Standards for Insecurity Acceleration Under Section 1-208 of the Uniform Commercial Code: A Proposal for Reform

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According to Professor Grant Gilmore, "[f]or a hundred years . . . no security agreement has failed to include an acceleration clause."¹ An acceleration clause permits a creditor to make an entire immature debt due immediately, so that satisfaction or suit may occur immediately. The debtor's failure to fulfill any enumerated contract duty may trigger acceleration, either automatically or at the creditor's discretion.² A creditor may contract to give himself the power to accelerate when he deems himself insecure, i.e., when he believes that his chances of being repaid are diminishing.³ This power exists under both the common law and the Uniform Commercial Code (U.C.C.).⁴ This article contends that the standards for insecurity acceleration under the U.C.C. are insufficient to protect the interests of debtors. Judicial attempts to compensate for this shortcoming have resulted in a hodgepodge of rules and redefinitions, a body of nonuniform case law that benefits neither debtor nor creditor.

The problem centers on the failure of the U.C.C. section 1-208 to provide fair and equitable guidelines for acceleration. Courts and authorities have tried to derive the proper standards of notice, burden of proof, and good faith in acceleration. Many opinions make strained attempts to skirt the statutory definition of good faith. Some debtors have found refuge in equity actions⁶

¹ 2 G. GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY § 43.4, at 1195 (1965) [hereinafter cited as SECURITY INTERESTS].
² Acceleration clauses are usually worded so that the creditor may accelerate at his option. Acceleration may also occur automatically. This variation may be significant with regard to the statute of limitations. See Cowan v. Murphy, 165 Ind. App. 566, 33 N.E.2d 802 (1975). The optional nature of acceleration is also significant for questions of notice. See Part II B 1 c infra.
³ U.C.C. § 1-208.
⁴ The exercise of this right is subject to the procedural and substantive limits discussed in Part I infra.
⁵ See, e.g., Seay v. Davis, 246 Ark. 201, 438 S.W.2d 479 (1969) (equitable relief from insecurity acceleration). Courts most often give equitable relief to prevent acceleration for missed payments. See, e.g., Bisno v. Sax, 175 Cal. App. 2d 714, 318 P.2d 814 (1960);
This article examines in Part I how insecurity clauses function under the common law and the U.C.C.. Part II discusses the areas of controversy under section 1-208, the definition of good faith, the need for notice to the debtor, and the debtor's burden of proof. The article will evaluate the need for substantive reform in each area of controversy. A two-tier test of the creditor's insecurity is proposed wherein although the creditor has no responsibility to check the truth of his information, he may accelerate only if the information is true and is such as to make a reasonable creditor insecure.

Part III examines four avenues of substantive reform: redrafting the U.C.C. itself, reinterpretation of existing U.C.C. sections without redrafting, actions in equity, and actions through collateral state statutes. The article concludes that the best way to insure fair and uniform results is to redraft the text of section 1-208 to include the two-tier test.

I. ACCELERATION AS A COMMERCIAL PRACTICE

A. The Common Law and the U.C.C.

Acceleration clauses have long been an important part of the creditor's protection against defaulting debtors. Since the equitable doctrine of estoppel prevents more than one suit on an instrument, a suit merely for payments currently due would prevent a suit for payments due in the future. The power to accelerate, however, obviates that problem because the creditor may bring one suit for the entire balance of the debt.

The oldest and most limited form of acceleration operates only upon default due to nonpayment of any required installment. The conditions have now been expanded to include a


7 Jones v. Morris Plan Bank, 168 Va. 284, 191 S.E. 608 (1937). The vitality of this doctrine was made painfully clear in General Elec. Credit Corp. v. Castiglione, 142 N.J. Super. 80, 360 A.2d 413 (1976). The creditor repossessed and sold the debtor's truck, demanding a deficiency judgment of over $25,000. The court held that the contract did not contain a "clear and certain" option to accelerate; thus the creditor was permitted to sue for only the balance of the missed payments—a sum of $57. Id. at 97, 360 A.2d at 422.

U.C.C. Art. 9, pt. 5 controls the creditor's right to repossess, sell collateral, and demand the deficiency. See Part III B 4 infra.

* Security Interests, supra note 1, at 1196.
host of specific events. "Anything that can be made an event of default can be made, and is made, an event which will trigger the acceleration." 9

The U.C.C., which controls contractual documents in most of the states, does not define the term "default." The term is usually defined in the security agreement, which has been characterized as "a contract of adhesion drawn by Creditor's attorney." 10 A creditor desires the broadest possible definition of default to insure his interest against all contingencies. It may be precisely the comprehensive, iron-clad image of acceleration clauses that encourages courts to circumvent them. An exhaustive litany of default events emphasizes the image of the debtor lacking freedom of action or choice.

The U.C.C. provides for two types of acceleration. One is acceleration conditioned upon non-payment of installments or other enumerated events of default; it is permitted by implication through the drafter's omission of a default definition. The other, acceleration upon insecurity, is specifically provided under U.C.C. section 1-208. 11 Insecurity is often listed as one of the circumstances which constitutes default. 12

The U.C.C. is currently the statutory authority in the District of Columbia and all the states except Louisiana. 13 Since each

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9 Id.

10 B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 24, at 92 (1972) [hereinafter cited as CONSUMER CREDIT CASES].

11 Originally, the main concern with such a provision was that it destroyed negotiability and prevented enforcers from becoming holders in due course. See, e.g., National City Bank v. Erskine & Sons, 158 Ohio St. 450, 110 N.E.2d 598 (1953); Fay v. Marina, Inc., 6 U.C.C. Rep. Serv. 516 (1969). When the drafters of the U.C.C. provided for insecurity acceleration, they eliminated that concern by stating that § 1-208 "has no application to demand instruments or obligations whose very nature permits call at any time with or without reason." U.C.C. § 1-208, Official Comment.

12 Technical complications can arise when insecurity is not clearly defined as a default. See notes 62-65 and accompanying text infra.


The May 1949 draft of the U.C.C. made no provision for insecurity acceleration. Section 1-208 first appeared essentially in its modern form in the 1950 Proposed Final Draft. The accompanying Official Comment, however, varied significantly from its present form. Initially, at least, the drafters intended good faith acceleration to include an objective standard of commercial reasonableness; "the option is to be exercised in good faith, which, of course includes observance of reasonable commercial standards ...." U.C.C. § 1-208, Official Comment (1950 Proposed Final Draft). Good faith measured by commercial reasonableness now exists only for Article 2 sales of goods. U.C.C. § 2-103(1)(b). See notes 141-143 and accompanying text infra. No official comments were published along with the 1951 final text edition; § 1-208 continued in its 1950 form. Curiously, the 1952 Official Draft Official Comment omitted any mention of commercial
state adopts the U.C.C. individually, it has the option of modifying or changing provisions. Although section 1-208 has remained largely uniform, two states, Washington and Virginia, made revisions before adopting it.14 These revisions are instructive in two ways. First, the changes indicate those areas of 1-208 which have caused the most concern. Second, these changes are significant for their form. The Washington and Virginia legislatures decided to meet the weaknesses of section 1-208 by redrafting, rather than by leaving the problems to judicial interpretation.

reasonableness; and was essentially the same as the present Official Comment.

The 1950 Official Comment included another variation omitted in 1952. It provided that “[t]he basic purpose of [insecurity] clauses is recognized and given effect in the Sales Article (Article 2) even in the cases where the parties have not expressly included it.” U.C.C. § 1-208 Official Comment (1950 Proposed Final Draft). The Comment then referred to § 2-609, the provision to demand adequate assurance of performance. This reinforces the theory that the drafters intended to include commercial reasonableness, an Article 2 provision, in § 1-208. It is unclear whether the drafters intended the right to accelerate upon insecurity to be automatic, as is the right to demand assurance. The right is not automatic at common law. United States ex. rel. Crow Creek Sioux Tribe v. Tri-County Bank, 415 F. Supp. 858 (D.S.D. 1976); General Elec. Credit Corp. v. Castiglione, 142 N.J. Super. 80, 360 A.2d 413 (1976). The nonconformities may explain the pertinent changes in the Official Comment during 1951. The drafters' reversion to a conservative commercial view suggests that § 1-208 was not meant to vary much from the common law rule, perhaps to be even more conservative by the conscious retraction of a reasonableness standard that some authorities claim existed at common law. See Security Interests, supra note 1, at 1197 and note 46 infra.

Since 1950, § 1-208 has remained essentially the same:

§ 1-208. Option to Accelerate at Will

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have the power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

For the purposes of this article, acceleration “at will” shall be assumed to be the equivalent of acceleration upon insecurity. The courts have made no distinction between the terms and the drafters have been satisfied to lump the terms together with “words of similar import,” indicating that the choice of terms is not important.

14 The Washington Code, Wash. Rev. Code § 62A.1-208 (Supp. 1974), does not include the last sentence placing the burden of proof on the debtor. It provides that “the burden will be on the creditor, obligee or other holder of the power to accelerate to prove his good faith.” Cosway & Shattuck, The Uniform Commercial Code—SB.122, 40 Wash. L. Rev. 873, 875 (1965).

The Virginia Code, Va. Code Ann. § 8.1-208 (Supp. 1979), makes a less radical change in the burden of proof. It provides that the creditor shall bear the burden of establishing good faith “[i]n any transaction arising out of the sale or financing of consumer goods.” Contemporaneous with this amendment, Virginia also added a new debtor protection statute prohibiting acceleration of payment if the late payment and acceptable late penalties are tendered within ten days. This does not, however, affect cases where acceleration is made upon insecurity rather than for missed payments. See Commercial Law, 1973-1974 Survey of Virginia Law, 60 Va. L. Rev. 1475 (1974).
B. Operation of Insecurity Acceleration Under the U.C.C.

