Section 2-102 of the West Virginia Consumer Credit and Protection Act and Assignee Liability: The Triangle of Consumers, Dealers, and Lenders has Come Full Circle

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SECTION 2-102 OF THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT AND ASSIGNEE LIABILITY: THE TRIANGLE OF CONSUMERS, DEALERS, AND LENDERS HAS COME FULL CIRCLE

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The opinions expressed in this Article are solely the opinions of the author and do not reflect, necessarily, the opinions of the management of One Valley Bancorp of West Virginia, Inc.
I. INTRODUCTION

The "pursuit of the American dream" has been replaced by the "search for instant gratification" as the consumer’s creed. More than ever, consumers are immediately purchasing coveted goods on installment credit\(^1\) rather than waiting until the amount of the purchase price can be saved.\(^2\) In 1989, the American Bankers Association reported that "[t]he personal savings rate, according to Federal Reserve statistics, declined from about seven percent of disposable income in the early 1980s to 4.2 percent in 1988."\(^3\) In the first quarter of 1989, the amount of the outstanding balance of consumer installment credit was a staggering $691.1 billion.\(^4\)

It is the rare dealer in consumer goods or the rare provider of consumer services\(^5\) who has cash capital sufficient to await a customer's promised payments but yet satisfy timely the expenses of the business.\(^6\) The necessary conclusion is "[t]he services of financing institutions in buying such paper (i.e., the document evidencing the consumer’s promise to pay) or lending funds against it are, therefore, essential to the business of installment selling."\(^7\)

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1. "Install[ment credit, used by consumers to purchase goods and services and to refinance existing debt, consists of short-term and intermediate-term loans scheduled to be repaid in multiple (i.e., two or more) install[ments]." AMERICAN BANKERS ASS'N, INSTALLMENT CREDIT REPORT 3 (1989).

2. Goods commonly sold on a installment payment basis include automobiles, trucks, aircraft, boats, frozen foods, house trailers, household appliances, furniture and household furnishings, radios, stereos, television sets . . . as well as . . . jewelry, and clothing. Services sold on an installment payment basis include medical, dental, hospital, burial, automobile repair, home improvement and modernization, travel, educational, and vocational training. AMERICAN INSTITUTE OF BANKING, INSTALLMENT CREDIT 63-64 (1964).

3. AMERICAN BANKERS ASS'N, supra note 1, at 3.

4. Id. This figure includes installment loans made directly to consumers by lenders as well as installment sales made to consumers by dealers. Installment sales are defined as "the immediate use of goods or services in exchange for a promise to pay a definite sum in a specified manner in the future." AMERICAN INSTITUTE OF BANKING, supra note 2, at 60. The promise to pay is typically "in the form of a security agreement, retail installment contract, lien contract, or note." Id.

5. Any reference in this Article to a "dealer" shall be deemed, unless otherwise indicated, to mean and include a "dealer in consumer goods" and a "provider of consumer services."

6. A dealer promoting installment selling receives conditional sale contracts or security agreements in lieu of cash for a substantial portion of his total sales, and these contracts or agreements are payable over extended terms. As a result, the dealer has considerable working capital tied up if he is unable to convert these documents into cash. AMERICAN INSTITUTE OF BANKING, supra note 2, at 61. In fact, for many dealers, the suppliers of the dealers' inventory will hold obligations of the dealers that are immediately due when the inventory is sold.

7. Id. The reference to financing institutions includes "commercial banks, finance companies,
The triangle of the consumer, the dealer, and the lender, which results in most instances from an installment credit transaction, provides the framework for this Article. Consumers are only vaguely aware that, after purchasing goods or services on credit, the payments are frequently made to a financial institution. Instead, the consumer views the transaction as solely between him or her and the dealer. Conversely, the lender typically views the purchase of the consumer’s installment sales contract as no different than a direct loan to the consumer for the result is the same: the consumer buys the product, the dealer is paid for the product, and the lender holds a credit obligation of the consumer. In fact, the lender’s activity in purchasing installment sales contracts from dealers has been described, generally, as “indirect lending.”

When the dealer of the goods ceases to do business or is otherwise insolvent and, as a result, breaks a promise or warranty to the consumer or is found to have materially misrepresented the goods or services to the consumer, the differing perceptions of the consumer and the lender give rise to conflict. The consumer perceives no independent promise to pay the lender and essentially “visits the sins” of the dealer upon the lender. The lender perceives a promise of the customer to pay which is no different than any other loan obligation held by the lender and, accordingly, the lender expects payment from the consumer notwithstanding the sins of the dealer. These days of economic uneasiness coupled with the enormous credit unions, and savings institutions.” American Bankers Ass’n, supra note 1, at 4-5. Installment credit obtained its legitimacy when commercial banks engaged in the business of install[ment] credit. Significantly, “[a]t first the [commercial] banks were reluctant to enter the instal[l]ment credit field.” American Institute of Banking, supra note 2, at 10. But:

[i]n the period following World War II the commercial banks really became interested in developing the business of instal[l]ment lending, which had begun to expand in volume as the country returned to a peace-time economy. The pent-up demand for consumer durable goods and the growing demand for goods and services could not have been met without the added facilities of banks.

Id. at 18.

Significantly, commercial banks held, at the end of 1988, 48.4% of the outstanding consumer installment debt. American Bankers Ass’n, supra note 1, at 4. With respect to buying consumer obligations from dealers, “[a]bout seven in ten community banks, more than nine in ten mid-sized banks, and almost all large banks offered indirect instal[l]ment loans . . . .” Id. at 11.

The various financial institutions who hold installment debt of consumers shall be generally referred to in this Article as “lenders.”
amount of consumer debt makes timely the issue of who, between the consumer and the lender, bears the loss when the dealer ceases to do business and a problem arises out of the underlying sales transaction.

In 1974, the West Virginia legislature enacted the West Virginia Consumer Credit and Protection Act.\(^8\) Section 2-102 of the West Virginia Act\(^9\) addressed the conflict between the consumer and the lender by focusing on the assignment of consumer credit obligations generally and by revitalizing the common-law principles governing the assignment of obligations. Unfortunately, the Assignee Provision has been perceived, at times, as imposing joint and several liability between the dealer and the lender for the damages suffered by the consumer in the consumer's transaction with the dealer. In effect, the lender becomes an insurer for all loss suffered by the consumer in the transaction. A review of the Assignee Provision establishes that such a perception of the Provision is unfounded.

Moreover, the Assignee Provision was enacted before "lender liability" became a catch phrase of 1980s' jurisprudence. An understanding of the policy advanced by the statutory provision underscores the potential friction between the policy and certain theories advancing a lender's liability for the acts of a third party. Accordingly, the Assignee Provision should be amended so that the enhancement of its policy is not the entrapment of a lender under other theories of a lender's liability.

This Article undertakes the review of the Assignee Provision, the development of the policy which it serves, and the advocacy for its amendment.

II. THE CONSUMER TRANSACTION IN A NUTSHELL\(^{10}\)

In the early 1900s, the mass production of automobiles was hindered because few people, understandably, were able to pay cash

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10. A consumer can apply directly to a lender, of course, for a loan and can use the proceeds
for such a highly priced product. In 1919, the General Motors Corporation formed the General Motors Acceptance Corporation to facilitate the sale of its product by dealers situated throughout the United States. The Acceptance Corporation accomplished this mission by (i) indirectly financing the consumer's purchase of an automobile by willingly accepting an assignment from the dealer of the purchaser's credit obligation arising from, at that time, an innovative finance plan; and (ii) directly financing the dealer's purchase of inventory from the automobile manufacturer.

Beginning in the 1930s, commercial banks were lured into the field of "indirect lending" by the insurance issued through the Federal Housing Administration, which covered losses on consumer credit obligations relating to home improvement transactions. The clarity of hindsight affirms that:

[i]the satisfactory experience gained by the banks in this area provided the impetus to explore other fields of installment credit. It was the majority view that since installment loans for property repairs and improvements could be made safely, installment loans could also be satisfactorily made for other worthy purposes.

Today, almost all commercial banks purchase installment sales contracts from dealers of consumer goods.

The process of taking assignment of consumer credit obligations or, rather, the business of "indirect lending" is fairly standardized. Before the consumer has actually visited the dealer's business premises, the dealer will have negotiated the sale of its installment sales contracts with a lender or, possibly, several lenders. The terms of, and conditions to, the sale of contracts will have been set forth in a written document generally referred to as a dealer agreement. Additionally, the dealer agreement will have set forth the dealer's gen-

of the loan to pay cash for a dealer's product. In this situation, no triangle exists; instead, the transaction is, essentially, a straight line between two entities, i.e., the consumer and the dealer. Accordingly, the lender is effectively isolated from the transaction and can demand, therefore, payment from the consumer without regard to the underlying transaction. However, this general rule is fraught with significant exceptions. See infra note 102.

11. AMERICAN INSTITUTE OF BANKING, supra note 2, at 5.
12. Id. at 6.
13. Id.
14. Id. at 6-7.
15. Id. at 7.
eral warranties to the lender covering the underlying consumer transactions, especially warranties with respect to (i) the compliance of the transactions with state and federal law or regulations, and (ii) the enforceability of the obligations against the consumers under state and federal law or regulations.

After execution of the dealer agreement, the dealer will submit to the lender or lenders a credit application of its customer which, in these days of facsimile transmissions, will be done in the "real time" of the transaction. The dealer will provide to the lender or lenders the basic terms of the proposed transaction including the cash price, the down payment, and the interest rate. A lender will either approve the purchase of the contract or refuse the purchase of the contract, depending upon the perceived strength of the customer's credit. If the purchase of the contract is approved, then the lender will impose conditions which must be satisfied before the transaction between the dealer and the lender is consummated. Standard conditions might be that the installment sales contract be in a form approved by the lender, the security, if any, for the credit obligation be properly documented and perfected, and the insurance for the collateral, if any, be issued.

Upon the lender's conditional approval, the dealer and its customer will execute the final form of the installment sales contract.

