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SEVERANCE OF BUYER’S DEFENSES AGAINST SELLER’S ASSIGNEE THROUGH MERGER-DISCLAIMER CLAUSES: CIRCUMVENTION OF UCCC SECTIONS 2.403 AND 2.404

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I. INTRODUCTION

UNTIL RECENTLY, the buyer of goods (B) was generally unable to invoke the seller’s (S) breach against the third party who financed B’s purchase (F). This result was usually accomplished in one of two ways: (1) by structuring the financing transaction as a loan agreement, with F remaining outside the sales relationship; or (2) by using dealer financing, whereby F purchased S’s rights under the sales contract, yet avoided his duties thereunder by utilizing a waiver-of-defense clause or the holder-in-like-course doctrine. In the former arrangement, B paid S cash for the goods out of the loan proceeds. Since the loan was a transaction entirely separate from the sale, B could not refuse repayment on the ground that S had breached his obligations.† Although this generally provided F with


1. The buyer-borrower can successfully resist repayment of the loan only in the unlikely event that the lender acted as seller’s principal or co-venturer, that fraud infected the loan contract, or that the lender was negligent (e.g., by providing an innocent buyer with a loan in full knowledge that the seller was wholly unscrupulous). Note, Direct Loan Financing of Consumer Purchases, 85 HARV. L. REV. 1409, 1423-32 (1972).

Massachusetts appears to be the only state in which the lender’s liability to underlying claims and defenses is regulated by statute:

A creditor in consumer loan transactions shall be subject to all of the defenses of the borrower arising from the consumer sale or lease for which the proceeds of the loan are used, if the creditor knowingly participated in or was directly connected with the consumer sale or lease transaction.

MASS. GEN. LAWS ANN. ch. 255, § 12F (1974). This section then proceeds to specify a number of situations in which the lender is deemed to have participated in the sale (e.g., where he is related to the seller, furnishes forms to the seller, is recommended to the buyer by the seller and makes two loans in one year whose proceeds go to the same seller, or is the issuer of a credit card). California has regulated the legal significance of underlying defenses in tripartite credit card sales, probably the most common form of direct financing. The credit card issuer is subject to the buyer’s defenses against the seller if: (1) the goods costs more than $50; (2) the sale is within the state; (3) the buyer unsuccessfully seeks satisfaction from the seller; and (4) the buyer gives notice of a defense to the issuer. CAL. CIV. CODE § 1747.90(a) (West Supp. 1974). The Fair Credit Billing Act, passed by the Senate as S. 2101, 93d Cong., 2d Sess. (1973), provided similar protection for credit card holders. The Federal Trade Commission has proposed a regulation which would subject both the credit card issuer and the related lender (e.g., one who supplies forms to the seller or to whom the seller regularly refers his buyers) to defenses arising out of the
absolute immunity against defenses arising out of the underlying sale, it suffered certain drawbacks. First, F's lack of communication with prospective buyers and the high cost of assessing an individual bor-


Buyers' defenses against related lenders and credit card issuers are regulated by the UNIFORM CONSUMER CREDIT CODE (Tent. Final Draft, Working Redraft No. 5, 1973) [hereinafter cited as UCCC Working Redraft No. 5] and the National Consumer Act (First Final Draft, 1970) [hereinafter cited as NCA]. UCCC Working Redraft No. 5 § 3.403(3) adopts the aforementioned California approach to buyers' defenses in credit card purchases. Section 3.405 subjects a lender to a buyer's underlying defenses in six cases: where 1) the lender knows the seller received a commission for arranging the loan; 2) the seller is related to the lender; 3) the seller bears the risk of default under the loan; 4) the lender supplies documents; 5) the loan is conditioned upon the buyer's purchase from a particular seller; or 6) the lender has knowledge or notice of the seller's misfeasance under similar sales contracts. NCA § 2.407 provides comparatively greater protection for the consumer. It expands the category of lenders who participate in or are connected with a consumer sale to include credit card issuers, any lender who finances 20 or more transactions with a particular seller, a lender to whom the buyer is referred by seller (no requirement for compensation), and any lender who makes payment directly to the seller. Moreover, unlike the UCCC Working Redraft No. 5 and California approach, there are no dollar limitations or requirements that the consumer first seek satisfaction from the seller. See Comment, An Analysis of the Uniform Consumer Credit Code and the National Consumer Act, 12 B.C. IND. & COM. L. REV. 899 (1971). See generally Miller & Warren, A Report on the Revision of the Uniform Consumer Credit Code, 27 OKLA. L. REV. 1 (1974); Comment, Preserving Consumer Defenses in Credit Card Transactions, 81 YALE L.J. 287 (1971).

Where the loan proceeds are contained in a cashier's check payable to the seller or to the buyer and seller jointly, the buyer may be able to prevent payment by the lender/issuing bank. Since the cashier's check is generally viewed as a draft accepted in advance, this cannot be effectuated by means of a stop payment order. UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] §§ 4-403(1), 4-303(1), 3-410, 3-413(1). See Pennsylvania v. Curtiss Nat'l Bank, 427 F.2d 395 (5th Cir. 1970); Wertz v. Richardson Heights Bank and Trust, 495 S.W.2d 572 (Tex. 1974). See generally Note, The Rights of a Remitter of a Negotiable Instrument, 8 B.C. IND. & COM. L. REV. 260, 261-62 (1967). However, this rule can be circumvented. If the issuing bank is unwilling to cooperate with the buyer, the buyer can assign all his rights under the sales contract to the bank. Upon the bank's refusal to pay the cashier's check, the seller must sue. Once the seller establishes his prima facie right to recover from the bank on the instrument, the bank will raise the defenses (non-performance, breach of warranty) arising out of the sales contract and force the seller to qualify as a holder in due course. UCC §§ 3-302, 3-307(3). The seller cannot so qualify because he had notice of the defect in the goods or gave value only "to the extent that the agreed consideration has been performed." UCC § 3-303(a). As one not a holder in due course, the seller is subject to "all defenses of any party (the Bank) which would be available in an action on a simple contract." UCC § 3-306(a). An obligor on a contract (here, the bank by its obligation to the seller on the check) can set-off against the obligee (the Seller) claims against the obligee even though these claims are acquired through assignment, arise out of a separate transaction, and antedate the primary obligation. See, e.g., Commerce Mfg. Co. v. Blue Jeans Corp., 146 F. Supp. 15 (E.D.N.C. 1956); Wood v. Sutton, 177 Okla. 631, 61 P.2d 700 (1936). If the check was made to the joint order of buyer and seller, the buyer is a "party" on the instrument. Under UCC § 3-306(b), the bank can raise the defense of "any party," hence apparently obviating the need for an assignment. Where the bank is unwilling to cooperate, the buyer must establish a "claim" to the check so as to come within the ambit of sections 3-306(a) and 3-603(1). He should immediately "reject" the goods and "cancel" the sales contract. UCC §§ 2-601, 2-711 (1). Having done so, he is entitled to a return of the price payment. UCC § 2-711. Since this right to the price, although secured under UCC § 2-711(3), is contractual in nature, it may not create the requisite property interest in the check implied by the "claim" element of UCC § 3-306(a). However, it should be noted that Comment 5 to UCC § 3-306 states that "claim" includes all claims for rescission. Compare Restatement of Reconstitut...
rower's credit-worthiness seriously limited the volume of such loan transactions. Second, the arrangement also limited F's profits, since the returns constituted "interest" subject to traditionally low rate ceilings as well as to restrictions extrinsic to the particular loan transaction. This inflexibility of interest rates prevented F from pricing his finance services in response to competitive forces or to the risks involved in a particular transaction or group of transactions.

The disadvantages of loan financing, however, could be avoided or minimized by dealer financing. Instead of obtaining a loan through F and paying cash for the goods, B obtained an extension of credit from S under an installment contract. In exchange for immediate possession of the goods, B agreed to make periodic payments of the

**TRANSACTION** § 167 (1937) (transfer induced by fraud results in constructive trust on property received by transferee), with **RESTATEMENT OF CONTRACTS** § 354 (1932) (total breach of contract involving unique res gives rise to right to specific restitution). See also 5 A. Scott, **TRUSTS** § 468 (3d ed. 1967). Finally, it should be noted that, upon cancellation, title to the goods reverts in the seller. **UCC** § 2-401(4). It is arguable that, by analogy, title to specific identifiable property (the check) received by the seller should revert to the buyer. Under **UCC** § 3-603(1), the buyer can utilize his "claim" to prevent the bank from paying the cashier's check. This tactic has been successfully employed by a remitter of a bank draft. See Fulton Nat'l Bank v. Delco Corp., 128 Ga. App. 16, 195 S.E.2d 455 (1973) and authorities cited therein.

2. Branch banking, preauthorized credit in the form of bank credit cards issued en masse, and "no-bounce" checking accounts are familiar devices used to minimize the contact and communication costs necessary for direct extensions of credit.

3. The traditional usury rates vary from 4% to 8% per annum with 6% being the most common limit. See 1 CCH **CONSUMER CREDIT GUIDE**, CHARTS § 510 (1971). Small-loan acts, although they permit significantly higher rates, apply only to relatively small extensions of credit. **Id.** ¶ 540 (1971). Installment-loan acts frequently specify no ceiling upon the credit extension and typically permit a finance charge of 6% on the total amount until payment of the final installment. **Id.** ¶ 570. Where the loan is repaid in equal monthly installments, this is equivalent to an annual percentage rate of about 11%. See rate table to Regulation Z in 5B F. Hart & W. Willier, **BENDERS UCC SERVICE** §§ 9-210.408 (1973).

The Uniform Consumer Credit Code [hereinafter cited as UCCC] provides for uniformly higher rates of interest for both loans and credit sales. In general, the seller or supervised lender may charge either 1) 36% per annum on the unpaid balances of the first $300 financed, 21% on the next $700, and 15% on the amount greater than $1000 or 2) 18% on the entire amount financed. **UCC** §§ 2.401, 3.508. Non-supervised lenders may charge no more than 18%. **UCC** § 3.201. The UCCC rate structure is discussed in Jordan & Warren, The **Uniform Consumer Credit Code**, 68 COLUM. L. REV. 388, 394-408 (1968). Like the UCCC, the NCA provides for either flat or graduated finance charges; however, it makes no recommendation as to the proper rate ceiling and, for purposes of rate regulation and disclosure, does not distinguish between a consumer credit sale and a consumer loan. See NCA §§ 2.201, 2.301, 1.301(10), and Comments thereto. The pros and cons of the UCCC and NCA regulations are ably discussed in Comment, An Analysis of the **Uniform Consumer Credit Code** and the **National Consumer Act**, 12 B.C. IND. & COM. L. REV. 889, 895-90 (1971).

4. Since the interest rate is a function of the supply of loanable funds, it will be influenced by the rates charged by the Federal Reserve Bank for discount of the lender bank's commercial paper and for loans made to member banks, as well as by the statutory reserve requirements. See Federal Reserve Act §§ 13, 13a, 12 U.S.C. §§ 343, 347 (1970). Interest and discount rates are fixed by Regulation A, 12 C.F.R. 201.51 (1974); reserve requirements are implemented by Regulation D, 12 C.F.R. 204.5 (1974).

5. For a discussion of dealer financing under the **UCC**, see Kriple & Felsenfeld, **Commercial Law** & Practice, § 26.47, at 19-21 (1977); see also J. Withrow, **RUTGERS L. REV.** 168, 170-81 (1962), reprinted in 2 **UCC REF. SERV.** 208, 291-97 (1966).
The "time-price" (the regular cash price plus a premium for the privilege of paying overtime) and to allow the retention of title by S until payment was completed. The retention of title by S secured his price claim against B. F financed the sale transaction by purchasing the contract from S. The time-price differential on such contracts was generally not considered "interest" under typical usury laws. The volume of F's dealer-financing operations depended upon F's rapport with the sellers — a smaller, better defined and hence more accessible class than that of prospective buyers. Moreover, by splitting the time-price differential with S and/or by varying its recourse against S, F was better able to adjust the price of its services to meet competition and to reflect the risk involved in various types of sales. As assignee of the sales contract, F was, of course, exposed to all B's defenses and claims against S. However, he was able to step out of S's shoes and immunize himself from defects in the sale transaction by resort to waiver-of-defense clauses and/or the holder-in-due-course doctrine. Unless B could show that there existed a very "close connection" between S and F or that F purchased the paper in bad faith or with notice of the defects, B had no choice but to pay F and seek recourse against S who often proved financially irresponsible.