1. The general context of insecurity acceleration—Section 1-208 clauses are usually exercised against small commercial debtors and consumers. Although the clause often appears as boilerplate in a credit transaction, creditors understandably have less cause for “insecurity” in deals with large commercial borrowers. There is a greater chance that established concerns will repay their loans; there is also less to be gained by harassing them with acceleration or suit. Insecurity acceleration is most active in the hands of creditors who deal with local consumers and small businesses, as well as the local banks which become assignees. Insecurity litigation often has the appearance of “big guy v. little guy,” which may have affected some results and the development of the case law.

2. The relationship between acceleration and repossession—Section 1-208 applies whether the transaction is secured or unsecured, but usually there is some designated collateral for which the creditor has the option of repossession upon default. Some courts have held that there is no distinction between a clause which merely authorizes the holder to take possession of the chattel and sell it, and one which additionally allows the holder to declare the whole debt due and bring suit...

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Footnotes:


17 U.C.C. § 9-501 gives the creditor a number of options upon default. These remedies are cumulative; repossession is merely one of them. Although the U.C.C. gives the creditor the right to move against the collateral (in rem) and the debtor (in personam) in the same action, if one measure is selected, res judicata prevents a later action on another remedy. For example, if the creditor wins a money judgment and the debtor later goes bankrupt, the creditor may not claim a security interest in the original collateral. In re Wilson, 290 F. Supp. 1121 (D. Kan. 1975).
before the stated due date (acceleration).\(^{18}\) Nevertheless, other courts have distinguished between the process of acceleration and the process of repossession and sale, the latter being controlled by U.C.C. section 9-504.\(^{18}\) Repossession and acceleration are powers triggered by the debtor’s default. A creditor may contract to accelerate upon a feeling of insecurity, but unless insecurity is listed as a default event in the security agreement, none of the section 9-504 powers, including repossession, vest. Instead, the creditor must cite one of his enumerated default events, which is usually the debtor’s failure to make timely payments. After acceleration, the “payment” due is the balance of the installments. The debtor is not responsible for meeting this increased payment unless he has notice of the acceleration. Hence, courts may require notice for insecurity acceleration, but only if insecurity itself is not denominated a default.\(^{20}\)

Generally, courts will not deny repossession or sale of collateral under an insecurity acceleration unless, because of a drafting error, insecurity is not denoted a default.\(^{21}\) Recently, Anderson v. Mobile Discount Corp.\(^{22}\) suggested that this drafting technicality should be ignored. In Anderson, the purchase-money contract specifically allowed the creditor both to accelerate and to repossess upon a feeling of insecurity. This was not merely a leapfrog from acceleration over notice to repossession; notice was specifically waived in the contract.\(^{23}\) Nevertheless, Anderson indicates that the section 9-504 requirement of default before repossession can be altered. Article 9 is thus rendered ineffective as protection for the debtor.\(^{24}\) Moreover, while Anderson seems to eliminate a possibly confusing technicality, this


\(^{20}\) In Mechanics Nat’l Bank v. Killeen, 79 Mass. Adv. Sheet 179, 384 N.E.2d 1231 (1979), the court held “certainly [the debtor] could not read the bank’s corporate mind and know that the notes were due. He was entitled to some notice that they were due.” Id. at 184, 384 N.E.2d at 1236.

\(^{21}\) Id. The court in Mechanics Nat’l Bank was careful to add that had the promissory note been of “a different form”—that is, denoting insecurity acceleration as a default—sale of the collateral without notice would have been permissible. Id.


\(^{23}\) "By providing that the Seller may lawfully enter and take possession ‘without notice or demand for performance,’ the contract clearly authorizes Seller to repossess immediately upon a feeling of insecurity.” Id. at 205.

\(^{24}\) The dubious, often illusory protection of Article 9, Part 5 is discussed in Part III B 5 infra.
benefit inures mainly to the creditor. Anderson only demonstrates the precarious position of the debtor who is summarily threatened with acceleration and repossession on no grounds other than the creditor’s feeling of insecurity. 25

3. Other general rules for the implementation of acceleration clauses—Aside from the question of whether acceleration allows repossession without default, there are other guidelines for the use and enforcement of acceleration clauses. The clause must actually appear in the contract to be enforced; it is not implied by a section 9-504(2) right to a deficiency. 26 The wording of the clause must be clear and unequivocal; if there is a reasonable doubt as to the meaning of the terms employed, the court will interpret them to prevent acceleration. 27 If a creditor wishes to accelerate upon insecurity, the insecurity cannot be predicated upon an event which, at the time of contract, the creditor knew would occur. 28 Although the creditor may have several grounds for acceleration besides insecurity, he waives all grounds other than those he pleads. 29

Finally, both insecurity and enumerated default acceleration clauses have been used in an evidentiary capacity in other commercial suits. Acceleration clauses have been used as evidence to distinguish a traditional lease from a lease operating as an Article 9 security interest. 30 The presence of an acceleration clause in a negotiable note already callable at any time may not, however, change the note into an installment contract. 31 These cases are additional evidence of the established position that acceler-
tion clauses occupy in commercial practise.

II. POSITION OF THE DEBTOR AND CREDITOR UNDER SECTION 1-208

This Part compares the positions of the debtor and creditor within the confines of the ruling statute on insecurity acceleration clauses, U.C.C. section 1-208. The major controversies in this area revolve around the issues of notice, burden of proof and creditor's good faith.

A. Good Faith

Section 1-208 was intended to clarify the language and meaning of clauses which provide for acceleration upon insecurity so that courts are not obliged to strike them for vagueness or unconscionability. In particular, the drafters wanted to make certain that acceleration occurred only when the creditor believed in good faith that the prospect of repayment was poor; the requirement of good faith was meant to protect the debtor. The effectiveness of the safeguard depends on who sets it. Protection of the debtor from arbitrary acceleration is inversely proportional to the power of the creditor to set his own standards of good faith. The degree of that power depends on the interpretation of good faith in the U.C.C. and the courts.

1. The reign of the subjective standard—The definitional cross references in section 1-208 refer the reader to section 1-201 for the definition of "good faith." Specifically, section 1-201(19) defines good faith as "honesty in fact." The courts have construed that phrase to be a subjective rather than an objective standard. As honesty in fact, good faith focuses on the individual creditor's state of mind. Under the U.C.C., honesty in fact is not a rigorous standard. Where the U.C.C. has required more

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According to the Official Comment, the section was included in the U.C.C. to alleviate the confusion about "the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of one party." U.C.C. § 1-208, Official Comment.

83 U.C.C. § 1-201(19).


than honesty in fact it has stated so explicitly. Also known as the "pure heart and empty head" rule, the honesty in fact standard requires only that the creditor actually have knowledge of the facts which cause him to accelerate.

Abuse occurs under this standard because there is no requirement that the creditor behave reasonably. The standard requires that there be more than a mere showing of error in order to prove lack of good faith. The creditor, however, may err in several important ways. He may make a mistake in judgment by overreacting to certain information and unreasonably deeming himself insecure. He may also make a mistake of fact, i.e., the event which would have clouded the prospect of payment never occurred. In some cases, the truth of the information may itself be a matter under current and separate litigation.

Where the creditor is not penalized for accelerating on false information, there is no incentive to verify even the most tenuous rumors. The good faith test dispenses with terms such as

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38 Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369 (5th Cir. 1969).
39 In Sheppard Federal Credit Union, the plaintiff took out a car loan from a credit union and made all the payments on time. During the course of payment, Palmer informed the Credit Union that he was leaving the military to find work in another town. Upon receiving this information, the Credit Union deemed itself insecure and demanded the car, although Palmer promptly found a better paying job and continued to make payments on time. The appellate court noted sympathetically that Palmer was at all times a "model debtor" and the debt was always secure. Id. at 373. Nevertheless, it reversed a finding for Palmer because he did not show the Credit Union's lack of good faith under § 1-208.
40 In Van Horn v. Van De Wol, Inc., 6 Wash. App. 959, 497 P.2d 252 (1972), the creditor made several unsecured loans to the debtor, reserving the right to accelerate if insecure. The creditor accelerated the loans when he heard that a bank had denied the debtor a loan. In fact, the loan was not denied. The court held:

Even if the plaintiff was negligent in not checking to determine whether defendant had in fact been denied a loan, negligence is irrelevant to good faith. The standard is what plaintiff actually knew, or believed he knew, not what he could or should have known. Because plaintiff believed defendant had been denied a loan, and acted in accordance with that belief, he acted in good faith.

6 Wash. App. at 961, 497 P.2d at 254.
41 See, e.g., Ginn v. Citizens & Southern Nat'l Bank, 145 Ga. App. 175, 243 S.E.2d 528 (1978). Here, the bank creditor made a car loan to the debtor. Soon after the loan and before the first payment was due, the bank received information suggesting that the debtor had falsified the loan application. The debtor was subsequently acquitted in a separate case on that issue. Although the court ultimately remanded the case on the issue of whether there was a default, it found that the bank had acted in good faith: "[T]he material issue of fact is not whether the loan was in fact insecure, but whether, in determining the loan insecure, the bank acted honestly, in good faith, and not arbitrarily or capriciously." Id. at 177, 243 S.E.2d at 530. See also Blaine v. G.M.A.C., 82 Misc. 2d 653, 370 N.Y.S.2d 323 (1975).
diligence, negligence, and notice. The creditor need not have noti-

tice of such facts as would create a duty of inquiry in a prudent

businessman. Courts will not permit the debtor to introduce evi-
dence on either reasonable inquiry or what such inquiry would
have uncovered. A court will inquire only when it is shown that
the creditor had actual knowledge of facts and circumstances.

The speed with which the ax can fall on a debtor whose con-
tract includes an insecurity clause is illustrated by cases brought
under section 1-208 in which the creditor is the bank where the
debtor also has his checking account. The bank's common law
right of set-off allows it to deem itself insecure, to accelerate,
and to pay itself out of the debtor's checking account; the
debtor learns of these events when angry creditors appear with
dishonored checks. The bank's swift and silent action is lawful
although it may push the debtor to bankruptcy.

