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Thomas D. Buckley, Jr.*

Consumer Protection legislation in Ohio is not new. The Printers Ink statute promulgated in 1911 by the advertising trade magazine of that name, and adopted here and in forty-four other states, makes false advertising a crime. The state food and drug laws also provide criminal penalties for particular deceptive practices. Prohibition against “short” weights and measures is a form of consumer protection. The Retail Installment Sales Act regulates the credit aspect of sales to ultimate users of goods and services. The Deceptive Trade Practice Act subjects certain sales techniques to injunction. There is even a form of “truth-in-labeling” statute explicitly made applicable to consumer packages. And consumer interests are relevant to a number of miscellaneous state statutory provisions such as those dealing with the redemption of trading stamps, the rights of credit card holders, and the marketing of insurance and other services.

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2 See Note, Regulation of Advertising, 56 COLUM. L. REV. 1018, 1058 (1956).
5 Id. at §§1317.01 et seq.
7 OHIO REV. CODE ANN. §1327.44(A) (Page Supp. 1972). But the provision forbidding the use of containers which mislead as to the quantity is not made applicable to consumer packages.
8 OHIO REV. CODE ANN. §1333.60 (Page Supp. 1972) provides that “Where any merchandise is offered for sale by means of its voluntary delivery to an offeree who has neither ordered it nor requested it, the delivery of such merchandise constitutes an unconditional gift to the recipient.”
9 OHIO REV. CODE ANN. §1333.02 (Page 1972).
11 OHIO REV. CODE ANN. §3999.08 (Page 1971).
12 E.g., OHIO REV. CODE ANN. §§3731.12 & 3731.16 (Page 1971), provide that at least two sheets be supplied to each hotel guest, and that hotel rates be posted conspicuously in each hotel room.

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traditionally subjected to state regulations. Recently enacted federal 
laws also bear on consumer interests; and some local consumer pro-
tection is also available.

This array of state consumer legislation has been of limited im-
portance for several reasons. Some only apply to particular industries 
or types of transactions (e.g., food and drug industry; credit card 
transactions), some to a limited form of sellers’ abuse (e.g., adver-
tising), and much of it cannot be invoked directly by a consumer,
but instead is enforced by public authorities or, in the case of the 
Deceptive Trade Practices Act, by non-consumers. Therefore, most 
aspects of consumer transactions have been subject not to a special-
ized “consumer law” but to the all-purpose commercial law applicable 
to sales and related transactions of all kinds. In a suit between a con-
sumer and a merchant or finance agency, a combination of the Uni-
form Commercial Code and general contract law principles govern 
the rights of the parties with respect to such fundamentals as contract 
formation, freedom of contract, and remedies. Moreover, there is, in 
general, no forum other than a private law suit for the resolution of 
particular consumer grievances concerning merchants or financers.

The drafters of the Uniform Commercial Code deliberately did 
not attempt comprehensive treatment of the particular problems 
which arise in the consumer context. Vestigial traces of their initial,
but soon abandoned, intent to deal thoroughly with consumer prob-
lems can be found in Article 9’s preservation of the “consumer goods”

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concept for limited special treatment. But the overall approach of the Code is suggested by §9-206 which contemplates a "statute or decision [outside the Code] which establishes a different rule for . . . consumer goods." Other hands, such as the state legislators or other uniform draftsmen, were expected to deal definitively, in other statutes, with consumer transactions and consumer interests.

The Ohio legislature has begun to respond to that invitation from the drafters of the Uniform Commercial Code, and to the increasing pressure from consumers and their representatives, for laws which take into account the relative bargaining powers and other special characteristics of consumers and merchants.

The result has been passage of Ohio's version of the Uniform Consumers Sales Practice Act, effective July 14, 1972; enactment of the Home Solicitation Sale Act, effective January 1, 1973; Ohio House Bill No. 350, Session 1972-73, effective April 4, 1973; and amended Substitute House Bill 243, Session 1973-74, effective January 1, 1974. House Bill No. 350 modifies Ohio's law with respect to the rights of third party financers of consumer purchases, and makes changes in the right of a secured party to repossess consumer goods after an alleged default by a consumer-debtor. Amended Substitute House Bill 243 eliminates the "cognovit" judgment in connection with defined consumer loans and consumer transactions.

Consumer Sales Practices Act

Ohio has adopted the Uniform Consumer Sales Practices Act, with certain modifications in the form and substance of the version promulgated by the Uniform Law Commissioners. The Act affects the substantive law of fraud, deception, and unconscionability rele-

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20 "Goods are 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes." OHIO REV. CODE ANN. §1309.07(A) (Page 1962); UNIFORM COMMERCIAL CODE §9-109(1) (1972 version) [hereinafter UCC].
21 OHIO REV. CODE ANN. §1309.17(A) (Page 1962); UCC §9-206(1).
22 Among the organizations which have participated in fact-finding hearings conducted by the Consumer Protection Division, Ohio Department of Commerce, are the following: in Cincinnati, South Western Consumers Association, and Women's City Club for Consumer Action; in Cleveland, Consumer Protection Association, and Consumer Education and Protection Association; in Dayton, Dayton Consumer Protection Association. FIRST ANNUAL REPORT, STATE OF OHIO, DEPARTMENT OF COMMERCE, CONSUMER PROTECTION DIVISION, Appendix A (1972).
24 Id. at §§1345.21-1345.99.
25 COMMERCE CLEARING HOUSE OHIO REGULAR SESSION 1972 NEW LAWS, 639 et. seq. [hereinafter House Bill No. 350].
26 COMMERCE CLEARING HOUSE OHIO REGULAR SESSION 1973 NEW LAWS, at (unavailable as of this printing).
27 See note 22, supra.
want to "consumer transactions." It provides for individual consumer remedies, class action remedies, publicly enforced remedies, and for remedies which combine individual and public elements. The Act also provides for the establishment of a Consumer Protection Division within the Commerce Department to administer the Act and to participate in the public enforcement process. The attorney general is authorized by the Act to investigate consumer grievances and to initiate public enforcement proceedings.

The Act forbids both "deceptive acts or practices" and "unconscionable acts or practices" in connection with consumer transactions. Its approach to the two categories of prohibited practices is different. Section 1345.02 lists a series of practices which are declared "deceptive"; proof of the commission of one of these practices establishes violation of the Act. However, the specific practices described in §1345.02 are illustrative and do not exhaust the category of prohibited deceptive practices. On the other hand, §1345.03, which deals with unconscionability, also lists a series of sales methods, but

29 "'Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise or an intangible...to an individual for purposes that are primarily personal, family or household, or solicitation to supply any of these things." OHIO REV. CODE ANN. §1345.01(A) (Page Supp. 1972). However, transactions between consumers and the utilities specified in OHIO REV. CODE ANN. §4905.03 (Page 1967) examples being telephone companies, electric companies, and water companies, are excluded from coverage, as are dealings with the financial institutions and insurance companies described in OHIO REV. CODE ANN. §5725.01 (Page 1967), along with attorney-client and physician-patient transactions. OHIO REV. CODE ANN. §1345.01(A) (Page Supp. 1972).


31 Id. at §1345.03.

32 OHIO REV. CODE ANN. §§1345.02(B) & (C) (Page Supp. 1972) provide as follows: "(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive. (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits it does not have; (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not; (3) That the subject of a consumer transaction is new, or unused, if it is not; (4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist; (5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section; (6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends; (7) That replacement or repair is needed, if it is not; (8) That a specific price advantage exists, if it does not; (9) That the supplier has a sponsorship, approval, or affiliation he does not have; (10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false. (C) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction."

33 Id. at §1345.05(B) (Page Supp. 1972), provides as follows: "(B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration: (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement; (2) Whether (Continued on next page)
makes proof of a supplier's use of such methods only a circumstance to be taken into consideration in determining whether an act or practice is unconscionable.

Section 1345.05 empowers the Director of Commerce to adopt rules defining "with reasonable specificity acts or practices" which are deceptive or unconscionable. This rule-making power in effect permits the Director of Commerce to enlarge the lists of deceptive and unconscionable techniques which are in the statute.

The deceptive sales techniques which the Act identifies and prohibits include misrepresentations which might find their way into any sales pitch, and also more deliberate schemes to defraud. Thus, in the first category, misrepresentations as to the quality, durability, or endorsement of the product offered are all forbidden. The clearly premeditated techniques which the Act prohibits are fake fire sales, referral sales schemes, and bait-and-switch advertising. The protection of the Act extends into the period after sale. Assurances given in reaction to consumer complaints, and threats made to stifle complaints, can both constitute violations.