6. See UCC § 2-401(1). The security interest, perfected without filing by virtue of UCC § 9-302(1)(d), provides the desired protection against lien creditors, the trustee in bankruptcy, used-goods dealers, and subsequent creditors with perfected security interests. See UCC §§ 9-301(1), 9-307(2), 9-312(5)(b).


8. The discount rate depends upon interest and market conditions. On automobile sales paper written at an 18% annual percentage rate, the discount ranges between 6% and 10%. So long as the discount rate is greater than zero and less than the effective interest rate imposed by the time-price differential or finance charge, the dealer and financier will be splitting the return represented by that differential. The assignee's recourse rights against the dealer are generally governed by agreement and range from "no recourse" to "full recourse." See Appendix II, ¶ 13 for an example of a typical "assignment" provision found in the Retail Sales Contract.

9. See UCC § 9-318(1)(a); Restatement of Contracts § 167 (1932).

10. See generally Comment, Consumer Protection — The Role of Cut-Off Devices in Consumer Financing, 1968 Wm. & L. Rev. 505, 507-19 (1968). The buyer generally signed a note payable to the sellers order, and the installment contract contained a waiver-of-defense clause whereby buyer agreed to waive any claims or defenses which arose out of the underlying sale and could be asserted against the assignee. If the financier were a holder in due course on the note, he could then enforce the buyer's price obligation free of the buyer's defenses and claims against the seller. UCC § 3-305. See, e.g., Waterbury Savings Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 4 UCC Rep. Serv. 1049 (1967) (financer as holder in due course); Block v. Ford Motor Credit Co., 286 A.2d 228 (D.C. App. 1972) (financer as beneficiary of waiver-of-defense clause).

11. See Rehurek v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. App. 1972) (in-house financier furnished forms, investigated buyer's credit, and purchased most of seller's contracts could not enforce waiver clause against buyer); General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971) (finance company taking home improvement note 12 days after execution without demanding completion certificate denied holder-in-due-course status); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967) (financer established to purchase seller's paper and exercise extensive control over seller could not qualify as holder in due course or as beneficiary of waiver clause).
Recent legislation, in particular the Uniform Consumer Credit Code (UCCC), has eliminated or greatly restricted F’s immunity in the dealer financing context. Section 2.403 of the UCCC prohibits, and section 5.202 penalizes, the use of non-demand negotiable instruments in consumer sales and thus effectively precludes F from exploiting the holder-in-due-course doctrine to immunize himself from B’s defenses against S. Section 2.404 either forbids or sharply restricts the use of waiver-of-defense clauses, thus leaving F qua assignee exposed to the claims and defenses arising out of the underlying sale. On the other hand, the UCCC leaves F free to immunize himself by structur-
innovations generally result in the consumer's increased use of credit, and the widespread effects of credit financing are often impeded by the expense of developing communications with prospective buyers, by the relative inflexibility of interest rates, and by the difficulty of splitting the finance profits with the supplier of the goods.

Given the natural desire of third-party financers to avoid any liability arising from the buyer-seller relationship and considering the basic economic advantages of dealer financing over the independent loan arrangement, it is not surprising that, despite the recent restrictions upon the use of negotiable instruments and waiver clauses, banks continue to print installment contracts, distribute them to dealers, purchase them when completed, and share the profits with the seller. More interesting are the innovations employed by the banks to immunize themselves from the seller's misfeasance. This article examines what appear to be the most common devices used to circumvent the UCCC restrictions upon negotiable instruments and waiver-of-defense clauses.  

II. THE HYPOTHETICAL TRANSACTION, BASIC WRITINGS, AND RESULTING LEGAL RELATIONSHIPS

In the market for a new car (boat, large appliance, etc.), B approaches S, who extolls his goods with the usual combination of sales talk, earnest representations, and references to the warranties given by the seller or manufacturer. After more or less protracted negotiations, B agrees to purchase (and S agrees to sell) a particular

15. See Littlefield, Preserving Consumer Defenses: Plugging the Loophole in the New UCCC, 44 N.Y.U.L. Rev. 272, 276-77 (1969). For existing and proposed legislation designed to plug this loophole, see note 1 supra. The most recent empirical study indicates that legislation similar to sections 2.403 and 2.404 has deferred some lenders (especially small finance companies) from buying installment contracts and has resulted in an increased use of direct loans. See Comment, Abolishing Holder in Due Course in Oregon Consumer Transactions: Legal and Economic Consequences, 52 Ore. L. Rev. 461, 479-80 (1973).

16. See note 3 supra.

17. In credit card financing, the agreement between the issuing bank and the cardholder seeks to establish a loan-like relationship rather than to nominate the bank as assignee of seller's price claim against the buyer. See Brandel & Leonard, Bank Charge Cards: New Cash or New Credit, 69 Mich. L. Rev. 1033, 1045-47 (1971). This relationship is confirmed by UCCC § 1.301(9) (definition of "lender credit card"). In contrast, the agreement between the bank and the participating merchant clearly resembles an assignment. Id. at 1041-44. See also Banks and Third-Party Credit Card Transaction Agreements, 13 Mich. L. Rev. 870, 902-03 (1965); N.Y.U. Comm., Bank Ameri

18. This article does not deal with the use of direct-loan financing to cut off buyer's defenses. For discussions of this loophole, see Miller, An Alternative Response to the Supposed Direct Loan Loophole in the UCCC, 24 Okla. L. Rev. 427, 433-37 (1971); Littlefield, supra note 16, at 292-97; and Comment, Preserving Consumer Defenses in Credit Card Transactions, supra note 1.
car. It is important to note that, at this point, there probably exists a valid contract between the parties.\textsuperscript{19} The paper work which follows this oral agreement generally involves two or three writings. In most new car sales, the buyer first signs a "Sales Order." This writing (typical provisions of which are reprinted in Appendix I) sets forth the basic terms of the sale\textsuperscript{20} and conditions its execution upon "purchaser's ability to obtain satisfactory financing."\textsuperscript{21} After B informs S of his preference regarding available financers (credit union, bank, independent finance company, or manufacturer's affiliated finance company), S contacts the designated institution (F) and inquires of F's readiness to purchase a contract signed by B.

Upon approval of his credit, B signs a "Retail Sales Contract" form (typical provisions of which are reprinted in Appendix II) supplied by F, an application for a motor vehicle certificate of title, and/or a UCC Financing Statement.\textsuperscript{22} Shortly thereafter, he receives possession of the vehicle and the operation manual. This manual contains the manufacturer's warranty, pursuant to which the manufacturer guarantees parts and workmanship against defects for a specific period of time or usage, provides for repair and replacement by an authorized dealer as the remedy for nonconformity, and may disclaim all other implied and express warranties.\textsuperscript{23} Within a few days, B receives from F both notification that it has acquired the contract and a book of payment coupons which designate the amount and date of each installment.

\textsuperscript{19} The UCC requires no magic words for contract formation:
A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. UCC § 2-204(1). The fact that the seller and buyer then proceed to execute a writing (purchase order) which imposes duties on both parties indicates that the oral negotiations terminated in a contract. Nor will that contract fail for indefiniteness due to open terms. UCC § 2-204(3). See, e.g., Southwest Engineering Co., Inc. v. Martin Tractor Co., Inc., 203 Kan. 684, 473 P.2d 18 (1970). However, until delivery or partial payment, the contract is unenforceable without "some writing sufficient to indicate that a contract of sale has been made." UCC § 2-201(1).

\textsuperscript{20} See notes 57-66 and accompanying text infra.

\textsuperscript{21} Appendix I, §§ 2 (Sales Order).

\textsuperscript{22} See UCC § 9-402. The last two items are required for compliance with the jurisdiction's motor vehicle registration act and/or for perfection of the seller's security interest which is created through the title-retention clause of the installment contract. UCC §§ 1-201(37), 2-401(1), 9-302(1); Uniform Motor Vehicle Certificate Title and Anti-Theft Act §§ 20, 21.

\textsuperscript{23} Whereas the manufacturer's express warranty is always contained in the operator's manual or in a separate brochure delivered with the manual, the warranty disclaimer frequently appears only in the installment contract or, when the buyer pays cash, in the purchase order. This arrangement recognizes 1) that in the absence of a sales contract between manufacturer and buyer, the privity rule suffices to preclude the existence of implied warranties against the manufacturer and 2) that since the implied warranty deemed to be given by the manufacturer cannot be disclaimed by a writing delivered after the sale is executed, the disclaimer would be ineffective were it contained in the operator's manual alone. See Koelmer v. Chrysler Motors Corp., 6 Conn. Cir. Ct. 478, 8 UCC Rep. Serv. 688 (1970). See Appendix III for typical provisions found in a manufacturer's warranty, and Appendix I, §§ 12 (Sales Order), and Appendix II, §§ 5 (Retail Sales Contract), for typical disclaimer clauses.
Now assume that the car turns out to be a "lemon" incapable of repair; or that S is unwilling to adequately service substantial defects in the vehicle. B wants to revoke his acceptance, return the car, recover at least a part of his payments, and be freed from any further obligation to F. 24 To his horror, he discovers that the various writings contain certain clauses, the combination of which operates, UCCC or similar legislation notwithstanding, to immunize F from his defenses and claims arising out of the underlying sale.

Ostensibly, the most important writing is the "Retail Sales Contract." This contract is executed on a form which is supplied by F and which designates F as the eventual assignee and party to whom B shall make payments. In almost all circumstances, it operates as a contract of adhesion, the terms of which are dictated by F. As a legal document, the form serves the dual purpose of integrating the sales contract and setting forth the security agreement between B and S. As a security agreement, the form contains no surprises. A title reservation clause is combined with fine-print boilerplate which governs the care of the collateral and defines "default." 25 In contrast, as an integration of the sales agreement, the form supplied by F is a study in one-sidedness. First, the only express undertakings are those made by the buyer, for example, to purchase, to pay, and to waive defenses against the assignee. 26 The seller does not even expressly agree to sell and deliver the goods. 27 Indeed, some such forms do not even provide a space for the seller's signature, except in connection with the assignment clauses on the reverse side. 28 Second, the contract completely disclaims all warranties. 29 Comparable forms used by a manu-


25. See Appendix II (Retail Sales Contract), ¶ 3 (title retention clause); ¶ 1 (description of the collateral); ¶¶ 9-2-9-7 (care and custody of collateral); and ¶ 9-9 (default). The requirements for an enforceable security interest are set forth in UCC § 9-203(1)(b) (1966 version) in connection with § 9-105(1)(h) (1966 version) and § 1-201(37).  

26. See Appendix II, ¶¶ 1, 2, 4, 9(1) (Retail Sales Contract).  

27. This is the minimal obligation of a seller. UCC § 2-301. It is recognized in most standard form contracts by the recital, "Seller sells and Buyers purchase . . . ." See, e.g., 18 Am. Jur. Legal Forms § 253:472 (1974).  

28. See, e.g., American Fletcher National Bank and Trust Company (Indianapolis, Indiana) Form 3303, Retail Installment Security Agreement, Automobile or Mobile Home (Copyright 1969 at the Villanova Law Review).  

29. See Appendix II, ¶ 5 (Retail Sales Contract).
facturer's in-house finance company, while likewise disclaiming all implied warranties, generally contain at least a cross-reference to the new-vehicle warranty. 30 Third, despite the lack of any reference to the seller's duties under the sale, the form is designated as the "entire agreement between the parties." 31 If effective according to its terms, this writing will enable the assignee F to enforce his price claims against B without regard to defects in the goods, the UCCC notwithstanding.