2. Support for an objective standard—The current subje-
tive standard was not an inevitable development. Professor Gil-
more and others have identified a more objective standard in
pre-U.C.C. law. In *Universal C.I.T. Credit Corp. v. Shepler,*
the court refused to apply the subjective standard, applying in-

[42] For a discussion of the scope of evidence admissible in a suit under § 1-208, see Part II C infra.


[44] See, e.g., *Jensen v. State Bank,* 518 F.2d 1 (8th Cir. 1975); *Farmers Coop. Elevator*
Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975); and *Merchant v. Worley,* 79 N.M. 771,

bank's right of set-off if a bankruptcy petition is filed within three months, and provides
for an automatic stay after filing. See *generally,* Kennedy, *Automatic Stays Under the New*

Corp., 449 F.2d 811 (5th Cir. 1971) (the court found that wrongful acceleration precipi-
tated the bankruptcy of debtor's business but assigned no fault for the event since the
business was supported by an illegal contract between debtor and creditor).

The cases are quite clear that the insecurity clause will not be allowed to operate
as a charter of irresponsibility. A 'reasonable man' rule emerges from the cases. *Secur-
ity INTERESTS,* supra note 1, at 1197. See, e.g., Bullock v. Young, 118 A.2d 917 (D.C.
1959); Monson v. Pickett, 253 Minn. 550, 93 N.W.2d 537 (1959); Goggins v. Bookout, 141
Mont. 449, 378 P.2d 212 (1963); Boak v. Brewer, 5 Misc. 2d 924, 160 N.Y.S.2d 146 (1957);

[46] "Both common sense and tradition dictate an objective standard for good faith per-
formance." *Farnsworth,* supra note 32, at 678.

Gilmore believed that the reasonable man standard was adopted by the drafters in §
1-208. See *Security INTERESTS,* supra note 1, at 1197.

stead a reasonableness standard in an insecurity acceleration. This standard would permit a creditor to accelerate if the decision to accelerate "would have been one made by a reasonable man under the same set of facts or circumstances." The reasonableness standard requires the creditor not only to have actual knowledge of the information, but to make a reasonable assessment of its effect on the debtor's ability to repay. Even under this standard, however, the information need not be true.

*Shepler* is the only case thus far to adopt the reasonableness standard as a conscious response to the inadequacy and inequity of the subjective good faith standard. Many courts have applied a reasonableness standard without comment about the honesty-in-fact standard of section 1-201(19). Still other courts have referred to the statutory language while applying a reasonableness standard.

In other cases, the courts have adopted a reasonableness test by investigating whether actual grounds for acceleration really did exist. While technically this is not relevant to good faith, which looks only to belief, the courts sometimes assume from the gravity of the evidence that the creditor had ample basis for feeling insecure, or that "the record contains considerable indisputable evidence of circumstances known to the [creditor] which would cause a lender concern." Section 1-208 notwithstanding, the courts appear to want to deal with factual evidence and factual justification, not the ephemeral condition of the creditor's belief.

A court may sometimes indicate that it looked for a reasonable basis for acceleration by including a detailed history of the facts of the case which illustrate the grounds of the creditor's

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60 *Id.* at 521, 329 N.E.2d at 624.
62 *In State Bank v. Woolsey*, 565 P.2d 413 (Utah 1977), the court at one point concluded that the creditor "had a genuine belief that its prospect for payment was impaired." *Id.* at 418. This presumably should be enough to satisfy the subjective requirement of good faith. The court went on, however, to comment that "acceleration is a harsh remedy which should be allowed only if there be some reasonable justification for doing so, such as the good faith belief that the prospect of payment is impaired." *Id.* at 417. The court depended on U.C.C. standards for its rationale, but the decision reflects reliance on a reasonableness standard.
insecurity. More often, the courts will interchange and combine the terms "honesty," "good faith," and "reasonableness." This use suggests that honesty is something separate from good faith, rather than its definition. Specifically, courts have used "honesty" as a synonym for "reasonableness." This is another way that the reasonable man standard has crept into section 1-208. The juxtaposition of these terms also indicates that honesty in fact has too many other implications to be used as a subjective standard.

3. A two-tier test of good faith—The appearance of two irreconcilable standards of good faith in so many opinions can be explained through the use of a two-tier test for good faith. Determination of whether there is honesty in fact requires a determination that the creditor possessed certain information and that there was an honest, i.e., reasonable, evaluation of that information. The section 1-201(19) good faith standard still exists on the first plane—the creditor must have actual knowledge of the information. The reasonable man standard applies to the evaluation of the facts—whether they are of sufficient gravity and relevance to cause a lender concern. A creditor need not be responsible for making a thorough check of the truth of the facts and risk the loss of valuable time. When the court evaluates those facts to determine whether acceleration was warranted, it should consider whether "under these circumstances, a reasona-

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57 "It seems likely that 'good faith,' 'reasonable cause,' 'reasonable manner,' and 'non-arbitrarily, with sustaining cause' are simply different ways of describing one standard." Washington State Board of Commissioners, RCW Title 62A Uniform Commercial Code Annotations 62AN-19 (1966 Supp.).

In Ginn v. Citizens & Southern Nat'l Bank, 145 Ga. App. 175, 243 S.E.2d 528 (1978), the court interpreted the issue in a dispute over the bank's acceleration to be whether "the bank acted honestly, in good faith, and not arbitrarily or capriciously." Id. at 177, 243 S.E.2d at 530.

57 See, e.g., Holmes v. Rushville Prod. Credit Ass'n, 353 N.E.2d 507, op. withdrawn, 355 N.E.2d 417, op. reinstated, 357 N.E.2d 734 (Ind. 1976). After reviewing the factual basis of acceleration at length, the court in Holmes concluded "[the creditor] could honestly have believed that its chances of payment had been diminished . . . ." Id. at 514. The inclusion of the factual history makes little sense unless "honestly" is read as "reasonably." Accord, McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325, cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

58 One form of the two-tier test is described in Blaine v. G.M.A.C., 82 Misc. 2d 653, 370 N.Y.S. 2d 323 (1975). Although the court reversed the order of the logical analysis, the basic elements of the two-tier test endure, i.e., preservation of good faith as actual knowledge with no duty to investigate, and reasonable evaluation of information: "The criterion for permissible acceleration under section 1-208 of the Uniform Commercial Code . . . has the dual elements of whether: (1) a reasonable man would have accelerated the debt under the circumstances, and (2) whether the creditor acted in good faith." Id. at 655, 370 N.Y.S.2d at 325.
ble person would believe that the prospect of payment was impaired."

The two factors in acceleration, the creditor's collection of data and his evaluation of that data, make a two-tier description useful. An important interest arises in each stage. At the first stage, the creditor must be able to protect his interest and investment by quick action. He cannot afford excessive, time-consuming data collection. At the second stage, the debtor must protect his contract and credit rating from unreasonable acceleration based on the data collected by the creditor.

Although the two-tier test as currently applied by the courts is a logical analysis of the application of insecurity acceleration and an effective vehicle for introducing a reasonableness standard, it does not completely balance the interests of debtor and creditor. Because the first tier preserves the mere actual knowledge standard of good faith, the debt remains subject to acceleration based on the creditor's mistaken information. Under the present two-tier test, the creditor is not required to have a factual basis for acceleration; he need not even inquire as to the facts. This article contends that the debtor is not sufficiently protected unless he is protected from the creditor's factually unfounded acceleration. Sufficient protection does not require changing the two-tier test, but rather increasing the sanction for unwarranted acceleration.

4. Good faith in perspective—A final testimonial to the confused state of the law with regard to good faith under section 1-208 is the growing tendency of courts to sidestep the good faith issue altogether. In some cases where insecurity acceleration

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60 See Part III A infra.

61 Courts have often been concerned not with the meaning of "good faith," but with what constitutes a "lack of good faith." The former phrase may have no particular reference whereas the latter phrase may refer to a very specific set of prohibited acts. See, e.g., Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W. 2d 674 (Iowa 1975) (court held for the creditor because debtor could not prove a specific "ulterior motive"). Under this interpretation, the phrase "good faith" operates in § 1-208 only as an "excluder." See Summers, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code," 54 VA. L. REV. 195 (1968). Professor Summers characterizes "good faith" as:

a phrase without general meaning (or meanings) of its own [which] serves to exclude a wide range of heterogeneous forms of bad faith. In a particular context the phrase takes on specific meaning but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out. Id. at 201 (footnote omitted). Because he believes that good faith has traditionally been only an excluder, Professor Summers states that the § 1-201(19) honesty in fact definition "restrictively distort[s] the doctrine of good faith." Id. at 215.
has been at issue, courts have based their decisions on drafting technicalities or on enumerated default events.

From a semantic viewpoint, the good faith requirement may be nothing more than a gentle warning, a net to catch only clearly objectionable behavior, or lip service to form by drafters who intend the creditor to have a free hand. The courts will always find a way to settle the obvious cases, and the ambiguous cases will be settled for the creditor. Concentration on good faith, however, is misleading. Although one might conclude that good faith has no actual referent and no acceptable synonyms, the phrase still determines whether a debtor will have his contract peremptorily ended with a sheriff’s order. Under the present construction of section 1-208, this might occur even if there are no factual grounds for insecurity.

The courts’ confusion demonstrates the importance of a good faith standard. Although a subjective standard still prevails, courts are more frequently paying only lip service to the statutory definition and calling instead for an objective reasonable man standard. Only a reasonableness standard can justify the inclusion of “good faith” in section 1-208.