16. The dealer may submit the proposal to more than two or three lenders. The dealer may be shopping for the best terms or may be shopping, simply, for the fastest response.
17. The interest rate is generally left to negotiation between the dealer and the customer, except the lender may establish a minimum interest rate for any contract as a condition to its purchase.
18. The purchase of an installment sales contract can be done (i) on a recourse basis, which means that the risk of the credit unworthiness of the customer remains with the dealer who will be obligated to repurchase the contract if the customer defaults for reason of inability to pay; or (ii) on a nonrecourse basis which means that the risk of the credit unworthiness of the customer is shouldered by the lender upon the purchase of the contract. It should be noted that the recourse or nonrecourse provisions of the dealer agreement are separate and discrete from any warranties of the dealer regarding the general enforceability of the customer's obligation. Accordingly, if the obligation is unenforceable because the dealer misrepresented the product, the lender can require the dealer to honor its warranty of enforceability even if the assignment of the contract is "without recourse."
19. The requirement that the dealer use a form approved by, or even prepared by, the lender ensures that the various requirements of state and federal law regarding consumer credit documentation and disclosures have been satisfied. Otherwise, lenders would require legal counsel to review each form submitted to them for compliance which would increase, unnecessarily, the costs of such transactions that would be transferred by the lender to the dealer and by the dealer to the consumer in the form of higher prices.
Significantly, the customer's promise to pay in installments is given directly to, and in favor of, the dealer. The dealer is obligated to provide to the customer all the necessary disclosures required by state and federal law or regulations. With the execution of the installment sales contract, the consumer will take possession of the product and the dealer will retain the installment sales contract and any cash down payment.

If the conditions to the lender's purchase of the contract have been satisfied and all periods for the consumer's rescission of the transaction have expired, the dealer will then actually sell its rights to, and interest in, the contract to the lender. The sale of the contract will be made effective by language "assigning" the installment sales contract and any accompanying documents.21

The consideration paid by the lender for the assigned contract will vary depending upon the strength of the competition from other lenders.22 The consideration paid by the lender might be (i) the principal balance of the contract with the lender's return solely dependent upon the collection of interest on the obligation,23 (ii) the principal balance of the contract discounted by an amount to additionally compensate the lender if the interest rate on the obligation

21. Transfers of rights to payment are made either through negotiation, if it is a negotiable instrument, or assignment, if it is not. As one treatise summarizes:

The word assignment is sufficiently comprehensive to include the transfers of all kinds of property and property rights and is sometimes used synonymously with "grant" so as to operate as a conveyance of the title to real property, but ordinarily it is limited in its application to the transfer of intangible rights, including contractual rights, choses in actions, and rights in or connected with property as distinguished from the property itself. It may be observed that while every assignment is a transfer, not every transfer is an assignment.

6 Am. Jur. 2d Assignments § 1 (1963). The premise that assignment is different from negotiation is found in the provisions of W. Va. Code § 46-3-202(1) (1966) which define "negotiation" as the "transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order, it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." The Code then declares that "words of assignment . . . accompanying an indorsement do not affect its character as an indorsement." W. Va. Code § 46-3-202(4) (1966). The issue is academic because, as will be discussed, negotiable instruments are not favored in consumer transactions, if they can even exist under the governing provisions.

22. In many dealer agreements, the lender will hold back for a reserve, a percentage of the consideration as security for the dealer's performance of its various obligations to the lender under the dealer agreement including, but not limited to, any recourse obligations.

23. The prepayment of the obligation may result in the lender having no, or only marginal, profit in the transaction.
is insufficient,\(^2\) and (iii) the principal balance of the contract plus a percentage of the interest anticipated to be collected on the contract — an arrangement common in automobile dealer agreements.\(^3\)

Upon receipt of the installment sales contract and the payment of the consideration for the contract, the lender will notify the consumer of the assignment to the lender of the dealer’s rights to the payments under the contract, and the lender will further inform the consumer that payments should be made to the lender directly as the assignee. The consumer will receive, in most instances, a payment booklet or a set of coupons from the lender to facilitate the consumer’s payment to the lender.

The analogue underlying the reference to the lender’s purchase of an installment sales contract as “indirect lending” is readily apparent. The procedures followed by the lender in making a direct loan is identical to the procedures followed by the lender in purchasing a consumer’s credit obligation. In both instances, the consumer’s credit rating will be investigated, and, in both instances, the proceeds will be paid directly to the dealer. From all appearances, the end result in taking an assignment of a consumer’s installment sales contract from a dealer is identical to the end result in making a direct loan to the consumer for purchase of the dealer’s product: (i) the consumer has use and possession of a product for which he or she could not, or desired not to, pay cash, (ii) the dealer has been paid for its product so that the expenses of business might be paid, and (iii) the lender holds a credit obligation of the consumer. However, as will be discussed below, appearances are deceiving due to the force and effect of the Assignee Provision.

III. THE LAW GOVERNING ASSIGNMENTS OF CREDIT OBLIGATIONS

The compelling issue with respect to the relationship among the dealer, consumer, and lender is who bears the risk of the loss oc-

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24. A particularly astute consumer may negotiate the rate with the dealer who, to make the transaction attractive to the lender, will have to discount the principal balance of the contract so the lender can realize the desired return.

25. The amount paid by the lender as a percentage of the interest to be collected on the contract is a premium for the sale of the contract to the lender made necessary by the intense competition for the particular type of contract. The premium may be required to be rebated, in whole or in part, if the consumer pays the obligation earlier than the stated maturity date in the installment sales contract, depriving the lender of the anticipated interest income.
casioned by the dealer's insolvency or cessation of a business and the dealer's resulting inability to honor a warranty or other promise to the consumer or, even more compellingly, the loss occasioned by the dealer's material misrepresentation of the product to the consumer. As with most loans, the lender expects repayment notwithstanding the consumer's dissatisfaction with the product purchased with the lender's financial assistance. The consumer, however, cannot differentiate between the dealer's promises to him or her and his or her promise to pay. This is understandable for, after all, the promise to pay was made on the dealer's premises, not in the lender's lobby.

The development of the law resolving this issue and generally governing the assignment of consumer credit obligations can hardly be described as an evolution. The reason is that the present solution to this issue, as set forth in the Assignee Provision, is, for almost all purposes, a return to our country's common-law roots. Thus, after the passage of a substantial period of time, the triangle of the consumer, the dealer, and the lender has come full circle.

A. The Common-Law Rule

As late as 1946, the West Virginia Supreme Court of Appeals confirmed its adherence to the common-law principle that "[t]he assignee steps into the shoes of the assignor and takes the assignment subject to all prior equities between previous parties. His situation is no better than that of the assignor."26 Essentially, the assignee was the assignor, but only for the purpose of the enforcement of the obligation. With respect to the claims held by the obligated party against the assignor, the assignee had no personal liability or, rather, the assigned asset was the only asset of the assignee which was subject to any claim of the obligated party. As the court clarified, "'normally the assignee takes subject to all the defenses and all the equities which could have been set up against the property in the hands of the assignor at the time of the assignment.'"27 Essentially,

26. Cook v. Eastern Gas & Fuel Assoc., 39 S.E.2d 321, 326 (W. Va. 1946) [hereinafter, at times, the common-law principle will be referred to as the Common-Law Rule].
27. Id. at 327 (emphasis added).
the issue between the assignee and the obligated party who held claims against the assignor was entirely focused on the rights which were assigned and the general enforceability of the rights by the assignee.\textsuperscript{28}

Moreover, the practical limitation on the manner in which the claims of the obligated party arising out of the underlying transaction could be asserted against the assignee further insulated the assignee from any personal liability: "[t]hus, as against the assignee, the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation."\textsuperscript{29} Essentially, the assignee at common law assumed the risk that the assigned obligation would be unenforceable due to the actions of the assignor as an original party to the transaction. However, the risk was merely related to the enforcement of the assigned obligation and did not mean, in any way, that the assignee was required to indemnify or otherwise insure the obligated party from damages suffered in the underlying transaction. This is particularly relevant to the discussion of the common day, rather than common law, assignee’s liability under the Assignee Provision because, as previously stated, the Assignee Provision has been perceived as creating a joint liability between the assignor and assignee for all damages sustained by the obligated party in the underlying transaction.

\section*{B. The Holder in Due Course Doctrine}

The potential problems with enforcement of an obligation by an assignee made the assignment of such obligations a difficult task.

\footnotesize
\textsuperscript{28} The absence of any general liability by the assignee is emphasized by the following corollary to the Common-Law Rule: "However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation." Rosemond v. Campbell, 343 S.E.2d 641, 645 (S.C. 1986). The assignee merely takes the right of payment subject to the other terms included in the writing, if any, evidencing the right to payment. The responsibility of honoring promises not embodied in the assigned writing remains with the assignor. Accordingly, while the failure to perform the promises may give rise to a defense to the enforcement of the obligation, it does not give rise to a claim that the assignee should have performed, or is liable for the nonperformance of, the nondelegated promises.

\textsuperscript{29} Id. at 645. For the reasons set forth in the text, the term "assignee liability" is somewhat of a misnomer, but it is certainly a more convenient reference than "the rule of restrictive enforcement of assigned obligations."
In England, Lord Mansfield deemed it vital that the Bank of England’s bearer notes be equivalent to cash.\textsuperscript{30} Opining that the good-faith purchaser of the bearer notes was not subject to any claims or defenses of the original parties to the note, Lord Mansfield promoted the free circulation of such notes, but, most significantly, planted the seed that blossomed into the holder in due course doctrine.\textsuperscript{31}

Significantly, the holder in due course doctrine was given the \textit{imprimatur} of West Virginia’s lawmakers with the adoption of the Uniform Commercial Code.\textsuperscript{32} Section 302(1) of Article 3 of the Uniform Commercial Code defines a holder in due course as a holder\textsuperscript{33} who takes a negotiable “instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.”\textsuperscript{34} With such lofty status, the holder of the instrument takes “the instrument free from . . . all claims to it on the part of any person . . . and all defenses of any party to the instrument with whom the holder has not dealt.”\textsuperscript{35}

Accordingly, lenders could purchase obligations evidenced by negotiable instruments and hold the obligations free from the claims or defenses which the obligated party held against the party with whom the obligated party had dealt in the underlying transaction. The doctrine protected the general negotiability of documents in the


\textsuperscript{31} Id.

