University of Michigan Journal of Law Reform

Volume 5

1971

New York Specious Cash Sales Act

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LEGISLATIVE NOTE

NEW YORK SPECIOUS CASH SALES ACT

I. INTRODUCTION AND BACKGROUND

The New York Legislature recently moved to protect consumers in that state from unscrupulous retailers of consumer goods and financers of consumer loans by enacting the Specious Cash Sales Act.[1] The new law is the third in a series of measures designed to remedy certain perceived inequities to which the holder in due course doctrine[2] gives rise in the consumer goods field.

Earlier this year, the Legislature undercut complicated mechanisms whereby a finance company could procure from a retailer contracts and obligations containing a waiver-of-defenses provision executed by the buyer-consumer[3] This law in turn complemented a still earlier statute which stripped assignees of consumer paper of their status as holders in due course.[4] As a result of these two laws, in a suit brought by an assignee of consumer paper against the consumer-buyer, the consumer can assert against the assignee any defenses he has against the original retailer (including failure of consideration and breach of warranty). The intended result was to force finance companies to investigate their sources of credit with an eye toward accepting paper only from those who were reputable and solvent.

Certain finance companies, however, were indefatigable in their search for legal loopholes.[5] Seeking to avoid consumer defenses,

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[1] N.Y. GEN. BUS. LAW §§ 252-255 (*McKinney's Session Law News of New York* No. 5, Ch. 605 (1971)), [hereinafter cited as Specious Cash Sales Act by section numbers: §§ 252-255]. The Act, which became effective September 1, 1971, is set out in full in the Appendix.

[2] An assignee of negotiable paper can become a holder in due course by fulfilling certain requirements. As a holder in due course, the assignee takes the note free of *most* defenses the maker may have against the assignor. (Failure of consideration, breach of warranty, and fraud in the inducement are some of the most important consumer defenses which are ineffectual against a holder in due course.)

[3] N.Y. PERS. PROP. LAW § 403.3(a) (McKinney 1970 Supp.) makes waiver-of-defense clauses in retail installment transactions unenforceable. Under the old law a creditor had to give the consumer notice of any assignment. The consumer then had ten days in which to offer defenses; if no defenses were offered, the waiver-of-defenses provision became effective.

[4] N.Y. PERS. PROP. LAW § 403.6 (McKinney 1970 Supp.).

[5] *See e.g.*, N.Y. Times, Aug. 19, 1971, at 49, Col. 2.

they developed the "specious cash sale." Under this arrangement the retailer does not extend credit to the buyer. Rather, he merely helps the buyer locate a willing and available creditor, sometimes by recommendation, frequently by providing the appropriate forms. Some went so far as to assist the buyer in filling out the forms. The immediate effect is two separate paper transactions: (1) a *loan* by the creditor to the consumer, and (2) a *cash sale* by the retailer to the consumer. Thus the procedure technically loses its identity as a retail credit transaction. Once again the consumer is left without any product or service related defenses against his creditor since the latter has only lent him funds with which to purchase the defective goods or services.

New York enacted the Specious Cash Sales Act in order to close this loophole.[6] A similar provision is included in the National Consumer Act (NCA) published by the National Consumer Law Center.[7] Under the new law the creditor in the specious cash sale transaction is subject to consumer defenses provided that "he knowingly participated in or was directly connected with such consumer sale."[8] This note will critically analyze the necessity of the enactment of the Specious Cash Sales Act, the adequacy of the law's coverage, its possible extensions, and its likely economic impact.

II. NECESSITY FOR A LEGISLATIVE SOLUTION TO THE SPECIOUS CASH SALE PROBLEM

A. Inadequacy of Ad Hoc Judicial Relief

The need to cope with specious cash sales arises out of the inadequacy of other statutory provisions and the likely inefficacy of any judicial solution. A judicial trend in the general direction of the preservation of consumer defenses in certain similar situations was noted as early as seventeen years ago.[9] Nevertheless, the trend appears to be proceeding a bit haltingly.[10] To be sure some courts have intervened on behalf of the consumer to preserve his defenses against an assignee-finance company.[11] The

[6] *See* statement by New York Governor Nelson Rockefeller in *McKinney's Session Law News of New York* No. 5, A.258 (1971).

