INRODUCTION

In 1979, the Unicameral significantly limited the default remedies for loans under Nebraska's Installment Loan Act (the ILA), a usury statute allowing up to 24% interest on personal loans of $7000 or less. Although the ILA was intended to apply only to licensed small loan companies, the National Bank Act of 1864 and the Depositary Institutions Deregulation Act of 1980 preempt that limitation. These two federal statutes may be interpreted to give banks, savings and loans, and credit unions the right to make loans at the ILA rates. When these lenders make loans at the high ILA interest rates, the policy of competitive equality underlying federal lending law subjects them, like small loan companies, to the new ILA default rules. The federal statutes in this way give the ILA amendments broader scope than the Unicameral anticipated.

The ILA amendments affecting formal collection practices on secured credit are drawn mainly from another consumer protection statute, the Uniform Consumer Credit Code (the UCCC). The ILA, like the UCCC, defines default by statute and not by contract, forbids the creditor to accelerate the debt or repossess the collateral until a payment is at least 30 days overdue, and elimi-
nates deficiency judgments on many loans. The ILA also contains one important restriction on secured creditors' remedies not found in the UCCC in that it prohibits self-help repossession of locked motor vehicles.

This article will analyze the ILA amendments limiting the default remedies of secured creditors. It will discuss which loans and lenders are subject to the new default rules under state and federal law, examine some interpretive problems raised by the ILA default rules, and suggest possible changes to further the legislation's goal of protecting debtors in default from undue hardship.

Two classes of consumer credit transactions are covered by the ILA and its default rules. The legislature intended to cover only small loans made by finance companies licensed under the ILA. However, federal statutes authorize many additional lenders to make loans under Nebraska's ILA. Let us begin with the coverage the legislature intended, and save the complex problems created by federal banking law for the end of the article.

**NEBRASKA'S USURY STATUTES**

An overview of Nebraska's usury statutes will set the ILA in context and show which transactions it is intended to cover. Nebraska's General Usury Statute sets maximum interest rates for loans, contracts and judgments. For loans, the General Usury Statute allows the parties to agree on any interest rate not exceeding 16% annually. One who lends money at a higher rate than 16% must bring himself within a specific statutory exception to the General Usury Statute or forfeit all interest on the loan.

The numerous exceptions to the General Usury Statute fall into two classes. Some loans such as corporate loans, loans in excess of $25,000 and government-guaranteed loans are exempt from all state interest rate ceilings. Other transactions are exempt from the General Usury Statute but are subject to more specialized interest rate ceilings based on the type of lender.

Among these lender-specific usury standards are the Install-
ment Sales Act\textsuperscript{13} for purchase-money credit extended by sellers of goods and services; the Personal Loan Act\textsuperscript{14} for small loans by commercial banks; and the Installment Loan Act for small loans by state-licensed finance companies. While all these usury statutes cover consumer credit, each carries its own maximum interest rate, borrower-protection regulations, and licensing and reporting requirements. The lender relying on one of these, or other similar statutes, to justify an interest rate greater than the General Usury Rate must comply with all the non-interest terms of the statute in question.\textsuperscript{15}

\textbf{Nebraska's Installment Loan Act}

Nebraska and many other states have accorded small consumer loans special legislative attention. Enacted in 1941, the present ILA was intended, like the various drafts of the Uniform Small Loan Act,\textsuperscript{16} to encourage legitimate lenders to make small consumer loans.\textsuperscript{17}

Early in the 20th century, commercial banks and other established lenders exhibited little enthusiasm for making small loans repayable in installments that would be convenient to wage earners. Since these loans require almost as much paper work at the outset as much larger single-payment notes, and require much more service over the life of the loan, legitimate lenders subject to low general usury statutes stayed out of this unprofitable market. The demand for small consumer loans was thus funnelled to the illegitimate loan shark, who charged whatever the traffic would bear and frequently used violent and coercive collection tactics.\textsuperscript{18}

To protect consumers from loan sharks, the Russell Sage Foundation spearheaded the drafting of a Uniform Small Loan

\textsuperscript{13} \textbf{NEB. REV. STAT.} §§ 45-334 to -353 (Reissue 1978).

\textsuperscript{14} \textbf{NEB. REV. STAT.} §§ 8-815 to -829 (Reissue 1974).


\textsuperscript{16} The seventh and most recent draft of the Uniform Small Loan Act is reprinted in B. Curran, \textit{Trends in Consumer Credit Legislation} 144-57 (1965).

\textsuperscript{17} See Uniform Small Loan Act § (1)(a) (1942 version), reprinted in B. Curran, \textit{Trends in Consumer Credit Legislation} 144-57 (1965).

