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Secured Transactions

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SECURED TRANSACTIONS

Comments on this section will be restricted to matters outside the purview of the Uniform Commercial Code.¹ In general, enactments in 1961 pertaining to Secured Transactions have continued to be regulatory in nature.

Nine states passed amendments to existing laws regulating finance companies and interest rates.² For the most part, these amendments have tended to liberalize interest rates, increase the maximum amount of loans allowable, or expand the scope of operations of banks and finance companies.

New Hampshire and Vermont now require full disclosure of finance charges.³

The Uniform Trust Receipts Act was adopted in North Carolina and West Virginia⁴ bringing the total number of states having this act to 37.⁵

Arkansas, Hawaii, Ohio and South Dakota amended their mechanic's and materialmen's lien statutes as to filing and discharge.⁶ Texas made extensive amendments in the same area,⁷ while North Dakota adopted a new, revised statute oriented toward clarifying existing laws.⁸

Wisconsin appears to be the only jurisdiction to deal specifically with factor's liens,⁹ many states still having no legislation in this area. Perhaps the lack of such legislation could be attributed to the consideration by many states of the Uniform Commercial Code, which deals with the problems involved.

Retail installment sales acts specifically designed to cover the sale of motor vehicles were enacted in four states,¹⁰ these statutes having the same basic regulatory scheme, but differing in specific details (*e.g.*, Vermont provides that interest on cars more than 2 years old cannot exceed 11%, while New Hampshire allows an interest charge of 12%). Other retail installment sales acts or their equivalent were enacted in three states, Hawaii, Missouri and Tennessee.¹¹ Missouri's enactment includes the

¹ Legislation and annotations regarding the Uniform Commercial Code are treated elsewhere in this Review.

² Ark. Acts 1961, No. 71; Ga. Laws 1961, S.B. No. 99; Minn. Session Laws 1961, c. 298; N.J. Laws 1961, S.B. No. 7 § 1; N.M. Laws 1961, H.B. No. 353; N.C. Session Laws 1961, S.B. No. 129; S.D. Laws 1961, c. 20; Vt. Acts 1961, H.B. No. 110; Wis. Laws 1961, c. 431.

³ New Hampshire Laws 1961, c. 246 § 399-B:2 reads as follows: "Any person engaged in the business of extending credit shall furnish . . . a clear statement in writing setting forth the finance charges . . . to be borne. . . ." Vermont Acts 1961, H.B. No. 110 reads: "When the loan is made, a statement . . . must appear . . . setting forth separately in dollars, the total amount of interest. . . ."

⁴ N.C. Session Laws 1961, S.B. No. 114; W. Va. Acts 1961, H.B. No. 282.

⁵ 5400 Condit. Sale—Chat. Mort. Rep., ¶ 3.

⁶ Ark. Acts 1961, No. 239; Hawaii Laws 1961, H.B. No. 1055; Ohio Laws 1961, H.B. 1041; S.D. Laws 1961, H.B. No. 520.

⁷ Tex. Acts 1961, c. 382.

⁸ N.D. Laws 1961, H.B. 584.

⁹ Wis. Laws 1961, c. 88.

¹⁰ Ariz. Laws 1961, c. 126. Calif. Stats. 1961, c. 1626; N.H. Laws 1961, H.B. No. 366; Vt. Acts 1961, H.B. No. 400.

¹¹ Hawaii Laws 1961, H.B. No. 1236; Mo. Laws 1961, S.B. No. 161; Tenn. Pub. Acts 1961, c. 110.

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sale of motor vehicles, while the Hawaii and Tennessee statutes are limited so as not to include them.¹²

Perhaps one of the more interesting enactments to come out of the 1961 sessions was an amendment to Massachusetts General Laws, Chapter 255, section 12, which provided that where there is a contract for the sale of consumer goods which requires or involves a promissory note, such note shall be marked "Consumer Note" and as such will not fall within the definition of negotiable instruments in Article 3 of the UCC.¹³ The purpose of this law is to prevent an assignee in good faith and for value of a note marked "Consumer Note" from becoming a holder in due course, with the resultant cutting off of any personal defenses which the buyer may have against the seller. The assignee would take subject to buyer's defenses.¹⁴

Under the terms of the statute it would appear that a note without "Consumer Note" being designated on it can still be made and assigned. A bona fide purchaser of the note would become a holder in due course, thereby cutting off the buyer's defenses. The vendor, however, would be subject to the penal fine imposed for noncompliance with the act's terms, and the assignee could not collect finance, collection, delinquency, etc., charges from the buyer. Also, the buyer would still retain any rights against the seller for defects which might appear.¹⁵