[7] NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT [First Final Draft, 1970] (hereinafter cited as NCA).

[8] Specious Cash Sales Act § 253.

[9] Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1097-98 (1954).

[10] Professor Kripke, just three years ago, could no longer detect such a trend. Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 469 n. 62 (1968).

[11] *See* cases cited in Gilmore, *supra* note 9, at 1099 n. 123. *See also* Littlefield,

question remains, however, whether the reasoning of these decisions lays a groundwork such that consumers can anticipate judicial relief in the specious cash sale context.

The Arkansas Supreme Court offered the first fully articulated rationale for preserving a consumer's defenses against an assignee-finance company in *Commercial Credit Co. v. Childs.*[12] The court held that the assignee did not qualify as a holder in due course because it was so "closely connected"[13] with the entire transaction that it could not be a good faith and innocent purchaser. *Childs,* however, was decided before the adoption of the Uniform Commercial Code (UCC), and it is difficult to say precisely what UCC section might be applied to a similar fact situation today. A likely possibility is section 3-302(1)(b), which requires that an assignee take in good faith[14] in order to be a holder in due course. Even if the assignee is found to be a holder in due course, another possibility is section 3-305(2) which subjects to consumer defenses a holder in due course who "dealt" with the consumer. Some courts have found a constructive agency relationship between the seller and assignee, thus viewing the latter as having dealt with the consumer and subject to consumer defenses.[15]

The "close-connection" doctrine set forth in *Childs* and the provisions of the UCC which arguably support it focus on the status of the finance company as *assignee* and *holder in due course.* Therefore, it is unlikely that courts will view *Childs* and the UCC provisions as a basis for subjecting the finance company to consumer product-oriented defenses in the specious cash sale setting where it is ostensibly nothing more than a lender of cash.

Even the most expansive case to date, *Unico v. Owen,*[16] does not support the notion that consumer defenses may be asserted against the finance company in a specious cash sale. In *Unico* the consumer contracted for the purchase of 140 record albums over a five year period but the retailer went out of business shortly

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Preserving Consumer Defenses: Plugging the Loophole in the New UCCC, 44 N.Y.U.L. REV. 272, 276 n. 9 (1969).

[12] 199 Ark. 1073, 137 S.W.2d 260 (1940) (financer's printed assignment form appeared on reverse side of the consumer note).

[13] *Id.* at 1077, 137 S.W.2d at 262.

[14] UNIFORM COMMERCIAL CODE § 1-201(19) [hereinafter cited as UCC] defines "good faith" as "honesty in fact." Although this has not prevented some courts from applying a "reasonable commercial standards" test in some egregious situations [*see, e.g.,* Norman v. World Wide Distributors, Inc., 202 Pa. Super. 53, 57 n. 2, 195 A.2d 115, 117 n. 2 (1963)], the clear intent seems to call for a subjective test [*see* Braucher, *The Legislative History of the UCC,* 58 COLUM. L. REV. 798, 812 (1958); and Waterbury Savings Bank v. Jaroszewski, 238 A.2d 448 (Conn. Cir. Ct. 1967)].

[15] *See* cases cited in Gilmore, *supra* note 9, at 1099 n. 126 and accompanying text.

[16] Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

thereafter. The financer was found to be a partnership formed expressly for the purpose of financing the seller. The court held that the financer was too closely connected with the sale to qualify as a holder in due course[17] and that the waiver-of-defense clause was void as against public policy.[18] As in *Childs* the court only discussed the holder in due course relationship, which does not necessarily cover a lender to whom a buyer directly gives a promissory note. Although extension of the *Unico* reasoning to this situation may be possible given past judicial activism in this area, such an extension would require a substantial leap from previously announced judicial doctrine.

B. Legislative Solution More Effective

The most important reason for legislative action is efficacy. Individual debtors do not benefit substantially from case law developments[19] for few can afford the protracted litigation necessary to take advantage of such gains.[20] In any event, the legislative branch is better equipped in terms of fact-finding apparatus to frame a rule of uniform applicability. The New York Legislature, recognizing its responsiblity to the many citizens involved in consumer credit transactions, produced the Specious Cash Sales Act.