To resist payment under the contract, B must be able to invoke either a contract provision or a rule of law which permits him to take such action. The Retail Sales Contract form, however, provides B with no assistance. The Uniform Commercial Code (UCC), in contrast, contains at least two sets of provisions which could justify B's refusal to pay. Under section 2-711(1) of the UCC, a buyer can withhold payment and claim damages if he effectuates a justifiable revocation of acceptance. 32 Alternatively, section 2-714(1) gives the aggrieved buyer a claim to breach-of-warranty damages which he can, under section 2-717, deduct from the purchase price. 33 As against a naked assignee of the contract, section 9-318 permits the buyer to raise the revocation of acceptance as a "defense" and the breach of warranty as a "claim" to thereby defeat, wholly or in part, the assignee's attempt to enforce the buyer's obligation to pay the price. 34 Until relatively recently, however, as previously noted, 35 the assignee could obtain immunity from these defenses and claims either as a holder

31. Appendix II, ¶ 5 (Retail Sales Contract).
32. UCC §§ 2-711(1), 2-608. On the availability of revocation of acceptance, see authorities cited at note 24 supra. An alternative basis for this same relief is a rightful rejection. See UCC §§ 2-711(1), 2-601, 2-602. However, in our hypothetical, B's use of the vehicle is inconsistent with S's ownership and thus results in an "acceptance," which precludes a "rejection." UCC §§ 2-606(1)(c), 2-607(2). Compare Woods v. Van Wallis Trailer Sales Co., 77 N.M. 121, 419 P.2d 964 (1966) and Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966) (buyer's very minimal initial use of new vehicle results in acceptance) with zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) (buyer's driving car 0.7 mile prior to attempted rejection is not such use as to result in acceptance and preclude rejection).
34. UCC § 9-318 provides in pertinent part:
(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 9-206 the rights of an assignee are subject to
(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom .
35. See notes 9-11 and accompanying text supra.
in due course of a note signed in conjunction with the sale or as a beneficiary of a waiver-of-defense clause included in the contract.

The present hypothetical is assumed to arise in a jurisdiction which has adopted the UCCC or similar consumer legislation. The UCCC not only prohibits the seller from taking a negotiable instrument from a consumer buyer, but, more importantly, also provides a penalty against any assignee who attempts to enforce such a consumer note. The penalty threat explains the absence of a note in the hypothetical. The present installment sales contract does, however, contain a waiver-of-defense clause. Although not prohibited or subject to penalty by the UCCC or similar legislation, such cut-off devices are limited as to their enforceability. If UCCC section 2.404 (Alt. A) has been enacted, the clause is wholly ineffective. If UCCC

36. Only 15 jurisdictions appear to have no legislation restricting the use of consumer-sale notes (Fla., Ga., Ky., Miss., Mo., Mont., Neb., Nev., N.M., Pa., S.C., Tenn., Tex., Va., W.Va.). See 2-3 CCH CONSUMER CREDIT GUIDE, STATE DIVISION § 4390 (1971) for the respective state. There are five main types of restrictions on consumer notes: 1) those which apply only to home solicitation sales or peddlers (e.g., Ariz., Iowa, N.D., N.H.); 2) those which prohibit execution of negotiable instruments other than checks to evidence indebtedness but leave open the possibility that an instrument issued in violation of the prohibition may be acquired by a holder in due course (e.g., UCCC § 2.403, discussed at note 13 supra; Cal., Del., Hawaii, Me.); 3) those which prohibit execution of consumer notes unless they bear a conspicuous indication of their origin and provide that any note so marked does not constitute a “negotiable instrument” under the UCC (e.g., Mass., N.J., Ore., R.I.); 4) those which enable a good faith transeree of a consumer-sale note to cut off buyer’s defenses only if buyer fails to raise his claims within a specified period (e.g., UCCC § 2.404(1), La., N.C., Ohio, S.D.); and 5) those which provide that any transeree of a consumer-sale note shall be subject to all of the buyer’s underlying claims and defenses against the seller (e.g., Wis., Vt.). For a comparison of the UCCC, NCA, and UCCC Working Redraft No. 5 rules governing negotiable instruments, see note 13 supra. Restrictions on the effectiveness of waiver-of-defense clauses are discussed at note 38 infra.


38. It appears that in some twenty jurisdictions a waiver-of-defense clause in a consumer sales contract is void or wholly unenforceable (Ala., Alas., Cal., Colo., Conn., D.C., Hawaii, Idaho, Me., Mass., Md., Minn., Nev., N.H., N.J., N.M., Ore., Utah, Vt., Wash.). Some fifteen other jurisdictions have enacted laws which give effect to a waiver clause only if the assignee provides the buyer with notice of the assignment and receives no complaints within a specified period (Ariz., Del., Ind., La., Md., N.Y., N.C., Ohio, Okla., Pa., P.R., S.D., Tex., Wis., Wyo.). The time for raising complaints varies from 10 days in New York to 12 months in Wisconsin. In those jurisdictions where this type of rule is enacted through UCCC § 2.404(Alt. B) (e.g., Ind., Okla., Wyo.) the combination of the waiver clause, plus notice to the buyer, and the buyer’s failure to complain, protects the assignee only from those defenses which arise before the end of the specified period. The other statutes are unclear with respect to the effect of defenses arising after expiration of the notice period. This legislation is compiled in 2-3 CCH CONSUMER CREDIT GUIDE, STATE DIVISION § 4380 (1971) for the respective state.

39. UCCC § 2.404(Alt. A) provides:

With respect to a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease notwithstanding an agreement to the contrary, but the assignee’s liability under this section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the
section 2.404(Alt. B)\(^{40}\) has been adopted, a good faith assignee for value enjoys only a limited immunity: he must notify the buyer of the assignment and of the buyer's right to communicate to the assignee within three months any defenses or claims against the seller. In the absence of a reply from the buyer, the assignee takes free of those claims or defenses which arise \textit{"before"} the end of the 3-month period after the notice was mailed.\(^{41}\) Hence, in our example, even if \(F\) mails the notice and \(B\) fails to respond, \(F\) is subject to defenses and claims arising after the expiration of this 3-month period.\(^{42}\) In many cases, the seller's failure to perform his repair obligations under the manufacturer's warranty will continue well beyond the 3-month period. Moreover, notice of substantial complaints of a seller's failure to perform and to remedy default under other contracts will disqualify the assignee from satisfying the good faith requirement and thus deprive him of even the limited immunity available under section 2.404(Alt. B).\(^ {43}\) Thus, although the UCCC does not greatly diminish the prac-

assignee. Rights of the buyer or lessee under this section can only be asserted as a matter of defense to or set-off against a claim by the assignee. See note 38 \textit{supra} for a list of states which have enacted this or similar provisions. The rules appearing in the UCCC, NCA, and UCCC Working Redraft No. 5 for regulating the effectiveness of waiver-of-defense clauses are compared in note 14 \textit{supra}.

40. UCCC § 2.404(1) (Alt. B) provides:
With respect to a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, an agreement by the buyer or lessee not to assert against an assignee a claim or defense arising out of the sale or lease is enforceable only by an assignee not related to the seller or lessor who acquires the buyer's or lessee's contract in good faith and for value, who gives the buyer or lessee notice of the assignment as provided in this section and who, within 3 months after the mailing of the notice of assignment, receives no written notice of the facts giving rise to the buyer's or lessee's claim or defense. This agreement is enforceable only with respect to claims or defenses which have arisen before the end of the 3-month period after notice was mailed. The notice of assignment shall be stated in the contract, identify the contract, describe the goods or services, state the names of the seller or lessor and buyer or lessee, the name and address of the assignee, the amount payable by the buyer or lessee and the number, amounts and due dates of the installments, and contain a conspicuous notice to the buyer or lessee that he has 3 months within which to notify the assignee in writing of any complaints, claims or defenses he may have against the seller or lessor and that if written notification of the complaints, claims or defenses is not received by the assignee within the 3-month period, the assignee will have the right to enforce the contract free of any claims or defenses the buyer or lessee may have against the seller or lessor which have arisen before the end of the 3-month period after notice was mailed.

41. \textit{Id.} (emphasis added).

42. UCCC § 2.404(Alt. B), Comment. See note 38 \textit{supra} for a list of states which have enacted UCCC § 2.404(Alt. B) or similar provisions.

43. UCCC § 2.404(2) (Alt. B) provides:
An assignee does not acquire a buyer's or lessee's contract in good faith within the meaning of subsection (1) if the assignee has knowledge or, from his course of dealing with the seller or lessor or his records, notice of substantial complaints by other buyers or lessees of the seller's or lessor's failure or refusal to perform his contracts with them and of the seller's or lessor's failure to remedy his defaults within a reasonable time after the assignee notifies him of the complaints.

tical *ad terrorem* effect of waiver-of-defense clauses, it so undermines their legal operation that they no longer provide the assignee with reliable immunity against B's defenses arising out of the underlying sale.

There is, however, more than one way to skin a consumer. Where the law renders unenforceable a waiver of existing defenses or prescribes its severance by resort to the holder-in-due-course doctrine, the obvious alternative route to immunity is to negate *ab initio* the very existence of any legal claims or defenses. Either a justifiable revocation of acceptance or breach of warranty presupposes a non-conformity in the goods.\(^4^4\) Goods qualify as "conforming when they are in accordance with the obligations under the contract."\(^4^5\) Where, as here, the written contract fails to specify quality terms, quality standards are determined by the UCC implied warranties unless effectively disclaimed.\(^4^6\) In our example, although the defects in B's car would, by assumption, constitute a breach of the UCC implied warranties, these warranties have been disclaimed in the Retail Sales Contract.\(^4^7\)

The merger clause ("this contract contains the entire contract between buyer and seller") precludes reliance upon those oral and written representations of quality which were made by S but not integrated into the installment contract.\(^4^8\) Together, the disclaimer and the merger clauses thus ostensibly prevent B from designating the goods as "non-conforming." Unable to establish the basic element of either justifiable revocation of acceptance or breach of warranty, he is left without a ground for resisting F's demands for price payments under the assigned contract. His only recourse, if any, is against S or the manufacturer under the warranties provided in the operator's manual, a document supplied to B after he executes the Retail Sales Contract and thus seemingly divorced from the B-F relationship. In fact, the disclaimer-merger clause, if effective, provides F with even greater immunity from claims and defenses than that available under waiver-of-defense clauses and the holder-in-due-course doctrine. Disclaimer-merger clauses, unlike the traditional immunity devices, can operate even where F was closely connected with the seller and had notice of the defects.\(^4^9\)

\(^4^4\) *See* UCC §§ 2-601, 2-608(1).

\(^4^5\) UCC § 2-106(2).

\(^4^6\) *See* UCC § 2-314(1) which provides in pertinent part: "Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale. . . ."

\(^4^7\) *See* Appendix II § 5 (Retail Sales Contract).

\(^4^8\) *Id.* The merger language of the provision, if effective, will preclude introduction of contradictory terms. *See* UCC § 2-202.

\(^4^9\) The effectiveness of merger-disclaimer clauses depends on: 1) their compliance with the specific requirements in UCC §§ 2-316, 2-202; and 2) their consistency with the general requirements of good faith and conscionability in UCC §§ 2-103(1)-(b), 2-202. None of these statutory requirements can be construed to affect expressly the validity of the merger-disclaimer clause as between buyer and assignee.
III. Vulnerability of the Merger-Disclaimer Clause as an Immunity Device

In considering the merger-disclaimer clause as an immunity device, it is well to keep in mind the two distinct functions served by this key provision of the Retail Sales Contract. The merger phrase locks B into the terms of the Retail Sales Contract. If effective, it will prevent him from relying upon any express representation of quality outside the confines of the Retail Sales Contract, including, in particular, S's assurance during negotiation and his adoption of the manufacturer's express new-vehicle warranty. It will also foreclose the argument that the contract between B and S came into existence at an earlier or later point in time and was unaccompanied by any disclaimer. Once B is locked into the Retail Sales Contract by the merger language, the disclaimer phrase removes this contract from the operation of the UCC implied warranties. The immunity sought by F depends upon the validity of both clauses. If the merger clause is unenforceable, B can introduce evidence of express warranties or of a prior contract unaccompanied by any disclaimer of implied warranties. Likewise, a valid merger clause will avail F nothing if the warranty disclaimer is ineffective, since B would then be able to invoke the UCC implied warranties. 50

When tested against UCC standards, the merger-disclaimer clause satisfies the most apparent prerequisites for validity. As a warranty disclaimer, the clause is, by assumption, sufficiently conspicuous and utilizes the requisite wording. 51 Viewed as a merger clause, the wording sufficiently identifies the Retail Sales Contract as a "final expression of their agreement with respect to such terms as are included therein" (e.g., warranty provisions) as to preclude contradiction of those terms by parol evidence. 52 However, neither merger nor dis-

where the assignee has notice of defects or where the type of relationship between assignor and assignee is a close one. The enforceability of the merger-disclaimer combination is discussed in detail at notes 82-99 and accompanying text infra.