\textsuperscript{32} \textsc{w. va. code} §§ 46-1-101 to -104 (1966).

\textsuperscript{33} “‘Holder’ means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.” \textsc{w. va. code} § 46-1-201(20) (Supp. 1991).

\textsuperscript{34} \textsc{w. va. code} § 46-3-302(1) (1966).

\textsuperscript{35} \textsc{w. va. code} § 46-3-305 (1966); \textit{see} Rosemond v. Campbell, 343 S.E.2d 641, 645 (S.C. 1986) (citations omitted), in which the court explained:

[A] person taking a negotiable instrument as a “holder in due course” takes it free from all claims to it on the part of any person and free from all “personal” defenses of any party to the instrument with whom the holder has not dealt. Personal defenses include the defenses of fraud in the inducement and failure of consideration.
flow of commerce, but, admittance, fostered potentially harsh results.36

C. The Waiver of Claims and Defenses Clause

The holder in due course protection was only available for instruments which were negotiable.37 Negotiability required that the writing contain "an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer."38 The combining of promises to pay with other standard terms of a loan agreement made the negotiability of loan instruments uncertain.

In response to the possible unavailability of the holder in due course protective status, lenders and other assignees began requiring a written waiver of the obligated party's claims and defenses to be set forth in the provisions of any contract to be purchased. Again, the inclusion of such a waiver in a contract received the imprimatur of the West Virginia Legislature with the enactment of the Uniform Commercial Code.39 Section 206 of Article 9 of the Code provides:

36. The following example was set forth in Lorin G. Tobler, Comment, Consumer Protection Under the UCCC and the NCA — A Comparison and Recommendations, 12 Anz. L. Rev. 572, 586-87 (1970):
Suppose Mr. Doe, a consumer, makes a credit purchase of a stove from a local appliance dealer. When he makes the purchase, Doe signs a negotiable note which the dealer later sells to a finance company which takes as an HDC [i.e., Holder in Due Course]. The night after selling the note this particular dealer leaves town without delivering the stove. At this point Doe refuses to pay because he feels he should not have to pay for something he did not receive. In the creditor's suit to collect the note, the primary question is the allocation of loss between the innocent consumer and the innocent creditor. On one hand, the court desires to protect the consumer from the seller's abusive practices and, on the other hand, to preserve the free negotiability of commercial paper. Under the present status of the law, failure of consideration is not a defense against an HDC and Doe would have to pay the finance Company the amount of the note even though he did not receive the stove.

Many courts, however, were entertaining creative theories to circumvent the effect of the holder in due course doctrine such as extending to its limits the requirement of good faith in accepting an instrument or imposing the requirement that no close connection exist between the holder and the seller. Id.; see generally Daniel F. Hedges, Note, The Holder-in-Due-Course Defense in Consumer Sales, 73 W. Va. L. Rev. 240 (1971). However, the various defenses were generally ineffective against holders of the instrument after the first assignment. See generally Tobler, supra.

[A]n agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument . . . . 40

Accordingly, consumers were required, effectively, to honor their obligations to the lenders as a result of their own express agreement to do so notwithstanding the fact that they may have held claims or defenses which might have been asserted in defense of the obligation if still held by the original dealer in the goods.41

D. The Uniform Consumer Credit Code

In 1968, the Uniform Consumer Credit Code (UCCC), after four years of study and drafting by the National Conference of Commissioners on Uniform State Laws, was presented for consideration by the legislatures of the fifty states.42 The UCCC was not passed due to any perception of pervasive evil in society, but, instead, arose naturally out of the National Conference of Commissioners on Uni-

40. W. Va. Code § 46-9-206 (1966). The provision is “[s]ubject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods.” Id. Before enactment of the Assignee Provision, however, no such statute or decision existed.

The effect of the inclusion of the waiver in a contract was to place the nonnegotiable writing on equal footing with the negotiable instrument. See Rosemond v. Campbell, 343 S.E.2d 641, 645 (S.C. 1986).

41. Although rhetoric to that effect exists, and although undoubtedly some unscrupulous activities occurred under the guise of the holder in due course doctrine and the waiver of claims and defenses clause, the real effect of such provisions was not to rob consumers of their very last penny, but, instead, was to merely equate the transaction in which a lender takes the assignment of consumer obligations with the transaction in which the consumer borrows directly from the lender. Again, the lender in the latter instance would hold an obligation of the borrower untainted, typically, by the underlying transaction.

42. Paul R. Moo, New Consumer Credit Legislation: Which Approach — UCCC or the NCA?, 2 URB. L.R. 439, 440 (1970). The Uniform Consumer Credit Code shall be referred to hereinafter as the “UCCC.” Mr. Moo was a member of the advisory committee which assisted in the drafting and revising of the UCCC. U.C.C.C. prefatory note (1974). With presumably some modesty, he described the participants in the drafting process as “composed of outstanding lawyers, judges and law professors from each State appointed by the respective Governors thereof.” Id. He further notes that:

The UCCC had[ ] been endorsed or approved by the House of Delegates of the American Bar Association, by the former Special Assistant to the President for Consumer Affairs, Betty Furness, by former President Johnson’s Committee on Consumers Interests and by its Director for Legislative Affairs who participated as an observer throughout much of the drafting work.

Id. at 441. The UCCC was revised in 1974.
form State Laws' consideration and drafting of the Uniform Commercial Code.\textsuperscript{43} Principally, the UCCC was "designed to supplant the existing hodgepodge of State statutes which presently control the extension and collection of credit to the consumer and to regulate many kinds of consumer credit transactions not within the scope of existing statutes."\textsuperscript{44} Interestingly, the "most controversial" problem faced by the drafters of the UCCC was "unquestionably" the "proper legal approach to the sensitive problem of the so-called holder-in-due-course situation."\textsuperscript{45} The Conference was confronted with the choice of "provid[ing] that no transfer or negotiation by the seller of the buyer's contract can cutoff or defeat the buyer's defenses or claims against the seller"\textsuperscript{46} and possibly adversely "imp-act[ing] and effect[ing] . . . small business, which to successfully compete for sales must be able to offer credit accommodations to its customers . . . [which] can be done only if some financial institu-tion is willing to buy the seller's credit contracts."\textsuperscript{47} In Solomonic, if not political, fashion, the Conference provided both alternatives between which the states could elect.

The Alternative A proffered by the UCCC was the most re-strictive, providing:

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 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.\textsuperscript{48}

\textsuperscript{43} Id.
\textsuperscript{44} Id. at 442.
\textsuperscript{45} Id. at 449.
\textsuperscript{46} Id. at 450.
\textsuperscript{47} Id.
\textsuperscript{48} U.C.C.C. § 2.404 (1974) [hereinafter the UCCC Rule]. Under the UCCC's Alternative B for the section, "a buyer's defenses can only be cut off if the seller transfers his buyer's obligations to a financial institution (1) not related to the seller, (2) which acquires the contract in good faith and for value, and (3) which gives the buyer a conspicuous notice that he must notify the assignee of the contract within ninety days of any claims or defenses the buyer then has against the seller." Moo, supra note 42, at 450. Obviously, this alternative is very restrictive and substantially limits, if not eliminates, the claims or defenses which a buyer of goods or services may assert against the assignee of his or her credit obligation.
The UCCC Rule mirrors, precisely, the Common-Law Rule in that it prohibits an affirmative action for relief against the assignee and limits any claim or defense asserted against the assignee to the amount owed on the assigned obligation. Restated, the UCCC Rule, like the Common-Law Rule, focuses solely on the enforceability of the obligation and does not make the assignee personally liable for the damages suffered by the obligated party in the transaction underlying the assigned obligation.

E. The National Consumer Act

Notwithstanding the UCCC’s endorsement by “recognized authorities with an admitted bias in favor of the consumer,” the arrival of the UCCC was not cheered by all consumer activists.49 Within a short period of time after the final version of the UCCC was presented, a “First Final Draft” of a National Consumer Act (NCA) was printed so it might be submitted concurrently with the UCCC for consideration by state legislatures. Unlike the drafters of the UCCC, the drafters of the National Consumer Act discussed the issues of consumer credit acerbically referring to “destroying” the holder in due course rule and not permitting the “subterfuge” of the waiver of defenses in contracts.50

For the first time, liability of the assignee was proposed to be extended beyond the mere enforceability of the assigned obligation. The relevant section of the NCA provided: “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.”51 The provision does not simply affect the value of the obligation, but provides, on its face, for the recovery of damages from the assignee although the amount of damages is limited by the amount involved in the transaction.

But what if no amount remains to be owed on the obligation? The Common-Law Rule and the UCCC Rule did not permit affir-

49. Moo, supra note 42, at 441.
50. NATIONAL CONSUMER ACT §§ 2.405-06 commentary at 49-50 (First Final Draft 1970) [hereinafter the “NCA”].
51. Id. [hereinafter the NCA Rule].
motive actions for relief against the assignee. The NCA provision on its face does not prohibit an affirmative action for relief, and, moreover, does not limit the relief to the mere cancellation or set-off of the obligation. Accordingly, the consumer could pay completely the obligation to the lender. If a warranty for the product was subsequently breached, the consumer could arguably sue the lender for recovery of those damages even though no relationship existed at the time between the lender and the consumer. One of the first commentaries on the National Consumer Act noted:

Were these NCA provisions adopted, no financial institution, regardless of how large it might be, could expose itself to any such potential liability. Knowingly or unwittingly, the authors of the NCA, by this one provision, would prohibit any seller of goods or services from being able to find anyone willing to purchase his customer’s obligations. Is this in the best interests of consumers?52

The language of the proposed statute was belied, however, by accompanying commentary which stated the following purpose for the NCA Rule: “This section makes ineffective and unenforceable agreements of consumers in form contracts which waive their defenses against assignees.”53 Possibly, the NCA Rule was intended to implement the Common-Law Rule, but did so inartfully.