California and New York, in an analogous situation, although attempting to give adequate protection to the installment buyer by in effect prohibiting negotiable instruments,¹⁶ provide that a waiver of defenses may be stipulated in the contract. If a waiver provision is inserted into the contract and if the buyer does not notify the assignee of any defenses he may have within a stated period of time (New York—10 days; California—15 days) after he (the buyer) receives notice of the assignment, his personal defenses are cut off as against the assignee. Pennsylvania, in its statute pertaining to motor vehicle sales financing, provides that the installment buyer cannot lose his defenses as a result of an assignment.¹⁷

Where statutes similar to the New York and California provisions are in force, the assignee would still appear to have the advantage, in that the buyer would have only a short time to discover any defenses which he may have.¹⁸ The pendulum swings to the other end in the Pennsylvania statute, as the assignee of the note cannot, in any circumstances, become

¹² Perhaps an explanation for this may be the fact that the largest amount of installment buying is concerned with automobiles and some states feel the need for separate treatment.

¹³ Mass. Acts 1961, S.B. No. 644.

¹⁴ This assumes, of course, that the statute deals only with the cutoff of personal defenses, as real defenses are generally available even against a holder in due course. See Britton on Bills and Notes, § 125; 2 B.C. Ind. & Com. L. Rev. 357, 358 (1961).

¹⁵ 44 Cornell L.Q. 38, 65 (1958).

¹⁶ Cal. Civ. Code § 1804.2, as amended, Stats. 1961, c. 1214, § 5; N.Y. Pers. Prop. Law § 403. For general discussion of California statute, see 7 U.C.L.A.L. Rev. 623 (1960).

¹⁷ Pa. Stat. Ann. tit. 69 § 615 (1941).

¹⁸ Willier, Protection Instalment Buyers Didn't Get, 2 B.C. Ind. & Com. L. Rev. 287, 296-97 (1961).

a holder in due course. The Massachusetts amendment provides what seems to be a needed compromise in that it offers protection to the buyer, yet does not destroy the negotiability of the note. It perhaps would have been desirable under the Massachusetts statute to allow for some cut off of the buyer's defenses rather than to allow them to continue indefinitely. It would seem that the ultimate effect of this amendment upon the seller-finance company relationship would be that the finance companies must be more careful in selecting those "sellers" with whom they will deal. Assuming that some cut off of the buyer's defenses as against the assignee is not read into the statute, the Massachusetts approach would seem to be the better approach in that it does not impair the free flow of negotiable instruments.¹⁹

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TRADE REGULATION

Since the last issue of the REVIEW there has been limited federal legislation in the field of Trade Regulation. A recently enacted amendment to the Shipping Act¹ has clearly established the legal position of the so-called dual rate contracts employed in maritime shipping. Under the dual rate system, shippers who agree to exclusive patronage of a shipping conference are accorded a lower rate. The need for clarifying the legal position of such contracts was raised by the decision of the Supreme Court in *Federal Maritime Board v. Isbrandsten Co.*,² where dual contracts were held to be a "competitive measure to offset the effect of non-conference competition",³ and prohibited by Section 14 of the Shipping Act.⁴ The Court limited its decision to instances where the contracts were used as "predatory devices". But since by their very operation dual contracts tend to cause non-conference lines either to join the conference using the contract or to leave the trade entirely,⁵ it was feared that all dual contracts would be outlawed by implication.⁶

The new amendment to the Shipping Act allows dual rate contracts upon approval by the Federal Maritime Commission. The Commission may not approve if the contract is (1) detrimental to the commerce of the United States, (2) contrary to the public interest, or (3) unjustly discriminatory or unfair. Previously, any discrimination would have invalidated the

¹⁹ For a general discussion of protections afforded instalment buyers see Willier, *supra* note 18.

¹ Act of Oct. 3, 1961, P.L. 87-346, 75 Stat. 762, amending 46 U.S.C. § 813.

² 356 U.S. 481 (1958).

³ *Id.* at 493.

⁴ Section 14 had prohibited retaliation "against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

⁵ S. Rep. No. 860, 87th Cong., 1st Sess. (1961), 1961 U.S. Code Cong. & Ad. News 4816.

⁶ Mr. Justice Frankfurter (dissenting) in *Federal Maritime Board v. Isbrandsten*, 356 U.S. 481, 500 (1958).