50. See UCC §§ 2-314, 2-315.

51. See UCC § 2-316. Similar disclaimers have been enforced in Bullinger v. General Motors Corp., 54 F.R.D. 479 (E.D.N.C. 1971); Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. App. 1972). Nevertheless, in consumer cases, many courts go to considerable extremes to find such disclaimers unenforceable. See notes 104-07 and accompanying text infra. At least one jurisdiction has, by statute, declared such disclaimers ineffective with respect to consumer goods. See MASS. GEN. LAWS ANN. ch. 106, § 2-316A (1974). Compare the prohibition of warranty disclaimers in the proposed Warranty-Federal Trade Commission Improvement Act, S. 356, 93d Cong., 1st Sess. (1973). Compare also NCA § 3.302 which prohibits a merchant from excluding, modifying, or limiting any express or implied warranty or any remedy provided by law.

52. UCC § 2-202. See Holton v. Bivens, 9 UCC REP. SERV. 836 (Okla. Ct. App. 1971), where the enforceability of a merger disclaimer clause in a consumer sales has been infrequently litigated. The few relevant decisions, all decided in favor
claimer language will be effective unless, in addition to these formal prerequisites, $F$ can establish sufficient intent on the part of $B$ to be so bound by the Retail Sales Contract.\textsuperscript{55} $F$ cannot use the Retail Sales Contract itself to bootstrap himself around this elemental prerequisite but must rely upon the implication of the events surrounding execution of the Retail Sales Contract. Viewed as indicia of $B$'s and $S$'s intents, these events militate against giving any legal effect to either the merger or disclaimer aspects of the proposed immunity device.

The original agreement between $B$ and $S$ is effectuated on an oral basis.\textsuperscript{54} After considerable haggling, $B$ agrees to purchase, and $S$ to sell, a specific vehicle at a more or less certain price. In the negotiations leading to this agreement, the quality of the merchandise receives overt consideration. In addition to the usual sales talk, the seller often provides the buyer with brochures which refer to the warranty covering the vehicle. To the extent that these representations and references become a basis for $B$'s decision to buy the car, the seller exposes himself to liability for breach of express warranties.\textsuperscript{55} Moreover, the oral agreement never contains any disclaimer of the implied warranties of merchantability and fitness which accompany all such sales contracts, oral or written. Had $F$ taken assignment of $S$'s rights under the oral agreement, his price claim would certainly be subject to $B$'s claims and defenses based upon the assumed nonconformity of the goods.\textsuperscript{56}

Following the oral agreement, $B$ and $S$ completed a writing designated, by its own terms, as a "Retail Sales Order."\textsuperscript{57} In a commercial context, a sales or purchase order generally describes a writing

of the buyer, are characterized by a judicial sympathy for the buyer's plight and by the seller's lack of expertise in utilizing the cut-off device. See Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972) (where seller admitted to understandings in addition to those set forth in the contract, merger clause did not so completely integrate parties' agreement as to preclude parol evidence of warranty representations); Mobile Housing, Inc. v. Stone, 490 S.W.2d 611 (Tex. App. 1973) (seller's failure to fill in blanks of mobile home contract prevents him from relying upon merger clause); Zwierzycyki v. Owens, 499 P.2d 996 (Wyo. 1972) (since seller's representations were inducements to enter contract and not part of contract itself, merger clause did not operate to prevent parol proof of representations).

53. The parol evidence rule applies to exclude contradictory terms if the parties indeed intended the writing to be the final expression of their agreement. UCC § 2-202. However, evidence of the circumstances surrounding the execution of the writing should be admissible to show whether or not such intent existed. See Restatement of Contracts § 228, comment a (1932); 3 A. Corbin, Contracts § 573, at 359–60 (1960, Supp. 1971) and authorities cited therein.

54. See note 19 and accompanying text supra.

55. UCC § 2-313. See, e.g., Woodruff v. Clark County Farm Bureau Coop. Ass'n, Inc., Ind. App., 286 N.E.2d 188 (1972) (seller of chickens bound by representations made in course of negotiations because warranty disclaimer in delivery receipt was not conspicuous); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 162 (1972) (merger clause ineffective to bar evidence of representations made by seller prior to execution of written sale agreement).

56. See UCC § 2-318(1)(a), the text of which is reprinted in note 34 supra.

57. Typical provisions found in a Retail Sales Order are reprinted in Appendix I.
intended to operate either as an offer or acceptance.\textsuperscript{58} In our hypo-
tetical, the Sales Order’s description of the vehicle and its statement of
the price terms are consistent with either alternative. However, other
provisions of the Sales Order indicate that it is intended to operate as
a partial integration and elaboration of the oral agreement. First,
the Sales Order contains a clause stating that it represents the entire
agreement of the parties.\textsuperscript{59} Second, the Sales Order incorporates the
manufacturer’s “New Vehicle Warranty,”\textsuperscript{60} and also contains a
conspicuous disclaimer of all implied warranties.\textsuperscript{61} Third, the seller
promises to service the stated warranties.\textsuperscript{62} Fourth, the Sales Order
provides that, should the buyer renege on the agreement, the seller
may retain any deposit and trade-in to liquidate his damages arising
from the lost sale.\textsuperscript{63} Finally, the writing is signed by both $B$ and $S$.\textsuperscript{64}
These characteristics indicate that the Sales Order is meant to operate
as a “contract” rather than a mere offer or acceptance. Indeed, where
the buyer pays cash for the vehicle, the Sales Order is the only writing
signed by the parties and is presumably intended to embody their
agreement. Only one clause militates against viewing the Sales Order
as a distinct and enforceable contract: the obligations of $B$ and $S$ are
“subject to the purchaser’s ability to obtain satisfactory financing.”\textsuperscript{65}
This condition refers to the approval of $B$’s credit by the institution
which finances $B$’s purchase. Under the better view, such approval
by a third party does not preclude recognition of a valid bilateral con-
tract prior to occurrence of the approval.\textsuperscript{66}

Consider, now, the position of $F$ if he had taken assignment of
the $B$-$S$ contract represented by the Sales Order. The warranty dis-

\textsuperscript{58} A buyer’s “order” constitutes an offer when it follows upon seller’s quotation of
price; it can operate as acceptance when it follows seller’s offer to sell at a given
price. See, e.g., Matsushita Electric Corp. of America v. Somis Corp., ___ Mass. ___,
284 N.E.2d 880 (1972) (purchase order as acceptance); Certified Laboratories, Inc.
v. Foley, 52 W.L.J. 103, 7 UCC REP. SERV. 1041 (Pa. C.P. 1969) (purchase order as
offer). Whether a purchase order operates as an offer or an acceptance is often
crucial in determining the contents of the final agreement under UCC § 2-207. See
Construction Aggregates Corp. v. Hewitt-Robbins, Inc., 404 F.2d 505 (7th Cir. 1968)
(purchase order as offer: subsequent letter a counter-offer and not an acceptance).

\textsuperscript{59} See Appendix I, ¶ 3 (Sales Order).

\textsuperscript{60} Id. ¶ 1.

\textsuperscript{61} Id. ¶ 12.

\textsuperscript{62} Id. ¶ 13.

\textsuperscript{63} Id. ¶ 8.

\textsuperscript{64} Id. ¶ 4.

\textsuperscript{65} Id. ¶¶ 2, 14.

\textsuperscript{66} See Restatement of Contracts § 265 (1932). Comment a to that section
provides in pertinent part:

A promise conditional upon the promisor’s satisfaction is not illusory since it means
more than that validity of the performance is to depend on the arbitrary choice
of the promisor.

See also 3A A. Corbin, Contracts § 644, at 83-84 (1960) discussing and approving
Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958) (agreement for sale of shopping
malls); Foster v. Lee, 197 F.2d 583 (10th Cir. 1952) (agreement for delivery of a tractor,
the purchaser, was held not to be illusory for want of mutuality).
claimer and merger clause, if effective, would immunize F from B’s claims based upon breach of implied warranties or express representations made by S during negotiation.67 Hence, F would be far better off in this position than as assignee of S’s rights under the preliminary oral agreement.68 Nevertheless, in the Sales Order, S makes two explicit undertakings which may provide B with an eventual claim or defense against F. S adopts the manufacturer’s New Vehicle Warranty and undertakes to promptly perform its conditions.69 Should the defects be irreparable or should S fail to promptly service the vehicle, B can demand assurances of performance and suspend payments.70 Continued nonperformance by S may then be treated as a repudiation of the contract.71 Alternatively, the nonconformity, when coupled with S’s nonperformance of the service obligation, can be viewed as the failure of an exclusive remedy.72 In such a case, a buyer can resort to the usual UCC remedies including revocation of acceptance.73 S’s constructive repudiation and B’s revocation of acceptance justify non-payment of price, a defense which may be asserted against F as assignee since the Sales Order contract lacks a waiver-of-defense clause.74 F might also be liable, at least in part, for the return of price payments already received from B.75

67. See notes 44-48 and accompanying text supra. 
68. See notes 9-11 and accompanying text supra. 
69. See Appendix I, § 13 (Sales Order). 
70. UCC § 2-609(1). 
71. UCC § 2-609(4). 
73. UCC § 2-719(2) provides: “Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.” See also UCC § 2-608. In addition to cases cited in note 72 supra, in which courts have permitted damages relief upon seller’s failure to perform his repair obligation, see Jacobs v. Metro Chrysler-Plymouth, Inc., 124 Ga. App. 462, 188 S.E.2d 250 (1972) (upon seller’s failure to repair defects in new car, buyer is permitted to revoke acceptance). 
74. See UCC § 9-318(1)(a), the text of which is reprinted at note 34 supra. 
75. Whether the assignee must return to the buyer payments received under a contract subject to rescission against both seller and assignee is an issue upon which the few extant authorities are divided. For example, RESTATEMENT OF RESTITUTION § 14(2) (1936) provides: 
An assignee of a non-negotiable chose in action who, having paid value therefor, has received payment from the obligor is under no duty to make restitution although the obligor had a defense thereto, if the transferee made no misrepresentation and did not have notice of the defense. 
Accord, Gilmore, The Assignee of Contract Rights and His Precarious Security, 74 Yale L.J. 217, 230 (1964). See also UCC § 9-318(1), RESTATEMENT OF CONTRACTS § 167 (1932), and UCC § 2.404(Alt. A), which appear to permit the buyer to use his claims and defenses only as a shield. However, the few relevant judicial decisions may favor the opposite result. See, e.g., Farmers Acceptance Corp. v. Delozier, 178 Colo. 291, 496 P.2d 1016 (1972) (where subcontractor assigned payment rights against contractor to finance company but failed to perform, contractor could recover payments already made to finance company); Vasquez v. Superior Ct., 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971) (buyers permitted to rescind the contract and recover payments made to finance company). The Vasquez decision can be reconciled partially with RESTATEMENT OF RESTITUTION § 14(2) by reference to the
It is only after completion of the Sales Order and approval of buyer’s credit that S presents B with the “Retail Sales Contract” which contains the crucial merger-disclaimer clause. By this time, the average buyer would view himself as being irrevocably committed to the deal. It is a commitment made in reliance upon S’s undertakings during the negotiations, first expressed in the oral agreement, and finalized in the Sales Order contract. The Retail Sales Contract is a title-retention sales agreement drafted by F, the institution which agrees to finance the transaction. The form designates F as the assignee and the party to whom B will make his payments. In contrast to the Sales Order, this conditional sales contract contains a waiver-of-defenses clause, imposes no explicit duties on the seller, and disclaims all warranties. Like the Sales Order, the Retail Sales Contract states that it constitutes the “entire contract.” If given effect as a complete integration of the B-S agreement, the Retail Sales Contract will, as discussed above, immunize F from B’s claims and defenses.

court’s finding that the assignee had constructive knowledge of the buyers’ defenses against the seller. Id. at 824, 94 Cal. Rptr. at 812, 484 P.2d at 980.

