Statement by

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North Carolina General Assembly
House Banks and Banking Committee

Re: House Bill 156
Thursday, March 25, 1971

Mr. Chairman, Members of the House Banks and Banking Committee.

I appreciate very much your invitation to appear before you today and speak in support of House Bill 156 entitled AN ACT TO REGULATE INSTALLMENT SALES AND SERVICES and, I believe, generally referred to as the "Buyer Protection Act". My interest in this bill, I think, is obvious because the office of Attorney General historically has been involved in consumer protection. I see this as a primary responsibility of my office and have devoted a great deal of time and energy to making our efforts in the area of Consumer Protection more effective.

I have not been one to clamor for a host of new consumer legislation. You will remember that the legislation we asked for and which was adopted by the last session of the General Assembly was simple, yet effective. It made unlawful "unfair and deceptive trade practices" and has allowed us since its enactment to stop a multitude of deceptive schemes and deter many others from ever

beginning them. In my opinion, however, it does not serve the purpose that House Bill 156 serves in regulating installment sales and services. In addition, I think it is obvious to anyone looking at the matter objectively that there is no other legislation on the books which does so either.

I cannot agree, therefore, that the consumer in North Carolina has "all the protection, he can stand or afford". As a matter of fact, while we are talking about what the consumer "can afford", we might ask whether we as a society can afford the diversion of the financial resources of the poor from legitimate needs of the family to the pockets of those who would take advantage of them through unfair installment sales and services practices.

The problem is stated quite well in a book titled The Innocent Consumer versus the Exploiters which states that this whole problem goes far beyond mere irritation. It is "serious business", says the author. "It really involves a massive waste of family money and a diversion of family resources that are helping to frustrate vital personal and national goals such as advanced education, the rehabilitation of our cities, better housing and more adequate health care."

"Ironically", said the author Sidney Margolius, "even while government and community agencies seek to raise family

incomes and families themselves seek to improve their earnings, much of this effort is thwarted through diversion of income to excessive finance charges; repossessions; concealed extra mortgage charges; ...; excessive price and sometimes wholly deceptive home improvement and car repair schemes; [and] unsatisfactory or high priced insurance ...".

These comments, I think, speak for themselves. I do not think that I need to elaborate to you.

Neither do I think that I should spend the major portion of my time today trying to convince you that abuses are taking place. You have heard a number of witnesses who bear painful testimony that they are. The witnesses you heard are not sophisticated or well educated. I doubt that any one of them would have even known that these hearings were taking place or could have appeared before you had not someone else made the effort to get them here. I'm glad they came, though, for I believe with Joe Doster of the Winston-Salem Journal, that "The simple eloquence of the humble may often be more persuasive than ... practiced and polished oratory ...".

It has been suggested by some that this bill interferes with the "freedom of contract". This argument is not a new one and in fact had its heyday about the turn of the century when

it was used to attack child labor restrictions, minimum wage laws, and limitations on maximum hours for labor.

Long ago, it became an established principle of American law that freedom to contract is not an unbridled, unqualified freedon. The courts and legislatures have recognized this fact and repeatedly enacted statutes and rules that regulate conduct in the bargaining process, outlaw some types of contracts, and actually write contracts for the parties in some situations. Pick up any volume of the North Carolina General Statutes and you will find laws that can be analysed as in some way inhibiting the freedom of contract.

Anti-trust laws deprive businesses with sufficient market power of the absolute freedom to select their own customers and the freedom to refuse to contract. Usury laws limit the freedom of the parties to contract in reference to interest rates. Statutes such as the North Carolina Consumer Finance Act involve many restrictions on the power of the parties to select their own terms of contract. Insurance statutes write many contract terms for parties. I previously mentioned laws regulating child labor, working conditions, minimum wage and hour laws. The illustrations are endless.

We have tested the wisdom of these laws because we have seen them operate to correct the abuses of the freedom of contract which they were designed to control. We, therefore, can understand the reasoning of Williston, the noted contract authority, who stated:

> "Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare, and that the only ultimate test of proper limitations is that provided by experience." Williston, Freedom of Contract, 6 Cornell L. Rev. 365, 374 (1921).