IV. THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT

Responding to the nationwide clamor for a standardized consumer credit and consumer protection act, the State of West Virginia enacted the West Virginia Act in 1974. As originally enacted, the West Virginia Act contained eight articles: Article 1 Short Title, Definitions and General Provisions; Article 2 Consumer Credit Protection; Article 3 Finance Charges and Related Provisions; Article 4 Supervised Lenders; Article 5 Civil Liability and Criminal Penalties; Article 6 General Consumer Protection; Article 7 Administration; and Article 8 Operative Date and Provisions for Transition.54

52. Moo, supra note 42, at 450.
53. NATIONAL CONSUMER ACT §§ 2.405-06 commentary at 50 (First Final Draft 1970).
In one of the rare instances of review of the consumer credit protection provisions of the West Virginia Act, the West Virginia Supreme Court of Appeals described the statutory provision in this manner: "In its present form the . . . Act is a unique compilation of consumer protection concepts. It is a hybrid of the Uniform Consumer Credit Code and the National Consumer Act and some sections from then-existing West Virginia law."55 The Court's characterization of the Act's hybrid nature is most evident in the provisions of the Act permitting the consumer's assertion of claims and defenses held by the consumer against the seller of goods or services against any assignee of the consumer's credit obligation. Although this had been the consumer's common-law right, the holder in due course doctrine and the consumer's waiver of claims and defenses in standard contractual clauses had completely negated the vitality of the Common-Law Rule as previously discussed. The West Virginia Act's revitalization of the consumer's common-law right is, upon close inspection, a unique blend of the provisions of the Common-Law Rule, the UCCC Rule, and the NCA Rule.

A. The Holder in Due Course Provision

The first step taken by the legislature was to address the holder in due course doctrine in the context of consumer credit obligations. Succinct in its language, the West Virginia Act provides: "With respect to a consumer credit sale . . . the seller . . . may not take a negotiable instrument other than a currently dated check as evidence of the obligation of the buyer . . . ."56 As previously dis-

56. W. Va. Code § 46A-2-101(5) (1986). A "consumer credit sale" is defined as a sale of goods, services or an interest in land in which: (1) Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card; (2) The buyer is a person other than an organization; (3) The goods, services, or interest in land are purchased primarily for a personal, family, household or agricultural purpose; (4) Either the debt is payable in installments or a sales finance charge is made; and (5) With respect to a sale of goods or services, the amount financed does not exceed twenty-five thousand dollars.

Such a sale does not include "a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement." W. Va. Code § 46A-1-102(13) (Supp. 1991).

The West Virginia Act also applies to consumer leases. However, for convenience's sake, only the sale of goods or services will be discussed.
discussed, a holder of an instrument cannot qualify as a holder in due course if he or she holds an instrument or other writing which is not negotiable.\(^57\)

**B. The Assignee Provision**

Having effectively dealt with the holder in due course doctrine, the legislature then turned to the issue of the waiver of claims and defenses in favor of an assignee. The Assignee Provision, entitled "[A]ssignee subject to claims and defenses," was the legislature's response. Interestingly, the UCCC Rule and the NCA Rule were one paragraph in length and the Common-Law Rule was a succinct statement of law while the Assignee Provision contains over one page of text and seven different subdivisions.\(^58\)

\(^{57}\) Interestingly, the UCCC prohibited a seller from taking a negotiable instrument as well. However, the UCCC precluded the status of holder in due course only if the holder had notice that the negotiable instrument was issued in violation of the provision. The commentary of the drafters of the UCCC stated that: "[I]t is possible in rare cases second or third takers may not know of an instrument's consumer origin; in this unusual situation the policy favoring negotiability is upheld in order not to cast a cloud over negotiable instruments generally." U.C.C.C. \$ 2.403 commentary (1974). The NCA cared not whether the skies were clear over the negotiability of instruments, declaring:

Any holder of an instrument, contract or other writing evidencing an obligation of the consumer takes it subject to all claims and defenses of the consumer up to the amount of the transaction total arising out of the transaction whether or not it is payable "to order" or "to bearer."

**NATIONAL CONSUMER ACT** \$ 2.405(2) (First Final Draft 1970). West Virginia opted for cloudy skies as well, providing: "[T]he holder in due course of a negotiable instrument taken in violation of this subsection shall . . . be subject to all claims and defenses arising from that specific consumer credit sale or consumer lease which the buyer or lessee has against the seller or lessor."

**W. VA. CODE** \$ 46A-2-101(5) (1986). The effect of subjecting a holder in due course to the claims and defenses of the consumer against the seller shall be deferred to the discussion of the Assignee Provision.

\(^{58}\) Relevant portions of the text of the Assignee Provision are set forth below. The remaining provisions will be set forth in context.

(i) an assignee of any such instrument, contract or other writing [evidencing an obligation arising from a consumer credit sale] shall take and hold such instrument, contract or other writing subject to all claims and defenses of the buyer . . . against the seller . . . arising from that specific consumer credit sale . . . but the total of all claims and defenses which may be asserted against the assignee under this subsection or subsection (3) . . . of this section shall not exceed the amount owing to the assignee at the time of such assignment, except (i) as to any claim or defense founded in fraud: Provided, That as to any claim or defense founded in fraud arising on or after the first day of July, one thousand nine hundred ninety, the total sought shall not exceed the amount of the original obligation under the instrument, contract or other writing and (ii) for any excess charges and penalties recoverable
The initial language of the Assignee Provision is a statement of its scope: "The following provisions shall be applicable to instruments, contracts or other writings, other than negotiable instruments, evidencing an obligation arising from a consumer credit sale . . . ." Because the previously discussed section of the West Virginia Act prohibited the use of negotiable instruments in consumer credit transactions, the Assignee Provision was obviously intended to apply to all transfers of the interests in, and rights to, a consumer credit obligation. 60

Additional introductory language dictates that the provision is to have force and effect "[n]otwithstanding any term or agreement to the contrary" or the provisions of article two, chapter forty-six of this code or section two hundred six, article nine of said chapter forty-six." This language affirms that the singular purpose of the Assignee Provision is to render ineffective any contractual waiver

under section one hundred one, article five of this chapter.

... (3) A claim or defense which a buyer . . . may assert against an assignee of such instrument, contract or other writing under the provisions of this section may be asserted only as a matter of defense to or setoff against a claim by the assignee: Provided, That if a buyer . . . shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or setoff against a claim by the assignee were such assignee to assert such claim against the buyer . . ., then such buyer . . . shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation in whole or in part, of the indebtedness evidenced by such instrument, contract or other writing or the release in whole or in part of any lien upon real or personal property securing the payment thereof: Provided, however, That any claim or defense founded in fraud, lack of failure of consideration or a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter, may be asserted by a buyer . . . at any time, subject to the provisions of this code relating to limitation of actions.

60. The legislature was also concerned with another mechanism whereby sellers and financial institutions would avoid potential assignee status by having the customers go directly to the lender. Section 2-103 of the West Virginia Act, W. Va. Code § 46A-2-103 (Supp. 1991), governs a lender who is a "participant" in the sales transaction or is "connected" with the sales transaction and provides that the lender is subject to all claims and defenses of the borrower against the seller arising from that specific sale of goods or services.

61. This is a reference to the provisions of the subject instrument, contract, or other writing evidencing the assigned obligation.

62. This is the Article of the Uniform Commercial Code governing sales of goods generally. The Article permits, at times, the waiver by the buyer of the goods of certain rights otherwise available in the Article.

63. This provision expressly permitted the consumer's waiver of defenses in favor of an assignee.
by a consumer of any defenses and claims held by the consumer against the seller upon the assignment of the consumer credit obligation. The enactment of the Provision was for no more noble a purpose, therefore, than simply negating the effect of standard provisions in consumer credit contracts in favor of the assignee, but in derogation of the consumer's common-law rights.

Significantly, the Assignee Provision does not prohibit the inclusion of such waivers in the contracts evidencing a consumer obligation. Instead, the provision dictates that, notwithstanding such a contractual provision, "an assignee of any such instrument, contract or other writing shall take and hold such instrument, contract or other writing subject to all claims and defenses of the buyer . . . against the seller . . . arising from that specific consumer credit sale . . . ." The foregoing language is essentially identical to the language of the UCCC and the NCA except that the provision is more specific as to the effect of negating a waiver of claims and defenses clause.

Each of the model acts intended to negate the effect of a waiver of claims and defenses clause in a consumer credit contract, but did so by stating blithely that the "assignee shall be subject to" the claims and defenses of the consumer arising out of the consumer credit sale. Yet, the real focus of the provisions was intended to be, as was the Common-Law Rule, on the enforceability of the assigned obligation rather than on any liability of the assignee. The model acts would have been more precise to have stated that the "rights of the assignee" shall be subject to the consumer's claims and defenses against the seller. The UCCC and the NCA both identify the assignee, however, as the "assignee of the rights of the creditor" which more narrowly focuses the impact of the imprecise operative language.

64. The inclusion of such a waiver in a contract or other writing might support a claim that the provision of the contract is unconscionable giving rise to a claim under the provisions of W. Va. Code § 46A-5-101 (1986) or constitutes an unfair or deceptive act giving rise to a claim under the provisions of W. Va. Code § 46A-6-106 (1986); see Life Credit Corp. v. Wilson, 301 S.E.2d 169 (W. Va. 1983); Orlando v. Finance One of W. Va., Inc., 369 S.E.2d 882 (W. Va. 1988).
The Assignee Provision does not suffer from this imprecision for it states with no uncertainty that it is the "instrument, contract or other writing" which shall be taken and held "subject to all claims and defenses of the buyer." The focus is on, as it was in the Common-Law Rule, the enforceability of the obligation held by the assignee and not upon any personal liability of the assignee. The precision of this wording leaves no ambiguity upon which it might be argued that the legislature intended to transform the assignee of a consumer credit obligation into an indemnitor or insurer of all damages of a consumer caused by the conduct of the seller in the underlying transaction.

1. The Parameters of the Claims and Defenses Assertable Against An Assignee

What are the "claims and defenses" to which the assignee takes the contract subject? The answer to this question is found in the express limitations on assertable claims and defenses rather than in any express definition of such claims and defenses.