Neither UCCC Working Redraft No. 5 § 3.404(2) nor NCA § 2.406 explicitly limits the buyer to the assertion of his rights as “a matter of defense to or set-off against a claim by the assignee.” UCCC § 2.403. Nor, however, does either explicitly establish the assignee’s liability for complete restitution. UCCC Working Redraft No. 5 § 3.404(2) provides in pertinent part:

A claim or defense of a consumer specified in subsection (1) . . . may be asserted . . . only to the extent of the amount owing to the assignee with respect to the sale . . . at the time the assignee has notice of the claim or defense. Suppose, after the buyer has paid $1,000 of a $4,000 price debt to the assignee, he gives notice of a defect in the goods and pays another $200 before he realizes that he will not receive satisfaction from the seller. Assume further that the defect justifies a revocation of acceptance and a claim to the return of the purchase price. UCCC Working Redraft No. 5 § 3.404 will permit the buyer to refuse payment of the remaining $2,800. It is also likely that it establishes a right to restitution of $200. Whether it permits restitutionary recovery of the pre-notice $1,000 depends upon the construction of the phrase, “extent of the amount owing.” If the word “extent” is viewed as the limiting factor, the provision does not preclude restitutionary recovery. However, if “amount owing” is the limiting term, the proposed provision bars restitutionary recovery of the $1,000 since it cannot be viewed as an “amount owing” to the assignee, having already been paid. Simpler but even more ambiguous is NCA § 2.406:

Notwithstanding any term or agreement to the contrary, an assignee of the rights of the creditor is subject to all claims and defenses of the consumer, up to the amount of the transaction total, arising out of a consumer credit transaction. Read literally, the reference to “all claims . . . up to the amount of the transaction total” certainly would not preclude restitution from the assignee. The language, however, does evidence a design to protect the assignee from liability for consequential damages in excess of the purchase price.

66. See Appendix II, ¶ 5 (Retail Sales Contract).

67. The average buyer probably views himself as committed once he orally announces to the seller, “I’ll take it.” Those few who still view themselves as uncommitted change their attitude upon signing the Sales Order, with its provisions governing merger, liquidated damages, warranties, and disclaimers, and upon making the required deposit. As a matter of good public relations, however, new car dealers almost never seek to retain the deposit of or impose contract liability upon a buyer who repudiates the agreement after signing the purchase order but before execution of the installment contract.

68. See notes 25-31 and accompanying text supra.

69. Appendix II, ¶ 5 (Retail Sales Contract).

70. See notes 47-49 and accompanying text supra.
arising from S's failure to perform. As assignee of the Retail Sales Contract, F is in a better position than as assignee of S's rights under the Sales Order contract. The latter subjected F to B's claims and defenses arising from S's failure to remedy breaches of the New Vehicle Warranty. 84 Just as the Sales Order contract utilizes merger-disclaimer language to truncate rights created under the oral agreement, the Retail Sales Contract applies the same technique to sever rights arising under the Sales Order. It remains to be seen whether and to what extent one contract can extinguish rights and duties created by a prior agreement between the same parties.

The Retail Sales Contract will extinguish B's rights under the prior agreements only if it operates as a superseding agreement, as a modification, or as a waiver. 85 In the Retail Sales Contract qua superseding agreement, the buyer agrees to accept a far smaller bundle of rights than that created by the oral contract or the Sales Order contract. In particular, he expressly agrees not to invoke the earlier undertakings of S with respect to warranty and service. However, nowhere does the installment contract provide B with additional consideration for this detrimental change in position. Under a well-recognized rule of contract law, S's promise to perform a pre-existing duty does not constitute adequate consideration for B's forbearance. 86 A fortiori, his promise to perform only a part of a pre-existing duty is also inadequate consideration. Hence, as a superseding agreement, the Retail Sales Contract is ineffective to extinguish the warranty rights created by the oral agreement or the Sales Order contract.

The consideration difficulty can be circumvented, at least in part, by viewing the Retail Sales Contract as a "modification" or "waiver." Under section 2-209(1) of the UCC, an "agreement modifying a contract within this Article needs no consideration to be binding." However, as emphasized in the official comment to section 2-209, 

81. See notes 68–75 and accompanying text supra.
82. The present facts preclude extinction or transformation of B's rights through other means of discharge such as performance or accord and satisfaction. See Restatement of Contracts § 385 (1932).
83. See Restatement of Contracts §§ 76, 78; § 78, illustration 1 (1932). These provide that performance of a pre-existing duty or promise of such performance is not adequate consideration.
84. See UCC § 2-209, Comment 2.
85. UCC § 2-103(1)(b) provides: "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.
obligations in the Sales Order) to entice a consumer into entering a second contract which disclaims those same undertakings. Contract rights obtained through this type of "bargaining naughtiness" might reasonably be attacked as unconscionable under section 2-302 of the UCC\(^6\) or as voidable under the law of fraud.\(^7\) This consideration also militates against viewing the Retail Sales Contract as an effective waiver of the rights created by the Sales Order contract. Otherwise, the UCC regulates neither the formal nor substantive prerequisites of the type of waiver arguably represented by the Retail Sales Contract.\(^8\) However, according to the Restatement of Contracts (Restatement), the Retail Sales Contract could not effectuate a valid waiver of B's rights. First, a waiver which is unsupported by new and adequate consideration is possible only with respect to conditions or terms, the performance of which is not a material part of the agreed exchange.\(^8\) Certainly, warranty and service obligations regarding a new car cannot be characterized as immaterial. Under the Restatement, performance of such material terms is excused only through a superseding agreement.\(^9\) This is, however, precluded by the previously-noted defect in the consideration offered by S in the Retail Sales Contract.\(^9\)

Second, it is doubtful whether the merger-disclaimer clause in the Retail Sales Contract is a manifestation of intent sufficient to waive the pre-existing rights against S.\(^9\) Since the Retail Sales Contract

\(^6\) UCC § 2-302. This section establishes the parameters of fairness beyond which agreements must not go. See J. White & R. Summers, Uniform Commercial Code 116-19 (1972), where unconscionability is divided into "procedural" unconscionability (bargaining "naughtiness") and "substantive" unconscionability (harsh terms).

\(^7\) See Restatement of Contracts § 473 (1932). Section 473 provides: "A contractual promise made with the undisclosed intention of not performing it is fraud." Id.

\(^8\) See generally Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292 (3d Cir. 1973) (oral waiver permitted under UCC); Blubaugh v. Ponca City Prod. Credit Ass'n, 42 Okla. Bar Ass'n J. 2309, 9 UCC Rep. Serv. 786 (Okla. App. 1971) (discusses many UCC decisions dealing with law of waiver applicable to a variety of farm-products security interests); George Lumber Co. v. Brazier Lumber Co., 6 Wash. App. 327, 493 P.2d 782 (1972) (common law concept of waiver used to determine if waiver had occurred). All the cases hold that the common law concept of waiver survives under UCC § 1-103. In controversy is the extent to which that law is modified by certain UCC sections which, however, are not even arguably applicable to our facts. See, e.g., UCC § 1-107 (waiver of claims arising out of breach); UCC § 1-205(4) (express terms negate any waiver based upon course of dealing); UCC § 2-209(4) (modification not satisfying statute of frauds may operate as waiver).

\(^9\) See Restatement of Contracts §§ 88(1), 297 (1932).

\(^9\) Id. § 297, comment c.

\(^9\) See note 83 and accompanying text supra.

\(^9\) See Restatement of Contracts § 297, comment c (1932):
If performance of the condition [e.g., seller's adoption of the new vehicle warranty] is a material part of the agreed exchange, an agreement [e.g., the Retail Sales Contract] to be liable in spite of the non-performance of the condition involves to so great a degree a new undertaking that the requisites for the creation of a new contract must exist.

An increasing number of courts refuse to enforce boilerplate language in adhesion contracts which limits or deprives the consumer buyer of otherwise available or pre-existing rights, unless the seller expressly brings that language to the buyer's attention. See Redlick v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. App. 1972); Woodruff
does not purport to be a waiver, to view it as such is to admit that
the writing is ambiguous on this point. This ambiguity justifies the
admission of parol evidence to show that B never intended to relin-
quish the rights created by the oral agreement or the Sales Order
contract.\footnote{98} The lack of new consideration from S, the materiality of
the prior rights in question, and the purport of the agreement itself
coalesce to prevent the Retail Sales Contract from extinguishing or
modifying the rights afforded B under the prior agreements.

The effectiveness of the Retail Sales Contract in precluding B
from raising warranty claims and defenses can also be viewed strictly
as a parol evidence problem. The relevant parol evidence rule appears
in UCC section 2-202:

Terms . . . set forth in a writing intended by the parties as a final
expression of their agreement with respect to such terms . . . may
not be contradicted by evidence of any prior agreement . . . .

Hence, if the Retail Sales Contract indeed was intended as a “final
expression of agreement” with respect to the quality terms, B will be
unable to introduce evidence of the warranty representations contained
in the oral agreement and the Sales Order. Without reference to
quality standards, B cannot establish that the defects render the vehicle
“nonconforming” for purposes of Article 2’s remedial provisions.

Despite the self-serving recital to the contrary — “this contract
contains the entire contract . . . and no warranties, of merchantability
or otherwise, express or implied . . . been made by or on behalf of the
seller, except as set forth herein . . . .”\footnote{99} — the Retail Sales Contract
demonstrates, on its face, that it was not intended as the “final ex-
pression” of the parties’ agreement with respect to the quality terms.
As noted above, the writing does not impose a single express obliga-
tion upon the seller. Except for its title (“Retail Sales Contract”)
the writing evidences nothing more than B’s promise to pay a sum
certain to S or his assignee. If this is the “entire agreement,” it is
unenforceable for want of consideration to support B’s promise. To

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\footnotesize{\textcopyright Villanova Law Review, Vol. 19, Iss. 4 [1974], Art. 1}
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93. UCC § 2-202. The point here is not whether a particular provision of the
Retail Sales Contract (see Appendix II, ¶ 5) operates effectively as a merger clause
or warranty disclaimer, but whether it can operate as a waiver of pre-existing rights.
So viewed, ¶ 5 (Appendix II) definitely is ambiguous and parol evidence is admis-
sible under UCC § 2-202 to explain the significance of the clause.

94. Appendix II, ¶ 5 (Retail Sales Contract). It should be noted that the parol
evidence rule does not preclude evidence of subsequent agreements. Often the New
Vehicle Warranty does not enter the transaction until after the Retail Sales Contract
is signed, then being executed as a modification of the B-S agreement. Under
UCC § 2-318(2), this modification binds the assignee.
meet this argument, F must admit that the document does in fact impose specific duties upon the seller, a reading which is impossible without reference to parol evidence.\footnote{95. See Restatement of Contracts § 240(2) (1932), which provides: Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative.} Once the question of sufficient consideration is opened to parol evidence, B can argue that the express warranties contained in the Sales Order contract and in the oral agreement represented a substantial part of the consideration for his payment obligation.