The Ohio Act's treatment of unconscionability makes a significant departure to the consumer's detriment, from the Uniform text. Even to make out a "circumstance" to be taken into consideration in determining unconscionability, it must be shown under §1345.03 that the supplier "knew" what the impact of its behavior would be, or that the supplier "knowingly" engaged in proscribed behavior. The Uniform text requires instead that the supplier 'knew or had reason to know' (emphasis supplied). The official comment states that, under

(Continued from preceding page)

the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers; (3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction; (4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer; (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier; (6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment."

\[1\] Id. at §1345.02 (B) (2).
\[2\] Id. at §1345.02 (B) (7).
\[3\] Id. at §1345.02 (B) (3).
\[4\] Id. at §1345.02 (B) (9).
\[5\] Id. at §1345.02 (B) (4); UNIFORM CONSUMER SALES PRACTICES ACT §3 (b) (4), COMMISSIONER'S COMMENT, 7 U.L.A. (1973 Supp).
\[6\] OHIO REV. CODE ANN. §1345.02 (C) (Page Supp. 1972).
\[7\] Id. at §1345.02 (B) (6); UNIFORM CONSUMER SALES PRACTICES ACT §3 (b) (6), COMMISSIONER'S COMMENT, 7 U.L.A. (1973 Supp).
\[8\] OHIO REV. CODE ANN. §§1345.02 (A) & 1345.03 (A) (Page Supp. 1972).
the Uniform text, a course of conduct often will establish the requisite knowledge, and, in any event, *scienter* is not invariably required to establish unconscionability. Omission in Ohio of the "reason to know" language, particularly because it is in the Uniform text, will make it difficult to avoid proof of *scienter* under §1345.03. This deviation from the Uniform text may have significance with respect to what is potentially the strongest pro-consumer part of the unconscionability provision. Section 1345.03 (B) (6) requires the court to take into consideration "whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment." This should be contrasted with the various misrepresentations of *fact* which §1345.02 prohibits as "deceptive" practices. By opening the *opinion* offered by suppliers to legal scrutiny and legal sanctions, §1345.03 (B) (6) invites courts in determining unconscionability to reassess older viewpoints on puffing, exaggeration, and bragging as supposedly innocuous parts of sales pitches. To make the Ohio consumer establish that the supplier not only knew that an opinion would be misleading, but that the consumer would rely on it, blunts the effectiveness of the Uniform text.

Proof of the supplier's actual knowledge will similarly undercut the usefulness of §§1345.03 (B) (3) and (4) by making the inability of the consumer to benefit from the transaction, and the consumer's probable inability to pay in full, factors in the determination of unconscionability.

Necessity for proof of knowledge may be less significant in connection with price unconscionability. The requisite supplier knowledge will not include information concerning the particular consumer's condition. Price unconscionability has been found by the courts to include a broad range of deviations from the market standard.

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44 *Keeton, Fraud: Misrepresentation of Opinion*, 21 MINN. L. REV. 643, 669 (1937): "In truth, community sentiment does not condemn a vendor for using what has been called 'trade talk' or 'puffing' to deceive a vendee who is a stranger, but it does condemn the same action if the vendee was a close friend of the vender. The test, in all cases, is what the ordinary ethical man would have done under the same circumstances, this fictitious person being endowed with the crystallized sentiment of the community." See also *Herbold Laboratory, Inc. v. United States*, 413 F.2d 342 (9th Cir. 1969), cert denied, 396 U.S. 1039 (1969) (referring to "normal puffing").

45 The uniform text would only have extended to opinions what is already the Ohio law with respect to "facts." "1. In an action for fraudulent misrepresentation, it is not necessary for the plaintiff to allege or prove that the defendant made the representation knowing that it was false." Syllabus by the Court, *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E.2d 328 (1956).

46 *Cf. American Home Improvement, Inc. v. Maclver*, 105 N.H. 435, 201 A.2d 886 (1964) (at most, an 83% overcharge, accompanied by interest and carrying charges of approximately 18% per year). *with Jones v. Sar Credit Corp.*, 59 Misc.2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (300% overcharge, plus finance charges). The test for price unconscionability is not the seller's "mark-up," but the price at which other sellers make similar property available to like consumers in similar transactions. *Ohio Rev. Code Ann. §1345.03(B) (2)* (Page 1972).
The comment to the official text says that price unconscionability includes charging $375 for a $125 item, an apparently studied illustration of a three hundred percent deviation from a standard price. If this is taken to be the threshold of unlawfulness, the concept of price unconscionability will not be important. Courts should consider not only such percentage factors, but also the absolute number of dollars involved, thus reducing the percentage deviation required to establish "substantial excesses" on big ticket purchases. A consumer overcharged $250 on a $500 item has been victimized as much as the consumer overcharged $250 on a $125 item. To the extent the appropriate standard price can be determined with confidence, there is no necessity to allow for a large margin of error, reflected in a large percentage deviation, in order to find price unconscionability.

While always posing evidentiary problems, proof of supplier knowledge may not be an insurmountable challenge with respect to unconscionability arising from one-sidedness of a consumer contract. Excessive pro-supplier boilerplate is the evil intended to be reached.

The Director of Commerce has promulgated detailed substantive rules defining deceptive trade practices which constitute violations of §1345.02. No substantive rules have appeared yet with respect to unconscionability.

The most significant rule with respect to deceptive trade practices is the shortest. Rule CO cp-3-01.10 states:

Sale of Motor Vehicles — It shall be a deceptive act or practice in connection with a consumer transaction involving a motor vehicle for a supplier of motor vehicles not to integrate into a written contract all material statements, representations, or promises, oral or written, made prior to the written contract by his agent, representative, or salesmen, to a customer.

This rule makes the existence of such prior statements germane with respect to the commission of a deceptive act. Hence, even if the parol evidence rule would have prevented the substantive content of such prior statements from being made a part of the consumer-supplier agreement, and thereby have precluded the consumer from holding the supplier to the fulfillment of pre-sale statements and promises, the consumer can nevertheless offer proof of such state-
ments in the demonstration of a deceptive practice. As a result, the consumer can avoid the contract as written; or actual damages might be measured by reference to the content of such statements. In either event, the parol evidence rule is rendered irrelevant. This handling of pre-sale oral and written statements and representations requires that the real bargaining process be reflected in the written agreement, rejecting the fiction that, in the consumer context, the particular terms of written agreements have been the focal point of negotiations. This rule should be extended from automobile transactions to all consumer transactions.

The other rules which have been issued by the Department of Commerce deal with: clear statements in advertising copy of specific reservations, exclusions, or modifications which are relevant to the advertised goods; bait advertising; free gift advertising; terms on which repair agreements can be entered into, and the representations made by repairers; use of prizes for promotional purposes; taking of deposits in advance of consummation of a consumer sale; representation of a used item as new; failure to deliver promptly; and direct solicitation of consumer transactions.

Remedies

More remedies are available under the Ohio Consumer Sales Practices Act than under the Uniform text. However, at the outset, all forms of remedy can be frustrated by §1345.11 which exempts suppliers from liability under the Act for violations which result from bona fide error. On this issue, the Uniform text is stronger because such an error is not a complete defense; it only limits liability to the amount by which the supplier was unjustly enriched as a result of the violation. This distinction between the wilful and the negli-

52 Rules of Ohio Director of Commerce, Rule COcp-3-01.03.
53 Id., Rule COcp-3-01.04.
54 Id., Rule COcp-3-01.05.
55 Id., Rule COcp-3-01.06.
56 Id., Rule COcp-3-01.07.
57 Id., Rule COcp-3-01.08.
58 Id., Rule COcp-3-01.09.
59 Id., Rule COcp-3-01.11.
61 "... [I]f a supplier shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no liability is imposed." Ohio Rev. Code Ann. §1345.11 (Page Supp. 1972).
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The purpose of the distinction, however, is not to reduce liability. Under the Federal law, the negligent violator is not even partially exonerated, and the wilful violator is made liable for exemplary damages.