B. Notice

One of the most striking characteristics of an insecurity acceleration, and one which appears most oppressive to the debtor, is the ability of the creditor to deem himself insecure and accelerate without notice. This part first identifies three situations where courts have required notice to the debtor at law and in

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As it is presently interpreted, the requirement of good faith is not an effective safeguard. It permits activity that traditionally ought to be prohibited, but which it is too inflexible to reach. Even when it is used as an excluder as in Farmer’s Coop. it still does not provide significant protection for the debtor, for he has the heavy burden of proving the creditor’s specific motive. The problem is not that good faith is used as an excluder, but rather that the narrow honesty in fact definition directs the court to look only to the creditor’s state of mind. Hence, whether good faith as honesty-in-fact is a standard of actual conduct or an excluder, it is a lame safeguard.

64 “[Good faith], when applied on a day to day basis, is . . . a warning to the business community that in all of its dealings with others it must beware just as buyers and sellers ‘must beware’ in retail transactions.” Eisenberg, Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem, 54 Marq. L. Rev. 1, 18 (1971).
66 Professors White and Summers remark that even though some courts demand a reasonable man standard, they are loathe to find an acceleration under an insecurity clause to be unreasonable. Cases decided under § 1-208 “indicate that the objective v. subjective dispute may not be very important.” U.C.C. HANDBOOK, supra note 13, at 1089.
equity. Second, it discusses the acts which have been held to constitute notice. Finally, notice to the debtor is shown to be inconsistent with the basic purpose of insecurity acceleration. To require notice would destroy whatever legitimate commercial benefit insecurity acceleration has for the creditor, with very little additional protection for the debtor.

1. **Circumstances in which notice is required**—There is no requirement in section 1-208 that a creditor give notice to the debtor before deeming himself insecure and accelerating the debtor's obligation. Courts, however, have required notice in three situations: (1) where a creditor's previous course of action triggers the doctrine of equitable estoppel; (2) where the document does not list insecurity as a default event; and (3) where the court chooses to emphasize acceleration as optional and not automatic.

   a. **Notice to avoid equitable estoppel.** One of the most common and important rights to notice is enforced by equitable estoppel. Courts require notice before acceleration when the creditor has engaged in a course of conduct by which the debtor assumes that his contract duties will not be strictly enforced.\(^\text{66}\) The creditor is equitably estopped from pouncing on the debtor for failure to meet conditions after the creditor has "lulled" the debtor into a false sense of security.\(^\text{67}\) Estoppel may rescue the more unsophisticated debtors because it is easy to plead.\(^\text{68}\) Notice to the debtor, however, allows the creditor to sue on the entire debt without the threat of estoppel.\(^\text{69}\) Until the debtor has

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\(^{67}\) Lee v. Wood Prods. Credit Union, 275 Ore. 445, 448, 551 P.2d 446, 448 (1976).

\(^{68}\) Estoppel does not have to be pleaded if it appears on the facts. Varela v. Wells Fargo Bank, 15 Cal. App.3d 741, 747 n.4, 93 Cal. Rptr. 428, 431 n.4 (1971). For a more detailed discussion of equitable estoppel, see notes 151-60 infra.

\(^{69}\) The creditor may wish from time to time to ignore a default condition, such as a missed payment, by allowing the debtor to remedy the condition. Even one instance of "looking the other way," however, may be enough to estop the creditor from accelerating the next time the condition occurs. Notice to the debtor that all conditions must be strictly followed in the future is necessary before the creditor may accelerate.

reason to think that something is amiss with his loan, he may safely tender payments even though events of default have occurred.\textsuperscript{70} Thus, where notice is required there is an automatic grace period of silence from the time of the creditor's insecurity to the debtor's notice. This grace period exists even where the contract has a clause waiving notice, for the creditor always has the option of waiving the default and continuing the contract by accepting the debtor's late tender or remedy. Principles of equity prevent a creditor from using a waived default to trigger a present acceleration when no new default event has occurred.\textsuperscript{71} Equitable notice thus works to the benefit of the debtor and creditor alike: the debtor is given a warning to comply in the future and the creditor preserves his right to accelerate later.\textsuperscript{72}

b. \textit{Notice where insecurity is not a default}. Situations in which insecurity acceleration is not effective until the creditor gives notice to the debtor can be distinguished from those situations in which the security agreement does not identify the creditor's insecurity as a default.\textsuperscript{73} The courts distinguish these situations because of the specific order of events that contract law requires before any of the creditor's rights vest.\textsuperscript{74} Acceleration vests as a creditor's right only after the debtor has defaulted. Under the U.C.C., the creditor can define default however he chooses. Unless the creditor's insecurity is defined as a default event, however, the creditor may feel insecure and accelerate even though the debtor is not technically in default.

The right of acceleration is a meaningless privilege if the debtor is not in breach. Article 9 rights, which allow a creditor to repossess, sue, or do any of the other things that protect his bargain, are not available until the debtor is in breach. But in order to put the debtor in breach, the creditor must rely on one of the enumerated default events, which is usually failure to make due payment. The debtor is not liable for missing the full accelerated payment unless he knows that the contract terms have changed. Hence, the courts require the creditor to give the debtor notice of the acceleration to make it effective upon the debtor.\textsuperscript{75} If insecurity is identified as a default event, then the

\textsuperscript{70} Romero v. Schmidt, 15 Utah 2d 300, 392 P.2d 37 (1964).


\textsuperscript{72} See, e.g., Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976).

\textsuperscript{73} For a discussion of the problems that arise when insecurity is not listed as a default, see notes 19-24 and accompanying text supra.

\textsuperscript{74} See generally U.C.C. Article 9, part 5.

creditor may accelerate and act immediately; notice is unnecessary when the debtor is already in breach. 76

The creditor has full freedom to define default broadly. Only a creditor's drafting error could neglect insecurity as a default and create a notice requirement. As a technical loophole, this mistake offers the debtor some relief from arbitrary acceleration. The relief is tenuous, however, and depends on whether the debtor's jurisdiction enforces the technicality. Encouraging courts to note this loophole will not greatly benefit debtors in the long run because creditors can avoid the notice requirement by minor redrafting of form contracts. Debtors are harmed not so much by a lack of means to circumvent insecurity acceleration, as by the arbitrary imposition of acceleration in the first instance. The abuse is not caused by the creditor's ability to accelerate but rather by giving the creditor the power to determine the good faith standard.

c. Acceleration at the creditor's option. Notice may be necessary because the contract specifies that the creditor has the option of declaring an acceleration upon default, where the option is strictly enforced by a court. 77 Where acceleration is optional the creditor must "communicate his decision [whether to accelerate] to the debtor or manifest it by some outward affirmative act." 78 Notice required by law differs from notice required by equity in that the former does not require a history of action that might cause reliance. 79 Making acceleration optional is similar to the situation discussed above where insecurity is not listed as a default. Both are technicalities which create a notice requirement, and a creditor may escape them by simple redrafting.

2. What constitutes notice—The kind of action by a creditor that suffices for notice depends on which of the three situations discussed above pertains. If notice is required to avoid equitable estoppel or to certify a non-default acceleration, specific verbal

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79 In Chrysler Credit Corp. v. Barnes, 126 Ga. App. 444, 191 S.E.2d 121 (1972), the court required notice where insecurity acceleration and repossession occurred before the first payment came due.
information is necessary.\textsuperscript{80} This is usually done in writing,\textsuperscript{81} but there is no evidence that specific oral communication cannot constitute notice.\textsuperscript{82} An unsuccessful suit by creditor has also been held to be notice.\textsuperscript{83} The vital point is that notice must be a warning that the creditor will exercise his rights; it cannot be the successful exercise itself of those rights. The debtor must actually receive the notice;\textsuperscript{84} a reasonable attempt will not suffice.\textsuperscript{85}

The courts which require notice in order for the creditor to exercise the option of acceleration have been very flexible in interpreting an affirmative act by the creditor. The mere exercise of the creditor's default rights may be sufficient notice. Hence, the actions of set-off,\textsuperscript{86} commencement of suit,\textsuperscript{87} foreclosure of deed of trust,\textsuperscript{88} and repossession of collateral\textsuperscript{89} have been deemed to be proper notice of acceleration. This indicates that in option cases, courts require notice to authorize an acceleration rather than to initiate it. One cannot set-off an immature debt or commence suit for the entire amount unless there has been an actual acceleration in the first place.

3. The dubious need for notice in insecurity acceleration—Of the three situations where notice is required, only notice to avoid equitable estoppel has any significant effect on the debtor's position in insecurity acceleration. Notice based on failure to list insecurity as a default is easily avoided by redrafting the form contract. Notice required by the option language is merely a post facto authorization because courts permit the very acts from which the debtor needs protection to constitute notice.

\textsuperscript{80} But see Spires v. Lawless, 493 S.W.2d 65 (Mo. App. 1973).
\textsuperscript{81} See, e.g., Chrysler Credit Corp. v. Barnes, 126 Ga. App. 444, 191 S.E.2d 121 (1972) and Paul Londe Assoc., Inc. v. Rathert, 522 S.W.2d 609 (Mo. App. 1975).
\textsuperscript{82} Oral communication is more expedient, but it may create problems of proof at trial.
\textsuperscript{83} See, e.g., Williamson v. Wanless, 545 P.2d 1145 (Utah 1976).
\textsuperscript{84} Joy Corp. v. Nob Hill North Properties, Ltd., 543 S.W.2d 691 (Tex. App. 1976). If there are joint debtors, the notice must be given to all of them to prevent the creditor's waiver of acceleration from late tender by any of the debtors. Lee v. O'Quinn, 184 Ga. 44, 190 S.E. 564 (1937).
\textsuperscript{85} Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971).
\textsuperscript{86} Jensen v. State Bank, 518 F.2d 1, 6 (8th Cir. 1975).
\textsuperscript{88} Markle v. Columbia Union Nat'l Bank & Trust Co., 483 S.W.2d 682 (Mo. App. 1972).
\textsuperscript{89} Id. Contra, Ford Motor Credit Co. v. Milline, 137 Ga. App. 585, 224 S.E.2d 437 (1976); C & S Motors, Inc. v. Davidson, 133 Ga. App. 891, 212 S.E.2d 502 (1975). In Milline, the court indicated that notice was required only because of the peculiarity of Georgia case law: "[T]he finance company's action of self-repossession without notice was in conformance with a legally approved practice, excepting for our rulings on the contract's acceleration clause as requiring notice before acceleration of default." Id. at 591, 224 S.E.2d at 441.
Notice which is required to avoid equitable estoppel, however, protects the debtor who has relied on the creditor's conduct. Section 1-208 needs no amendment to secure this protection because courts will enforce it as a principle of equity.