This Buyer Protection Act does place limitations on the freedom of contract, but I contend that they are "proper limitations" and are in the spirit of previous action by this General Assembly.

I am not one to talk in terms of theory, but allow me to point out that freedom of contract as an intellectual theory is premised upon equality of bargaining position between the parties. The witnesses who have appeared before you are enough to illustrate that this equality does not exist between some contracting parties even in a twentieth century society. This bill tends to produce the equality in the consumer credit bargaining process and eliminate a well documented history of abuses.

The thrust of my comments before you today, then, will be directed at refuting the sentiment expressed earlier that House Bill 156 "would serve no worthwhile purpose and would be contrary to the best interests of every facet of the citizenry of North Carolina." This isn't the case and I wouldn't be here before you today if I had any reason to believe that it was.

I also would like to dispel the notion that if the bill is imperfect in any way that the entire bill should be killed and, in the words of one witness, "be given a complete and speedy death."

Objections have been made to certain parts of the bill and some of these objections may be valid and worthy of your consideration. I have talked with sponsors of House Bill 156 and they themselves recognize that some amendments may be desirable and could result in a better law. I am sure that in the exercise of your good judgment and your responsibility to the people that you will make some amendments. But I also urge you, on behalf of the consuming public of North Carolina, to give this bill a favorable report substantially as it now appears.

An editorial in the March 21st Durham Herald states the purpose of the bill very well, I think. The editorial states:

"The bill seeks to set up additional safeguards for consumers, and to cover areas now unprotected. It would not penalize the honest person, the honest salesman, the honest repairman and others who would give the consumer everything that is coming to him. Rather, it would work to their advantage by establishing regulations for the common good."

The editorial goes on to point out that the bill itself does not stand as an

"indictment against the vast majority of the State's business community, but only against those who would take unfair advantage of consumers or otherwise would fail to give them a fair deal."

I stated a while ago that in my judgment the North Carolina consumer does not now have all the protection that he can stand or afford. The files in the Consumer Protection Division of my office and the hearings before this Committee bear out this judgment. There are numerous areas in the field of consumer credit where additional protection for the consumer is required and certainly that additional protection can be afforded by favorable action of this Committee on House Bill 156. I would like then to talk with you briefly about several of these areas and relate them to the bill which is now before you for consideration.

I think I should begin by noting that one side of consumer credit is strongly regulated today. The North Carolina Consumer Finance Act regulates loans of money to consumers by companies licensed under that Act and our usury statutes impose some regulation on all loans made to consumers and others. Thus there is already a pattern of regulation of credit that is endorsed by previous General Assemblies and confirmed by experience. However, for reasons largely historical and technical, the protection afforded by such statutes has not yet been extended to the installment sales side of consumer credit in North Carolina.

And we all know that the installment sales credit is of greater consequence to the average consumer than is direct loan credit. The legislatures of many other states have adopted Retail Installment Sales Acts or similar legislation, and I believe that the time has come for this General Assembly to give serious consideration to the adoption of legislation regulating specific aspects of installment sale credit.

RATES

I think that everyone will agree that it is no more justifiable to allow a consumer to be charged excessive rates for the use of credit in an installment sale than it is to allow him to be charged excessive interest rates when he borrows money

directly. We regulate the rates when he borrows or when he buys on revolving credit; we should regulate the rates when he buys in an installment sale.

What are appropriate rate limitations? I do not know. It is essential, however, that the rates be set at a realistic level. One cannot expect credit to be extended on a losing basis and credit is essential to our economy. The rates must be set high enough to allow a reasonable return but not so high that the consumer is unconscionably deprived of the product of his labor.

I think I know that 40% is too high and 8% is too low for installment credit. House Bill 156 does contain rate limitations. Whether the specific rates contained therein are the best I cannot say; that is the job for this Committee and the General Assembly.

REBATES

There are many circumstances in which the debt in a retail installment contract will be paid off early. The buyer will save enough money to liquidate that particular debt or credit life insurance might pay off the debt in the event of the buyer's death. In such cases, the creditor should rebate unearned finance charges. But the files of the Consumer Protection Division indicate that many creditors in this State are not making the rebates or are demanding a large deduction for the rebate.