III. ANALYSIS OF THE SPECIOUS CASH SALES ACT

A. Statutory Language

The Specious Cash Sales Act specifically excludes certain consumer transactions from its coverage,[21] to wit: consumer sales pursuant to article nine[22] of the personal property law, credit transactions, consumer sales of personal property or services which could require the execution of a promissory note pursuant to section 403 of the Personal Property Law,[23] and transactions

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[17] *Unico* arose before New Jersey adopted the UCC. However, the court noted that its holding was consistent with the Code, which was enacted in New Jersey before the decision was handed down.

[18] UCC § 9-206(1) essentially leaves the validity of such waiver provisions to the state. *See* General Investment Corp. v. Angelini, 58 N.J.396, 278 A.2d 193 (1971), in which the court held that N.J.REV. STAT. § 12A:9-206 (1962), (UCC § 9-206), allowed courts to invalidate waiver of defense clauses in their discretion where such clauses violated pulic policy.

[19] James, *Holder in Due Course and Other Prohibitions on Agreements*, 26 BUS. LAW. 881, 882 (1971).

[20] *Id.*

[21] Specious Cash Sales Act § 255.

[22] N.Y. PERS. PROP. LAW §§ 301-312. (McKinney's 1968). This is the Motor Vehicle Retail Installment Act.

[23] N.Y. PERS. PROP. LAW § 403.2. This section permits a promissory note only where

involving the purchase of an automobile. However, defining the relationship between seller and financer was perhaps the most acute difficulty confronting the draftsmen of the statute. One author has expressed scepticism as to the possibility of an acceptable definition.[24] The Legislature handled the problem by making the statute applicable "provided that the creditor knowingly participated in or was directly connected with such consumer sale."[25] Such language includes similar but more exacting criteria than the parallel provision in the NCA.[26]

The ultimate liability of the creditor under this section is limited to the amount owing to him at the time a defense is successfully raised.[27] This is the same ceiling as New York law provides in the case of assignees of consumer paper.[28] It varies, however, from the parallel NCA section which provides for liability up to the total amount financed.[29]

B. Statutory Interpretations

The use of the phrase "knowingly participated in or . . . directly connected with"[30] to describe the seller-financer relationships covered by the Act presents a major interpretive difficulty. Specious cash sales are in *substance* identical to other consumer credit transactions,[31] while in *form* they appear as standard loans and cash sales. Distinguishing the specious cash sales from the innocent loan and sale is the problem, and the above language is crucial to this distinction. Interestingly, the statute does not define the language; rather, it sets out three fact situations which raise rebuttable presumptions that the creditor's knowledge or activity is subsumed by the statutory language.[32] Although the NCA provides for conclusive presumptions of an interlocking of seller and financer,[33] the New York Legislature's adoption of rebuttable presumptions seems only reasonable. The rebuttable presump-

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the vendor furnishes goods or services for repairs, improvements or alterations of real property. However, since the obligation arising may be represented by a promissory note only after the work is fully completed, there is ample consumer protection without the new law.

[24] Kripke, *supra* note 10, at 471 n. 6 and text accompanying.

[25] Specious Cash Sales Act § 253.

[26] NCA § 2.407(1) employs the standard: "[i]f the creditor participated in or was directly connected with. . . ."

[27] Specious Cash Sales Act § 253.

[28] N.Y. PERS. PROP. LAW § 403.6 (McKinney 1970 Supp.).

[29] NCA § 2.407(1).

[30] Specious Cash Sales Act § 253.

[31] Littlefield, *Parties and Transactions Covered By Consumer-Credit Legislation*, 8. B.C. IND. & COM. L. REV. 463, 468 (1967).

[32] Specious Cash Sales Act § 254.

[33] NCA § 2.407(2).

tion places upon the financer the burden of showing that the presumed inference is not true. Such a presumption protects the financer when the financer-seller relationship is not what it appears to be.