The premise for the Ohio bona fide error rule must be that when loss occurs and both the consumer and merchant are "innocent," the loss should be allocated to the consumer even when caused by the merchant. This places the loss where its effect cannot be spread among the relevant community giving rise to the risk; it places loss on the party less able to control events and reduce losses in the future; and it places loss not on the party that caused the loss, albeit through good faith error, but on the party without fault. When the bona fide error rule is combined with the necessity of proving scienter even to make out a "circumstance" which a court can consider in determining unconscionability, the consumer's chances of prevailing are seriously reduced.

As for the remedies themselves, an individual consumer can maintain an action to rescind a contract, for actual damages, for a declaratory judgment, or for an injunction, when the merchant violates §§1345.02 or 1345.03 by committing a deceptive or unconscionable act. An individual consumer can rescind, collect actual damages, or collect a minimum of $100 in lieu of actual damages for violation of a substantive rule promulgated by the Department of Commerce, or for commission of an act previously determined by an Ohio court to violate §§1345.02 or 1345.03.

Consumers may bring class actions under the Act for violations of existing Commerce Department rules, and for practices which an Ohio court has already determined to be violations of §§1345.02 or 1345.03. However, the relief in such a class action is limited to actual damages; the $100 minimum damage amount is expressly made not available in a class suit.

These private remedies provided in the Act are weak. There is no provision for recovery of attorneys' fees in connection with either individual or class actions. The individual action for rescission or for

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44 CONSUMER CREDIT PROTECTION ACT §616, 617. The federal act also provides criminal penalties for knowing and wilful violations, §112.
46 Id.
47 Id. at §1345.09(D).
48 Id.
49 Id. at §1345.09(B).
50 Id.
51 Id.
52 Id.
actual damages will frequently be too costly to maintain, or its results too negligible in terms of the consumer recovery, for such actions to be numerous.\(^{72}\) Therefore, the lack of incentive for such suits will reduce their utility as monitoring devices to secure compliance by suppliers with the Act's substantive provisions. The class actions which are allowed pursuant to the Act are limited at present to cases charging violation of the Commerce Department's ten substantive rules. The very detail with which most of those rules are stated may serve to enable sophisticated suppliers to protect themselves by careful avoidance of the particularized forbidden practices.\(^{73}\) Class action under the Act is of little use to victims of the infinite number of as yet undefined deceptive practices.

However, another class action, not specifically provided for in the Act, is probably available to consumers. It is inferred from comparison of the Uniform text and the Ohio law. The Uniform text provides that "The remedies . . . are in addition to remedies otherwise available . . . under state or local law, except that a class action relating to a transaction governed by this Act may be brought only as prescribed by this Act . . ."\(^{74}\) (emphasis added). The counterpart of this provision in Ohio omits the emphasized restriction on class actions.\(^{75}\) Presumably, therefore, consumers can maintain a class action for any violations of §§1345.02 or 1345.03, and not only for those violations already defined by the Commerce Department or by judicial decision.

The availability of the class action to consumers injured by all violations of the Act, and not only to those injured by violation of Commerce Department Rules, is a significant advantage to consumers under the Ohio law. The Ohio version further improves on the Uniform text by eliminating a special provision which encourages defendants to make settlement offers in class actions, and provides no incentive to make such offers acceptable,\(^{76}\) therefore enabling suppliers to use it as a dilatory device.

Public enforcement of the Act is handled by the attorney general, who can seek declaratory judgments or injunctions with respect to violations of §§1345.02 and 1345.03.\(^{77}\) The attorney general can also bring class actions on behalf of consumers in matters arising out of


\(^{74}\) \textit{Uniform Consumer Sales Practices Act} §15, 7 U.LA. (1973 Supp.).


\(^{76}\) \textit{Uniform Consumer Sales Practices Act} §13, 7 U.LA. (1973 Supp.).

deceptive practices (but not unconscionable practices), violations of Commerce Department rules, or practices determined by a court to be deceptive or unconscionable. 78

The Ohio Act also improves upon the Uniform text by eliminating a provision which restricted attorney general class actions for statutory violations to a class consisting of those who had already complained to the attorney general or the Director of Commerce. 79

This and the other restrictions on the use of the class action rendered the Uniform text remedies extremely weak. The elimination of those restrictions increases the effectiveness of the Ohio Act significantly.

The Commerce Department has, pursuant to the Act, established a Division of Consumer Protection with responsibility for administration of the Consumer Sales Practices Act. The Consumer Protection Division has already issued significant substantive rules applying the statutory definition of deceptive practices. 80

One of the most significant aspects of the Division's rule making authority, is the opportunity it provides members of the public to participate in the rule making process. "Any person may petition the director requesting the adoption, amendment or repeal of a rule." 81

"Within sixty days of submission of a petition, the director shall either deny the petition in writing, stating his reasons for the denial, or initiate rule making proceedings." 82 This statutorily-imposed accountability is limited, however, because there is no right of appeal from denial of a citizen's petition. 83

The Consumer Protection Division has also undertaken analysis of the consumer fraud problems in the state, and has determined the seven product and service categories which are most troublesome: mail order, home improvements and services, automobiles, appliances, home furnishings, vocational training schools, and mobile homes. 84

It is also responsible for reacting to direct consumer complaints. The Division estimates its activities in that connection during its first four months of operation account for the return of over $100,000 to swindled consumers. 85

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78 Id. at §1345.07(A)(2).
80 See text at notes 46-56 supra.
82 Id.
83 Id.
84 First Annual Report, Division of Consumer Protection, Department of Commerce, (1972) at 3.
85 Id. at 1.
Home Solicitation Sale Act

This Act gives a consumer an automatic right to cancel, during a three day period after purchase, any sales contract within the Act's definition of a home solicitation sale. Home sales must be evidenced by a written agreement which gives conspicuous notice of the buyer's right to cancel. Cancellation itself must be in writing.

The Home Solicitation Sale Act does not apply to: purchases for less than $35.00; purchases which are made after negotiations which began at the seller's place of business; any sales made pursuant to pre-existing revolving charge accounts; or if the buyer initiated the contact with the seller.

The revolving charge account exclusion will remove from coverage customers who are most in need of the Act's protection—the poor who are paid regular visits at home by salesman who give credit. Courts should not further restrict the application of the Act by finding that a buyer who responds by phone or mail to an advertisement has "initiated the contact" with the seller and therefore may not cancel.

These exclusions are not consistent with the underlying rationale of the Act, which differentiates homes sales from other sales on the theory that high pressure techniques and coercion are more apt to be successful in the home than elsewhere. The granting of a cooling off period, and time for reflection after a sale is closed, can undercut a consumer's claim made later on, that high pressure, confusion, or misunderstanding accounted for the purchase in the first place. Particularly with respect to the formal written content of documents, consumer confusion will be harder to establish against a background of seventy-two hours in which documents can be read carefully.

\[\text{OHIO REV. CODE ANN. } \S 1345.21(A-E) \text{ (Page Supp. 1972).}\]

\[\text{Id. at } \S 1345.22.\]

\[\text{Id. at } \S 1345.23(B).\]

\[\text{Id. at } \S 1345.23(A) \text{ speaks of } "writing."\]

\[\text{Id. at } \S 1345.21.\]

\[\text{D. CAPLOVITZ, THE POOR PAY MORE, at 58-80 (1967).}\]

\[\text{Fraud in the facrm, note 155 }}\text{infra, will be harder to establish in the context of sales solicited at home. In American Plan Corp. v. Woods, 16 Ohio App.2d 1, 240 N.E.2d 886 (1968), a "woman... with little if any business experience or knowledge, was approached at her home during the hours of 8:00 and 10:00 p.m. ... In those two hours there apparently followed what is commonly called the 'hard sell..." The misrepresentations made... involved the nature and effect of the instruments signed... thus... the fraud was fraud in the factum..." There is no indication that the consumer ever examined the papers she signed, yet the three day cooling-off period would arguably have provided her the "reasonable opportunity to obtain knowledge of [their] character or its essential terms" and, thus would defeat the fraud in the factum defense. OHIO REV. CODE ANN. } \S 1303.34(B)(3) \text{ (Page 1972).}\]
House Bill No. 350

House Bill No. 350 affects the establishment of security interests in collateral purchased by consumers and the rights of consumers and their creditors after an alleged default under a contract granting a security interest. The Bill also makes changes in the holder in due course rule and in the law dealing with a consumer waiver of defenses vis-à-vis a third party financer. In addition, House Bill No. 350 multiplies the types of transactions covered by the Retail Installment Sales Act.