In one case the amount of the unearned finance charge was in excess of $1,000.00 - money that should belong to the debtor or his estate. Statutes now require the equivalent of rebates when the transaction involves a loan of money; we should, by statute, require rebates when the transaction is an installment sale. House Bill 156 does contain such a provision.

TRANSFER OF EQUITY

When a consumer buys an automobile or other goods on time, he generally makes some type of down payment. Therefore, from the very beginning that consumer has an "equity" interest in those goods. If he later wants to trade in the car for a new one prior to the time he has completely paid for the old one, or if he desires to sell his interest in the goods to someone else, he should be free to do so. The Uniform Commercial Code presently so provides.

The transfer of equity by the buyer does not relieve him from continuing personal liability for the payments. However, if he has the new car, his interest in continuing to pay for the old one may certainly be diminished. Therefore I believe that the creditor in the original transaction should be free, if he desires, to contract for making the transfer of equity a default, which in turn would allow the creditor under the typical agreement to accelerate the due date of the obligations on the first car.

Thus the creditor would have the option of terminating his investment in the automobile if the buyer should decide to sell to someone else. The "transfer of equity" provision in House Bill 156 is unclear on this latter point and possibly should be clarified.

BALLOON PAYMENTS

The average consumer measures his ability to enter into a credit transaction by the amount of the monthly payment. Through the device of the large "balloon" payment at the end of a contract, the earlier monthly payments can be made deceptively small and the transaction can be made deceptively attractive. In all likelihood, the consumer will not have sufficient cash to pay the final balloon payment. He is then faced with suffering consequences of a default or refinancing the transaction on the terms of the financing agency, including payment of additional fees. Our present Consumer Finance Act prohibits balloon payments in consumer loans; a similar limitation with respect to installment sales would be appropriate.

Unless the consumer has a seasonal income, there seems to be little justification for the payments under his installment contracts varying significantly in amount - in other words, there seems to be little justification for the balloon payment. House Bill 156 does provide for balloon payments by persons with

irregular incomes, such as the tobacco farmer and others engaged in seasonal occupations.

THE HOLDER IN DUE COURSE PROBLEM

People who are induced to sign contracts through gross and vicious misrepresentations and who receive, under those contracts which talk of high quality, only the shoddiest of merchandise or services, should not be compelled to pay the full contract price plus the large finance charges. And if the contract were still in the hands of the original seller, the people would not have to pay that price.

But, unfortunately, under our present law, the people will, in all likelihood, be compelled to pay the full price and finance charges. The contract will have been assigned to a "holder in due course" or the people will have "waived" their defenses as to the assignee. The present law is exploited continuously by the unscrupulous seller.

House Bill 156 would strike at this problem by making the assignee of the contract subject to all defenses that would have been available to the buyer if the seller were to seek to collect. An obvious effect of House Bill 156 would be to require the assignee to look more closely at the credentials, reputation, and capitalization of the person who is trying to sell the contract.

Anyone interested in fair dealing would do so anyway. If the seller is honest, his contract with the buyer will be performed in accordance with its terms. The buyer will not have defenses against the seller and he likewise would have no defenses against the assignee or "holder in due course".

However, this inquiry about the seller is far more within the capability of the assignee than the buyer. He is knowledgeable in this area and usually better educated. It is the assignee who has ready access to credit information about people and corporations. The consumer-buyer does not have these things.

It is true that a fraudulent or continually breaching seller will occasionally slip through any screen. But when that happens, one must ask the question, with which party will State law and policy leave the loss - the individual consumer who is ill-equipped to negotiate in the face of the fraud, ill-equipped to make inquires, and unable to shift the loss, or the financial institution, who as the assignee of the paper is well equipped to negotiate, better equipped to inquire, and able to shift the loss? This is a policy question which you must decide. In a sense, the operations of the fraudulent and fly-by-night seller are a cost of our credit system - a cost which does not, as a matter of necessity, have to be left with a few individual consumers who get taken.