The first presumption arises when "the creditor is a person related to the seller."[34] The statute exhaustively defines "person related to the seller."[35] In the case of the individual seller, the term covers most persons who are closely related to the seller by blood or family.[36] If the seller is not an individual, the term "person" covers any one whom the seller controls, who controls the seller, or who is under common control with the seller;[37] plus any officer, director or similar functionary, or any spouse or other relative residing with such individual(s).[38] In addition, the presumption arises if any officer or similar functionary of the creditor is related to the seller under any of the above provisions.[39] In net effect, these provisions cover all situations in which the creditor and retailer are in business together, including, incidentally, such cozy arrangements as the one in *Unico*.[40]

The second situation giving rise to a presumption is where "the seller prepared forms or documents used to evidence or secure the consumer loan."[41] Third, a presumption arises where "the creditor supplied forms to the seller which were used by the consumer to apply for, evidence or secure the consumer loan."[42] These sections are straightforward and apply to situations where the financer has an obvious, direct connection with the seller.

It is significant to note that these presumptions in no way limit the coverage of the Act.[43] Other evidence can be adduced to prove the requisite creditor-seller relationship. However, a consumer using any other evidence must assume the burden of proof.

C. Statutory Improvement: Some Suggestions

1. *Additional Presumptions* – Although the New York law is an important step forward, attention should nonetheless be given to those aspects of the law that could be augmented or improved. For instance, the list of fact situations giving rise to a presumption

[34] Specious Cash Sales Act § 254(a).
[35] *Id.* § 252(f).
[36] *Id.* § 252(f)(1)-(4).
[37] *Id.* § 252(g)(1).
[38] *Id.* § 252(g)(2).
[39] *Id.* § 252(h).
[40] 50 N.J. 101, 232 A.2d 405 (1967), (where the financing corporation was formed, in large part, to facilitate the seller's operations).
[41] Specious Cash Sales Act § 254(b).
[42] *Id.* § 254(c).
[43] *Id.* § 254.

of the requisite knowledge or activity could easily be expanded. In particular, several additional presumptions which are included in the NCA would serve to stengthen the New York Act.[44] In view of the fact that the Act does contain some NCA language, it may be assumed that the draftsmen were familiar with the NCA and intentionally omitted some of the presumptions included therein.

The statute omits kickbacks from financer to seller from the list of presumption-raising fact situations.[45] Common sense suggests that in such a situation the financer and seller are acting collusively; perhaps the Legislature reasoned that this was so obvious as not to require its inclusion in the Act. But with language as amenable to different interpretations as that used in this statute, every possible aid to construction should be given.

Also missing from the statute is any provision making seller's referral of the buyer to a particular finance company presumptive evidence of knowing participation.[46] Possibly the draftsmen feared that innocent financers would be unintentionally included, perhaps by the offhand suggestion of a retailer.[47] However, since the New York law, in contrast to the NCA,[48] provides that these fact situations merely raise *rebuttable* presumptions, the financer could still offer evidence tending to prove that the requisite relationship was in fact lacking. Given that most of the relevant evidence is readily available to the financer, shifting the burden of proof in a referral situation would not impose too great a responsibility on him.

Another of the NCA conclusive presumptions arises when during a one year period a financer makes twenty or more loans for the purchase of goods from the same seller.[49] Omission of such a provision from the New York Act is probably wise, for it would apply to many transactions which are at arm's-length.[50] A large financer in an urban area could easily account for twenty such transactions involving several different retailers without the least collusive involvement. Or the sole source of credit in a sparsely populated area might find itself in a similar position vis-à-

[44] NCA § 2.407(2).

[45] Compare *id.* § 2.407(2)(f) which makes this evidence sufficient per se to establish the seller-financer relationship.

[46] *Id.* § 2.407(2)(e) makes this evidence conclusive on the issue.

[47] *But, see id.* § 2.407, Comment 3, which suggests that such referral is almost invariably by prearrangement.

[48] *Id.* § 2.407(2) lists fact situations meant to be taken as conclusive proof that "the creditor participated in or was directly connected with" the sale.

[49] *Id.* § 2.407(2)(d).