Alternatively, B can introduce evidence of the express warranty under a well-established qualification of the parol evidence rule: the rule does not apply to proof of such “facts rendering the agreement void or voidable for illegality, fraud, duress, mistake or insufficiency of consideration.”\footnote{96. Restatement of Contracts § 238(b) (1932). See, e.g., Fecik v. Capindale, 54 Pa. D. & C.2d 701 (C.P. 1971) (car buyer permitted to introduce seller’s statements regarding mileage).} This is but one example of the general principle that the parol evidence rule does not extend to questions involving inducement to sign a purported integration.\footnote{97. See Restatement of Contracts § 228 (1932) and comment a to that section, which provides: “That a document was or was not adopted as an integration may be proved by any relevant evidence.” Accord, 3 A. Corbin, Contracts § 573, at 359–60 (1960).} Indeed, other than by parol evidence, there is no way to establish whether a writing in fact was intended as the “final expression of agreement.” In our hypothetical, this principle permits B to introduce the express warranties given by S in the oral agreement and the Sales Order. The representations of warranty, when coupled with B’s reliance thereon and S’s knowledge that the final contract contained no such warranties, constitute common law fraud or a statutory “deceptive act,” either of which renders the contract voidable.\footnote{98. See notes 100–03 and accompanying text infra.} Even if S’s behavior does not constitute fraud, evidence of the representations are properly admissible to show that, given such inducements, B cannot be deemed to have intended to integrate the B-S agreement into a writing which deprived him of the basis of his bargain.\footnote{99. See notes 100–03 and accompanying text infra.}

In sum, when viewed against the parties’ negotiations and prior agreements, the Retail Sales Contract cannot stand as a complete integration. The integration, if there ever was one, consisted of the
Sales Order contract which unambiguously granted warranty rights to the buyer. Having enticed B into a sale agreement through warranty promises, F and S cannot, at the last moment, extinguish B's rights by having him sign a new piece of paper. The Retail Sales Contract amounts to little more than a unilateral, post-contractual act on the part of F and S.\footnote{A sale is not an instantaneous phenomenon. It commences with inquiries and invitations to offer, proceeds to offer and acceptance, then may entail an exchange of papers, and concludes with tender and payment. The precise point at which the contract comes into existence is not easy to establish. Some courts have seized upon the point-of-contract as a policy variable. By moving this point toward the beginning of negotiations, a court can effectively immunize a party against the legal implications of writings delivered subsequent to that time. This same approach has been used repeatedly by courts to protect buyers from warranty disclaimers contained in writings delivered after a written contract has been signed. \textit{See, e.g.}, Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969); Woodruff v. Clark County Farm Bureau Coop. Ass'n, \textit{et al.}, Ind. App. \textit{et al.}, 286 N.E.2d 188 (1972); Zoss v. Royal Chevrolet, Inc., 11 UCC Rep. Serv. 527 (Ind. Super. Ct. 1972); Uganski v. Little Giant Crane & Shovel, Inc., 35 Mich. App. 88, 192 N.W.2d 580 (1971).} Given their knowledge of the representations leading to the oral agreement and those contained in the Sales Order, the Retail Sales Contract represents an oppressive exercise in bad faith. Article 2 of the UCC provides no independent remedy for such \textit{culpa in contrahendo} unless it rises to the level of unconscionability.\footnote{The unenforceability of contracts or contract provisions which results from application of UCC § 2-302 derives not so much from the objective content of the contract or provision, as from the quality of the negotiation leading to the contract. This is demonstrated by the courts' emphasis upon the comparative bargaining power of the parties, their expertise, the commercial setting of the contract, duress, the failure to disclose relevant facts, and other deceptive practices. In fact, the substantive content of a contract can seldom be attacked successfully under UCC § 2-302 in the absence of \textit{culpa in contrahendo}. \textit{See J. WHITE \\& R. SUMMERS, UNIFORM COMMERCIAL CODE} § 4-6, at 125-29 (1972) (citing many cases). On the distinction between "substantive" and "procedural" unconscionability, \textit{see generally} Ellinghaus, \textit{In Defense of Unconscionability}, 78 YALE L.J. 757, 761-78 (1969).} However, the attempt by S and F to deprive B of the basis of his bargain could qualify as fraud, either under the common law\footnote{See Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971) (buyer's fraud action is precluded neither by fact that seller's representations did not qualify as express warranties under UCC § 2-313 nor by presence of warranty disclaimer valid under UCC § 2-316).} or under the deceptive-practices acts enacted in several jurisdictions.\footnote{For example, where S uses warranty representations to obtain an oral commitment from B, and subsequently employs a "purchase order" form containing similar warranty references to obtain an initial written commitment and deposit from B, only then to disclaim all warranties in a final document with which he is intimately acquainted, he has committed a "deceptive act" under \textit{UNIFORM CONSUMER SALES PRACTICES ACT} § 3(b) which provides in pertinent part: \textit{[T]he act or practice of a supplier in indicating any of the following is deceptive:} (2) that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not . . . (10) that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations; if the indication is false . . . .} Moreover, even if the Retail Sales Contract were viewed as a complete integration of the sales agreement, the warranty disclaimer
is vulnerable. An ever-increasing number of courts are holding that, in consumer sales, such disclaimers are invalid unless expressly negotiated or brought to the buyer's attention.104 Given the content of both the oral agreement and the Sales Order contract, either S or F would find it difficult if not impossible to prove that the warranty disclaimer in the Retail Sales Contract was a "dickered" term. The warranty disclaimer may also be subject to attack under UCC section 2-719. By completely disclaiming all warranties, the seller leaves the buyer virtually without remedy for defects in the goods.105 Although section 2-719 permits a limitation upon remedies — such as restricting the buyer to seeking repair or replacement only — it requires that "minimum adequate remedies be made available."106 A complete exclusion of all remedies should require a court to strike down the limitation as unconscionable and to apply the UCC's remedy sections.107

Finally, the Retail Sales Contract violates the public policy embodied in sections 2.403 and 2.404 of the UCCC. By these provisions, the draftsmen sought to neutralize the only devices known to them to be employed to sever the buyer's defenses against the dealer's financier. This explicit expression of pro-buyer policy, when coupled with the policy against complete warranty disclaimers embodied in the UCC, should suffice as a basis for refusing to enforce the merger-disclaimer clause insofar as it purports to deprive B of his defenses against F.

As assignee, F is so vulnerable to B's claims and defenses as to be tempted to construe the B-F relationship as a direct loan. Both the Retail Sales Contract and the events surrounding its execution support this interpretation of the B-F transaction. The very characteristics which militate against viewing the Retail Sales Contract as a sales agreement108 (the requirement that B make payments to F, the absence of any duty imposed upon S, the lack of any remedy for nonconformity) nevertheless are compatible with the view that it is a loan agreement. As in direct-loan financing, B chose the financial institution who financed the sale; an investigation of the prospective debtor's credit-worthiness preceded the extension of credit; the credit

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104. See note 92 supra.

105. The complete absence of warranties precludes B from establishing the non-conformity necessary to support a rejection, revocation of acceptance, or damages claim. See notes 44-48 and accompanying text supra.

106. UCC § 2-719, Comment 1.

107. Id. See also UCC § 2-719(2). Upon the seller's and manufacturer's failure to fulfill the limited remedy provided by the standard new-vehicle warranty, the buyer may resort to the usual UCC remedies, including revocation or damages. See, e.g., Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973); Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227 (Tex. App. 1973); notes 72 and 73 supra. The same relief should, a fortiori, be available to a buyer who receives no warranty protection in connection with the purchase of a new vehicle.

108. Id. See note 35 supra and accompanying text supra.
proceeds were disbursed directly to the seller;\textsuperscript{109} the credit is liquidated by payments directly to $F$; and any default by $B$ may lead to enforcement of a security interest identical to that used to collateralize a direct loan. In the direct-loan interpretation of the $B$-$F$ relationship, $S$ acts as $F$'s agent for finding a loan customer. As compensation, he receives a share of the finance charge when $F$ discounts the paper. Compared to its position as an assignee, $F$ as a direct-loan financer enjoys far greater immunity from $B$'s claims and defenses against $S$ because its claims will be subject to defeat only in the event that it was $S$'s principal in the sale transaction; that fraud infected the loan contract; that it as the lender was negligent; or that the jurisdiction enacted legislation rendering the direct lender subject to claims and defenses arising out of the underlying sale.\textsuperscript{110}

Although the direct-loan ploy might provide potentially greater immunity in an individual case, its adoption by a court could entail devastating results in other cases. To sustain the direct-loan argument, $F$ must recognize $S$ as its agent for finding a loan customer. Once $S$ becomes $F$'s agent, representations which normally serve as inducements only for the sale would also constitute inducements for the loan agreement. As $S$'s principal, $F$'s rights under the loan agreement are subject to defeat on account of $S$'s misrepresentations. Furthermore, unlike the assignee of a sales agreement, $F$ as $S$'s principal becomes personally liable for $S$'s misconduct in arranging for the loan. In the hypothetical, for instance, $S$ arguably perpetrates a fraud when he employs warranty representations in the oral negotiations and Sales Order to obtain $B$'s commitment, only to deprive $B$ of warranty expectations once the commitment has been obtained.\textsuperscript{111} It is to avoid such liability for $S$'s conduct that the Retail Sales Contract expressly provides: "Seller is not the agent of the Bank for any purpose."\textsuperscript{112} Given this provision in $F$'s own contract and the consequences attendant upon its converse, it is extremely unlikely that $F$ will urge adoption of the direct-loan construction of the $B$-$F$ relationship, even though that interpretation often may better comport with the reality of the transaction.

IV. Conclusion

The genesis and deployment of the merger-disclaimer clause warrants two concluding observations. The most obvious lesson, perhaps, concerns the efficacy of remedial legislation. In sections 2.403 and

\textsuperscript{109} In dealer financing, the financer pays the seller directly for the chattel paper; in loan financing, the financer also endeavors to disburse the proceeds directly to the seller by means of a check payable to the seller's order or to the joint order of buyer and seller.

\textsuperscript{110} See note 1 supra.

\textsuperscript{111} See United States v. $F$, supra and preceding text supra.

\textsuperscript{112} Appendix II, ¶ 2 (Retail Sales Contract).
March 1974] Merger-Disclaimer Clauses 579

2.404 of the UCCC, the draftsmen sought to restore the legitimacy of justifiable nonpayment, the buyer's most effective means to ensure the seller's performance. The meteoric rise of direct-loan financing, in the form of bank credit cards, illustrates the most obvious loophole. The social significance of this gap is tempered by the fact that those who qualify for a bank credit card can perhaps better fend for themselves than the typical signatory of a consumer note. With respect to indirect financing, UCCC sections 2.403 and 2.404 have led to a more pernicious result, one which the draftsmen most certainly did not, and perhaps could not, have foreseen. Waiver-of-defense clauses and consumer notes have been replaced by merger-disclaimer clauses which, if effective, leave the buyer with far less recourse than did traditional immunity devices. A negotiable instrument or waiver-of-defense clause, while providing immunity for the financer, nonetheless did not foreclose the buyer's legal remedies against the seller. Moreover, their immunizing effect could be neutralized by the buyer's showing that the financer had notice of the underlying defects or was closely connected with the seller's operation. In contrast, the merger-disclaimer device operates directly on the buyer-seller relationship in such a way as to preclude relief against the seller, too, and does so independently of the notions of notice or involvement.

Analysis of the merger-disclaimer immunity device discloses, as a second lesson, the continued relevance of elementary contract doctrines and their interrelationship with the modern commercial law of the UCC. Traditional immunity devices were tested primarily by reference to concepts contained in the codified commercial law, i.e., notice, good faith, and the "connected lender" concept. In contrast, as demonstrated in the foregoing discussion, the effectiveness of the merger-disclaimer device depends primarily upon the operation of such basic contract law doctrines as consideration, waiver, modification, and the parol evidence rule. Although the analysis of the merger-disclaimer clause appears rather technical, it represents more than a juggling exercise to accomplish preconceived policy objectives. The basic contract doctrines invoked were developed to prevent the very type of overreaching represented by the Retail Sales Contract.