Nevertheless, equitable estoppel is not equivalent to a positive duty to give notice. It is only an equitable defense where the debtor had relied on the creditor's conduct. This article contends that pre-acceleration notice is inconsistent with the purpose of insecurity acceleration. Fairness to the debtor or creditor does not require any more notice in insecurity cases than is already supplied by the courts. Notice in the sense of a warning that the creditor is about to feel insecure is incomprehensible. Indeed, if the debtor were warned that he was treading on thin ice, he could make it very difficult for the creditor to find him or the collateral. If the creditor knew beforehand what would make him insecure, he could list it as a default. The very vagueness of insecurity reflects a need to respond quickly to unforeseen emergencies—an expedience which "warning notice" could thwart. The creditor may unilaterally assume a duty of notice to avoid equitable estoppel, a duty which would be consonant with section 1-208 and the creditor's right to extend a contract by waiving conditions. Any other type of notice is superfluous if nothing the debtor could do would prevent the acceleration. If further protection of the debtor is desired, the more logical and efficient approach is to modify good faith so that the creditor is not at liberty to define his own standard of insecurity.

C. Burden of Proof

Section 1-208 places the burden of proving lack of good faith on the party against whom the insecurity acceleration is exercised. Thus, the burden of proof is on the party least accessible to the creditor's state of mind. Commentators have taken a rather casual approach to the debtor's burden. Professor Gilmore sees no great controversy in the burden of proof: "[t]he decision to throw the burden of proof on the debtor is debatable." Others contend that section 1-208 merely follows the

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90 Although there is no key principle governing the apportionment of burden of proof, McCormick notes that accessibility is often a factor: "A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." McCormick on Evidence § 338, at 787 (2d ed. 1972).

91 Security Interests, supra note 1, at 1198.
common law position on burden of proof. It is not clear, however, that even under the common law, the debtor bears the burden.

Nevertheless, the touchstone case for section 1-208 litigation, *Sheppard Federal Credit Union v. Palmer*, and subsequent cases form a litany of summary judgments for the creditor resulting from the debtor's failure to sustain his burden of proof. The nonchalance of Professor Gilmore and the others may be explained on the ground that they expected a less rigorous standard of proof of good faith than that which has developed. Under an objective standard of good faith, the debtor can establish a prima facie case with testimony that he knew of no reason for the creditor's insecurity. If the debtor can avoid the summary judgment, the jury may tend to favor the debtor.

Courts which must enforce the subjective standard of good faith under section 1-208 follow the standard procedure for summary judgment. The issue of good faith goes to the jury "unless the evidence relating to it is no more than a scintilla, or lacks probative value having fitness to induce conviction in the minds of reasonable men." So many debtors lose on summary judgment not because of the procedural standard, but because the subjective standard of good faith gives so much latitude to the creditor that it is practically impossible for the debtor to produce sufficient evidence. Specifically, the debtor must produce evidence that the creditor was not in actual possession of the information which supposedly caused him to accelerate. The debtor cannot introduce evidence that the creditor's information

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92 See Farnsworth, *supra* note 32, at 672 n.33.
94 408 F.2d 1269 (5th Cir. 1969). For a discussion of the case, see note 39 *supra*.
96 See notes 39-41 and accompanying text *supra*.
97 *Security Interests, supra* note 1, at 1198.
99 A handbook for creditors who use insecurity acceleration clauses recommends that some record of the facts always be kept. "This ordinarily will be sufficient to withstand a claim of acceleration in bad faith, particularly since the burden of so proving rests upon the debtor . . . ." 1 *Anderson on the Uniform Commercial Code* § 1-208:3, at 189 (2d ed. 1970).
was false, but can only assail what the creditor actually believed about the state of the debt based on the information possessed by the creditor.\textsuperscript{100}

Good faith is thus the door to the debtor's entire case. Unless he effectively attacks good faith, he cannot introduce evidence on any other issue. Courts have given partial relief from the burden of proof only in very unusual fact situations.\textsuperscript{101} Even if the issue of subjective good faith could get to the jury, evidence on the creditor's state of mind would be very difficult to evaluate.\textsuperscript{102} The gravity of the situation is brought home by the realization that two states have modified their versions of section 1-208 to allow the burden of proof to be put on the creditor at least in some cases.\textsuperscript{103}

Both the arguments for requiring notice and shifting the burden of proof can be answered with a change in the standard of good faith. The subjective standard of good faith makes insecurity acceleration potentially oppressive. The problem of the burden of proof would not be as significant if it were easier for the debtor to present acceptable evidence. To reform the notice and burden of proof requirements of section 1-208 and to ignore the good faith requirement would be to patch an old coat with new cloth.\textsuperscript{104}

III. REFORM FOR THE DEBTOR AND CREDITOR

Most of the problems inherent in section 1-208 center on the definition of good faith. A single, clear standard with which to measure the creditor's actions would lessen problems of notice

\textsuperscript{100} Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 523, 329 N.E.2d 620, 627 (1975). The concurring judge indicated that the admissibility of evidence on the factual basis of insecurity depends on what has been introduced concerning the creditor's state of mind. If there is no evidence that X was known to the creditor, the truth or falsity of X is irrelevant. \textit{Id.} (Garrad, J., concurring). \textit{Accord}, Anderson v. Mobile Discount Corp., 122 Ariz. 411, 595 P.2d 203 (1979).

\textsuperscript{101} Cf. Drouet v. Moulton, 245 Cal. App. 2d 667, 54 Cal. Rptr. 278 (1966) (where the creditor tortiously interferes in the debtor's business, he must make some showing that the insecurity arose from reasons other than his acts); Blaine v. G.M.A.C., 82 Misc. 2d 653, 370 N.Y.S.2d 323 (1975) (where the debtor put collateral in danger of confiscation by transgression of federal criminal statute, he was allowed to require creditor to call witnesses).

\textsuperscript{102} "[Good faith] requires a trier of fact to glean from the testimony and evidence such manifestations in speech, conduct, and behavior of a person that it can know or infer what a person thought in a given situation and whether the person was honest in what the person did." McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325, 329 cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978) (Sutin, J., concurring).

\textsuperscript{103} See note 14 supra.

\textsuperscript{104} \textit{Mark} 2:21.
and burden of proof. This goal may require a more precise definition of good faith or merely the universal recognition that good faith can and should have no standard definition. The key term is universal; it benefits neither debtors nor creditors to have rules of law which vary from jurisdiction to jurisdiction. Section 1-208 is presently antithetical to the idea of a uniform commercial code. If the current state of the law is not changed, other jurisdictions may follow the lead of Virginia and Washington and adopt their own versions of section 1-208. This part discusses several routes to the reform of insecurity acceleration. Judicial interpretation is one way to meet the problems of good faith. Other solutions have been attempted in the U.C.C. itself and through other legislation. This article contends that the answer lies not in external limiting statutes or internal borrowing, but in reformation of section 1-208 itself. Such reform would increase protection of the debtor as well as provide a uniform standard for the creditor.

A. Reform Within Section 1-208

There are several avenues of reform within the U.C.C. The first alternative is to delete the definition of “good faith” in section 1-201. If good faith is equivalent to a mere warning to creditors to keep records and to exercise some care, then it is defined through daily business dealings. If good faith is merely an excluder, a net to catch certain types of clearly objectionable action, then there is no need to define it. In fact, a definition would only limit the term’s flexibility. Nevertheless, the drafters felt that good faith was too important to leave undefined. The courts have also used it as a convenient peg. Without the statutory requirement of some standard, there is no guarantee that the results would be any more equitable or any less diverse.

There is no need, however, for good faith in section 1-201(19) to mean the same in section 1-203, the general requirement of good faith in all transactions, and section 1-208, insecurity accel-

108 See note 14 supra.
106 See notes 52-57 supra.
107 Eisenberg, supra note 64, at 18.
108 Summers, supra note 61, at 215.
109 Courts use the requirement of good faith to inject an element of equity and fairness in some contract actions. Good faith stands for “basic obligations of fair dealing,” Urdang v. Muse, 114 N.J. Super. 372, 379, 276 A.2d 397, 401 (1971); or “a general requirement of fundamental integrity,” Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846, 851 (3d Cir. 1964). It can be a familiar and convenient judicial buttress for a decision based on questionable logic.
The drafters’ inclusion of a specific good faith requirement in 1-208 even after it was generally required in section 1-203 implies that the standards are not the same. The question is whether this important distinction should be left to judicial interpretation. The history of inconsistent case law concerning insecurity acceleration calls for a single, identifiable, and mandatory standard. Reform of the U.C.C. would have the necessary universal impact. The proper place to modify the good faith standard of section 1-208 is within that section itself. A test within section 1-208, modeled on the logical procedure of insecurity acceleration, would minimize the need to borrow from other sections and to create new definitions. One unequivocal standard would obviate attempts by courts to divine what the drafters would have intended in cases of abusive and arbitrary acceleration which they never anticipated. The two-tier test, together with stricter sanctions for the creditor’s mistake, should be incorporated into section 1-208.