[50] Note, *Limitations on Sales Agreements Under the Uniform Consumer Credit Code and The National Consumer Act*, 56 IOWA L. REV. 171, 185 (1970).

vis many local retailers. Indeed, one policy reason for preserving consumer defenses in consumer loan and sale transactions is to place a burden of investigation on the financer.[51] By providing that frequency of association gives rise to a presumption of collusion this provision might induce the financer to refuse credit rather than investigate a retailer with whom he has little, if any, contact.

2. *Credit Card Transactions*—Although the Act could be broadened to cover the expansive field of consumer credit transactions involving the use of credit cards, it specifically excludes credit card transactions from its coverage.[52] In contrast, the NCA specifically includes these transactions where "the creditor is the issuer of a credit card which may be used by the consumer in the consumer sale or lease as a result of a prior agreement between the issuer and the seller or lessee."[53] The primary concern here is the national multi-purpose credit card business, such as that carried on under the aegis of Master-Charge and Bank-Americard. One commentator suggests that the credit card arrangement is the logical place to begin plugging the specious cash sale loophole because the credit card company *necessarily* has some prior arrangement with those businesses which honor its card.[54] Other commentators reason that the relationship between cardholder and issuer is primary in this situation, and an extension of the law to cover it would make the financer responsible for sellers with whom he has only the remotest relationship.[55] Obviously, substantial losses by credit card companies on account of vendor malfeasance would be unacceptable. Since, however, the card companies and retailers operate under running agreements, the companies could contractually arrange to pass back any losses (possibly through the use of repurchase agreements) from transactions resulting in such consumer defenses as unmerchantability.[56] At most, the only additional burden on the credit card companies is the burden of investigating the solvency of those retailers which they authorize to honor their cards. Since credit card companies exhort consumers to buy where their signs are displayed,[57] ex-

[51] James, *supra* note 19, at 883.

[52] Specious Cash Sales Act § 255.

[53] NCA § 2.407(2)(g).

[54] Kripke, *supra* note 10, at 470–71 n. 66.

[55] Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 438 (1968).

[56] James, *supra* note 19, at 882, observes that repurchase agreements are already common in many financial dealings involving assignments of notes.

[57] Bergsten, *Credit Cards—A Prelude to the Cashless Society*. 8 B.C. IND. & COM. L. REV. 485, 514 n. 128 and accompanying text.

tending their responsibility to include the quality or, at least, solvency of the retailer hardly seems unfair.

3. *Subsequent Assignment of Consumer Note by Lender*— The Act provides in the specious cash sale context a creditor making a consumer loan is subject to all consumer defenses arising from the related consumer sale.[58] It does not state that any subsequent assignee of that note would also be subject to those defenses. This differs from the recently passed New York law on retail installment contracts, which specifies that any assignee of the contract is subject to all consumer defenses.[59] Thus it appears that assignees of the specious cash sale contracts may qualify as holders in due course[60] and thereby attain immunity from consumer defenses.

Lenders who seek to evade the reach of the Specious Cash Sales Act by resorting to this tactic should meet with little success in the courts. The purchase money loan and subsequent sale only *appear* to be distinct transactions. In substance they are integral parts of the same consumer credit transaction. Therefore, the assignee of the note or contract executed by the consumer-buyer takes subject to all claims and defenses that this buyer would have against the seller.[61]

The courts would reason that the purpose of the Specious Cash Sales Act was to protect consumers in this hybrid context to the same extent they were already protected in the retail installment context. Since a consumer in the latter situation is able to maintain his defenses against a subsequent assignee of his note,[62] it would follow that a consumer in the specious cash sale context should also be able to maintain his defenses against subsequent assignees of the lender. Anticipation of liberal judicial construction, of course, is no excuse for the omission of specific statutory language going to the subsequent assignee contingency.

IV. LIKELY ECONOMIC IMPACT OF THE SPECIOUS CASH SALES ACT

A. Availability of Consumer Credit

The potential economic impact of this legislation upon consumer credit is necessarily speculative. As a basis for suggesting likely results, this note relies upon empirical studies and pre-

[58] Specious Cash Sales Act § 253.

[59] N.Y. PERS. PROP. LAW § 403.6 (McKinney 1970 Supp).

[60] They would, of course, have to meet the requirements of UCC § 3-302.