I recognize that there are differences of opinion about just how this problem should be resolved and the extent to which the buyer should be able to assert defenses against the assignee, for example, whether all defenses should be asserted or only those that arise within a certain period of time. I recognize also that it may be desirable to give slightly different treatment to items that are subject to continual maintenance and warranty disputes over an extended period of time, such as new automobiles. I do not know the precise answers to these problems, but I do think that House Bill 156 is headed in the right direction on these issues.

APPLICATION OF PAYMENTS

People who buy numerous items, for example, furniture, from a single store over a period of time and who make payments regularly for many months, probably would be surprised to learn that under present law the seller can insert in the agreements a payment application formula that makes it mathematically impossible for the buyer to pay for and free from the security interest any item until all of the items purchased have been paid for. The law should require that an equitable application of payments be made so that the buyer could, at some reasonable time after making payments equal to the value of the first item, know that that first item could no longer be repossessed for a subsequent default.

RESTRICTIONS ON COLLATERAL

A seller of goods should not have the unlimited ability to take a security interest in the buyer's property. A family should not be threatened with loss of their home because they have defaulted on the payments on some item of personal property purchased by them on credit. Under present law, there is little limitation on what the seller may demand as security in such circumstances. Reasonable restrictions would be desirable. No sight is more familiar to those of us from rural areas than that of the time-merchant's truck backed up to the front door of a tenant house, taking every earthly belonging of that man because he fell behind in payments on a new stove or washing machine. You can see the same thing in the lower income sections of any city.

REFERRAL SALES

The referral sale of the type where the buyer's price reduction or rebate is contingent upon the happening of future events such as providing the seller additional customers or other persons buying, is a particularly misleading type of transaction. The hope is held out to the buyer that the product he is purchasing will cost him practically nothing by the time all of the rebates come in. In reality, the rebates never seem to materialize to the extent suggested in the initial sales pitch, if they materialize at all. Through the referral device, the seller is able to sell overpriced merchandise to a person who cannot afford it.

RESTRICTION ON DEFICIENCY JUDGMENTS

Sellers of real estate in North Carolina have long been denied the remedy of a deficiency judgment when they foreclose their purchase money mortgage on the real estate. Presumably, the reason for retaining this rule over the years has been to encourage sellers of real estate to be realistic in their pricing, or at least to deny to them all benefits where the property is over-priced.

House Bill 156 would provide a similar rule for sales of personal property, where the purchase price was less than $1,000.00. This limitation of remedy would not be an unreasonable burden on the honest seller or creditor. If he takes a reasonable down payment, if he does not sell to a buyer already overloaded with debt, and if the price of his product is commensurate with its value, the option provided by House Bill 156 should be an adequate remedy.

HOME SOLICITATION SALES

The home solicitation sale section provides only a limited remedy to the buyer - basically the right to cancel the agreement for three days following its consumation. This provision applies only to sellers who sell on credit - it would not affect, as some have contended, the operations of businesses that we know

to be honest and legitimate and who sell for cash on a door-to-door basis.

The home is not a good place for the consumer to negotiate or to resist high pressure sales tactics. It does not appear unreasonable to give the buyer the right to re-think and reconsider the desirability of entering into this credit transaction. It is probably a credit transaction in the first place because it involves a large sum of money and is thus of great consequence to the consumer. If the reflection of the light of day shows that the transaction is honest and fair, the consumer in all likelihood would not attempt to cancel. If it is not honest and fair, he should have the right to cancel.

Additional Comments

Restrictions on Collateral

Section 25A-21 (similar to UCCC 2.407, 2.408) contains restrictions on the collateral that can be taken by sellers as security for payment. It essentially limits the security interest of the seller to the goods sold subject to a number of significant exceptions: (1) where the seller has sold the same debtor items previously and reserved a security interest in such items, then the security interest may reach the items previously sold; (2) if the item sold is more than $500.00 and is affixed to some item of personalty, the security interest may reach the personalty; and (3) if the debt on the item sold is more than $2,000.00 and the item is affixed to real property, the security interest may also reach the realty; (4) rights created by this state's lien statutes.