The first limitation on assertable claims and defenses is found in the clause "arising from that specific consumer credit sale." If a seller has several business transactions with a buyer, the assignee of any one transaction can enforce the consumer's obligation without fear that any other transaction between the seller and consumer will result in the unenforceability of the assigned obligation.

A second limitation is found in the following section of the Assignee Provision: "[n]otwithstanding any provisions of this section, an assignee shall not be subject to any claim or defense arising from or growing out of personal injury or death resulting therefrom or damage to property." The obvious impact of this provision is that the assignee shall not be responsible for the defect in any product or the action of any dealer which causes injury or damage to person or property. Because personal injury encompasses mental injury, the assignee would not take and hold the contract subject to commonly asserted claims for relief founded on the emotional distress of the

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consumer. Again, the assignee is not providing product liability insurance nor is the assignee providing indemnity for all damages suffered by the consumer. The focus on the assignee in the transaction is simply on the enforceability or unenforceability of the assigned obligation, and, therefore, only the claims or defenses which generally affect the enforceability of contractual obligations can give rise to a claim or defense which can be asserted against the assignee.\textsuperscript{67} The foregoing provision simply makes express that which was implicit in the Common-Law Rule, the UCCC Rule, and the NCA Rule.

Another limitation is found in the requirement that the "claims or defenses" be those of the "buyer." No definition of a buyer is contained in the provisions of the West Virginia Act. However, by common usage, the buyer would be the person to whom title to the product was passed in the sales transaction. What if, however, a cosigner, endorser, or guarantor was required in the transaction?\textsuperscript{68} The Assignee Provision would not affect the enforceability of the obligation against such persons because they are not "buyers," and the cosigner, endorser, or guarantor would be forced to offer defenses peculiar to their status rather than defenses held by the consumer whom they are accommodating.\textsuperscript{69}

What if the assignee collects the obligation from the nonbuyer party to the obligation? General principles of subrogation would dictate that the nonbuyer party step into the shoes of the assignee. The irony is that the nonbuyer party would then be subject to the claims and defenses of the buyer against the seller. However, this is not a disturbing result for if a nonbuyer party is involved, the consumer should, at the behest of the nonbuyer party, carefully

\textsuperscript{67} The type of claims or defenses which relate to the enforceability of a contractual obligation are varied in form including, but not limited, to "a change in the conditions under which the parties contracted . . . where performance has been substantially interrupted or prevented thereby," "fraud," "a breach of warranty," or "any material breach by the other party." 17A AM. JUR. 2D Contracts § 664 (1991).

\textsuperscript{68} The lender in reviewing the transaction might refuse the installment sales contract due solely to the weak credit of the consumer. The contract might be resubmitted on the strength of a co-maker, endorser, guarantor, or accommodating party.

\textsuperscript{69} In fact, a waiver of claims and defenses clause in favor of the assignee by the co-maker, endorser, guarantor or accommodating party would seemingly be effective.
scrutinize the transaction. While the consumer may still believe that he or she is only dealing with the business and may not be able to separate the assignee from the business, the nonbuyer party has a different perception because his or her role is simply to accommodate the consumer for the credit purposes of the assignee. The nonbuyer party has a financial stake in the consumer's decision to purchase the subject goods or services, and the investigation of the product and the dealer would seemingly be a necessary and prudent step for the nonbuyer party.

A requirement that the claims and defenses be against the "seller" provides additional limitations on the claims and defenses which may be asserted against the assignee. The most obvious limitation is that a "manufacturer's" warranty would not give rise to a claim and defense that can be asserted against the assignee. This result is not disturbing because such warranties cannot be breached by the seller in any event.

What, however, if the seller is acting as an agent for the retailer of another product in conjunction with the sale of the seller's product? An example would be a maintenance contract which is sold with the product. First, if the maintenance contract is also financed in the sale, then the obligation to pay for the maintenance contract, a service, would certainly be held by the assignee subject to any claims and defenses of the consumer against the seller of the maintenance contract.

But would the remaining balance of the transaction be affected? A previously discussed requirement was that the claim or defense arise out of that specific consumer credit sale. When the service was sold, it was sold by the dealer, but only as agent for the warranty company actually issuing the maintenance contract. The seller then is the warranty company, not the dealer, and the sale is actually the sale of the maintenance contract, not the seller's product. Accordingly, the balance of the transaction should not be affected.

But to what extent is the enforcement and collection of the consumer's obligations by the assignee affected by the consumer's claims and defenses against the seller? The Assignee Provision provides additional limitations on the claims and defenses assertable against
an assignee by specifying the manner and amount of the claims and defenses to which the assignee takes subject the contract, instrument, or other writing evidencing the consumer’s credit obligation.

The first such limitation expressly limits the manner in which the claim or defense can be asserted. Significantly, "a claim or defense which a buyer . . . may assert against an assignee of such instrument, contract or other writing under the provisions of this section may be asserted only as a matter of defense to or set-off against a claim by the assignee." The practical effect of limiting, in this fashion, the manner in which the claims or defenses may be asserted against the assignee is to limit the relief which can be obtained by the consumer — that is, the consumer cannot seek affirmative relief from the assignee on the claims or defenses. This is consistent with the Common-Law Rule which, as previously stated, provided for no "right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation." It is also consistent with the UCCC Rule. Two pertinent exceptions apply to this limitation, however.

The first exception relates to the disturbing prospect for many consumers that, absent the right to seek affirmative relief, the consumer must simply stop paying the assignee and await suit. The assignee may not sue, however, but may nonetheless adversely report the credit. The drafters of the West Virginia Act were sensitive to this potential plight of a consumer and included the following language in the Assignee Provision:

72. The most persuasive reason for not limiting a consumer to a wholly defensive position is the situation referred to in Professor Guttman's testimony. A consumer may stop payment after unsuccessfully attempting resolution of a complaint with the seller, or he may have finally discovered that the seller has moved, gone out of business or reincorporated as a different entity. During this period the consumer may have been making payments to the financer in good faith, notwithstanding the prior existence of defenses against the seller. If the consumer stops payment, he may be sued for the balance due by the third party financer. The financer may, however, elect not to bring suit, especially if he knows that he would be unable to implead the seller and he knows the consumer's defenses may be meritorious. Under such circumstances the financer may elect not to sue in the hopes that the threat of an unfavorable credit report may move the consumer to pay.
Provided, that if a buyer . . . shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or setoff against a claim by the assignee were such assignee to assert such claim against the buyer . . . then such buyer . . . shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation, in whole or in part, of the indebtedness evidenced by such instrument, contract or other writing or the release, in whole or in part, of any lien upon real or personal property securing the payment thereof . . . .

Again, however, the relief of the consumer is strictly limited to that of cancelling the amount which remains due and owing to the assignee. No affirmative relief against the assignee is permitted with respect to the amount of the obligation already paid by the consumer.

The second exception to the prohibition against affirmative actions against the assignee is stated as follows:

Provided, however, That any claim or defense founded in fraud, lack or failure of consideration or a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter may be asserted by a buyer or lessee at any time, subject to the provisions of this code relating to the limitation of actions.

Accordingly, the claims or defenses founded in fraud or a lack or failure of consideration give rise to the consumer’s right to seek affirmative relief from the assignee.

2. Lack or Failure of Consideration

The affirmative relief sought by a consumer through assertion of a claim or defense founded on a lack or failure of consideration has express limits in the Assignee Provision, but has additional limits inherent in such a claim’s very nature. Obviously, the ability of a consumer to commence an affirmative action against the assignee based upon a lack or failure of consideration is not intended to


74. The exception for the violation of provisions of W. VA. Code § 46A-5-101 (1986) is merely an acknowledgment that the assignee, as a creditor, is expected not to take any actions inconsistent with the provisions of the West Virginia Act for which section 5-101 provides civil remedies and criminal penalties. The exception precludes the argument that the assignee cannot be sued unless it sues the consumer even with respect to its own actions as a creditor after the assignment of the consumer’s credit obligation.
permit the recovery of compensatory damages from the assignee, for the lack or failure of consideration does not give rise to an action at law, but, rather, gives rise solely to an excuse for nonperformance of a contract and an action for rescission of the contract and for restitution.\textsuperscript{75} Accordingly, the claim or defense, by its very nature, is limited by the amount involved in the transaction.

The Assignee Provision provides an express limitation, however, by requiring that the “total of all claims or defenses which may be asserted [affirmatively] against the assignee under . . . subsection (3) . . . shall not exceed the amount owing to the assignee at the time of such assignment.”\textsuperscript{76} The successful claim or defense based upon the failure of consideration will necessarily entail the cancellation of the balance of the consumer credit obligation. The limitation of the “amount owing to the assignee at the time of such assignment” has application, therefore, with respect to the restitution to be demanded by the consumer upon rescission of the contract for the lack or failure of consideration.\textsuperscript{77} The difference between the amount remaining to be owed on the obligation, which is a principal balance (plus potentially accrued interest), and the amount owing to the assignee at the time of the assignment of the obligation, which is a principal balance (assuming the obligation is current), will be the amount by which the consumer reduced the principal amount of the obligation through payments to the assignee after the assignment of the consumer’s obligation.

The “amount owing at the time of assignment” becomes a limitation, therefore, because it does not permit a claim for restitution of the interest paid to the assignee. Equity is served by such a result because the failure of consideration is based upon an excuse for nonperformance of a contract resulting from an intervening event

\textsuperscript{75} See Laurie v. Thomas, 294 S.E.2d 78 (W. Va. 1982); Frasher v. Frasher, 249 S.E.2d 513, 517 (W. Va. 1978) (“Since rescission or cancellation of a deed is an equitable remedy, failure of consideration need not be the only basis on which relief may be granted.”).

\textsuperscript{76} W. VA. CODE § 46A-2-102(1) (Supp. 1991).

\textsuperscript{77} Technically, if a lack of consideration existed, then no contract was ever formed because consideration is a necessary requisite of a contract. See Lightner v. Lightner, 124 S.E.2d 355 (W. Va. 1962). Accordingly, no contract can be rescinded. Nonetheless, the customer may demand restitution of the amounts paid for a nonexistent bargain, so no distinction will be made between the “lack” or the “failure” of consideration in this discussion.
over which the parties had no control. 78 The assignee’s retention of the interest payments is consistent with the requirement that, in a rescission of a contract, the benefits conferred by each party to the other be returned. 79 The assignee advanced funds which enabled the completion of the intended, although subsequently thwarted, transaction and, therefore, retention of the interest payments is fair value for the use of the lender’s money before rescission.