In the indirect financing of new cars, the author and beneficiary of the Retail Sales Contract does not enter the picture until negotiations are virtually completed, but then ruthlessly exploits the vulnerability of the buyer. The financer generally knows the nature of the representations which induce the buyer to commit himself in the oral agreement, as well as the nature of the express warranties given by the seller and manufacturer, under the standard new-vehicle warranty.
The financer is also aware that the buyer — having orally committed himself, having signed an apparent contract (Sales Order), having arranged for financing, having made a deposit, and now having had the car within his grasp — will not balk at signing just one more piece of paper. Not even the seller considers the Retail Sales Contract as the document which defines his duties with respect to the buyer: the seller intends to perform the terms of the Sales Order contract with its warranties and service obligations running in favor of the buyer. The doctrines governing consideration, waiver, modification, and parol evidence find their justification in their ability to prevent one party from being deprived of existing rights in the absence of sufficient certainty as to the requisite intent. If ever applicable, these rules should operate where a financer enters a virtually completed sale and seeks, unilaterally, to condition final performance upon the buyer’s relinquishing the major part of his bargain.
APPENDIX I

A typical sales order used in the purchase of a motor vehicle would include the following provisions:

SALES ORDER

(Front)

(1) Purchaser Understands That the Motor Vehicle He Is Purchasing Is Warranted or Not Warranted As Indicated Below:

☐ Manufacturer's Standard New Vehicle Warranty As Stated By The Manufacturer And Limited By Section 12 On The Reverse Side Of This Retail Order Form.

Signed: ____________________________________________

☐ No Warranty Is Given On The Above Described Vehicle, Either Expressed Or Implied, Of Merchantability, Or Of Fitness, And The Vehicle Is Sold In Its Present Condition As Is.

Signed: ____________________________________________

☐ Used Car Warranty Furnished By The Dealer And Subject To The Terms And Conditions As Set Forth in Paragraph 16 On The Reverse Side of This Retail Sales Order Form.

Signed: ____________________________________________

☐ The Remainder Of The Manufacturer's Standard New Vehicle Warranty, If Available. Seller does not certify whether or not, nor the extent to which the remainder of the manufacturer's standard new vehicle warranty exists. Purchaser Understands It Is His Responsibility To Purchase And/Or Transfer The Remainder Of This Warranty Into His Name.

Signed: ____________________________________________

(2) Unless The Purchaser Is Paying Cash, The Purchaser's and Dealer's Obligations Under This Sales Order Are Subject To The Purchaser's Ability To Obtain Satisfactory Financing.

(3) Purchaser has read the front and back of this sales order and understands that it represents the entire agreement affecting this purchase. No other representations, agreements or warranties have been made and no services are to be rendered or items furnished unless written or printed herein.

(4) Purchaser certifies that he is 21 years of age, or older, and hereby acknowledges receipt of a copy of this order. Purchaser understands that all items or services promised to him have been written in on the above retail sales order and that no verbal agreements are binding or will be honored.

(5) This Order Is Not Valid Unless Signed And Accepted By Dealer Or His Authorized Representative.

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS OF THIS AGREEMENT

Signed: ____________________________

Purchaser

Address: ____________________________

City. ______ State ______

Zip Code ______ Township ______

Res. Phone. ______

Approved

Your Salesman

City. ______ State ______

Zip Code ______ Township ______

Res. Phone. ______

Bus. Phone ______

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(Reverse)

CONDITIONS

It is further understood and agreed: The order on the reverse side hereof is subject to the following terms and conditions which have been mutually agreed upon.

(6) The manufacturer has reserved the right to change the list price of new motor vehicles without notice and in the event that the list price of the new car ordered hereunder is so changed, the cash delivered price, which is based on list price effective on the day of delivery, will govern in this transaction. But if such cash delivered price is increased the purchaser may, if dissatisfied with such increased price, cancel this order, in which event, if a used car has been traded in as a part of the consideration herein, such used car shall be returned to the purchaser upon the payment of a reasonable charge for storage and repairs (if any) or, if the used car has been previously sold by the dealer, the amount received therefor, less a selling commission of 15% and any expense incurred in storing, insuring, conditioning, or advertising said car for sale, shall be returned to the purchaser.

(7) If the used car is not to be delivered to the dealer until the delivery of the new car, the used car shall be reappraised at that time and such reappraisal value shall determine the allowance made for such used car. The purchaser agrees to deliver the original bill of sale and the title to any used car traded herein along with the delivery of such car, and the purchaser warrants such used car to be his property free and clear of all liens and encumbrances except as otherwise noted herein.

(8) Upon the failure or refusal of the purchaser to complete said purchase for any reason other than cancellation on account of increase in price, the cash deposit may be retained as liquidated damages, and in the event a used car has been taken in trade, the purchaser hereby authorizes dealer to sell said used car, and the dealer shall be entitled to reimburse himself out of the proceeds of such sale, for the expenses specified in paragraph 6 above and also for his expenses and losses incurred or suffered as the result of purchaser's failure to complete said purchase.

(9) The manufacturer has the right to make any changes in the model or design of any accessory or part of any new motor vehicle at any time without creating any obligation on the part of either the Dealer or the Manufacturer to make corresponding changes in the car covered by this order either before or subsequent to the delivery of such car to the purchaser.

(10) Dealer shall not be liable for delays caused by the manufacturer, accidents, strikes, fires, or other causes beyond the control of the dealer.

(11) The price of the car quoted herein does not include any tax or taxes imposed by any governmental authority prior to or at the time of delivery of such car unless expressly so stated, but the purchaser assumes and agrees to pay, unless prohibited by law, any taxes, except income taxes, imposed on or incidental to the transaction herein, regardless of the person having the primary tax liability.

(12) THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, OF MERCHANTABILITY, OR OF FITNESS, MADE BY THE SELLER HEREIN, OR THE MANUFACTURER, ON THE VEHICLE OR CHASSIS DESCRIBED ON THE FACE HEREOF EXCEPT THAT, In The Case Of A New Vehicle Or Chassis The Printed New Vehicle Warranty Delivered To Purchaser With Such Vehicle Or Chassis Shall Apply And The Same Is Hereby Made A Part Hereof As Though Fully Set Forth Herein. The New Vehicle Warranty Is The Only Warranty Applicable To Such New Vehicle Or Chassis And Is Expressly In Lieu Of All Other Warranties, Expressed Or Implied, Including Any Implied Warranty Of MERCHANTABILITY Or Fitness For A Particular Purpose. In The Case Of A Used Vehicle Or Chassis, The Applicability Of An Existing Manufacturer's Warranty Thereon, If Any, Shall Be Determined Solely By Terms Of Such Warranty.

(13) The Dealer Also Agrees Promptly To Perform And Fulfill All Terms And Conditions Of The Owner Service Policy.

(14) This order shall not become binding until accepted by dealer or his authorized representative, and, in the event of a time sale, dealer shall not be obligated to sell until approval of the terms hereof is given by a bank or finance company willing to purchase a retail installment contract between the parties hereto based on such terms.
(15) In case the car covered by this order is a used car, no warranty or representation is made as to the extent such car has been used, regardless of the mileage shown on the speedometer of said used car.

(16) USED CAR WARRANTY: THERE ARE NO WARRANTIES, EXRESSED OR IMPLIED, OF MERCHANTABILITY, OR OF FITNESS, MADE BY THE SELLER HEREIN, OR THE MANUFACTURER. The used car described on front is hereby warranted to be in satisfactory operating condition commensurate with age and condition at this date and to remain in such condition under normal use and service for a period of one year after delivery.

(17) The undersigned agrees, if said car is delivered during the above period to our place of business, to make with reasonable promptness any repairs or replacements which may be necessary to its satisfactory operating condition in accordance with normal use and service, at a cost to the purchaser named on front at a 25% discount on parts and 25% discount on labor.

(18) This warranty does not extend to any replacements, repairs, or service made necessary by misuse, negligence, or accident, considering age and condition of car.

All Parts And Labor Under This Warranty Shall Be For Cash Only.

(19) When purchasing a demonstrator it is hereby understood that the price being paid takes into consideration the fact that the automobile has been driven and subject to normal wear and use. It is also understood that the purchaser has inspected the automobile before delivery. It is further understood that any applicable warranty was put into effect on the day the car was first put in demonstrator service and not the date of the retail sale.

APPENDIX II

A typical retail sales contract used in the purchase of a motor vehicle would include the following provisions:

RETAIL SALES CONTRACT

AND

TRUTH IN LENDING DISCLOSURE

(Front)

(1) Buyer's Name __________________________ Address __________________________

(Street No. or P.O. Box)

(City) (County) (State) ("Buyer") purchases from

(Seller's Name and Address) ("Seller")

the following described goods:

<table>
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<tr>
<th>Quantity</th>
<th>Year of Model</th>
<th>New or Used</th>
<th>Type of Collateral</th>
<th>No. of Cyl.</th>
<th>Model No. (if any)</th>
<th>Mfg. Ser. No. or Identification No.</th>
<th>Other descriptive Material</th>
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Accessories: ☐ air conditioning ☐ auto. transmission ☐ radio
☐ power brakes ☐ power steering

and the following Extra Equipment __________________________

together with all tools, accessories, parts, equipment, and accessions attached thereto, and, if the goods include a mobile home, all furniture and appliances now in or hereafter placed in or on such mobile home, the aggregate of all such
goods, accessories, and Extra Equipment being hereinafter referred to as “Collateral,” which will primarily be used for □ personal or family use, □ business use, or □ farming operations, for a Total of Payments computed as follows:

1. Cash Price - - - - - - - - - - - - - $ 
2. Down Payment:
   (a) Trade-in (description________________ $________________
   (b) Amount of Pay-off, if any - $________________
   (c) Equity (a+b) - - - - - $________________
   (d) Cash Down Payment - - - $________________
3. Total Down Payment (c+d) - - - $________________ $________________
4. Unpaid Balance of Cash Price (No. 1-No. 3) - - - $________________
5. Other Charges:
   (a) Total Insurance Premiums - - - - - $________________
   (b) Sales Tax - - - - - - $________________
   (c) Excise Tax - - - - - $________________
   (d) Filing Fee - - - - - - $________________
   (e) License Fees - - - - - - $________________
6. Total Other Charges - - - - - - - $________________
7. Unpaid Balance and Amount Financed - - - - - $________________
8. FINANCE CHARGE (Credit Service Charge) - - $________________
9. Total of Payments (No. 7 + No. 8) - - - - - $________________
10. Deferred Payment Price (No. 1 + No. 6 + No. 8) - - - $________________
11. ANNUAL PERCENTAGE RATE - - - - $________________ %

(2) Buyer agrees to pay to Seller the Total of Payments in ______ installments of $________________ each, payable on the __________ day of each month commencing __________, 19____, with a final payment of $________________ due and payable on __________, 19____. Total number of payments: __________. All installments of the Total Time Selling Price (Total of Payments) shall be payable at the main banking office of any branch of The ______ Bank (“Bank”). Buyer admits that Seller is not the agent of the Bank for any purpose.

(3) Until such time as the Total Time Selling Price (Total of Payments) is paid in full by the Buyer, the Seller shall retain title to the Collateral and Seller shall have a security interest in the Collateral, to secure payment and performance of all Buyer’s obligations set forth on the reverse hereof.

(4) Delinquent Charges: On each installment in default more than 10 days there will be assessed an amount equal to 5% of each installment or $5.00, whichever is the lesser amount. Buyer and Seller agree that if any installment is not paid within 10 days after due date, Seller may unilaterally grant deferral and make charges provided by law. Buyer agrees to pay any attorneys’ fees incurred by the holder of this contract in its enforcement if referred to an attorney not an employee of holder. Rebate: A fraction of the FINANCE CHARGE (Credit Service Charge) of which the numerator is the sum of the periodic balances scheduled to follow the computational period in which payment occurs and the denominator is the sum of the periodic balances under the sales agreement. A minimum charge of $7.50 will be retained.

(5) THIS CONTRACT CONTAINS THE ENTIRE CONTRACT BETWEEN SELLER AND BUYER, AND NO WARRANTIES OF MERCHANTABILITY OR OTHER WARRANTIES, EXPRESS OR IMPLIED, AND NO AGREEMENTS, REPRESENTATIONS, PROMISES OR STATEMENTS HAVE BEEN MADE BY OR ON BEHALF OF THE SELLER EXCEPT AS SET FORTH HEREIN OR AS MAY BE SPECIFICALLY ENDORSED HEREIN IN WRITING.

SEE REVERSE SIDE FOR ADDITIONAL TERMS OF CONTRACT.