Under present law, including the Uniform Commercial Code, there is little legislative limitation on the security a creditor can obtain to insure payment of the debt. Thus, a creditor selling a consumer a $200.00 washing machine can obtain

and enforce liens on all other property then owned by the consumer - his automobile, his household possessions, his home itself. Limitations of the nature set out in 25A-21 are necessary in order to protect the consumer. It is not unjust that a consumer unable to pay for a time purchase that he makes give up the goods he has not paid for, but he should not be reduced to poverty by losing all other property he owns, also.

Additional Comments

Restrictions on Deficiency Judgments

Section 25A-24 of the proposed Act (similar to 5.103 of the UCCC) limits a creditor's remedy which has been a cause of much of the injustice in the consumer credit field - deficiency judgments. Presently, a creditor has the right to repossess the goods in which he has a security interest, sell such goods, and obtain a judgment from the debtor personally for any deficiency. The size of the deficiency judgment then is dependent upon two factors: the price obtained by the creditor upon resale and the expenses of repossessing and reselling that the creditor can add to the debtor's obligation. Such a rule ignores the realities of present commercial practices. It is based on two invalid assumptions: (1) that repossessed goods can be sold for reasonable price; (2) repossessing creditors will conduct such repossession sales in a manner to result in the highest possible price and accordingly the lowest possible deficiency.

Some high priced items, such as automobiles, have a reliable resale market and can bring reasonable prices. Such

goods are not affected by 25A-24 which prohibits deficiency judgments only in cases in which the cash price of the goods was $1,000 or less. This section then is directed at less expensive items such as furniture and small appliances where the resale values are woefully small. In these cases, a debtor who must pay a deficiency judgment loses the goods but still owes the purchase price. In fact, with the addition of collection costs, the deficiency judgment might be greater than the purchase price. For example, in Imperial Discount Corp. vs. Aiken, 38 Misc. 2d 187, 238 N.Y.S. 2d 269 (1963), the repossession and resale of a car to satisfy a $12.00 balance on its battery increased the indebtedness by $117.00 for which a deficiency was sought. The resale price was $50.00, but charges were: attorney's fee, $16.80; repossession charge, $45.00; auctioneer's fee, $35.00; and storage charges, $70.00, for a total of $167.00.

Moreover, present provisions do not assure that a sale will bring the true market value of the goods. The Uniform Commercial Code, in section 9-504, requires that the sale be "commercially reasonable" but gives no real guidance as to what constitutes a commercially reasonable sale. More significantly, 9-504 permits the creditor to sell the goods to himself. It is, of course, in the creditor's interest to sell the repossessed property to himself or his "strawman" for the lowest possible price and thus increase the amount of the deficiency left to be recovered from the debtor.

A recent study by Professor Shuchman of the University of Connecticut Law School in 22 Stanford Law Review 20 (1969), illustrates how ineffective the Uniform Commercial Code has been in assuring that the sale of repossessed goods bring the true market value of such goods. Professor Shuchman studied the resale of repossessed cars in Connecticut. Resales by the repossessor averaged only 52% of the retail Redbook value of the vehicle; shortly thereafter, most vehicles were subsequently resold for near 100% of the Redbook retail value. A Wall Street Journal study in California yielded similar results, Immel, Repossession Practices for Cars Called Unfair to Defaulting Buyers, Wall Street Journal, Tuesday, July 21, 1970.

Limitation of deficiency judgment in the manner set out in 25A-24 will not be an unreasonable burden on the honest seller, the honest creditor. If he takes a reasonable down payment, if he does not sell to a buyer overloaded with debt, and if the price of his product is commensurate with its value, the right to repossess will be a sufficient remedy in most cases. In those cases where it is not, he can always sue for the unpaid debt, allowing the debtor to keep the goods. In fact, 25A-24 should benefit the honest creditor who under the present statute is often precluded from collecting his debtor's bankruptcy by bankruptcy caused by unreasonable deficiency judgments.

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Additional Comments

Balloon Payments

The ordinary person measures his ability to finance a credit transaction by the size of the monthly payment he will be required to make. Consumer salesmen know this and utilize the so-called balloon payment to make the monthly payment schedule look more attractive to the prospective buyer. The monthly payments apparently are reduced to a manageable size. The last scheduled payment includes the amount remaining due. Often that payment is substantially in excess of the prior payments.