1. **Balancing the needs of the debtor and creditor**—Although the most prominent characteristic of insecurity acceleration is its devastating effect upon the debtor, one must remember that acceleration, even upon insecurity, is an important and useful tool of creditors. In many cases the creditor must act quickly to protect his investment. For example, if the debtor is not taking care of livestock collateral, even a short delay may significantly reduce the value of the creditor’s loan. Similarly, a creditor with a security interest in sales floor inventory will want to act fast if he suspects that the debtor is selling out of trust or if he notices that the debtor is having a brisk

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110 The U.C.C. often sets a special standard of good faith for the purposes of an individual section. See U.C.C. §§ 2-103(1)(b), 3-406, 7-404, 8-318. See also Industrial Nat’l Bank v. Leo’s Used Car Exch., Inc. 362 Mass. 797, 291 N.E.2d 603 (1973).

111 This interpretation is strengthened by the history of § 1-208 in the early drafts of the U.C.C. Section 1-208 included a requirement of good faith from its first appearance in the 1950 Proposed Final Draft. See note 24 supra. The Official Comment specified a reasonable standard, apparently distinguishing § 1-208 good faith from § 1-203. By 1952, the reasonable standard dropped out of the Official Comment, but good faith remained in the text. Good faith in § 1-208 started out as something distinct from both § 1-203 and § 1-201(19). The skeleton of its original form still remains to be fleshed out by the courts.

112 See part II A 3 supra.


114 A merchant debtor sells “out of trust” by selling floor inventory which the creditor has financed without assigning to the creditor the proceeds or installment contract for the sale. See, e.g., Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846 (3d Cir. 1964), and Sherrock v. Commercial Credit Corp., 290 A.2d 648 (1972).
"going out of business" sale.\textsuperscript{118} Such actions can put the value of the collateral out of the secured creditor's hands forever and leave him scrambling with unsecured creditors in bankruptcy court.

The need for quick action reintroduces the problem of the first tier of the two-tier analysis: the need for the creditor to check the truth of his information before he beings to evaluate it. Although many courts have tried in some way to insert a reasonableness requirement into acceleration, few have indicated a reasonableness standard for the \textit{collection} of information.\textsuperscript{116} If fast action is a virtue, a creditor should not have to exhaust his sources of information before acting. Moreover, the option of acceleration makes creditors more willing to extend credit to marginally secure debtors. Many of the uniform consumer statutes do not recognize the commercial importance of insecurity acceleration,\textsuperscript{117} and any reform of section 1-208 must take this interest into account.

As it is presently applied by some courts, in the first tier of the two-tier test the creditor has no duty to investigate the truth of the information in his possession.\textsuperscript{118} At this stage, the honesty-in-fact interpretation obtains. Although many courts support a reasonable man standard for the \textit{second} tier evaluation of data, they are loathe to interfere so extensively on the investigation level in the creditor's conduct of his own business. They prefer to let the creditor control his own data collection, requiring only that the creditor actually possess the data when he evaluates his insecurity. The courts' reluctance to interfere unfortunately preserves one of the greatest abuses of insecurity acceleration: the creditor may accelerate on totally unfounded information.\textsuperscript{119}

To correct this abuse, this article adopts the first tier test as presently applied, \textit{i.e.}, there is no duty to investigate, but there is a strict sanction for creditor error. Lest the creditor continue to act as if he has no responsibility to investigate at all, there should be strict requirement of a factual basis for insecurity acceleration as part of the creditor's contractual duty. Acceleration

\textsuperscript{118} See, \textit{e.g.}, Monson v. Pickett, 253 Minn. 550, 93 N.W.2d 537 (1958).
\textsuperscript{116} \textit{But see} Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 329 N.E.2d 620 (1975) (indicating that Sheppard Federal Credit Union v. Palmer, 408 F.2d 1369 (5th Cir. 1969), and Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196 (Ky. 1964), require the creditor to make an honest and diligent effort to discover from all available sources that the security is greatly impaired. Other courts have not interpreted \textit{Sheppard} and \textit{Ft. Knox} to state such a requirement).
\textsuperscript{117} See part III D \textit{infra}.
\textsuperscript{118} See part II A 3 \textit{supra}.
based on unfounded information would be a breach by the creditor, making him liable for full contract damages. This addition to the first tier preserves the definition of good faith as actual knowledge but requires that the actual knowledge be correct. It eliminates the abuse of mistaken acceleration and obviates the need for courts or drafters to determine the creditor’s proper standard of care. The creditor would choose that standard himself as an expert in the risks of his own business, without interference from the courts or section 1-208.

A factual basis requirement may have the disconcerting result of making a creditor liable even after he has made a reasonable, albeit unsuccessful, attempt to ascertain the facts. There are significant policy reasons for making the creditor liable. The risk of mistake should arguably fall on the person best able to bear it. Neither the debtor nor creditor may be at fault for the error, yet the creditor is presumably better able to bear the loss and can insure against it. Moreover, investigation of credit-worthiness is the creditor’s responsibility; he has the resources and the professional expertise. Finally, the creditor takes the initiative to accelerate, yet if he is mistaken, the debtor and not the creditor bears the consequences of the creditor’s mistake.

A factual basis for insecurity also has judicial support. A factual basis is already required in enumerated default accelerations. For example, a court will not allow acceleration for a missed payment unless there is proof that the payment was not made. The debtor may submit evidence that the default event never occurred. With the factual basis requirement, the debtor may submit this evidence in insecurity acceleration cases.

118 "The basic purpose of the U.C.C. is to put the loss on the party whose conduct is most responsible for the loss." Sherrock v. Commercial Credit Corp., 290 A.2d 648, 651 (Del. 1972) (Wolcott, C.J., dissenting).

119 In Nebraska State Bank v. Dudley, 198 Neb. 132, 252 N.W.2d 277 (1977), aff’d on other grounds, 203 Neb. 226, 278 N.W.2d 334 (1979), the court held:

A clause in a chattel mortgage providing that the mortgagee may, at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the mortgagor is about to do, or has done, some act which tends to impair the security.

Id. at 138, 252 N.W.2d at 280 (quoting J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N.W. 1119 (1891)). See Bank of New Jersey v. Brokers Financial Corp., 557 F.2d 365 (3d Cir. 1977) (Seitz, J., dissenting) (dissenting judge found, inter alia, that creditor could not accelerate upon insecurity because enough collateral then existed to cover the debt, regardless of the creditor’s state of mind).

121 In cases of default because of missed payments, courts have refused to find a default where a payment was missed but the debt was substantially prepaid, First Nat’l Bank v. Appalachian Industries, Inc., 146 Ga. App. 630, 247 S.E.2d 422 (1978), and where the creditor refused to accept timely payment in order to declare a default, Universal C.I.T. Credit Corp. v. Johnson, 41 Ala. App. 148, 127 So. 2d 642 (1960).
as well. If the debtor has given actual cause for insecurity, no injustice is done, but if the acceleration is not based on facts, the creditor should be responsible to put the debtor in as good a position as he would have occupied had the acceleration not occurred.\textsuperscript{122} If the information is true but the creditor has acted irrationally, the debtor would be protected by the reasonable man standard imposed in the second tier of the test.

2. A proposed redraft of section 1-208—In conformance with the proposed two-tier test, section 1-208 should be amended to read:

\section*{§ 1-208: Option to Accelerate at Will}
1) A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he may do so only if
a) he has actual knowledge of information which causes him to believe that the prospect of payment or performance is impaired;  
b) the information is founded on fact; and,  
c) the belief that the prospect of payment or performance is impaired which results from such information is reasonable according to commercial standards.

2) The party against whom the power is exercised has the burden of proving  
a) lack of actual knowledge; or  
b) lack of a factual foundation; or  
c) an unreasonable belief.

Where acceleration does not conform to section 1-208, as amended, full contract liability would protect the innocent

\textsuperscript{122} Under this proposal, one might ask what the result would be if the debtor gives actual grounds for insecurity, but the creditor accelerates on other, mistaken grounds. Ordinarily, the preservation of the honesty-in-fact good faith standard in the first tier test would mandate a decision for the debtor, because the creditor did not have actual knowledge of those true grounds and hence could not produce evidence of them. See, e.g., Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 329 N.E.2d 620 (1975) (Garrad, J., concurring). The problem is more difficult if the creditor has only an inaccurate picture of the true situation. The factual basis requirement is imposed to avoid creditor error; it should not require the creditor to have a perfect knowledge of the details of the debtor’s business. Whether the situation as the creditor believes it to be is sufficiently similar to the actual situation so that the creditor can be held to have actual knowledge of the true situation would be a question of fact for the jury.
debtor whose credit rating is impaired by an unfounded, abrupt end to a current contract. Injury to the debtor's credit reputation could be included as a consequential damage of unfounded acceleration. The debtor would be permitted to present evidence of the lack of a factual basis without having first to challenge actual knowledge. The debtor would still have the burden of proof to show lack of a factual basis, but evidence on this issue is more accessible to the debtor and would increase his chances to bring his case to the jury. The creditor could be found to have acted reasonably given his information, but the debtor still could prevail by producing evidence either that the information was false or that the creditor did not possess it until after he accelerated. The new organization of section 1-208 itself mirrors the logical process of insecurity acceleration, and clearly illustrates to the debtor the three separate and independent avenues through which he can attack an insecurity acceleration.

B. Internal Code Solutions

If section 1-208 is not reformed, an acceptable good faith standard might be built out of the tools already provided in the U.C.C. Although the U.C.C. does not provide an objective standard, the courts could find one through interpretation.

1. Section 1-201—Some authorities posit that a reasonable man standard can be injected into the good faith standard of section 1-208 through the introductory language of section 1-201. This introduction to the general definitions states that the definitions are valid "unless the context otherwise requires." The proper context of section 1-208 could be construed to prevent arbitrary acceleration. This would bring section 1-208 into line with reasonable business practices. It is not reassuring, however, to depend on the strained interpretations of other sections to compensate for the inadequacies of a weak section. Section 1-201 may handle the rare exception but it cannot be expected to carry the rule itself. Such reliance would also be antithetical to Professor Llewellyn's maxim that "[e]very pro-

123 Punitive damages may be available if debtor can show actual malice. However, punitive damages are historically disfavored in contract actions. Cf. Parks v. Phillips, 71 Nev. 313, 289 P.2d 1053 (1955) (appellate court disapproved but allowed jury award of punitive damages for wrongful repossession and acceleration).
124 Farnsworth, supra note 32, at 679. Of course, dependence on judicial interpretation is open to all the dangers of inconsistency illustrated by current case law.
125 U.C.C. HANDBOOK, supra note 13, at 1090 n.25.
126 U.C.C. § 1-201.
127 Summers, supra note 61, at 215.
vision should show its reason on its face.”

