

CONSUMER PROTECTION SYMPOSIUM

FOREWORD

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The consumer is no longer a forgotten man. At least not in the rhetoric of the day. In his 1968 State of the Union message, President Johnson called upon Congress to "make this truly a new day for the American consumer, and by giving him this protection we can live in history as the consumer conscious Congress."¹ Similar calls have issued and are issuing from state and local leaders across the nation. And there has been an outpouring of scholarly writing concerning the problems of the consumer, particularly the impoverished consumer.² Politically and intellectually, "consumer protection" has become one of the fashionable issues of the time.

Nor has this awakening interest in consumer problems been limited to talk; there has been action as well. The last few years have seen the enactment of a number of consumer-oriented federal statutes, the most recent and certainly not the least important of which is the Truth-in-Lending Act.³ State legislatures have begun to move in a parallel direction. In 1966 and 1967, Massachusetts enacted two far-reaching pieces of consumer legislation.⁴ And more seems to be in the offing, particularly the soon-to-be-promulgated Uniform Consumer Credit Code, which is the subject of the first two articles in this symposium. The rights of the poor consumer under existing law are also receiving increasing attention as legal assistance programs are enlarged and invigorated with federal funds.⁵

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¹ President Lyndon B. Johnson, State of the Union Message, Jan. 17, 1968, UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 90TH CONG., 2D SESS. 133, 137 (1968).

² See, e.g., D. CAPLOVITZ, THE POOR PAY MORE (1963); NEW YORK UNIVERSITY SCHOOL OF LAW PROJECT ON SOCIAL WELFARE LAW, THE LAW AND THE LOW INCOME CONSUMER (1968); *Symposium on Consumer Protection*, 64 MICH. L. REV. 1197 (1966); *Consumer Credit: A Symposium*, 8 B.C. IND. AND COM. L. REV. 387 (1967).

³ 82 Stat. 146, Pub. L. No. 90-321 (May 29, 1968).

⁴ Retail Installment Sales and Services Act, MASS. ANN. LAWS ch. 255D, §§ 1-31 (1968); Regulation of Business Practices for Consumer's Protection Act, MASS. ANN. LAWS ch. 93A, §§ 1-8 (Supp. 1967).

⁵ The activities of the Ohio State Legal Services Association, especially its recent publication of COURSE ON LAW AND POVERTY: THE CONSUMER, are illustrative of this development.

Judges, too, are becoming more consumer conscious, as a number of recent decisions attest.⁶

We are thus caught up in a consumer-rights movement. Whatever one's view of the significance of this movement's accomplishments to date, it must be conceded that those accomplishments are sufficient to command the attention of every lawyer of general interests. Moreover, the movement is clearly going, and clearly should go, further. The difficult and important questions are precisely how far and in what directions it should go. What must we do to achieve justice for the consumer? What actions will be ineffective or, worse, redound to the ultimate disadvantage of consumers by imposing unnecessary or exorbitant costs on sellers and financiers? In its own way, each of the articles in this symposium contributes to the answering of these questions.

Professor Bailey opens the symposium with a description of the most comprehensive piece of consumer legislation presently under serious consideration: the proposed Uniform Consumer Credit Code. Still in draft form, this product of the National Conference of Commissioners on Uniform State Laws is designed to replace, simplify and modernize a plethora of existing statutes, including retail installment sales acts, small loan acts and usury laws. In addition, it would work a number of reforms which would be of particular importance in Ohio. For example, it would make the familiar *cognovit* provision void when contained in a consumer note,⁷ and it would go a long way toward depriving the financiers of consumer sales of the ability to obtain holder-in-due-course status.

In connection with the last matter, it is interesting to note that Professor Bailey's view of the U3C's provision on negotiable notes differs from that subsequently taken by Professor Murphy. The section in question, 2.403, provides that:

In a consumer credit sale or consumer lease . . . the seller or lessor may not take a negotiable promissory note payable in installments as evidence of the obligation of the buyer or lessee. A promissory note negotiable in form issued in violation of this section may be enforced as a negotiable instrument by a holder in due course according to its terms. . . .