When that large payment comes due, the financing agency is then in a remarkably favorable position. If the balloon payment is not met, the consumer is in default and all the remedies of repossession, foreclosure and the like are available. The financing agency can then require the consumer to refinance the balloon payment, and charge him the usual fees associated with making a new transaction. These fees were paid once by the buyer, in the time price charge made against him by the seller, when he bought the goods on credit.

Our North Carolina Loan Finance Act prohibits such balloon payments. Section 53-180, as amended in 1969, states that no installment contracted for in a consumer loan transaction shall be substantially larger than any preceding installment. Of course this does not apply at all to a consumer credit sale.

At least ten states have adopted some type of regulation of the balloon payment in the consumer credit sale transaction. (These include California, Delaware, Hawaii, Pennsylvania, Washington, and the four states that have adopted the UCCC, Indiana, Wyoming, Utah and Oklahoma). The Federal Truth in Lending Act merely requires full disclosure of the amount of the balloon payment, and Maine's Banking Commissioner has adopted a regulation that does likewise. The state enactments - and the UCCC, have generally taken the form of a rule that permits balloon payments but gives the buyer an absolute right to refinance the large sum due.

Unfortunately, the right to refinance does not satisfactorily deal with the substantive evil of the balloon payment. If the problem is that buyers over-extend themselves by relying on small monthly payments in order to acquire consumer goods on time, then the balloon payment needs to be prohibited outright. The right to refinance plays into the hands of an unscrupulous financing agency since it does nothing to discourage,

Addition Comments

Application of Payments

25A-25 (similar to UCCC 2.409) deals with the application of payments by a seller who has made more than one consumer credit sale to a single consumer. The provision is similar in principle to the accounting method, fifo, i.e., it allocates the debtor's payments first to the debts first incurred. This prevents the seller from repossessing all items purchased on time when a single payment is missed.

Under present North Carolina law, including the Uniform Commercial Code, a seller can include an add-on clause in any consumer credit transaction. (e.g., "all payments now and hereafter made by purchaser shall be credited pro rata on all outstanding accounts due Company by purchaser at the time the payment is made".) The effect of such a provision under present law can best be understood by considering the following illustration.

On January 1, 1970, X buys a stove from Y, agreeing to pay $100.00 down and $10.00 a month for 36 months;

Ten months later, X buys a refrigerator from Y, again paying $100.00 down. This contract contains an add-on clause

similar to that set out above and provides for monthly payments of $15.00 on the stove and refrigerator both.

Fifteen months thereafter, X buys a washing machine from Y, paying $100.00 down, signing a contract with an add-on clause that provides for monthly payments of $20.00 a month for 25 months on all three appliances.

Twenty months thereafter, X suffers financial reverses and defaults. Y would be able to repossess all three appliances notwithstanding the fact that X had made monthly payments totaling $650.00. An add-on clause under present law prevents a debtor from paying off any one item until he has paid all items. Is this reasonable? Is this what the average consumer understands to be the effect of his payments? Is this sort of protection necessary for creditors?

Aside from the policy considerations, there are also legal problems with the present add-on practice. Section 9-505(1) of the Uniform Commercial Code gives the buyer the right, upon repossession, to have the goods repossessed resold if he has paid over 60% of the purchase price. However, with an add-on clause, a buyer might have paid enough to have paid 60% of most of the goods, or enough to have completely paid off some of the goods and still not have the right to have any of the goods resold.

Additional Comments

~~HB 156 and~~ Freedom of Contract

Freedom of Contract as a basis for ~~successfully challenging~~ restricting the power of the state to regulate in the public interest had its days of flowering in the late 19th and early 20th centuries. During that period, "freedom of contract" was used to strike down many different types of state legislation relating such things a maximum hours for labor, child labor restrictions, minimum wage laws. But at least from the time of of Justice Holmes' dissent in Lockner v. New York, 198 U.S. 45 (1904), a growing realization began to develop that freedom of contract as an unbridled, unqualified freedom was potentially as great a threat to the ultimate freedom of the individual as was the condition of servitude that preceded development his right to contract.