Security interests in personal property, including consumer goods, and the rights of holders of negotiable instruments, including consumer notes and chattel paper, are subject to Articles 494 and 3, respectively, of the Uniform Commercial Code. However, House Bill No. 350 effects changes in the law with respect to both areas principally by amendments and additions to the Retail Installment Sales Act. Relevant parts of the UCC are then subordinated, for covered consumer matters, to the amended and new provisions of the Retail Installment Sales Act [hereinafter referred to as RISA].

Effect on Retail Installment Sales Act Coverage

As a result of the changes it makes the law of secured transactions and of negotiable instruments, House Bill No. 350 also changes the coverage of RISA. RISA's definition of "retail installment sale" is amended to include "every consumer transaction in which the cash price may be paid in installments over a period of time" (emphasis supplied). "Consumer transaction" is a new concept in RISA, defined as a "sale, lease, assignment, award by chance or other transfer of an item of goods, a service, franchise or an intangible . . . [except a sale or lease of a motor vehicle or mobile home] for purposes that are primarily personal, family or household." While the "consumer transaction" as thus defined is the reference point for, and the subject of changes in, secured transactions and negotiable instru-

95 Id. at §1303.01-1303.78.
96 Id. at §1317.01-1317.99.
97 House Bill No. 350, supra note 25.
98 "Retail installment sale" includes every retail installment contract to sell specific goods, every consumer transaction in which the cash price may be paid in installments over a period of time, and every retail sale of specific goods to any person in which the cash price may be paid in installments over a period of time." Ohio Rev. Code §1317.01(A) (Page 1972) as amended by House Bill No. 350, Commerce Clearing House Regular Session 1972 New Laws, 640.
99 Except for the motor vehicle and motor home exclusion, the definition is the same as that employed in the Consumer Sales Practices Act. See note 29, supra, for other utility and finance company exceptions. The significance of excluding automobile transactions from the act cannot be gainsaid. No service or product category generated more consumer complaints to the Commerce Department's Consumer Protection Division during the first months of its operation that the automotive industry.
merit law which House Bill No. 350 accomplishes, the inclusion of the "consumer transaction" concept in the definition of "retail installment sale" significantly enlarges the applicability of RISA in its entirety. Prior to H.B. 350, a "retail installment sale" subject to regulation under RISA meant only a contract to sell or the sale of "specific goods", on the installment plan, at retail. "Retail" means the disposition of goods for purposes other than resale. Thus it includes consumer purchases, but covers in addition, all other sales to ultimate users of products. "Specific goods" under RISA means almost exactly what it seems to mean — "chattels personal", plus (and this is the only technical part of its definition) "related services". Therefore, the inclusion of the "consumer transaction" (when done on the installment plan) in the definition of retail installment sale makes RISA applicable to personal property leases, service contracts (for services unrelated as well as related to goods sold), assignments, awards by chance, franchises, and transfers of intangibles (with the sale or lease exception for motor vehicles and mobile homes) so long as such arrangements are entered into primarily for "personal, family or household" purposes. This means that all of RISA's requirements with respect to the form of written contracts, computation and amount of finance charges, delinquency penalties, pre-payment credits, credit insurance, and other matters, apply under House Bill 350 to the leases, the service contracts, and other categories or acquisitions within the terms "consumer transactions."

However, some ambiguity as to whether such an expansion of RISA's coverage is actually intended is introduced by the reference to the "cash price" as the amount to be paid in installments for "consumer transactions" made part of the "retail installment sale" definition. "Cash price" itself is defined in terms of the price at which "specific goods" would be sold. "Contract of sales" and "sale" are defined by reference to definitions in Article 2 of the Uniform Commercial Code which refer to "sales of goods." Some question arises

110 Id. at §1317.01(D).
111 Id. at §1317.04.
112 Id. at §1317.06(A).
113 Id. at §1317.06(B).
114 Id. at §1317.09.
115 Id. at §1317.05.
117 "Cash price" means the price measured in dollars, agreed upon in good faith by the parties as the price at which the specific goods which are the subject matter of any retail installment sale would be sold if such sale were a sale for cash to be paid upon delivery instead of a retail installment sale." Ohio Rev. Code Ann. §1317.01(K) (Page 1972).
as to whether "retail installment sale" as amended by House Bill No. 350 includes all "consumer transactions" for which a "cash price" is possible; i.e., only those "consumer transactions" involving the "sale" of "specific goods." This narrower reading of the new "retail installment sale" definition would eliminate the leases, the service contracts, etc., from coverage. That reading has some surface plausibility, even though it makes the words "cash price" bear a very large weight of meaning. The narrow reading should be rejected, however, because it would render the entire "consumer transaction" part of the "retail installment sale" definition redundant in light of the very next clause in that definition. That clause is identical to the "consumer transaction" clause except that it says "retail sale of specific goods" instead of "consumer transaction" and it adds the words "to any person." Any "person" includes corporations and other entities incapable of having "family, household or person" purposes. Thus, as to the "sale of specific goods" the last clause encompasses everything in the "consumer transaction" clause, plus other non-consumer transactions. Therefore, the only function of the "consumer transactions" part of the "retail installment sale" definition is to make that definition include the leases, service contracts and other enumerated consumer arrangements and to extend RISA's coverage to them.

The use of the term "cash price" in the consumer transaction clause is unfortunate, since it introduces some doubt as to the scope of RISA as amended by House Bill No. 350. Its inclusion can be explained, however, by the utility of the "cash price" concept, with its good faith content, to forbid the avoidance of RISA's finance charge limits by the setting up of phony prices for nonexistent cash sales. The ambiguity could be removed by a simple amendment to the present definition of "cash price." 112

The effect of the expanded application of RISA can be illustrated by reference to the motor vehicle exception to the consumer transaction definition. Sales of automobiles on time are still within the definition of retail installment sale, whether bought for personal, family, or household purposes or for any other purpose except resale. RISA's regulation of auto sales on the installment plan remains intact, unaffected by House Bill No. 350; and, because all auto sales are excluded from the definition of "consumer transaction," security interests in automobiles and the rights of holders in due course of consumer notes executed in connection with auto sales, whether bought

110 Note 97, supra.

111 OHIO REV. CODE ANN. §1317.01(B) (Page 1972).

112 As amended to remove reference to "specific goods," "cash price" would mean "the price measured in dollars, agreed upon in good faith by the parties as the price at which the subject matter of any retail installment sale would transfer if such sale were a sale for cash to be paid upon performance instead of a retail installment sale." Compare present definition, note 108, supra.
for personal, family or household purposes or not, are also unaffected by House Bill No. 350. At the same time, a service contract with respect to an automobile, if the service is for "personal, family or household purposes" and to be paid for on time, is a consumer transaction and is, therefore, within the definition of "retail installment sale." Thus, it is subject to both the old RISA law regulating finance charges, delinquency penalties, etc., and to the new holder in due course and waiver of defense rules established by House Bill No. 350 for "consumer transactions."

Establishment and Liquidation of Security Interests — Consumer Transactions

House Bill No. 350 adds §1317.071 to the Retail Installment Sales Act. Section 1317.071 sets limits on the rights of a seller in a consumer transaction to take a "security interest." A security interest is the special property right which a creditor has in particular property (the collateral) of the debtor which assures payment by the debtor; a creditor who holds a security interest can repossess the collateral in the event the debtor defaults. Section 1317.071 authorizes a seller to take a security interest in the property sold, and in other goods closely related to the sale, such as property in which the goods sold are installed.

Section 1317.071 also deals with the "cross collateral problem." "Cross-collateral" refers to the setting up of security interests in other property in addition to the goods sold. Under §1317.071 the seller can achieve a security interest in such other property if "as a result of a prior sale, the seller has an existing security interest in the other property. . . ." For example, in January a seller sells debtor an anchor on credit, taking a security interest, and in February seller sells debtor a bicycle, also on credit. In February, at the time of the bicycle sale, seller can secure the bicycle debt not only with a security interest in the bicycle, but also with a security interest in the anchor. Section 1317.071 also authorizes the seller to "contract for a security interest in the property sold in the subsequent sale as security for the previous debt." Section 1317.071 is not clear as to when this con-
tract can be entered into, but the pre-existing UCC law precludes any creditor from taking a security interest in after-acquired consumer goods unless the debtor actually acquires the goods within ten days of the extension of credit by the creditor. Thus, if the January anchor contract purported to set up a security interest, securing the anchor debt, in any property which might be bought in the future by the consumer, such as the bicycle, the security interest in the bicycle would not be effective under the January contract unless the bicycle was bought within ten days of the January contract.