(6) UNLESS SPECIFICALLY STATED, THE INSURANCE CONTRACTED FOR IN CONNECTION WITH THIS RETAIL INSTALLMENT SALE DOES NOT PROVIDE FOR LIABILITY INSURANCE FOR BODILY INJURY AND PROPERTY DAMAGE.
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(7) Buyer acknowledges receipt of this disclosure and that a completely filled in copy of this Contract, signed by Seller, has been delivered to and retained by Buyer.

(8) "Seller" X ____________________  "Buyer" X ____________________

By ____________________  ____________________

(Reverse)

ADDITIONAL TERMS OF CONTRACT

Buyer warrants and agrees that:

(9-1) Buyer waives, as against any assignee of this Contract, all claims, now or hereinafter existing, of Buyer against Seller and agrees not to set up such claims as a defense, set-off, counterclaim, or otherwise, to any action brought by such assignee for any amount due hereunder or for possession of the Collateral or any part thereof. Provided, however, if the transaction underlying this Contract constitutes a Consumer Credit Sale pursuant to the Uniform Consumer Credit Code such waiver shall not be effective unless assignee is not related to the Seller; assignee acquires the Contract in good faith and for value; and assignee gives Buyer notice of the assignment and Buyer gives no written notice of the facts giving rise to the Buyer's claim or defense to assignee within 60 days after the mailing of the aforementioned notice.

(9-2) The Collateral will be kept at the address of the Buyer set out in the contract, which in the case of a business is the address of the principal office of such business within this state. Buyer will not remove the Collateral from the state without the prior written consent of the Seller. Buyer will immediately give written notice to the Seller of any change of address or, in the case of a business, any change in its principal place of business, and any use of the Collateral in any jurisdiction other than a state in which the Seller shall have been advised in writing that such Collateral will be used.

(9-3) Buyer will deliver or cause to be delivered to the Seller any certificate or certificates of title to the Collateral with the security interest of the Seller noted thereon. In addition, Buyer authorizes the Seller at the expense of the Buyer to execute and file on its behalf a financing statement or statements in those public offices deemed necessary by the Seller to perfect its security interest in the Collateral.

(9-4) The Collateral is now and shall continue to be personal property until the total of payments and any other indebtedness is paid, notwithstanding the manner or degree of affiliation of the Collateral to any real property, and notwithstanding the extent to which such affiliation shall facilitate the use of the real property.

(9-5) Buyer shall keep the Collateral free from any adverse lien, security interest, or encumbrance, and shall keep such Collateral in good order and repair and will not waste or destroy such Collateral or any part thereof. Buyer will not use the Collateral in violation of any statute or ordinance or any policy of insurance thereon and the Seller may inspect such Collateral wherever located at any reasonable time or times. Buyer assumes the risk of loss of the Collateral.

(9-6) Buyer will not sell or offer to sell or otherwise transfer this Collateral or any interest therein without the prior written consent of the Seller.

(9-7) Buyer agrees to keep the Collateral insured, in favor of Seller and at Buyer's expense, against fire, theft, and other risks, and for such amounts as Seller may require and with companies acceptable to Seller; and to furnish satisfactory evidence of such insurance to Seller upon demand. Upon any failure of Buyer to do so, Seller may, but need not, so insure the Collateral. To the extent expenditures of Seller for such insurance are not included in Insurance Premium, Buyer agrees to pay to Seller, upon demand, the amount of such expenditures, together with interest thereon at the annual percentage rate provided herein, until paid. In the event of default by Buyer hereunder, Seller may cancel any insurance hereinabove referred to. Buyer hereby assigns to Seller the right to any moneys which may become payable under or on account of any such insurance, including returned or unearned premiums, and directs any insurance company to make payment directly to Seller, to be applied to such of the indebtedness of Buyer hereunder as, subject to any requirements of applicable law, Seller may elect, and appoints Seller as Buyer's attorney in fact to endorse drafts.

Buyer authorizes Seller to correct any patent errors in filling in any blanks in this Contract.
(9-8) Buyer will pay promptly when due all taxes and assessments upon the Collateral or for its use or operation.

(9-9) The occurrence of any one of the following events shall constitute default under this Contract: (a) nonpayment when due of any installment of the indebtedness hereby secured or failure to perform any agreement contained herein, (b) any statement, representation, or warranty, at any time furnished the Seller if untrue in any material respect as of the date made; (c) Buyer's insolvency or inability to pay debts as they mature or making of an assignment for the benefit of creditors or the institution of any proceeding by or against the Buyer alleging that such Buyer is insolvent or unable to pay debts as they mature; (d) entry of a judgment against the Buyer; (e) loss, theft, substantial damage, destruction, sale, or encumbrance to or of all or any portion of the Collateral, or the making of any levy, seizure, or attachment thereof or thereon; (f) death of the Buyer who is a natural person or any partner of the Buyer which is a partnership; (g) dissolution, merger, or consolidation or transfer of a substantial portion of the property of the Buyer which is a corporation or a partnership; or (h) the Seller deems itself insecure for any reason whatsoever. When a default shall exist, the entire indebtedness of the Buyer and any other liabilities may, at the option of the Seller and without notice or demand, be declared and thereupon immediately shall become due and payable and the Seller may exercise from time to time any rights or remedies of a secured party under the Uniform Commercial Code or any other applicable law. Buyer agrees in the event of default to make the Collateral available to the Seller at a place acceptable to the Seller which is convenient to the Buyer. Seller will give Buyer at least ten (10) days prior written notice of the time and place of any public sale of the Collateral or of the time after which any private sale or any other intended disposition thereof is to be made. Expenses of retaking, holding, repairing, preparing for sale, and selling shall include the Seller's reasonable attorneys' fees and expenses. Any proceeds of any disposition of the Collateral may be applied by the Seller to the payment of expenses of retaking the Collateral, including reasonable attorneys' fees and legal expenses, and any balance of such proceeds may be applied by the Seller toward the payment of the indebtedness owing from the Buyer to the Seller.

(10) No delay on the part of the Seller in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Seller of any right or remedy shall preclude other or further exercise thereof or the exercise of any other right or remedy. If more than one party shall execute this Contract, the term "Buyer" shall mean all parties signing this contract and each of them, and all such parties shall be jointly and severally obligated hereunder. The neuter pronoun, when used herein, shall include the masculine and the feminine, and also the plural.

(11) This Contract shall be construed in accordance with the laws of the State of _________________. Wherever possible each provision of this Contract shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Contract shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Contract.

This Contract shall be binding upon the heirs, administrators, and executors of the Buyer, and the rights and privileges of the Seller hereunder shall inure to the benefit of its successors and assigns.

(12) Guaranty by Third Party

Undersigned, jointly and severally, if more than one, guarantee(s) the payment when due to any holder of the within contract of all amounts from time to time owing thereunder and the payment upon demand of the unpaid time balance owing on said contract in the event of any default by the purchaser named therein.

Undersigned waive(s) notice of acceptance of this Guaranty, notice of any extensions in time of payment, notice of sale of the property, and all other notices to which undersigned might otherwise be entitled by law; agree(s) to pay all amounts owing on said contract, upon demand, without requiring any action or proceeding against purchaser; and agree that the holder may set off any amounts so owing against any accounts, including joint accounts, of the undersigned with holder.

Dated ________________, 19______

ATTEST: (If required for Corporation authority)

By ____________________________

(Authorized Officer)
(13) Assignment

FOR VALUABLE CONSIDERATION, the receipt whereof is hereby acknowledged, the undersigned hereby sells, assigns, and transfers to THE ___________ BANK the within contract, and all right, title, and interest in, to, and under the same, and in and to the property therein described, with authority to take, either in its own name or in the name of the undersigned, but for its own benefit, all such proceedings, legal or equitable, as the undersigned might have taken but for this assignment.

The undersigned hereby warrants that the within contract represents a valid deferred-payment obligation for the amount therein set forth, of bona fide purchaser(s), as therein described, having legal capacity to enter into the same; that said contract and all accompanying agreements and other documents are genuine in all respects and are what they respectively purport to be; that the disclosure statement pursuant to the Consumer Credit Protection Act is true and correct; that all statements of facts within the knowledge of the undersigned therein contained are true; that at the time of execution of said contract the undersigned had good title to said property and the right to transfer encumbered title thereto; that the security interest expressed in said contract is a perfected security interest and is a first lien on the Collateral; and that the undersigned has no knowledge of any facts which impair the validity of any of said instruments. The undersigned waives all demands and notices of default and consents that, without notice to the undersigned, the assignee may extend time to or compound or release, by operation of law or otherwise, any rights against Buyer or any other obligor.

The assignee shall not be bound to take any steps necessary to preserve any rights in the within contract or any accompanying agreements or documents against prior parties, which the undersigned hereby assumes to do.

The undersigned agrees to indemnify the Bank against any and all losses and expenses it may incur as the result of any defense or claim raised by the Buyer under this Contract.

The undersigned agrees that if any warranty herein contained proves to have been false when made, or the Bank suffers any loss from a claim raised by the Buyer, the undersigned will, upon demand of the assignee, at its election, either accept a reassignment of the contract or repurchase the property, and, in either event, will pay therefor the amount then due under the contract. The assignee shall have, in addition to the rights set forth above, all those rights set forth in the most recent agreement between the undersigned and the assignee, incorporated herein and made a part hereof, or, in the event the undersigned signs any provision dealing with repurchase, limited repurchase, partial guaranty, or full guaranty, the assignee shall have the additional rights of recourse against the undersigned appearing in the provision signed.

___________________________, 19
___________________________ Signature of Seller

By: __________________________ Title: __________________________

APPENDIX III

A typical new vehicle warranty would include the following provisions:

NEW VEHICLE WARRANTY

WHAT IS WARRANTED AND FOR HOW LONG

Manufacturer warrants to the owner of each 1974 model _______________ motor vehicle that for a period of 12 months or 12,000 miles, whichever first occurs, it will repair any defective or malfunctioning part of the vehicle except tires, which are warranted separately by the tire manufacturer. This warranty covers only repairs made necessary due to defects in material or workmanship.

The 12-month/12,000-mile warranty period shall begin on the date the vehicle is delivered to the first retail purchaser or, if the vehicle is first placed in service as a demonstrator or company vehicle prior to sale or retail, on the date the vehicle is first placed in such service.
WHAT IS NOT COVERED BY THE WARRANTY

This warranty does not cover:

1. Conditions resulting from misuse, negligence, alteration, accident, or lack of performance of required maintenance services;
2. The replacement of maintenance items (such as spark plugs, ignition points, positive crankcase ventilation valve, filters, brake and clutch linings) made in connection with normal maintenance services;
3. Loss of time, inconvenience, loss of use of the vehicle or other consequential damages;
4. Any vehicle on which the odometer mileage has been altered and the vehicle's actual mileage cannot be readily determined; or
5. Any vehicle registered and normally operated outside the United States or Canada. The warranty for these vehicles shall be that authorized for the country in which the vehicle is registered and normally operated.

MANUFACTURER'S OBLIGATIONS

1. Repairs qualifying under this warranty will be performed by any authorized dealer within a reasonable time following delivery of the vehicle to the dealer's place of business.
2. Manufacturer will pay the authorized dealer for any repair under the warranty.

OWNER'S OBLIGATIONS

1. The vehicle must be delivered to an authorized dealer's place of business during regular business hours for performance of warranty repairs.
2. The owner is responsible for maintenance services which may be performed at the owner's option by any repair outlet regularly performing such services.

This is the only express warranty applicable and Manufacturer neither assumes nor authorizes anyone to assume for it any other obligation or liability in connection with such vehicles.

WHAT TO DO IF THERE IS A QUESTION REGARDING WARRANTY

The satisfaction and goodwill of owners of the Manufacturer's products are of primary concern to it, as well as to its dealers. In the event a warranty matter is not handled to your satisfaction, the following steps are suggested:

1. Discuss the problem with your dealership's management.
2. Contact the Zone Office closest to you as listed in the Owner's Manual.
3. Contact the Manufacturer's listed Customer Services Manager.