundamental imbalance of power still exists. Creditors normally have more than consumers, whether in individual transactions, access to the legal system, traditional doctrines of contract law, or lobbying in the legislative halls.⁹⁰ If these professionals, with superior power to shape and enforce the transaction and to influence the legislative-administrative process, are also able to block comprehensive reform simply by raising the spectre of uncertainty, little progress can be expected. If the legislative burden is consistently placed upon consumers to show by persuasive evidence that serious abuses do exist and that the proposed reform will not create more problems than it solves, the potential for other than compromise reform is severely reduced.

The conscientious and courageous legislator, however, can equalize to some extent this power imbalance. If there is evidence that some creditor abuses exist in the cycle and the proposed legislation is responsive to these abuses, the legislator can insist that those segments of the credit industry affected produce data to show that the alleged abuses are in fact insubstantial or are justified in terms of legitimate business risks or fairness to the consumer. Put another way, the subjects of regulation should be required to play a major part in allaying the suspicion caused by factual uncertainties.⁹¹ Data on the exercise of restraint in triggering the cycle, the incidence of repossession where defenses are involved, and the use of deficiency judgment would, for

⁹⁰ It has been stated that consumers need greater access to power, not more information. Schooler, *The Consumer Interest—the Real Issue*, 1 J. CONS. AFFAIRS 34 (1967).

⁹¹ Similarly, it has been stated that a professional seller, when charged with what amounts to a prima facie unconscionable term or practice, has the ultimate burden in litigation of justifying the term or practice as commercially reasonable. Zuckman, *Walker-Thomas Strikes Back: Comment on the Pleading and Proof of Price Unconscionability*, 30 FED. B.J. 308 (1971); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970). Cf. Michelman, Book Review, 80 YALE L.J. 647, 684-85 (1971) (parties involved in conduct complained of bear heavy responsibility to reduce the costs of uncertainty). A classic example of the difficulties posed when data is, as yet, inadequate and the party seeking reform bears the burden of justification is found in the movement to change the Marijuana laws. See Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1125-55 (1970). :

example, be critical to sound evaluations. Vague allegations concerning the impact costs of reform should, therefore, be supported by the professionals rather than left to the consumer for rebuttal. As a class, they are in the best position to assume this burden, just as they are in the best position to calculate and provide for business risks at the time credit is extended.

We should not pretend that better data will answer the ultimate questions posed by the consumer credit reform movement. At best, it will illuminate the issues and better inform judgment on whether the NCA or something less is appropriate reform for any particular time and place. At worst, it could be a costly exercise in futility. But if law is to be evaluated by what it seeks to accomplish for individual consumers,⁹² the NCA makes important strides in the right direction.⁹³ Frequently, spirit rather than intellect will provide the critical catalyst for change. If affected creditors are given a full opportunity to allay suspicion and reduce uncertainty in the legislative process, the cost of experimentation should not be excessive. This is particularly true if legislatures are prepared to adjust experiments in the light of experience. Conceding the difficulty of the factual and value questions involved, at some point the conscientious legislator, sensing the need for change, will echo the words of the California Supreme Court:

If any hardship results from the rule we adopt, it is only that hardship inherent in the insistence of the law that honesty and enterprise must also remain compatible.⁹⁴

⁹² See Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 14 (1963):

In the consumer perspective, the significance of any principle, rule, or concept, however exalted, is investigated by observing the specific human targets of its impacts and the occasions when it becomes material to concrete experiences of the members of the community. . . . If legal philosophers would examine concepts like freedom, truth, security, welfare, and sovereignty with a . . . sensibility to human impacts, they might bring a bright new light to the law.

⁹³ Professor Barkly Clark has asserted that the NCA "goes too far" and has devised a comprehensive statutory proposal somewhere between the UCCC and the NCA which is designed to give the "consumer some relief without strangling the creditor." Clark, *supra* note 21 at 335-42. The new WISCONSIN CONSUMER ACT, *supra* note 35, is a comprehensive legislative package with more roots in the NCA "first" final draft than the UCCC.

⁹⁴ *Vasquez v. Superior Court*, 4 Cal.3d 800, 825, 484 P.2d 964, 980, 94 Cal. Rptr. 796, 812 (1971).