Achieving cross-collateral security in this way gives an important advantage to the seller. For if the bicycle is lost or destroyed, the seller with cross-collateral security can still look to the anchor as a source of funds to pay the amount owed on the bicycle. This seller's advantage, however, can have catastrophic impact on the buyer if the cross-collateral situation is left unregulated: "the debt incurred at the time of purchase of each item [is] secured by the right to repossess all the items previously purchased by the same purchaser." If the consumer over a period of years has bought not only the anchor and the bicycle but other things including a xylophone, some yarn, and a zoom lens, at a total cost of $2,600, of which only $100 remains outstanding, a default on the $100 debt would expose the consumer to the repossession of all the many items purchased, since the $100 debt would be secured by security interest in each item purchased. The seller's right to repossess what might be almost all the consumer's household goods would tend to discourage the debtor from risking default, and this in turn would give the seller strong leverage in negotiating grievances, for a $50 grievance, if not settled the seller's way, could lead to the repossession of property of vastly greater value. Unregulated cross-collateral terms were an important

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payments, and the debt is secured by security interests taken with respect to one or more of the sales, payments received by the seller after the taking of security interests in the other property or the consolidation 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. To the extent debts are paid according to this section, security interests in items of property terminate as the debt originally incurred with respect to each item is paid.

Payments received by the seller upon a revolving charge account are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of credit service charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made.

If the debts consolidated arose from two or more sales made on the same day, 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 applied first to the payment of the smallest debt.


factor in Judge Wright's finding a contract unconscionable in Williams v. Walker-Thomas Furniture Company, one of the earliest, best-known pro-consumer cases.

Section 1317.071 permits the taking of cross-collateral security interests, but regulates their effect by providing that

"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. To the extent debts are paid according to this section, security interests in items of property terminate as the debt originally incurred with respect to each item is paid." 119

Thus, in the example above, by the time the zoom lens was purchased and $100 remained due on the $2600 total purchase, the anchor, the bicycle, and the rest of the $2500 worth of goods paid for would be beyond the reach of the seller to repossess.

Section 1317.071 applies the same first-in first-out treatment to goods purchased under revolving charge account plans. 120 With respect to debts incurred the same day, payments are allocated first to the smallest purchases, 121 thereby furthering the policy of keeping the smallest number of items encumbered by security interests.

House Bill No. 350 further regulates the rights of sellers and buyers in consumer transactions by forbidding "balloon" payments, 122 and the use of several agreements with respect to a single item or group of related items purchased at the same time, if the purpose of the multiple agreement is to obtain a higher charge, or to avoid disclosure of an annual percentage rate. 123 A "balloon" payment is a

119 350 F.2d 445 (D.C. Cir. 1965).
121 Id.
122 Id.
123 OHIO REV. CODE ANN. §1317.06(C) (Baldwin Supp. March 1973), provides as follows:
(C) No retail installment contact arising out of a consumer transaction and requiring the payment of the charges authorized by this section shall be executed unless the combined total of the cash price and all finance charges and service charges is required to be paid according to a schedule of substantially equal consecutive installments, except where the contract contains a provision allowing the buyer to refinance the contract under terms no less favorable than those of the original contract after making the refund credit required by section 1317.09 of the Revised Code. No seller shall, pursuant to any provision in a retail installment contract arising out of a consumer transaction, accelerate any payments on account of a default in the making of an installment payment that has not continued for at least thirty days. Division (C) of this section does not apply to the extent that the payment schedule is adjusted to the seasonal or irregular income of the buyer.

123 OHIO REV. CODE ANN. §1317.07 (Baldwin Supp. March 1973), provides in part as follows:
No retail seller shall use multiple agreements with respect to a single item or related items purchased at the same time, with intent to obtain a higher charge than would otherwise

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scheduled installment payment which is disproportionately larger than all other installment payments. Since its magnitude makes it unlikely that many consumers can pay the balloon payment when due, the requirement of such a payment can be perceived as inducing default. If the balloon payment is the last payment, the seller could anticipate substantial recovery through the faithful payment of all regular installments, followed by recovery of the item purchased itself, if the consumer failed to meet the last, balloon payment.\textsuperscript{124}

House Bill No. 350's treatment of the taking of security interests, including its handling of the cross-collateral problem and its prohibition against balloon payments and the use of multiple agreements are all derived from and, in most instances, follow the language of the proposed Uniform Consumer Credit Code.\textsuperscript{125}

\textbf{Default: Repossession, Disposition of Collateral, Deficiency Judgments — Consumer Transactions}

House Bill No. 350 reduces the significance of a buyer's default in a consumer transaction in two important ways: the seller cannot accelerate payments,\textsuperscript{126} i.e., make the entire sum due under the contract payable at once, until the default in meeting an installment has continued for at least thirty days; and a seller's right to repossess goods acquired in a consumer transaction is completely eliminated when the consumer has paid 75\% of the total cost (including down payment) provided for in the installment contract.\textsuperscript{127}

House Bill No. 350 also introduces changes in the rights of consumer and seller, after both default and repossession have occurred, with respect to the right of the consumer to redeem the repossessed collateral,\textsuperscript{128} the seller's resale of the repossessed collateral,\textsuperscript{129} and the

(Continued from preceding page)


\textsuperscript{125}OHIO REV. CODE ANN. §1317.06(C) (Baldwin Supp. March 1973).

\textsuperscript{126}OHIO REV. CODE ANN. §1317.13 (Baldwin Supp. March 1973), provides as follows: Notwithstanding the provisions of section 1309.46 of the Revised Code or any agreement by the parties to a consumer transaction to the contrary, a secured party whose security interest is taken pursuant to section 1317.071 of the Revised Code, shall not be entitled to take possession of the collateral upon default by the debtor if the time balance at the time of the default is less than twenty-five per cent of the sum of the time balance on the day such retail installment contract was executed and the down payment recited in such contract.

\textsuperscript{127}Id. at §1317.12.

\textsuperscript{128}Id. at §1317.16.
seller's right to a deficiency judgment\textsuperscript{130} (a claim for money due from the debtor beyond what the seller can realize upon resale of repossessed collateral).

The UCC also regulates each of these areas. The Code rules remain in effect; House Bill No. 350 supplements them. The Code provides that after default and repossession, a debtor has the right to "redeem" or reacquire the collateral any time until the creditor has resold it or has entered a contract for its resale.\textsuperscript{131} This right cannot be waived in the original agreement granting the security interest, but it is subject to waiver in a separate writing after default.\textsuperscript{132} The debtor can redeem by tendering "fulfillment of all obligations secured by the collateral" plus the creditor's expenses.\textsuperscript{133} It is arguable that during the first thirty days after default, "all obligation" means only the amount of the installment which is in default. Thereafter, however, the debtor must tender to the creditor the entire amount of the debt outstanding in order to reacquire the collateral under the Code's redemption provision.

House Bill No. 350 adds to this right of redemption an opportunity to "cure" defaults which occur in consumer transactions.\textsuperscript{134} The debtor can effect this cure and reclaim the collateral within twenty days after repossession or within fifteen days after receipt of a notice from the creditor which sets forth the right to cure, whichever comes later.\textsuperscript{135} As is the case with the right to redeem, the right to cure cannot be waived in advance in the installment contract; apparently it can be waived thereafter, conceivably even before the default occurs.\textsuperscript{136}

The debtor's advantage in "curing," rather than in redeeming, lies in the lesser amount which needs to be tendered to reacquire the

\textsuperscript{130} Id. at §1317.12.
\textsuperscript{131} OHIO REV. CODE ANN. §1309.49 (Page 1972).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} OHIO REV. CODE ANN. §1317.12 (Baldwin Supp. March 1973), provides in part as follows: The debtor may cure his default within twenty days after the secured party retakes possession of the collateral, or within fifteen days after the secured party sends the notice required by this section, whichever is later, by delivering to the secured party the following: (A) All installments due or past due at the time of such delivery; (B) Any unpaid delinquency or deferred charges; (C) The actual and reasonable expenses incurred by the secured party in retaking possession of the collateral provided that any portion of such expenses which exceeds twenty-five dollars need not be delivered to the secured party pursuant to this division; (D) A deposit by cash or bond in the amount of two installments, to secure the timely payment of future installments by the debtor. The secured party may apply such cash or the proceeds of such bond toward the satisfaction of the debt in the event of another default by the debtor.
\textsuperscript{135} Id.
\textsuperscript{136} "Notwithstanding any agreement to the contrary in a retail installment contract..." (Baldwin Supp. March 1973); cf., OHIO REV. CODE ANN. §1309.49 (Page 1962), on redemption.
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goods. "Cure" does not demand tender of "all obligations" secured, but only of past-due installments, plus a deposit equal to two more installments to secure time payments in the future, plus delinquency charges and the creditor's expenses. The right to cure can be exercised only once in regard to each debt. House Bill No. 350 also provides that, despite cure, a creditor may retain collateral until the debt is fully paid if there is reason to believe the debtor will make the collateral inaccessible in the future.