[61] N.Y. PERS. PROP. LAW § 403.6 (McKinney Supp. 1970) generally concerns "the assignee" of a retail installment contract or obligation.

[62] *Id.*

dictions directed at legislation which eliminated the holder in due course status and waiver-of-defenses in consumer transactions.

The theory that freeing finance companies from consumer defenses in the holder in due course context is to encourage the free flow of commercial paper has been attacked by many commentators.[63] It is doubtful that the unavailability of defenses quickens the free flow of consumer paper, because these instruments move equally as fast in states that allow consumer defenses against holders as in those that do not.[64] Moreover, since the New York Act only closes a small loophole in a comprehensive scheme for preserving defenses, it is doubtful that its further effect on negotiability will seriously impede the availability of credit.

The most extensive empirical survey,[65] however, seems to suggest that legislation along these lines can make credit more difficult to procure. This study concerned the Connecticut Home Solicitation Sales Act of 1967.[66] Relevant here is the section of the statute providing that a consumer's obligation may not be evidenced by a negotiable instrument.[67] The study showed that the number of dealers maintaining financing arrangements with financial institutions was cut in half.[68] It is, however, difficult to evaluate this statistic. Approximately one-third of the decrease may have resulted from one large financer's leaving the market entirely.[69] In addition, the Connecticut law reached only at-home solicitation sales. Arguably, a decrease in the number of dealers able to procure financing may show only that the law effectively shut fraudulent dealers out of the consumer market.

Another interesting facet of the study is that some bankers believed that the Connecticut Act covered the specious cash sale situation whenever the seller referred the buyer to a financer.[70] Nevertheless, only three of sixteen dealers surveyed who had

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[63] James, *supra* note 19, at 883 claims the freedom from defenses is "now important primarily as a means by which disreputable sellers continue to get financing for their consumer paper." Kripke, *supra* note 10, at 470 suggests that consumer defenses against a holder in due course would make a negligible difference to the financers. Littlefield, *supra* note 11, at 285, believes that the consumer paper segment has little effect on the commercial paper market in any case.

[64] Jordan & Warren, *supra* note 55, at 436.

[65] Comment, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969). [Hereinafter cited *Yale Study*.]

[66] CONN. GEN. STAT. § 42-134 to -143 (Supp. 1968).

[67] *Id.*

[68] *Yale Study* at 637-638.

[69] *Id.* at 638.

[70] *Id.* at 626, n. 35.

used this arrangement were subsequently unable to procure financing in that manner.[71]

B. Lenders and Sellers

The ultimate effect of the Specious Cash Sales Act on finance companies in New York is likely to be minimal. Since the law is aimed only at financers engaged in collusive dealings with retailers, it should have no effect on the normal business of these institutions, especially since they are now subject to consumer defenses in all legitimate consumer credit transactions. Any increase in investigative activity should be negligible since the only additional investigation necessitated would be of retailers in whose activities they knowingly participate or with whom they are directly connected.[72]

The effect on the retailer will be that any arrangement with a lender premised upon the specious cash sale loophole is apt to be terminated unless the retailer can convince the lender of his solvency, the quality of his products or services, and his willingness to assume responsibility for any obligation subject to product-oriented defenses.[73] Since most of the reputable merchants now using the specious-sale procedure can probably meet these requirements, hopefully only the disreputable few will go out of business.

C. Consumers

In terms of the Act's likely economic impact, buyers stand to be affected indirectly. Those disreputable sellers using the specious-cash loophole to make fraudulent sales will lose their share of the market. If the more stringent regulations make credit more expensive, the cost no doubt will be passed on to consumers. Note, however, that once the policy decision has been made to cut off holder in due course immunity and waiver-of-defenses from consumer transactions,[74] plugging this last apparent loophole with the Specious Cash Sales Act logically completes the legal package and at minimal cost.

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[71] *Id.*

[72] Schuhman, *Consumer Credit by Adhesion Contracts II*, 35 TEMPLE L. REV. 281, 294 (1962); *Yale Study* at 640–41; Note: *Limitations on Sales Agreements Under the Uniform Consumer Credit Code and the National Consumer Act*, 56 IOWA L. REV. 171, 186 (1970).