Said Williston in 1921, "Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare, and that the only ultimate test of proper limitations is that provided by experience." Williston, Freedom of Contract, 6 Cornell L. Rev. 365, 374 (1921).

"While is is highly important to preserve that liberty (of contract) from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it would be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard." Chief Justice Hughes, dissenting in Morehead v. New York, 298 U.S. 587 (1936).

"(F)reedom must sometimes be limited in the interest of its own preservation " and contract is no exception. Kessler & Gilmore, Contracts, p. 9 (Little-Brown 1970).

As an intellectual concept, freedom of contract is premised upon an equality of bargaining position, an equality that has never existed in fact between many contracting groups in our society. "Society, in granting freedom of contract, did not guarantee that all members of the community would be able to utilize it to the same extent. The free use that can be made of contract will depend on the system governing the distribution of property: to the extent that the law sanctions an unequal distribution of property, freedom of contract inevitably becomes a one-sided privilege. Kessler & Gilmore, supra, p. 7. The courts and the legislatures have increasingly recognized the realities and have enacted or adopted inumerable statutes and rules that regulate conduct in the bargaining process, outlaw some types of contracts, and write contracts for the parties in some situations. One simply cannot pick up a volume of the North Carolina General Statutes and not find many rules that can be analysed as in some way inhibiting the freedom of contract. Fair Trade laws, which allow a person or organization not a party to a retail sale contract to fix the price at which goods are sold involve inherent violation of freedom of contract. Anti-trust laws deprive ~~many businesses of the right to~~ a business with sufficient market power the freedom to select his own customers and the freedom to refuse to contract. Usury laws limit the freedom of the parties to contra c t in reference to interest rates. Statutes such as

the North Carolina Consumer Finance Act involve many restrictions on the power of the parties to select their own terms of contract. Insurance statutes write many contract terms for parties. Further illustrations are almost withou limit. But the point is that the legislatures in enacting those statutes must have used some other critera for determining whether the statutes should be enacted. The Legislature must determine the public policy of the state in regard to the matters before it, and if minimal restrictions on freedom of contract are needed to help effectuate that policy, those restrictions can and must be imposed.

~~---In the interest of freedom of contract in its best sense, it is important that our law-making bodies strive to introduce equality into the bargaining process. and that equality can often be introduced only by removing certain aspects of the bargaining power of the contract from the negotiation process, where those aspects are always decided in favor of one side and which tend to be oppressive on the other.~~

House Bill 156 does contain several provisions that remove from the bargaining process certain terms. But it is submitted that the method used is one that will tend to produce more equality in the consumer credit bargaining process and result in less possibility of economic oppression of many consumers. Lord Chancellor Nortington observed in 1761 that "necessitous men are not, truly speaking, free men." It is [illegible]

The "necessitous"man is in no position to realize the benefits of unlimited freedom of contract, in fact quite the contrary, he will only be harmed by it. The interests of society call as much for regulation of "contract" in consumer credit sales as they have called for and realized regulation in other credit transactions.

Freedom of contract is a slogan, not a principle of law, and, like other slogans, it is a rallying cry not an ultimate goal. We do not give homage to the slogan because as a goal it has intrinsic worth; we acknowledge the slogan because it is expressive of our concern than men be allowed, to the fullest extent possible, to control their own destinies, to make up their own minds as to what they wish to do and then to do it--so long as they hurt no one else in the process. The freedom to contract is thought of as a handmaiden to this American creed. Note, however, that it utlimately deals with consent, the informed choice of the individual--the individual must be free to exercise his free choice, to manifest his consent to the course of action he has freely chosen; contract is considered essentially as a consensual concept. But, is the modern sales transaction truly a consensual transaction; most clearly it is as regards the question of to buy or not to buy. But, most clearly not so as regards the intricate details buried in the fine print of the standard printed form prepared by the seller's lawyer to achieve maximum legal leverage. Although the buyer's signaure may be solicited, his understanding of what he signs is not. Nor, of course, is he given opportunity to quibble about anything other than price. The buyer's consent thus is generic only; it is not specific with respect to the fine print. ~~Thus, when the seller or the banker speaks of freedom of contract~~ But the freedom of contract urged by the seller and the banker does not deal with the generic; it is addressed to the specific, namely his power to dictate the terms of the fine print. Freedom, in a civilized society, falls short of license. The practices of the few have illustrated that freedom of contract has meant license for a few. The preservation of true consensual choice, like the preservation of individual liberties, requires the law to come in and say at some point: you shall not pass this line, for beyond that line is trespass. Without some boundaries, liberty becomes confused with licnese, and there is liberty is lost.