House Bill No. 350's cure provisions appear to ignore recent developments in constitutional law applying to repossession. The right to repossess is sanctioned by the UCC, which states that, in repossessing, "a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." The "action" used to effect repossession has traditionally been replevin. In 1972, statutes permitting replevin of property without notice and hearing were held unconstitutional as violative of due process. "Self-help" repossession, effected "without judicial process," has also come under attack. The theory is that if a creditor who uses the courts to achieve repossession must proceed only upon notice and hearing, then a fortiori, a creditor who by-passes the judicial process altogether, by relying on self-help, should not be permitted to avoid giving notice and engaging in a hearing before retaking collateral. However, the constitutional due process issue depends on the presence of state action; and self-help arguably is the opposite of state action.

These developments render some of the default cure provisions incongruous, although nevertheless operative, and cast doubt on the legality of others. The notice to the debtor setting forth the right to

128 Id.
129 Ohio Rev. Code Ann. §1317.12(D) (Baldwin Supp., March 1973), provides in part: A secured party who reasonably believes that a debtor intends to conceal or remove the collateral from this state after curing his default may, within five days after retaking possession of the collateral, move in a court of competent jurisdiction that he be allowed to retain possession of the collateral as security for the debt. If the court finds reasonable cause to believe that the debtor intends to conceal the collateral or remove it from this state, it shall order that the collateral remain in the possession of the secured party, notwithstanding the other provisions of this section. If the debtor cures his default, the secured party shall not dispose of the collateral unless the debtor again defaults, and he shall make such collateral available to the debtor when the debt is paid in full.
cure is required to be sent "within five business days after taking possession" \(^{143}\) by the creditor. The notice must set forth "specifically the circumstances constituting the default." \(^{144}\) If the repossession has occurred "by action," then the debtor should have already received notice of the circumstance of default before the repossession. House Bill No. 350 makes no exceptions for that situation, and requires the creditor to re-notify the debtor again after the repossession. If self-help repossession had occurred, then the "cure" notice would have been the first notice the debtor received. The anomaly of a statutory provision requiring notice after, rather than before, property has been seized would seem to increase the probability of a court's finding the state action needed to invalidate self-help repossession as unconstitutional for failing to provide notice and opportunity to be heard.

The provision in House Bill No. 350 allowing the creditor to retain possession of collateral, despite cure, is also of doubtful constitutionality. \(^{145}\) It provides that within the five day period after repossession, during which the notice must be sent to the debtor, the creditor can move the court to be allowed to retain possession until the debt is paid in full. If the court finds "reasonable cause to believe that the debtor intends to conceal the collateral or remove it from the state, it shall order that the collateral remain in the possession of the secured party." \(^{146}\) The statute apparently contemplates an ex parte proceeding. It also seems to contemplate that no judicial process preceding repossession has occurred at which the likelihood of concealment of the collateral might have been explored. A post-repossession ex parte hearing affecting custody of the debtor's property would seem to suffer the same constitutional defects as a pre-repossession ex parte replevin suit. This defect could probably be remedied without amending the statute, by a judicial decision requiring notice, and an inter partes hearing before allowing the creditor to retain repossessed property despite the debtor's cure of default. \(^{147}\)

Disposition of repossessed property is also governed by the Uniform Commercial Code. The UCC disposition provisions are supplemented, for consumer transactions, by House Bill No. 350. Under the Code, a creditor may dispose of property at either public or private sale. \(^{148}\) House Bill No. 350, by adding §1317.16 to RISA, requires disposition by public sale only, of goods repossessed in a consumer transaction. The public sale must be preceded by notice to the


\(^{144}\) Id.

\(^{145}\) See note 139, supra.


debtor at least ten days in advance of sale (the Code requires "reasonable notice"\textsuperscript{149}) stating the time and place of sale, the minimum price for which the collateral will be sold, and warning the debtor that a deficiency judgment may be taken if what is realized upon resale does not fully satisfy the consumer debt.\textsuperscript{150}

Under another section of the Code, the creditor may propose not to resell repossessed collateral, but to keep it in full satisfaction of the debt due.\textsuperscript{151} That section also provides that with respect to consumer goods, a consumer who has paid sixty percent of the debt can insist, nevertheless, on a sale by the creditor. Therefore, under House Bill No. 350, the right of the consumer who has paid sixty percent of his debt to require resale, would give rise to a right to require a public sale.

House Bill No. 350 creates a question, however, as to whether the creditor can propose, in any case, not to resell but to retain the collateral in full satisfaction of the debt. House Bill No. 350 states that "a secured party [in a consumer transaction] . . . may, after default, dispose of . . . the collateral, only as authorized by this section. (B) Disposition of the collateral shall be by public sale."\textsuperscript{152} How is this language to be reconciled with the Code's provision for no sale whatsoever when the creditor chooses to retain the collateral in full satisfaction of the debt? Confusion is added by Subsection (C) of §1317.16 which states that "except as modified by this section, section 1309.47 . . . governs disposition of collateral by the secured party." This would seem to mean that the creditor's right to retain collateral has been abolished. But that conclusion requires an assumption that the parts of §1309.48 which deal with "consumer goods," which are the major parts of the section, have been repealed \textit{sub silentio} by House Bill No. 350. Inasmuch as §1309.48's provision for retention of collateral and consequent elimination of a deficiency judgment can be beneficial to a consumer, a reading of House Bill No. 350 which forces a sale by the creditor should be avoided. "Disposition" should not be read to include "retention," and the possibility of creditor retention of collateral in exchange for the creditor's surrender of the right to a deficiency judgment should be continued.

Deficiency judgments are authorized by the Code.\textsuperscript{153} House Bill No. 350 repeals\textsuperscript{154} §1319.07 (a provision not contained in the UCC)

\textsuperscript{149} Id. at §1309.47 (C).
\textsuperscript{150} \textit{Ohio Rev. Code} Ann. §1317.16(B) (Baldwin Supp., March 1973).
\textsuperscript{151} \textit{Id.} at §1309.48(B) (Page 1972).
\textsuperscript{152} \textit{Id.} at §1317.16 (Baldwin Supp., March 1973).
\textsuperscript{153} \textit{Id.} at §1309.47(B) (Page 1972).
which made the taking of a deficiency judgment contingent upon the same ten day notice of resale now required by §1317.16. The effect of this repeal is to leave debtors in non-consumer transactions without any right to notice of resale, but nevertheless still facing the possibility of a deficiency judgment if the resale does not satisfy the non-consumer debt due. For consumer transactions, House Bill No. 350 explicitly provides in §1317.12 that a deficiency judgment is contingent upon the sending of the “cure” notice to a defaulting debtor within five days after repossession. Section 1317.16, while it requires a ten day notice of public sale and a warning in that notice that a deficiency judgment is possible, does not in terms make the deficiency judgment contingent upon the sending of that ten day notice. These two notices can be accomplished, of course, simultaneously.

Holder In Due Course Rule, Waiver of Defense Clause — Consumer Transactions

House Bill No. 350 also modifies, for consumer transactions, the “holder in due course” rule and the law applicable to a “waiver of defense” clause.

The holder in due course rule prevents most of a consumer’s contract defenses from being taken into consideration, in a suit against the consumer by a finance agency which has acquired a promissory note executed by a consumer to evidence credit extended at the time of purchase. The finance company is a holder in due course and, therefore, insulated against defenses that would be operative as between the consumer and the merchant, only if the finance company acquired the consumer’s note for value, in good faith, and without notice of any defenses.