[73] This, of course, means lenders will acquire additional investigative costs. Even if the original costs of investigation resulting from the laws eliminating holders in due course and waivers of defenses in New York may have raised credit costs, the instant law probably involves only minimal additional costs.

[74] *Yale Study* at 656.

V. CONCLUSION

The New York Specious Cash Sales Law guarantees the preservation of consumer defenses against financing institutions in consumer transactions. Unfortunately, given the possibility that other states may enact such legislation, , the proposed Uniform Consumer Credit Code (UCCC)[75] contains no such provision. Though this defect in the UCCC has been noted,[76] no remedial action has been taken. Any state considering adoption of the UCCC as part of a comprehensive consumer protection package must adopt a provision similar to the New York Specious Cash Sales Act or the NCA § 2.407. Hopefully, this note has offered some suggestions as to the comparative strengths and weaknesses of the individual provisions in these acts.

—*Craig D. Holleman*

[75] A Final Draft of the UCCC was approved by the National Conference of Commissioners on Uniform State Laws on July 30, 1968 and by the American Bar Association on August 7, 1968.

[76] Littlefield, *supra* note 11.

APPENDIX

Specious Cash Sales Act

Sec. 252. Definitions. For purposes of this article:

(a) The term "consumer" means an individual.

(b) The term "creditor" means a person regularly engaged in the business of making loans.

(c) The term "seller" means a person who sells or agrees to sell personal property or furnishes or renders or agrees to furnish or render services.

(d) The term "consumer loan" means a loan of money by a creditor to a consumer for which the consumer's obligation is payable in installments or for which a finance or other charge is or may be imposed.

(e) The term "consumer sale" means a sale by a seller to a consumer of personal property or services for personal, family or household purposes.

(f) The term "person related to the seller" means with respect to an individual seller:

(1) the spouse of the seller;

(2) a brother, brother-in-law, sister or sister-in-law of the seller;

(3) an ancestor or lineal descendant of the seller or his spouse; and

(4) any other relative, by blood or marriage of the seller or his spouse who shares a residence with the seller.

(g) The term "person related to the seller" means with respect to any other seller:

(1) a person directly or indirectly controlling, controlled by or under common control with the seller;

(2) an officer or director of the seller, or a person performing similar functions with respect to the seller; the spouse of any such person; and any other relative by blood or marriage of any such person who shares a residence with such person.

(h) A creditor who is not an individual shall be a "person related to the seller" if an officer of the creditor or a person performing similar functions, whose duties include participation in or supervision over the consumer loan the proceeds of which were primarily used in the consumer sale, is a person related to the seller under (f) and (g) of this section.

Sec. 253. Consumer defenses. A creditor, who made a consumer loan the proceeds of which were primarily used in a consumer sale, shall be subject to all of the defenses of a consumer arising from such consumer sale, provided that the creditor knowingly participated in or was directly connected with such consumer sale. The creditor's liability under this article shall not exceed the amount owing to the creditor at the time the defenses of the consumer are asserted against the creditor. Rights of the consumer under this article can only be asserted as a matter of defense to or set-off against a claim by the creditor. The creditor shall be subrogated to the rights of the consumer arising from the consumer sale and shall have recourse against the seller to the extent of any liability incurred by the creditor pursuant to this article.

Sec. 254. Creditor relationship. Without limiting the scope of section two hundred fifty-three [¶6302], there shall be a rebuttable presumption that the creditor shall have knowingly participated in or shall have been directly connected with a consumer sale if:

(a) the creditor is a person related to the seller; or

(b) the seller prepared forms or documents used to evidence or secure the consumer loan; or

(c) the creditor supplied forms to the seller which were used to evidence or secure the consumer loan; or

(d) the creditor supplied forms to the seller which were used by the consumer to apply for, evidence or secure the consumer loan.

Sec. 255 [Exceptions.] The provisions of this article shall not apply to consumer sales made pursuant to article nine [¶6059 *et seq.*] of the personal property law, credit card transactions, consumer sales of personal property or services which could require or entail the execution of a promissory note pursuant to section four hundred three [¶6016] of the personal property law, or transactions involving the purchase of an automobile.