A general rule regarding assignments is that only the claims or defenses existing before or at the time of notice of the assignment to the obligated party may be asserted against the rights of the seller as held by the assignee. 80 Failure of consideration will generally arise in the course of the contract performance, perhaps substantially after the date on which the contract was executed and assigned. The general rule would preclude the obligated party’s assertion of the defense because it was not one existing before the assignment. The drafters of the Assignee Provision very adroitly solved this problem of timing by providing: “Notwithstanding any provisions of this section, an assignee shall be subject to any claim or defense based upon lack or failure of consideration.” 81 Although seemingly innocuous, the provision sustains the consumer’s action for rescission should the consideration for the consumer credit obligation fail after the date of the seller’s assignment of the consumer’s credit obligation to a lender.

3. Claims or Defenses Founded in Fraud

As with a claim or defense founded in the lack or failure of consideration, the consumer has a right to seek affirmative relief

78. See id. at 360 (“[F]ailure of consideration . . . means that something presumably of value moving from the obligee to the obligor was intended, but did not materialize.”) (citations omitted); see also Rauschenbach v. McDaniel’s Estate, 11 S.E.2d 852 (W. Va. 1940).
79. The West Virginia Supreme Court of Appeals has opined:
   The rule that he who seeks equity must do equity requires that “any person demanding the rescission of a contract to which he is a party must restore or offer to restore to the other party whatever he may have received under the contract in the way of money, property, or other consideration or benefit.”
80. “The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment, but not to defenses and claims which accrue thereafter . . . .” Restatement (Second) of Contracts § 336(2) (1979).
from the lender, as assignee, based upon a claim founded in fraud. The limitation on affirmative relief to the “amount owing to the assignee at the time of assignment” (previously discussed with respect to claims or defenses based on a lack or failure of consideration) has an exception for the “claim or defense founded in fraud.” The reason for the exception is that, for fraud, a complete rescission should be available to the consumer, including a return of the paid interest, because, unlike the instance of a lack or failure of consideration, the transaction into which the consumer entered never bore any relation to the transaction as represented by the seller. Equity compels that the consumer be made completely whole.

Before 1990, however, no express limitation was set forth in the Assignee Provision on the amount of the claims or defenses founded in fraud which could be asserted against the assignee. The lack of such a limitation gave rise to the previously mentioned perception that the assignee was liable for all damages, including punitive damages, incurred by a consumer as a result of the fraud of a seller with whom the consumer dealt. In the context of the Assignee Provision, however, this perception was unfounded for several reasons.

First, as previously discussed, the language of the operative provision of the statute is quite precise. The declaration that the assignee shall “take and hold” the assigned obligation “subject to” the consumer’s claims and defenses against the seller focuses any claim or defense, without exception, on the four corners of the writing evidencing the obligation. The affirmative relief sought by the consumer is limited, necessarily, by the amount of the assigned obligation.

Second, the reference to “claims or defenses” negates any such argument. A reference to “claims” in the Assignee Provision is never

82. W. VA. CODE § 46A-2-102(1) (Supp. 1991). Excess penalties and charges imposed by the provisions of W. VA. CODE § 46A-5-101 (1986) are also an exception to the limitation of the amount which the consumer may assert against the assignee. Id. As previously discussed, the provisions of section 5-101 of the West Virginia Act govern the actions of creditors. The exception for the charges and penalties is simply to ensure that no argument can be made that the penalties or charges are limited, in any way, by the limitations set forth in the Assignee Provision with respect to the actions of the assignee as a creditor of the consumer after taking assignment of the consumer’s credit obligation.
made without an accompanying reference to "defenses." This usage is consistent with the common-law phrase "claims or defenses" relating to defenses to payment of an obligation or for set off of an amount against an obligation. In the common-law phrase, "claims" meant counterclaims necessary to establish the amount of any set off.

The drafters of the Assignee Provision were very much aware of the symbiotic nature of the terms "claims" and "defenses." In another section of the provision, the drafters made reference to a consumer's "right of action, claim or defense."83 If the exception for "claims or defenses founded in fraud" was truly an *imprimatur* of affirmative actions against the assignee for the recovery of damages, the usage of "claims or defenses" rather than, or in addition to, "claims for relief" or "rights of action," seems unlikely due to the drafters' express distinction among these terms in other sections of the Assignee Provision.

Third, the reference to "claims or defenses founded in fraud" is, but for the exception to the limitation of the amount, coupled at all times with the reference to "lack or failure of consideration." As no affirmative action at law exists for the lack or failure of consideration and the only relief, at all, is equitable, consistency compels the conclusion that the relief intended for claims or defenses founded in fraud is also solely equitable.84

Fourth, fraud is not a cause of action or a claim for relief. Rather, fraud is a finding of fact that an intended, material, false representation has been made. If fraud induced a contract, the defrauded party can "affirm the contract and bring his action at law for damages for the *deceit.*"85 Alternatively, the party may assert the fraud by disaffirming the contract and suing for rescission.86

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84. Laurie v. Thomas, 294 S.E.2d 78, 80 (W. Va. 1978) ("The main thrust of the complaint was to have the deed rescinded based upon a claim of fraud, duress, coercion, undue influence and a lack of adequate consideration. This type of claim is traditionally equitable.").
85. Crockett v. Burleson, 54 S.E. 341 (W. Va. 1906); see also Zogg v. Hedges, 29 S.E.2d 871 (W. Va. 1944) ("Ordinarily, the remedy for false representation or fraud is by an action at law for fraud and deceit.").
86. See Crockett, 54 S.E.2d 341.
Because the Assignee Provision is focused expressly on the assigned obligation, the only relief based on fraud which is consistent with the Provision’s focus is the equitable relief providing for the disaffirmance of the assigned obligation and the suit for rescission.

Fifth, the Assignee Provision insulates the assignee expressly from liability for claims arising out “of personal injury” or “damage to property.” A cause of action for damages arising out of fraud requires the showing of some injury which will necessarily be to the person or a property interest of the person. Accordingly, no claim can be made for such injury. Fraud only then serves as a basis for relief other than the recovery of damages, i.e., rescission and the attending requirement of restitution.87

Sixth, the imposition of strict liability upon the assignee for damages arising from the acts of a third party would violate the substantive due process rights of the assignee. The West Virginia Supreme Court of Appeals, when confronted with the imposition of strict liability upon an employer for an employee’s injuries, opined:

Conceding, as we do, that the state has the right, through workmen’s compensation legislation, to require the creation of a fund, and to administer the same for the benefit of those injured in industry, we do not think the legislature, under our Constitution, can arbitrarily impose liability [for an employee’s injury], enforceable in an action at law, upon an employer, in the absence of a showing of wrongdoing, neglect or default on his part, proximately contributing thereto. We do not think the police power of the state can be extended to sustain such an enactment.88

Consistently, the West Virginia Act can preserve the equities among the parties to the transaction, but the West Virginia Act cannot impose strict liability upon the assignee merely because of its status as an assignee.

Seventh, the application of the Assignee Provision to permit recovery from the assignee of all damages suffered by the consumer

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87. The reason that the breach of a seller’s warranty might be assertable against an assignee even though the cause of action typically represents the recovery of damages to the buyer’s property interests is that the seller’s breach of warranty has been treated historically as a defense to the buyer’s contractual obligation or the basis for restitution of amounts paid by the buyer upon the belief that the seller would fulfill his or her promises subsequently. See supra note 67.

as a result of the seller’s fraud runs afoul of federal provisions. In 1975, the Federal Trade Commission (FTC) determined that, in light of the absence of statutes in the majority of states protecting consumers in the assignment of credit obligations, it should engage in ad hoc law making. Under the guise of its rule-making authority, the FTC declared that the seller committed an unfair or deceptive practice if a notice in at least ten point, bold face type was not included in any consumer credit contract which the seller took or received in a transaction. The required notice was:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREOF.

Because the FTC had no jurisdiction over lenders, this provision was necessarily directed to sellers. By requiring a seller to put the notice in a contract between the seller and the consumer, the assignee took the contract subject to an express contract term eliminating the assignee’s protection under the holder in due course doctrine and, due to the notice’s prominence in the contract, eliminating the assignee’s protection under any fine print waiving the consumer’s claims and defenses.

As one federal court noted, “This [federal] regulation was specifically intended, according to the FTC to provide that ‘a consumer can... maintain an affirmative action against a creditor who has

89. “In one stroke of their pen the clever rascals at the FTC did what Congress would have feared to do, what the courts could do only piecemeal and over decades, and what state legislatures had refused to do.” Michael F. Sturley, The Legal Impact of the Federal Trade Commission’s Holder In Due Course Notice on a Negotiable Instrument: How Clever are the Rascals at the FTC?, 68 N.C. L. Rev. 953 n.1 (quoting JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 14-8, at 639 (3d. ed. 1988)). Hereinafter the Federal Trade Commission shall be referred to as the “FTC.”

90. “Seller” is defined as “a person who, in the ordinary course of business, sells or leases goods or services to consumers.” 16 C.F.R. § 433.1(j) (1991).

91. 16 C.F.R. § 433.2 (1991). The FTC also required that the seller not accept the proceeds of any loan made for the purpose of acquiring the seller’s goods or services if the loan agreement did not contain the required notice. The seller would typically have notice of the purpose of the loan to the consumer for reason that the loan proceeds check is made payable to the seller in most instances.

92. Id.
received payments for a return of monies paid on account." The federal court further observed, "as noted by the FTC, an affirmative action against a creditor 'will only be available where a seller's breach is so substantial that a court is persuaded that rescission and restitution are justified.' Thus, the FTC's required language, if included in a contract, expressly limits the recovery of a consumer from an assignee to the amounts paid under the contract and permits only such a recovery when the circumstances warrant rescission and restitution.