The waiver of defense clause is typically part of the consumer sales contract signed by the consumer at the same time a promissory note is executed. The clause constitutes the consumer’s agreement not to raise against an assignee of the contract, such as a finance company, defenses which the consumer may have vis-à-vis the merchant. The waiver of defense clause achieves by private contract the same result which the holder in due course rule achieves by operation of law.

House Bill No. 350 modifies the classic operation of the holder in due course rule and waiver of defense clause by making the finance company’s insulation against consumer defenses contingent upon the

155 However, infancy, other incapacity, duress, illegality, and fraud in the factum are the “real” defenses which remain available even against a holder in due course. OHIO REV. CODE ANN. §1303.34 (Page 1972).

issuance of a written warning to the consumer concerning the transfer of his note or sales contract, and by giving the consumer the opportunity to preserve contract defenses, even as against the finance company which takes the note or sales contract, by responding to the warning with a notification to the finance company of specific defenses.\footnote{OHIO REV. CODE ANN. §§1317.031 & 1317.14 (Baldwin Supp., March 1973).}

The consumer has fifteen days after receipt of the goods purchased, or fifteen days after receipt of the warning, whichever is later, within which to notify the assignee of claims and defenses.\footnote{Id.} The notification from the consumer must be in writing.\footnote{Id.} To defeat holder in due course status, the consumer's response must assert the existence of a claim or defense and it must apprise the finance company with "reasonable specificity" of the nature of the claim or defense.\footnote{Id. at §1317.031(A) (2) (Baldwin Supp., March 1973).} To overcome a waiver of defense clause, the notice by the consumer must give the "facts giving rise to the ... defense."\footnote{Id. at §1317.14(A).} Defenses which are not so described in writing by the consumer are not available should the note-holder or assignee of the sales contract sue in the future. Defenses which the consumer cannot know about because they do not arise until after the fifteen day period are also not available to the consumer in the event of such a suit.

The approach of House Bill No. 350 to the problem of third party freedom from defenses resembles in part the reaction to this problem found in the Uniform Consumer Credit Code [hereinafter, the U3C\footnote{UNIFORM CONSUMER CREDIT CODE, 7 U.L.A. (1970).}] . The U3C, however, almost completely abolishes the holder in due course rule\footnote{UNIFORM CONSUMER CREDIT CODE §2.403, 7 U.L.A. (1970), provides that a seller may not take a negotiable instrument, except a check, as evidence of the consumer's debt. However, it is theoretically possible for a finance company or other holder of an instrument to qualify as a holder in due course if a merchant has disobeyed §2.403 and extracted a negotiable note from a consumer. In the unlikely event such a holder did qualify, it would receive the benefits of holder in due course status.} for consumer transactions. The effect of that reform is significantly diminished, however, by its treatment of waiver of defense clauses. On the issue of waiver, the U3C offers two alternatives, its equivocation reflecting the sensitivity of the issue and the intensity of creditor pressure on formulation of the act. Alternative A, the consumer alternative, makes a waiver of defense provision unenforceable. Alternative B, the finance company alternative, makes the effectiveness of such a clause contingent upon the issuance to a consumer of a notice of the assignment of the contract, and the failure
of the consumer to respond to the finance company with notice of the facts giving rise to the consumer’s claim or defense. Alternative B gives the consumer ninety days in which to notify the finance company-assignee of claims and defenses arising within ninety days of purchase. Alternative B renders the waiver of defense clause completely unenforceable as to all claims and defenses which arise after the ninety day period.

The U3C’s alternative B, the creditor alternative, is obviously far superior, from the consumer’s point of view, to House Bill No. 350’s change in the third party defense rules. Yet alternative B is itself generally criticized by consumer advocates as inadequate. Recent legislation in other jurisdictions has gone much further in providing consumer protection with respect to third party defense issues.

Is House Bill No. 350’s treatment of the holder in due course and waiver of defenses clause nevertheless better than nothing? Not necessarily. The extremely grudging, nearly trivial concessions to consumer interest which House Bill No. 350 makes with respect to third party defenses may stifle judicial reform which was already underway in Ohio. American Plan v. Woods held that the “close-connectedness” of a merchant and a third party financer destroyed the finance company’s good faith and lack of notice as to consumer defenses; the finance company was therefore not a holder in due course, and the consumer’s defenses were operative. The Ohio Court in applying the law on “close connectedness,” followed the celebrated Unico v. Owen decision and did so on facts much less compellingly favorable to the consumer than those found in the New Jersey case. Favorable reaction to Unico, and its absorption into Ohio jurisprudence, is significant because the New Jersey Supreme Court in Unico also held that a waiver of defense clause, in the consumer context, was unconscionable and therefore unenforceable: Statutory regulation of the waiver of defense clause, as found in House Bill No. 350, makes such a judicial development far more difficult in Ohio, if it does not foreclose the possibility altogether.

There is yet another respect in which House Bill No. 350’s treatment of the third party defense issue is a bad bargain for the con-


165 E.g., MASSACHUSETTS GENERAL LAWS Ch. 255 §12(F) (1) (1968) provides: “A creditor in consumer loan transactions shall be subject to all of the defenses of the borrower arising from the consumer sale or lease for which the proceeds of the loan are used if the creditor knowingly participated in or was directly connected with the consumer sale or lease transaction.”

166 16 Ohio App.2d 1, 240 N.E.2d 886 (1968).

sumer. It provides, with respect to a waiver of defense clause, that "to the extent that under this section an assignee is subject to defenses . . . rights of the buyer . . . can only be asserted as a matter of defense" (emphasis supplied). This language, taken from the UCC\textsuperscript{169} was apparently intended to negate any implication that the consumer could assert a products liability claim against a financier.\textsuperscript{170} Unfortunately, the provision also seems to prevent any positive action whatsoever from being initiated by a consumer against a third party for relief from the terms of a credit agreement. It is not uncommon for consumers to seek such relief on their own before being sued by a merchant or finance company. House Bill No. 350's artless method of protecting financiers against the improbable prospect of defending a products liability suit adds a needless obstacle to consumers seeking to vindicate their rights.\textsuperscript{171}

Amended Substitute House Bill No. 243: Cognovit Judgments

Amended Substitute House Bill No. 243\textsuperscript{172} invalidates the warrant of attorney to confess judgment in connection with consumer loans and consumer transactions. The Bill also provides for a special form of notice to the consumer in actions founded upon instruments executed in connection with consumer loans and consumer transactions.\textsuperscript{173}

A "confession of judgment" or "cognovit" clause has two elements: (1) waiver of notice of any legal proceedings begun against the debtor on account of the instrument containing the clause; and (2) appointment of any attorney, even one designated by the creditor, to make an appearance on behalf of the debtor and confess judgment which may then be entered in favor of the creditor against the debtor.

Controversy over the lawfulness and propriety of confession of judgment predates specific consumer objection to the practice. It is


\textsuperscript{169} \textit{Uniform Consumer Credit Code} §2.404, Alternatives A and B both state: "Rights of the buyer or lessee under this section can only be asserted as a matter of defense to or set off against a claim by the assignee."

\textsuperscript{170} \textit{See}, e.g., Vasquez v. Superior Court, 4 Cal. 3d 800, n.23, 484 P.2d 964, 94 Cal Rptr. 796 (1971).

\textsuperscript{171} Legislation has been introduced in the Ohio 110th General Assembly which would extend the period during which the consumer's defenses would be operative via a via a third party financier until the due date of the last installment owing to the financier. House Bill No. 88, 1973-74 session, Ohio General Assembly. Legislation has also been introduced to eliminate the motor vehicle exception to the "consumer transaction" definition in the Retail Installment Sales Act. House Bill No. 359, 1973-74 session, Ohio General Assembly.

\textsuperscript{172} \textit{See} note 26, supra.

\textsuperscript{173} The notice of complaint served on a consumer must state: "You have a right to retain an attorney. If you do not appear at the trial or file an answer, judgment may be entered against you by default, and your earnings may be subjected to garnishment or your property may be attached to satisfy said judgment. If your defense is supported by witnesses, account books, receipts, or other documents, you must produce them at the trial. Subpoenas for witnesses and subpoenas duces tecum, if requested by a party, will be issued by the clerk." Amended Substitute House Bill No. 243.
forbidden altogether in some jurisdictions,\textsuperscript{[174]} is a crime in others,\textsuperscript{[175]} and is prohibited for consumer transactions in many places.\textsuperscript{[176]} Much litigation has arisen in the context of full faith and credit, and enforcement of a sister state’s confessed judgment has been frequently denied, without respect to the capacity or business acumen of the defendant-debtor.\textsuperscript{[177]}

When made part of a consumer’s finance agreement, a cognovit clause provided the creditor with powerful leverage. Once the merchant or creditor obtained judgment on the authority of the clause, all adjustments, bargaining, or other negotiated resolution of consumer complaints would take place, if at all, under the threat if imminent execution on the debtor’s property. The burden, and with it the cost of initiating legal proceedings, was also shifted to the consumer who attempted to set aside or reopen the judgment taken against him. The use of the cognovit clause had been identified as one of the major sources of grievances in consumer transactions.\textsuperscript{[178]} Its abolition in connection with consumer loans and consumer transactions was overdue.