2. Section 2-103—The U.C.C. sometimes provides for a good faith standard other than mere honesty in fact. Article 2, concerning sales of goods, provides in section 2-103(1)(b) that “‘Good Faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” If section 2-103(1)(b) is the proper standard of good faith to be applied in section 1-208, the subjective standard problem would be solved, at least with respect to contracts for the sale of goods. A creditor could accelerate only if his insecurity met “reasonable commercial standards,” i.e., if he had reasonable grounds to feel insecure under prevailing commercial practices. A debtor could attack the creditor’s acceleration by bringing evidence of what constitutes reasonable commercial grounds for insecurity. The debtor’s attack would not be limited to the individual creditor’s state of mind.

Authorities conflict, however, as to whether the section 2-103(1)(b) standard applies in credit contracts arising from the sale of goods. While the drafters originally included a standard of commercial reasonableness in the 1950 draft of section 1-208, it is uncertain whether when they excluded it from the 1952 Final Draft, they did so because they did not want a reasonableness standard or because they anticipated that section 2-103 would apply, rendering the standard superfluous. Another U.C.C. section suggests that the reasonable commercial standard does not apply to section 1-208. The Official Comment to the definition of good faith in section 1-201(a) refers to the reasonable commercial standard of section 2-103 as an additional requirement to be observed “throughout that Article [Article 2] wherever a merchant appears.” This does not prohibit its extension to other sections but it indicates that extension was not foreseen. Case law, as well, is indecisive on the application of

128 Karl Llewellyn, principal draftsman of Article 1, quoted in U.C.C. HANDBOOK, supra note 13, at 12.
129 See note 110 supra.
130 Commercial standards are used as the measure of the creditor’s reasonableness in the proposed reform section of § 1-208. See part III A 2 supra.
131 Professor Summers appears to believe that merchants of goods must conform to Article 2 standards even in the case of insecurity acceleration. Summers, supra note 61, at 215. Professor Farnsworth disagrees: “Since § 1-208 is in Article 1, the standard of good faith is subjective, even in the case of a merchant, and this is emphasized by the use of the word ‘believes’.” Farnsworth, supra note 32, at 672 n.33.
133 U.C.C. § 1-201, Official Comment 19.
commercial reasonableness. In short, while the extension of the reasonable commercial standard to insecurity acceleration may be beneficial, for the debtor's position, there is insufficient groundwork in the U.C.C. to permit the courts to interpret an extension.

3. Unconscionability—Section 2-302, which prohibits unconscionability, may provide an indirect limitation on acceleration under section 1-208. In *Urdang v. Muse*, the court found that section 1-203, whose good faith standard is defined as honesty in fact, and section 2-302 both imposed "the same basic obligations of fair dealing in commercial transactions." It is uncertain whether the court intended by its use of "fair dealing" to inject the "reasonable commercial standards" of section 2-103 into section 1-203. On the one hand, if the court did intend to imbue section 1-203 with a reasonableness standard, *Urdang* might establish a reasonable man standard in section 1-208 simply because section 1-203 applies to all duties in the U.C.C. On the other hand, *Urdang* can be said to extend unconscionability to section 1-208 by equating the requirement of general good faith with the prohibition of unconscionability; section 1-203, in turn, applies to all U.C.C. provisions, including section 1-208. Thus, it is arguable that the U.C.C. prohibits "unconscionable" accelerations.

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184 See, e.g., *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972) ("commercial reasonableness" of § 2-103(1)(b) is not the same as good faith under § 1-201(19) and does not apply to secured transactions). Cf. *Industrial Nat'l Bank v. Leo's Used Car Exch., Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973) ("commercial reasonableness" is not the definition of good faith as defined by § 1-201(19) because "[e]ach word of a statute is presumed to be necessary," and hence if good faith always included commercial reasonableness it would make the language of § 2-103(1)(b) superfluous. *Id.* at 802, 291 N.E.2d at 606); *Farmers Coop. Elevator, Inc. v. State Bank*, 236 N.W.2d 674 (Iowa 1975) (although the court does not use the term "commercial reasonableness", the court allowed insecurity acceleration upon information that "would cause a lender concern." *Id.* at 678).

185 U.C.C. § 2-302(1) states,

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.


187 *Id.* at 379, 276 A.2d at 401.

188 See *Fontaine v. Industrial Nat'l Bank*, 111 R.I. 6, 298 A.2d 521 (1973). The cases applying § 2-302 concentrate mainly on unconscionable means of repossession. Acceleration is important in these cases only because it is the only step before repossession. Courts have also held that notwithstanding a just repossession, it is unconscionable not to return the collateral if late charges are paid, even if the creditor still claims to be "insecure." *Robinson v. Jefferson Credit Corp.*, 4 U.C.C. Rep. Serv. 15 (1967).
This argument requires excessive bootstrapping. There are significant limitations on the use of the unconscionability prohibition in insecurity acceleration under section 1-208, even in transactions involving the sale of goods. Section 2-102 provides that “[u]nless the context otherwise requires, this article applies to transactions in goods; it does not apply to any contract which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction.” The Official Comment to section 2-102 excepts the security aspects of purchase money agreements from the operation of Article 2. Thus, an insecurity acceleration is probably not a “general sales aspect” qualifying it for Article 2 provisions under the Official Comment to section 2-102. The insecurity acceleration provision appears in Article 1, but it is not mentioned in Article 2. A strict construction of the U.C.C. forces the conclusion that section 2-302 does not apply in the context of section 1-208. This is also the conclusion of the case law. Insecurity acceleration is an accepted part of contract privilege and the courts are traditionally loathe to interfere with an agreement between parties even if it results in a forfeiture. Moreover, there is no question that Article 2 does not apply in nonsale security transactions, where goods already owned are collateral for a general loan.

4. Article 9—Notwithstanding the state of good faith standards and recourse under other parts of the U.C.C., courts have been quick to note that once repossessed, the debtor has the full

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139 U.C.C. § 2-102 [emphasis added].

140 U.C.C. 2-102 Official Comment provides in part: “The Article on Sales of Goods leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions.”


This assurance is given without regard to the question of how Article 9 interacts with the right to contract for a harsh acceleration, upon which the courts differ. Section 9-507 allows a debtor who has been harmed by improper repossession to collect damages. As long as the subjective standard of good faith makes it so difficult for the debtor to prevail, the question of section 9-507 damages may be academic.

The debtor has the right, under section 9-506, to redeem repossessed collateral before the creditor disposes of it. The debtor must fulfill all obligations, i.e., pay the accelerated amount. If the creditor does sell under section 9-504, he may sue the debtor for any deficiency not covered by the sale. The debtor has a concurrent right to a surplus, but a surplus is rare in repossession sales. The U.C.C. has been said to encourage deficiency judgments by allowing the creditor to define "default" as broadly as possible and by authorizing "insecurity" and acceleration clauses. Although instances of the debtor getting section 9-507 damages are rare, there are situations where the creditor may lose his right to a deficiency, but only when the foreclosure provisions of Article 9 have been violated. These provisions are cold comfort; once the debtor gets in a position where he must depend on Article 9, he has little to which to look forward.

145 Compare Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971) (acceleration is separate from repossession which must follow Article 9 guidelines) with Anderson v. Mobile Discount Corp., 122 Ariz. App. 41, 595 P.2d 203 (1979) (repossession rights may be contracted away).
146 Cf. Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196, 200 (Ky. 1964) (punitive damages do not flow from good faith conduct).
147 "[T]he debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations . . . ." U.C.C. § 9-506.
149 The Supreme Court improved the debtor's position in repossession in Fuentes v. Shevin, 407 U.S. 67 (1972). In Fuentes, the court held that a consumer debtor is entitled by due process to notice and a hearing before the creditor repossesses. The protection was extended to corporate debtors in North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

The benefit to the debtor, however, is tenuous. These hearings are required only where the creditor gets a replevin judgment from a court which is carried out by the sheriff. Much repossession is accomplished by the creditor himself under the self-help provision of U.C.C. § 9-503. A flurry of litigation followed Fuentes to have self-help repossession declared unconstitutional. The courts favor the creditor in this situation. There is insufficient state action to trigger the due process clause in self-help repossession. Repossession through replevin requires the help of a court or sheriff, while in self-help repossession
The debtor should not have to wait until Article 9 provisions apply to his case to get some protection under the U.C.C. By that time, the creditor has already accelerated and the debtor is witnessing the post mortem of his contract. The U.C.C. should provide safeguards to prevent the initial arbitrary acceleration. If, however, courts cannot fashion a reasonableness standard out of the tools already in the U.C.C., debtors will continue to depend on the limited protection of Article 9.

5. *Internal U.C.C. solutions in perspective*—Internal U.C.C. solutions are only second-best. Because they depend entirely on judicial interpretation, they yield inconsistent results. Those sections which do not depend on deft interpretation, such as section 2-302, which treats unconscionability, and Article 9, Part Five are limited by their own terms. The U.C.C. was meant to clarify and organize contract law. It is consistent with this goal that the U.C.C. should be drafted to say what it means and not what it could mean if stretched to the limits of logic and semantics.

C. Actions in Equity

Another way to get a reasonable result under section 1-208, if not a reasonableness standard, is through equity. U.C.C. section 1-103 provides that the principles of common law and equity shall supplement U.C.C. provisions. In addition to any limitations imposed under section 1-208, a court of equity has the power to relieve the debtor from the effects of acceleration. A debtor, doubting his chances of success under section 1-208, may appeal for an equitable solution. The good faith requirement of section 1-203 is one of the debtor's most important tools. In giving equitable relief, courts state that the good faith requirement prohibits the creditor from acceleration, even though it is provided for in the contract, when the creditor has previously

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the creditor acts alone.