The FTC notice, interestingly, would not supplant the Assignee Provision, because the FTC concedes that "one must look to state law and the terms of the contract to determine the 'manner and procedure' by which a consumer may affirmatively maintain an action against the creditor." The interpretation of the Assignee Provision's reference to claims founded in fraud as merely permitting an affirmative action for the equitable relief of rescission and restitution coincides precisely with the intent of the FTC regulation and complements comfortably the manner and procedure by which the consumer can present his or her claims. If the Assignee Provision was otherwise interpreted to permit the affirmative recovery of damages from the assignee in excess of the amount of the assigned obligation, the statute would be in conflict with the express limitation set forth in the FTC's required notice.

Finally, if the imposition of liability upon an assignee for all the damages suffered by a consumer in a sales transaction was intended by the drafters of the Assignee Provision, then the West Virginia Act has substantially departed from its heritage as expressly declared

94. Id. at 165 (quoting 40 Fed. Reg. 53506, 53524 (1975)).
95. Id.
96. The question arises as to whether the Assignee Provision is rendered superfluous by the FTC's regulation. The answer is no because (i) the FTC's notice, if not included in the contract, results in a violation by the seller, not the holder of the contract, and, accordingly, the Assignee Provision would provide the protection of the consumer in the absence of the FTC's notice; and (ii) the Assignee Provision is a more precise application of the principles advocated by the FTC and, in the absence of the state provision, the courts would have to determine how to implement the provisions of the sparsely worded FTC notice.
by the West Virginia Supreme Court of Appeals, i.e., the UCC, the NCA, and existing law. The UCCC imposes a limitation on "all claims and defenses" of an amount that does not "exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee." 97 This limitation is merely the practical application of the UCCC's restriction that "rights of a 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." 98 As previously discussed, these limitations mirror the Common-Law Rule governing the assignment of obligations. For claims or defenses founded on grounds other than fraud or lack or failure of consideration, the Assignee Provision's limitation is identical.

The NCA, however, which was "advocated by a small but vocal minority of self-appointed consumer activists . . . [who] vigorously attacked the provisions" of the UCCC, imposed a limitation of the amount of the "transaction total" for all claims and defenses of the consumer. 99 The section containing the limitation was described as rendering "ineffective and unenforceable agreements of consumers in form contracts which waive their defenses against assignees" so that the "subterfuge used even when the holder in due course does not apply is not permitted at all." 100 Despite the stridency of the NCA's drafters, they still honored a limitation tied to the four corners of the assigned instrument, contract, or other writing.

The West Virginia Supreme Court of Appeals perceived the West Virginia Act as built upon the model acts or existing law and not as creating new principles of law. 101 Accordingly, the Assignee Provision should be interpreted consistently with the model acts and existing law. A consistent interpretation is that the West Virginia Legislature saw fit to impose three differing standards for the consumer's relief against the assignee depending upon the nature of the claim or defense held by the consumer.

98. Id.
99. Moo, supra note 42, at 441.
100. NATIONAL CONSUMER ACT § 2.406 commentary (First Final Draft 1970).
First, for the consumer's basic claims or defenses, the West Virginia Act honors the Common-Law Rule and the UCCC Rule limitation on claims and defenses assertable against an assignee which is the amount remaining to be owed on the contract. Moreover, the consumer has only the right to assert a defense to, or a set off against, a claim if brought in an action commenced by the assignee, except that the customer does have the right to the cancellation of any remaining debt in the consumer's own affirmative action against the assignee.

Second, for a claim or defense based on a lack or failure of consideration, the Act honors the common-law right of the consumer to rescind the transaction and demand restitution, but the Act permits the assignee to retain the interest paid on the obligation.

Third, for a claim or defense based on a fraud, the Act honors the NCA Rule and the common law by preserving the consumer's right to a complete rescission of the assigned obligation and permitting the consumer's full restitution from the assignee.102 This is

102. By this point, a lender might have determined that it should simply make direct loans to a dealer's customers. This is not an original thought. Before the drafting of the model acts, lenders had attempted to cut off the consumer's defenses by orchestrating the transaction as a direct loan. Notably, "the term 'dragging the body' was coined to refer to some sellers' practice of taking the consumer to the lender's office." Lawrence & Minan, supra note 30, at 329. The West Virginia Act includes a provision that provides a direct loan is made subject to the consumer's claims or defenses if the "lender participates in or is connected with the sales transaction." W. VA. CODE § 46A-2-103 (Supp. 1991). The lender is "considered to be connected with the sales transaction" if:

(i) The lender and the seller have arranged for a commission or brokerage or referral fee for the extension of credit by the lender; (ii) The lender is a person related to the seller unless the relationship is remote or is not a factor in the transaction; (iii) The seller guarantees the loan or otherwise assumes the risk of loss by the lender upon the loan other than a risk of loss arising solely from the seller's failure to perfect a lien securing the loan; (iv) The lender directly supplies the seller with the documents used by the borrower to evidence the transaction or the seller directly supplies the lender with documents used by the borrower to evidence the transaction; (v) The loan is conditioned upon the borrower's purchase of the goods or services from the particular seller, but the lender's payment of proceeds of the loan to the seller does not in itself establish that the loan was so conditioned; [or] (vi) The seller in such sale has specifically recommended such lender by name to the borrower and the lender has made ten or more loans to borrowers within a period of twelve months within which period the loan in question was made, the proceeds of which other ten or more loans were used in consumer credit sales with the seller or a person related to the seller, if in connection with such other ten or more loans, the seller also specifically recommended such lender by name to the borrowers involved . . . .

W. VA. CODE § 46A-2-103(a)(2) (Supp. 1991). In such an instance, the analysis of the Assignee Provision would be relevant to understanding the liability of the lender.
the unique blend of the provisions of the Common-Law Rule, the UCCC Rule, and the NCA Rule which truly attests to the Act's, in the words of the West Virginia Supreme Court of Appeals, "hybrid" nature.

In the 1990 legislative session, an express limitation was added to the Assignee Provision on the amount of the claims or defenses founded in fraud able to be asserted against the assignee. The following clause was added to the provisions of Section 2-102 of the Act: "Provided, That as to any claim or defense founded in fraud arising on or after the first day of July, one thousand nine hundred ninety, the total sought shall not exceed the amount of the original obligation under this instrument, contract or other writing." The intent of the proponents of the legislation was to merely confirm the status and meaning of the existing law and to "clear up" any perception that the Assignee Provision provided for personal liability of assignees in consumer credit transactions beyond the assigned obligation. The amendment passed without debate or outcry — legislative silence which supports the assertion that the amendment was not a dramatic shift in the policy respecting assignee liability. The effective date of July 1, 1990, was not in the legislation as introduced, but was inserted by a member of the Senate Judiciary Committee so that the amendment did not affect or interfere with existing claims under the Assignee Provision. Admittedly, the inclusion of an effective date opened the door for an argument that some change was intended and, therefore, assignees must have had a greater exposure for claims and defenses founded in fraud than the amount set forth in the amendment. However, the preceding discussion negates this argument.

103. W. VA. Code § 46A-2-102(1) (Supp. 1991). The legislation was proposed by the West Virginia Bankers' Association. The author of this Article and the general counsel for One Valley Bancorp of West Virginia, Inc. assisted the Senate Judiciary Committee in revising the proposed language of the amendment. The amendment eliminated also certain transitional provisions of the Assignee Provision.

104. For two reasons the argument that the amendment changed existing law should not be advanced. First, by reason of oversight, the amendment was not made to the provisions of W. VA. Code § 46A-2-101 (1986) governing holders in due course who take assignment of a negotiable instrument without knowledge of the consumer nature of the obligation. The provision provides for the same limitations as the Assignee Provision before 1990 including the absence of an express lim-
C. The Limitation of Actions Restriction

The Assignee Provision provides that, for affirmative actions in which claims or defenses founded in fraud or lack or failure of consideration are asserted against the assignee, the consumer's assertion of the claims or defenses are subject to the provisions of the Code relating to limitation of actions.\(^{105}\) The restriction belies the argument that the West Virginia Act merely preserves the consumer's claims for equitable relief, because the statutes governing the limitation of actions apply only to actions at law.\(^{106}\) However, the doctrine of laches applies to such equitable claims and the most analogous limitation of action is relevant to determining whether, in most circumstances, laches should be found.\(^{107}\) The assignee has, therefore, the benefit of the equitable defense of laches in any affirmative action permitted to be brought by the consumer under the Assignee Provision.

D. The Preservation of Right of Action, Claim, or Defense

Finally, with respect to the consumer's claims and defenses against the seller, the Assignee Provision stipulates: "Nothing contained in this section shall be construed as affecting any buyer's . . . right of action, claim or defense which is otherwise provided for in this code or at common law."\(^{108}\) While this provision has yet to be interpreted

\(^{107}\) Id.
by the West Virginia Supreme Court of Appeals, one explanation for the provision is that it permits the consumer to maintain an action against the assignee, presumably a lender, on other theories of a lender’s liability. Such an interpretation would, however, lead to completely absurd results. If the assignee sues the lender claiming the seller was merely an instrumentality of the lender, then the assignee provisions would not apply because the lender could not be an assignee of its own rights.

Similarly, if the lender is claimed to be a joint venturer with the seller, then the consumer’s attempt to base a claim both upon a joint venture and a contract of assignment would necessarily fail, because the joint venture is an agreement to share profits that is fundamentally inconsistent with an agreement in a contract of assignment to an arm’s length transfer to an assignee, for valuable consideration, of all the seller’s rights to, and interests in, a consumer’s credit obligation. For the same reason, the lender could not be engaged in both a conspiracy requiring an illicit agreement and a legitimate transfer of rights pursuant to a contract of assignment.