The reform is not yet complete, however. Consumers are still exposed to use of the cognovit clause in real estate transactions, such as apartment leases. In addition, purchases made to start small, at-home, part-time business ventures are not within the definition of consumer transactions, although the possibilities for abuse and overreaching are similar to those found in personal, family, educational, or household dealings.\textsuperscript{[179]}

With respect to such non-consumer transactions, the warrant of attorney clause remains effective. Since January 1, 1971, instruments containing the clause must also spell out, conspicuously, in specified colloquial “warning” language, the legal significance of the cognovit clause.\textsuperscript{[180]}

\textsuperscript{[178]}\textsc{National Legal Aid and Defender Association, \textit{Due Process in Consumer Affairs After Snidach} (1971)}.
\textsuperscript{[179]}See generally Fischer v. Division West Chinchilla Ranch, 310 F.Supp. 424 (D. Minn. 1970), where a millwright, a farmer, a paper mill hand, and a housewife were among those induced to become part time chinchilla ranchers.
\textsuperscript{[180]}The instrument must contain the following: “Warning — by signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for regained goods, faulty goods, failure on his part to comply with the agreement, or any other cause.” \textsc{Ohio Rev. Code Ann.} §2323.13(D) (Page Supp. 1572). As amended by Am.Sub.H.B. No. 245.
This warning, then, must continue to be used in connection with real estate and other transactions not within the coverage of Am.S. H.B. No. 243. The warning message may be more harmful than helpful to those executing notes containing it.

In *Overmeyer v. Frick*, the United States Supreme Court held that the Ohio pre-warning confession of judgment procedure was not unconstitutional on its face, and that its application to the facts in *Overmeyer* was also constitutional. The Court noted, without any comment whatsoever, the enactment of the warning provision during the pendency of the case. *Overmeyer* was not a consumer case. The debtor was a corporation. "Its corporate structure [was] complicated, its activities [were] widespread." it was represented by counsel throughout the course of its dealings with its creditors. The cognovit provision appeared for the first time in a note representing a second extension of time to pay an already matured debt arising from construction work done by the creditor for the debtor, Overmeyer, and accepted by Overmeyer. The creditor released mechanic's liens on Overmeyer's property, and gave monetary relief in the form of extra time to pay and a more favorable interest rate at the time of the execution of the note which contained the cognovit clause.

The Court said:

Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

Another important consumer case disposed of by the Court on the same day that *Overmeyer* was decided, *Swarb v. Lennox*, was a class action which came to the Court on appeal from a three-judge federal district court in Pennsylvania. The lower court had upheld the constitutionality of the Pennsylvania cognovit procedure "providing there has been an understanding and voluntary consent of the debtor in signing the document." The three-judge court also decided that with respect to the class of plaintiffs earning less than $10,000 per year, there had been no such intentional waiver of known rights, and because "the Pennsylvania procedure with respect to the designated class was based upon a waiver concept without adequate

182 Id. at 175.
183 Id. at 186.
184 Id. at 186-87.
185 Id. at 188.
understanding, it was violative of due process." The lower court went on to declare the Pennsylvania cognovit procedure unconstitutional prospectively for the class earning less than $10,000 per year, and to enjoin entry of judgment based on warrant of attorney "in the absence of a showing of the required waiver." (emphasis supplied). "A statewide rule or legislation providing for a finding of proof of intentional understanding and voluntary consent" to the surrender of the right to notice and real court appearance, would satisfy due process, according to the three-judge court, and allow continued use of the cognovit procedure in Pennsylvania.

Only the plaintiffs appealed from the judgment of the district court. They claimed error in the failure of the lower court to declare the Pennsylvania cognovit system unconstitutional on its face, and to extend the holding of the court on the necessity of positive proof of understanding waiver, to the larger class of all signers of cognovit instruments as proposed by plaintiffs, instead of limiting the holding to a class earning under $10,000 per year. Rather then appealing, the Pennsylvania attorney general joined the plaintiffs in urging in the Supreme Court that the state's cognovit procedures were facially unconstitutional.

On this state of the record, the Supreme Court affirmed on the basis of Overmeyer, (in effect giving its approval to the district court's denial of any further relief to the plaintiffs), but withheld its approval from other aspects of the district court judgment. The Court found that in the absence of a cross-appeal, those aspects of that judgment which were favorable to plaintiffs were not subject to review. Therefore, because of the significance the Court assigned to the posture of the case on appeal and its consequent refusal to deal in detail with its particular facts, Swarb v. Lennox is a very narrow holding merely following Overmeyer and neither extending nor limiting that precedent in the consumer context. A possible explanation for the Court's reluctance to seize the opportunity it had in Swarb to speak definitively about the use of cognovit clauses in consumer financing can be found in the Court's closing observation that "problems of this kind are peculiarly appropriate grist for the legislative mill."

109 Id. at 200.
111 Swarb v. Lennox, 405 U.S. 191, 200 (1972)
112 Id. at 200-01. Justice Douglas in dissent strongly criticized refusal to decide all the issues presented in the lower court; he said "It is anomalous that an appellee by confessing error can defeat an appeal." Id. at 207 (Douglas, J., dissenting).
113 Id. at 202.
The case for the advantage to a debtor of the cognovit warning clause is extremely thin. It depends on the willingness of users of the clause to negotiate cognovit provisions, or to compete for business by eliminating cognovit provisions voluntarily; any advantage to debtors as a class is further attenuated by the improbability that an increased number of debtors would be rendered sophisticated enough to act in their own interests as a result of the knowledge gained from the warning. In other contexts, warning clauses are regarded with skepticism by consumer advocates.194

If the warning clause has such negligible utility to debtors, it ought to follow that the constitutionality of the cognovit device is unaffected, or at least not enhanced, by the warning provision. But that may not be the case.

In Swarb the Supreme Court reiterated its observation in Overmeyer "that other [more favorable to the debtor] legal consequences"195 might follow in a case marked by: (1) great disparities in bargaining power; (2) a contract of adhesion; and (3) the absence of a quid pro quo for a cognovit provision. But constitutionality does not depend upon the harshness of contract terms. What is unconscionable is not necessarily unconstitutional. Contracts evidencing the three characteristics mentioned by the Court can be one-sided in many ways totally unrelated to the cognovit clause. What saved the constitutionality of the Ohio cognovit system, as applied in Overmeyer, was that "Overmeyer, in its execution and delivery... of the second installment note containing the cognovit provision, voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and... did so with full awareness of the legal consequences."196

In Swarb it was the absence of such intelligent, informed waiver on the part of the designated class earning less than $10,00 per year that led the district court to give such qualified relief to the plaintiffs as was granted. The Supreme Court noted (albeit without comment) the district court's observation that a rule or legislation insuring proof of the informed basis for the waiver of rights would allow Pennsylvania's cognovit system to continue even for those earning less than $10,000. And since, in the Supreme Court's view, the cognovit problem is "grist for the legislative mill," the Ohio warning provision tends to insulate the confession of judgment in Ohio from constitutional attack. It would be difficult to imagine clearer or more explicit language than that required in the warning clause. It makes gro-

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194 See note 167, supra.
196 Id. at 187.
tesquely clear the effect and possible consequences of signing a cognovit vote. The debtor's signature appears in close proximity to the conspicuous printing contained in the warning. The possibility of arguing ignorance of legal consequence, or of a court's finding such ignorance, is sharply reduced, and the possibility of judicial control of the cognovit clause is thereby severely undercut. Inasmuch as this protection for real estate and other interests is achieved via a warning clause which is advantageous to few (if any) debtors, the price paid by creditors for even a limited perpetuation of the cognovit system is cheap. The public as a whole would be better off were the warning statute repealed, and the cognovit clause eliminated altogether.