Additional Comments (not distributed to the House Committee)

FREEDOM OF CONTRACT

Freedom of Contract as a basis for restricting the power of the State to regulate in the public interest had its heyday in the late 19th and early 20th Centuries. During that period, "freedom of contract" was used to strike down many different types of State legislation relating such things as maximum hours for labor, child labor restrictions, minimum wage laws. But at least from the time of Justice Holmes' dissent in LOCKNER v NEW YORK, 198 US 45 (1904), a growing realization began to develop that freedom of contract as an unbridled, unqualified freedom was potentially as great a threat to the ultimate freedom of the individual as was the condition of servitude that preceded development of his right to contract.

Said Williston in 1921, "Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare, and that the only ultimate test of proper limitations is that provided by experience." Williston, Freedom of Contract, 6 Cornell L. Rev. 365, 374 (1921).

"While it is highly important to preserve that liberty (of contract) from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it would be used to override all public interests and thus in the end destroy

the very freedom of opportunity which it is designed to safeguard." Chief Justice Hughes, dissenting in MOREHEAD v NEW YORK, 298 US 587 (1936).

"(F)reedom must sometimes be limited in the interest of its own preservation" and contract is no exception. Kessler and Gilmore, Contracts, p. 9 (Little-Brown 1970).

As an intellectual concept, freedom of contract is premised upon an equality of bargaining position, an equality that has never existed in fact between many contracting groups in our society. "Society, in granting freedom of contract, did not guarantee that all members of the community would be able to utilize it to the same extent. The free use that can be made of contract will depend on the system governing the distribution of property: to the extent that the law sanctions an unequal distribution of property, freedom of contract inevitably becomes a one-sided privilege. Kessler & Gilmore, supra, p. 7.

The courts and the legislatures have increasingly recognized the realities and have enacted innumerable statutes and rules that regulate conduct in the bargaining process, outlaw some types of contracts, and write contracts for the parties in some situations. One simply cannot pick up a volume of the North Carolina General Statutes and not find many rules that can be analyzed as in some way inhibiting the freedom of contract.

Fair Trade laws, which allow a person or organization not a party to a retail sale contract to fix the price at which goods are sold involve inherent violation of freedom of contract. Anti-trust laws deprive a business with sufficient market power the freedom to select his own customers and the freedom to refuse to contract. Usury laws limit the freedom of the parties to contract in reference to interest rates. Statutes such as the North Carolina Consumer Finance Act involve many restrictions on the power of the parties to select their own terms of contract.

Insurance statutes write many contract terms for parties. Further illustrations are almost without limit. But the point is that the legislatures in enacting those statutes must have used some other criteria for determining whether the statutes should be enacted. The Legislature must determine the public policy of the State in regard to the matters before it, and if minimal restrictions on freedom of contract are needed to help effectuate that policy, those restrictions can and must be imposed.

House Bill 156 does contain several provisions that restrict the power of the parties to contract or remove from the bargaining process certain terms. But it is submitted that the method used is one that will tend to produce more equality in the consumer credit bargaining process and result in less possibility of economic oppression of many consumers. Lord Chancellor

maximum legal leverage. Although the buyer's signature may be solicited, his understanding of what he signs is not. Nor, of course, is he given opportunity to quibble about anything other than price. The buyer's consent thus is generic only; it is not specific with respect to the fine print, printed by the seller. But the freedom of contract urged by the seller and the banker does not deal with the generic; it is addressed to the specific, namely his power to dictate the terms of the fine print. Freedom, in a civilized society, falls short of license. The practices of the few have illustrated that freedom of contract has meant license for a few. The preservation of true consensual choice, like the preservation of individual liberties, requires the law to come in and say at some point: You shall not pass this line, for beyond that line is trespass.