Moreover, the necessity to elect remedies precludes such inconsistent claims. The assertion of claims for damages precludes the assertion of equitable relief under the West Virginia Act for the basic reason that, if an adequate remedy at law exists and damages fairly compensate the injury, equity is not invoked.109

The second, and most compelling, explanation is that the section is intended merely to preserve the consumer’s claims against the seller. Accordingly, the consumer may sue the assignee to relieve itself of the consumer credit obligation, but the consumer may sue also the seller for the damages occasioned by the seller’s conduct. The consumer may have damages from a breach of warranty that exceed the amount that remains on the credit obligation for purposes of a setoff, and, therefore, the consumer may sue the seller for compensation of this amount. The rescission of the contract would necessarily preclude the suit against the seller for breach of con-

tractual provisions. However, if the rescission were based upon the fraud of the seller, then the consumer could sue the seller for recovery based upon the tort of fraud and deceit.\textsuperscript{110}

This provision should not be interpreted to permit multiple recoveries. Instead, the seller should be able to reduce the consumer's damages by any loss abated by the rescission and restitution of the contract in the hands of the assignee. Otherwise, an assignee who has incurred a loss under the Assignee Provision would be unable to seek contribution or indemnity from a seller because the seller could defend the assignee's claim on the ground that its liability to the consumer was not extinguished by the assignee's payment.

V. THE POLICY UNDERLYING THE ASSIGNEE PROVISION AND LENDER LIABILITY

The advent of the Assignee Provision was not heralded by the trumpeting of archangels. The Assignee Provision's revitalization of the Common-Law Rule was not seen as the conquering of the darkest evil. Even as acerbic as the commentary of the NCA was, no hue and cry was heard for the cessation of consumer credit. In fact, the preservation of consumer credit was an express goal of the UCCC's drafters for fear that the consumer would resort to unscrupulous sources of credit.\textsuperscript{111} Also, small or new businesses can be competitive, typically, only with the assistance of lending institutions and, therefore, the continued competitiveness of the consumer industry would be direly affected by the cessation of indirect lending.\textsuperscript{112} The death knell was simply not sounded for "indirect lending" with the passage of the West Virginia Act and the Assignee Provision.

The decision to reinstate the rule that the assignee holds the consumer's contract subject to the consumer's claims and defenses

\textsuperscript{110}. This discussion may be merely academic. The recourse against the assignee is not typically necessary unless the seller is insolvent or has moved. Accordingly, recourse against the seller may be a futile exercise.

\textsuperscript{111}. "As stated in the prefatory note, the Special Committee of the Conference recognized that ... too much enhancement of debtors' rights or remedies, might deprive the less credit-worthy of lawful sources of credit and drive them to 'loan sharks' and other illegal credit grantors." Moo, \textit{supra} note 42, at 442-43.

\textsuperscript{112}. \textit{Id.} at 450.
against the seller was merely a matter of economic reality. A consumer does not have the resources, typically, to investigate a product and does not have the wherewithal, generally, to bear the financial loss in a transaction. A seller's dependence upon a lender's involvement in a consumer transaction provides an opportunity for policymakers, through the lender, to influence the seller's activities, while the competition among lenders for consumer credit obligations is such that a modest adjustment in the consumer credit triangle will not result in the abandonment of the business of "indirect lending." With the Assignee Provision, therefore, the legislature has simply shifted the loss arising from a dealer's activities to the lender in the consumer credit triangle, rather than leaving the loss on the shoulders of the consumer.

By forcing lenders to bear the risk of loss in consumer credit transactions due to the sellers' actions as well as the consumers' default, prudent lenders will attempt to ensure that they are dealing with reputable sellers engaged in responsible business practices. Lenders have the means, as well as the incentive, to investigate the practices of dealers with whom they do business and to monitor the

113. Of course, the amount of the potential loss must be definite; otherwise financial institutions will restrict consumer credit severely if the risk cannot be adequately assessed.

114. Lending institutions have been viewed frequently as a tool with which public policy can be shaped. In 1968, a California court determined that the state's problems with tract housing could be solved by the imposition of liability upon a lender to a builder of tract housing, opining:

If existing sanctions are inadequate, imposition of a duty at the point of effective financial control of tract building will insure responsible building practices [because] the residential construction industry is composed principally of small builders, most of whom have so little equity that they must borrow money in order to finance the production of new homes. Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609, 619 (Cal. 1968) (overruled by statute). Twenty-two years later, the Eleventh Circuit Court of Appeals was of the opinion that a lender should be held responsible for the environmental contamination caused by a borrower's inadequate hazardous waste policy, declaring:

Our ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment systems will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.

business activities of these dealers.115 Dealers who are found to be unscrupulous or who have an inordinate amount of consumer complaints made against them will be unable to find lenders with whom to do business, and, therefore, will be forced to cease doing business or, at least, to curtail their unscrupulous practices.116

Unfortunately, this policy decision was made before lender liability came into vogue. With the advent of lender liability predicated upon theories of joint venture, breaches of duties of care to third parties, and instrumentality, the actions of a lender in adequately assessing its risk as an assignee of a dealer's consumer credit sale creates a potential paradox: the carrying out of a policy advanced by the lawmakers of this state while undertaking actions which might support a prima facie case of lender liability under various theories.

115. One author has advocated that the risk of loss be placed not on either the innocent consumer or the innocent lender, but, rather, on the seller:
Neither the UCCC or the NCA have offered a proposal which protects both the creditor and the consumer, but it is submitted that the protection of both is possible. By placing the risk of loss upon the party who gave rise to the consumer's claim or defense the seller of the consumer goods through the requirement of a bond to hold the consumer harmless, the "free flow of credit" can be essentially preserved.
Tobler, supra note 36, at 593. The author's proposition, however, required a state agency to be responsible for the bonding and to be a necessary party to any action. The additional costs to the state would require a tax either upon the consumer or the lender and, therefore, the interests of neither would not, in the final analysis, be served. Technically, the same result could be obtained by refusing permits of business without adequate capital which, of course, means the possible extinction of the small business entity.

116. A potential argument against an assignee bearing the risk of loss is that consumers who paid for the product in full at the inception of the transaction have no recourse against the lender. Conceivably, one might argue that such a policy encourages credit transactions at a time when a debt ridden nation needs to build its capital through savings. However, cash purchasers do benefit, indirectly, from the Assignee Provision by the fact that, if the policy of the rule is fully served, dealers who cannot fulfill their promises will not be able to do business and, therefore, the cash transaction will not take place. Moreover, the advice to borrow rather than spend is unwise since in most instances the assertion of claims and defenses against the assignee will involve annoyance and inconvenience for all parties, potential credit difficulties for the consumer in the future, and the attendant costs of litigation. Accordingly, the policy is probably neutral in its effect upon consumer spending habits.

However, the fact that consumers who paid for the product in full at the inception of the transaction have no recourse against the lender is an argument in support of expressly limiting the consumer's recovery against the assignee within the boundaries of the transaction. If consumers can be enriched by punitive damages against a lender merely as an assignee, then no consumer should ever pay cash. Obviously, this result cannot be tolerated, and, therefore, the limits of the assignee's liability are necessarily defined by the amount of the assigned obligation.
For example, the lender is encouraged to investigate the dealer and, conceivably, the dealer's product by reason of the risk of loss imposed by the Assignee Provision. This investigation will be done solely for the economic protection of the lender's interests or, more specifically, the interests of the lender's depositors and shareholders. However, a claim might be made by a customer of the seller that the investigation was performed negligently, and thus the lender breached a duty owed to the customer.117

Moreover, the imposition of liability upon the lender gives the lender a reason and, in fact, a compulsion, to encourage the seller to resolve a consumer's complaint or, in the absence of the seller's ability to do so, a reason to undertake itself the correction of the buyer's problem. Yet, under these circumstances, a claim might be made that the seller and the assignee are engaged in a joint venture based upon the lender's actions in resolving, practically, the consumer's complaint.118

Finally, if the lender monitors the seller's activities to ensure that the seller is keeping its promises and is not engaged in conduct giving rise to a substantial number of complaints, a claim might arise from the apparent involvement of the lender in the seller's business that the seller was merely an agent for the lender or that the seller was a mere instrumentality of the lender.

117. These claims were often made by the purchasers of homes who felt the lender had negligently supervised the construction of the home. The majority of courts have denied such claims. E.g., Armetta v. Clevetrust Realty Investors, 359 So. 2d 540 (Fla. 1978). In Armetta, the court ruled:

The only supervisory provisions in the loan agreement were inserted for the protection of the lender, as a lender, not as a participant in the development . . . . Even when a lender is in privity with a purchaser, provisions in the mortgage for inspection by the lender of the project do not give rise to a duty by the lender to the purchaser-mortgagor to see that the project is properly constructed.

Id. at 543 (citations omitted).

118. The author was involved, personally, in a case where a seller had ceased doing business. When a customer complained that the product she had purchased was broken, the client, a financial institution, hired a person to make repairs. In a subsequent suit, the fact of the repair was offered as proof that the financial institution was engaged in a joint venture, or was in control of the seller, because, as opposing counsel noted satirically, "when did you ever see a bank come out and change the transmission in your car?" This action was entirely consistent with the Assignee Provision, however, because the bank shouldered, arguably, the loss arising from the seller's breach of a warranty of service or repair made at the transaction's inception.
Given these illustrations, it is obvious that if statutory policy mandates that the lender bear the risk of loss in a transaction with a dealer — thereby encouraging lenders to make such assessments or take such actions to avoid liability — then the lender should not be permitted to be sued for the very behavior which was compelled by the statute. The West Virginia Supreme Court of Appeals noted a similar paradox when it decreed: "It cannot be that one can be liable to a private party under a state's tort law for doing exactly that which the state government itself has instructed him to do and threatened him a penalty for not doing." Accordingly, the statute should be amended by adding a "safe harbor" clause which provides that any reasonable actions taken by a lender to assess its risk of loss with respect to an assigned consumer credit obligation should not be offered as a basis for liability to the consumers except under the provisions of the Assignee Provision.

VI. CONCLUSION

The Assignee Provision allocates the risk of loss in a consumer credit transaction arising from the acts of the seller to the lender, as assignee, rather than to the consumer. The Assignee Provision accomplishes this allocation by preserving the consumer's claims or defenses against the seller in actions by or against an assignee. The claims and defenses which may be asserted against an assignee are limited in total by the amount involved in the transaction. However, the Assignee Provision should be amended so that steps taken by a lender to fulfill the policy underlying the statute do not serve as a basis for allegations of the lender's liability to the consumer other than pursuant to the dictates of the Assignee Provision.