Professor Bailey is concerned that in the event a seller takes a negotiable note in violation of the first sentence of this provision and

⁶ See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

⁷ UNIFORM CONSUMER CREDIT CODE, Working Draft # 6, § 2.415 (1967).

transfers it to a financier, such financier might attain the rights of a holder in due course even though he purchased the note knowing it was a consumer note which the seller had taken unlawfully. Professor Murphy, on the other hand, seems to believe that knowledge that the note in question was taken in connection with a consumer-credit sale, and thus unlawfully, will negate the financier's good faith, and that, pursuant to the Uniform Commercial Code,⁸ this will prevent him from attaining holder-in-due-course status.

Professor Bailey's general description of the substantive provisions of the Uniform Consumer Credit Code is followed by Professor Spanogle's treatment of the proposed code's enforcement provisions. This treatment is highly critical. While Professor Spanogle agrees with the draftsmen's decision to establish a state "Administrator" to enforce the code in the interest of consumers, he feels that the present draft fails to give the Administrator adequate power. With respect to private remedies available to individual consumers, he is in basic disagreement with the draftsmen. They have opted for rather limited private remedies, at least in part because they recognize the risk that "too great enhancements of debtors' rights or remedies, might deprive the less credit-worthy of lawful sources of credit and drive them to 'loan sharks' and other illegal credit grantors in whose hands they will enjoy no legal protections. . . ."⁹ Professor Spanogle believes that the result is a set of ineffective private remedies which are likely to lead to a failure of the code's consumer-protection policies in states that lack strong administrators.

In a lively article Professor Murphy details the increasingly vigorous attack on the affording of holder-in-due-course status to financiers of consumer sales. While this assault has attained considerable success in the courts and legislatures of a number of states, others, including Ohio, have continued to allow the purchasers of consumer paper to take free of the consumer's personal defenses. With the promulgation of the Uniform Consumer Credit Code, these recalcitrant states will be confronted with a serious reform effort. Fairness to consumers calls for a positive response. But, as Professor Murphy points out, it does not require the enactment of the code alternative which would completely destroy the efficacy of a waiver-of-defense clause in a consumer note. The less drastic

⁸ UNIFORM COMMERCIAL CODE, §§ 1-201(19), 3-302(1)(c).

⁹ UNIFORM CONSUMER CREDIT CODE, Working Draft # 6, Prefatory Note at 3 (1967).

alternative, which would allow a purchaser of consumer paper to take free of personal defenses if (1) he was not on notice that he was purchasing from a disreputable merchant and if (2) the consumer did not give him notice of a defense within a given time period,¹⁰ appears adequate to provide fair treatment in the great majority of transactions.

Important as it is, the prospect of legislative reform is of small comfort to the consumer who has already been victimized by an overreaching merchant. Such consumers must rely on existing law—including the Uniform Commercial Code. In more instances than are generally recognized, this provides important avenues of relief. Hence the pertinence of the guide to the sales article of the Code based on Professor Shanker's address. As this points out, sales warranties arise more frequently than one might at first suspect, provisions which purport to negative or limit them are often vulnerable to attack, and the doctrines of fair dealing and unconscionability are of significant potential value to the poor consumer. On a more general level, this article teaches that the poverty lawyer, no less than the corporate lawyer, must be knowledgeable, imaginative and thorough. This of course is true not only with respect to the existing Uniform Commercial Code; it will also be true with respect to all future consumer-oriented legislation.

In the final piece in the symposium, Mr. Merlin Miller, a layman who serves as a consultant to the Cooperative League of the U.S.A., explores the opportunities and difficulties involved in the use of cooperatives as aids to poor consumers. While Mr. Miller does not deal in detail with the strictly legal problems of consumer cooperatives, he nevertheless has important advice for those who would serve as their counsel. As business ventures, such cooperatives must, if they are to be successful, be operated in businesslike fashion, which means in a manner different from that to which their owners, the poor consumers, are accustomed. Hence, the representation of a consumer cooperative will call for a large measure of economic education and leadership as well as sound legal advice. And, as Mr. Miller suggests, such education has a dual importance. Not only is it essential to the success of the cooperative entity, it is also likely to be of independent value to the members of the cooperative. In fact, the indirect educational benefits of cooperative participation may, more often than not, outweigh the direct financial advantages.

¹⁰ UNIFORM CONSUMER CREDIT CODE, Working Draft # 6, § 2.404 Alternative A (1967).