181 Professors White and Summers call U.C.C. § 1-103 “probably the most important single provision in the Code.” U.C.C. HANDBOOK, supra note 13 at 6-7. But see Note, The Uniform Commercial Code as a Premise for Judicial Reasoning, 65 COLUM. L. REV. 880 (1965). The author contends that “[t]he policy of modernizing the law and furthering the development of commerce will be needlessly constricted if courts continue to retain outmoded common-law rules in areas not covered by the Code and refuse to give the Code the recognition it deserves.” Id. at 887.


183 In Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976), the court found § 1-208 “is in harmony with the principles of equity . . . .” Id. at 1149.
accepted debtor's assurances\textsuperscript{184} or indicated that compliance is not vital.\textsuperscript{185} Equity looks to the obligation of good faith under the U.C.C., but is not constrained by the honesty in fact standard of section 1-201(19). The court is not limited to the information the creditor actually has, but also may balance the parties' mutual expectations about their contract.

Since equity will inquire into the entire fact situation, the debtor can introduce all the background factual evidence which is inadmissible under section 1-208. An equity court may disallow an acceleration if the prospect of payment is not actually impaired.\textsuperscript{186} A creditor may be equitably estopped from asserting either type of acceleration if he has engaged in a history of overlooking late payments or insecure positions.\textsuperscript{187}

Although the courts have the option of skirting section 1-208 good faith problems through an equitable solution, the solution has limits. Unlike law, equity is an uncertain remedy. "Equity having taken jurisdiction over a cause does complete justice,"\textsuperscript{188} even beyond the pleadings. The debtor seeking relief must approach with 'clean hands'; he must have done everything possible to heal the situation before he comes to court.\textsuperscript{189} Equity is traditionally most amenable to cases of real estate forfeiture.\textsuperscript{190} Real estate cases usually involve significant amounts of money and raise serious issues of mortgage foreclosure. Not all contracts with insecurity clauses will involve large amounts of money or sympathetic social issues such as protection of the homestead.

\textsuperscript{184} Seay v. Davis, 246 Ark. 201, 438 S.W.2d 479 (1969), reh. denied, 246 Ark. 627, 438 S.W.2d 481 (1969). The court initially held that the creditor did not meet the good faith requirement of § 1-208 but had a dishonest motive. On petition for rehearing, however, the court found that § 1-208 did not apply because the creditor's acceleration was based on a missed payment, not on his insecurity. Nevertheless, the court denied a rehearing, holding that equity prevents acceleration where the creditor previously accepted the debtor's assurances that he would make missed payments "good within three hours." 246 Ark. at 203, 438 S.W.2d at 480.

\textsuperscript{185} Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846 (3d Cir. 1964). Skeels was neither an equity nor a contract action; it was a debtor's suit for a business tort. The court looked to § 1-103, however, for the application of equitable principles and cited the § 1-203 obligation of good faith. Id. at 851.


\textsuperscript{187} See note 66 and accompanying text supra.


\textsuperscript{189} See, e.g., New England M.L. Ins. Co. v. Luxury Home Bldrs., Inc., 311 So. 2d 160 (Fla. App. 1975) (to defuse an acceleration in equity after the due date, debtor must have tendered all due payments plus late charges before official acceleration is made).

Equitable relief should be one option, but not the sole option, of a debtor harmed by the failure of section 1-208. This section should not have to borrow from other sections to be acceptable, nor should actions at law have to borrow from equity merely to get a coherent result.

D. Other State Statutes

Although the U.C.C. is in effect, states retain the right to set up other laws that supercede U.C.C. provisions. A final means of injecting a reasonableness standard into insecurity acceleration is through external legislation.

States have a body of statutory law covering various special types of credit transactions which are concurrent with the U.C.C. Insecurity acceleration may play an important role in these laws. The earliest types of this legislation were retail installment sales acts. These frequently regulate the operation of insecurity acceleration,¹⁶¹ but may instead merely require prominent disclosure of the acceleration clause.¹⁶² As the litigation discussed throughout this article indicates, these statutes have not removed insecurity acceleration clauses from many credit contracts. Furthermore, the statutes might affect only a limited variety of contracts.

The Truth in Lending Act (TILA)¹⁶³ was the federal response to the need for debtor protection in credit transactions.¹⁶⁴ There has recently been much debate about the disclosure of acceleration clauses under TILA.¹⁶⁵ The controversy does not concern the standards under which acceleration is made.¹⁶⁶

The growing interest in the area of consumer credit transac-

¹⁶⁴ TILA is a disclosure statute; through Truth in Lending Regulations (Reg. Z), 12 C.F.R. § 22 (1979), it requires that certain information be made obvious to the prospective debtor, that there be a standard use of terms, and that all the pertinent information appear in logical order on one side of a piece of paper.
¹⁶⁶ This does not prevent debtors from using disclosure statute technicalities to invalidate acceleration clauses for nondisclosure. See Holmes v. Rushville Prod. Credit Assoc., 353 N.E.2d 509, op. temp. withdrawn, 355 N.E.2d 417, reinstated, 357 N.E.2d 734 (Ind. 1976).
tions has fostered the establishment of several uniform acts. The Revised Uniform Consumer Credit Code (RU3C) was first promulgated in 1968 and has been adopted in seven states. This and other uniform laws serve as models for states which wish to codify their own consumer statutes. The present RU3C makes no change in the U.C.C. approach to insecurity acceleration. Other model acts are more radical but have not yet been enacted.

Some states have passed statutes to regulate acceleration clauses only in certain transactions. Acceleration may be prohibited in certain retail installment sales such as motor vehicle sales. Statutes regulating certain types of commercial transactions can serve a significant underlying public policy. Although not prohibited by these laws, acceleration clauses may be given closer scrutiny when used in these transactions because of this legislative recognition. The wave of consumer legislation is expected to continue.

It is not advisable to rely too heavily on state and federal consumer statutes. At best, it may be a welcome surprise to a debtor to find a statutory defense. But this is possible only if the correct statute can be found and if it applies to the particular contract. The state statutes are similar in that they usually refer

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167 Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah, and Wyoming have adopted RU3C.

168 The RU3C Working Redraft No. 6 includes an objective definition of default and gives the debtor 20 days to cure a default after receipt of notice. Statutory notice of default must be sent to the debtor 10 days after he misses an installment. This appears to apply only to default by missed payment and not default by insecurity. Consumer Credit Cases, supra note 10, § 4(f) at 13-14 (Supp. 1979).

169 The National Commission on Consumer Finance published its report in December 1972. Among its recommendations is that a creditor may not accelerate, repossess, or bring suit without giving debtor 14 days notice of default. The debtor would then have the right to cure. Id.

The Model Consumer Credit Act, formerly the National Consumer Act, is the most pro-consumer of all the uniform acts. It requires that the creditor bring a replevin action to repossess the collateral. The consumer then has 15 days to cure. Default is defined as the missing of three payments; "this effectively does away with insecurity clauses." Consumer Credit Cases, supra note 10, § 24(d) at 101.


171 Cf. Oakland Nat’l Bank v. Anderson, 81 Mich. App. 432, 265 N.W.2d 362 (1978) (the creditor was not allowed to accelerate a car loan upon insecurity because such clauses were prohibited by the Michigan Motor Vehicle Sales Finance Act).

172 General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971). The court gave special scrutiny to creditor's good faith in assignment of a home repair contract because of "the unique policy considerations attendant upon consumer home repair transactions" which are reflected in the Home Repair Finance Act. Id. at 403, 278 A.2d at 197.

173 Consumer Credit Cases, supra note 10, § 3 at 9-10 (Supp. 1979).
to consumers; the small business debtor, a common victim of insecurity acceleration, is excluded. Nor are these statutes necessarily fair to the creditor. The statutes either provide only for disclosure, a useless provision if the debtor does not read the contract, or else abolish insecurity acceleration altogether. Even in consumer contracts the creditor's right to protect his collateral may override the debtor's right of equitable ownership. Insecurity acceleration is not unfair in theory but becomes undesirable only when it is abused in practice. The best solution, then, would be to regulate insecurity acceleration through a reasonableness standard of good faith, based on fact. Consumer protection statutes vary widely from state to state both in the type of transactions covered and the attitude they take toward insecurity acceleration. A straightforward modification of 1-208 would have universal application while preserving a balance of rights.

CONCLUSION

Section 1-208 of the U.C.C. is open to abuse by creditors who arbitrarily accelerate debts based on insecurity. Courts currently must approve these actions if the debtor cannot show that the creditor did not act in good faith, i.e., that the creditor did not actually believe that its information indicated a chance of non-payment. The abuse has been countered somewhat by actions in equity, procedural loopholes, and a well-meant but disjointed collection of consumer statutes. Courts have also tried to inject a more objective standard into section 1-208, but due to the ambiguous meaning of honesty in fact, the decisions fail to represent a unified body of case law. The best solution is to re-draft section 1-208 to change the standard of good faith from a subjective to a two-tier subjective-objective test. Creditors should be able to accelerate on the information they have; there would be no duty to ascertain the truth of this information, but creditors would be in breach and liable for full contract damages if the information were false. The creditor would also be liable if his valuation of the information were not reasonable according to commercial standards. This test would obviate the need for procedural end-runs and equity actions, and remove much of the difficulty the debtor faces in meeting his burden of proof. It

174 There is some merit to the argument that state legislatures could approve a U.C.C. uniform change with the imprimatur of the American Law Institute more expeditiously than each state could legislate individual changes in the appropriate state statute.
would put the debtor in as good a position as performance without frustrating the creditor's important need for quick action.

—Darlene M. Nowak