Act.19 This statute and others modeled on it authorized interest rates high enough to make small loans profitable, but allowed those rates to be charged only by lenders licensed by the state to engage in the small loan business. These lenders submitted to special limitations on loan amounts and length of repayment periods, as well as disclosure, reporting and examination requirements.20 Thus, the special rules and regulations of Nebraska's 1941 Installment Loan Act were intended to apply only to licensees, those lenders who signified acceptance of the terms and conditions of the Act by applying for a small loan license from the Nebraska Department of Banking and Finance.21

Commercial banks are prohibited by Nebraska statute from obtaining ILA licenses and making small loans bearing the high interest rates allowed by the ILA. The Personal Loan Act sets a maximum interest rate lower than the ILA rate for small personal bank loans.22 One effect of this statutory rate differential between state-chartered banks and finance companies on small personal loans is that bank loans at lower rates attract the better credit risks. Finance companies are left to serve more questionable risks. The rate differential causes this market split and compensates the finance companies for their increased risk by a higher interest rate.23

The belief that finance company borrowers tend to be the most necessitous debtors who cannot get credit from other legitimate lenders, may explain why the Unicameral thought it reasonable to afford those borrowers greater protection on default than borrowers from other lenders. In any event, when the ILA amendments were enacted, they were intended to apply only to finance company loans.

The word loan is not defined in the ILA or the General Usury Statute, but it should be understood to mean an advance of money from the creditor to the debtor to be repaid with interest on terms

19. Hubachek, The Development of Regulatory Small Loan Laws, 8 LAW & CON-
TEMP PROB. 108, 111-14 (1941).
20. Id. at 110-11.
22. NEB. REV. STAT. §§ 8-815 et seq. (Reissue 1974). Section 8-817 now provides "No bank or trust company shall be eligible for a license or to make loans under sections 45-114 to 45-158 [the Installment Loan Act]." Id. Federal preemption has left this section little scope. It now would apply only to those state-chartered banks and trust companies which do not carry federal deposit insurance. See notes 157-71 and accompanying text infra.
23. See testimony of Mr. Pat Gross before the Banking Committee of the Uni-
cameral on Jan. 30, 1979 when the ILA amendments were under consideration. Banking Committee, L.B. 97, Jan. 30, 1979, at 54.
set out by statute or agreed on by the parties. General usury statutes have traditionally been applied only to credit extended by lenders of money and not to credit extended by sellers of goods. The distinction between lender and vendor credit is embodied in a judge-made rule, the time-price doctrine, which holds that a seller may have two prices, one for cash and one for deferred payment or, in other words, a cash price and a time price. The time price is considered to be neither a loan nor a forbearance of money, within the meaning of those terms as used in usury statutes, so it is immaterial that the difference between the cash and time prices greatly exceeds the interest which may lawfully be reserved on a loan.

The time-price doctrine entered Nebraska law, but few retail credit sales were actually held exempt from the usury statutes in reliance on this doctrine. A series of Nebraska cases held that what in form was a retail installment credit sale with subsequent assignment of the installment contract to a sales company was in substance and in law a direct loan from the sales finance company to the buyer, with the seller acting as the lender's agent. The transaction was thus a loan, the time-price differential was interest, and if the interest rate was too high the transaction was usurious. One interesting twist was that the usury statute applied was not the General Usury Statute, which penalized usury only by forfeiture of all interest, but the Installment Loan Act, which at the time punished usury by forfeiture of the entire unpaid balance. A buyer who showed that a purported time sale was really a disguised usurious loan got to keep the goods without having to make any more payments.


30. See Nebraska Usury Statutes, supra note 15, at 445.
SMALL LOAN ACT

The Nebraska Supreme Court's equation of lender and vendor credit for usury purposes was rejected by an amendment to the Nebraska Constitution in 1965 specifically authorizing the legislature to set separate usury rates for loans and sales.31 Thereafter, the legislature enacted the Installment Sales Act regulating vendor credit and sales finance companies.32

Since adoption of the Installment Sales Act and revision of the penalty provisions of the ILA to require forfeiture only of interest, litigation to turn sales into installment loans has been unsuccessful,33 and the form of the transaction controls which interest rate will apply. Lenders are unlikely to try to evade the ILA default rules by disguising direct loans as credit sales, since interest rates under the Installment Sales Act are lower than under the ILA.34

This statutory distinction between debts arising from direct loans and credit sales may lead to confusion among finance companies and their debtors. In addition to making direct loans, finance companies regularly purchase "dealer paper" or installment credit contracts from sellers of goods.35 Since these consumer debts are not loans within the meaning of the ILA, these debts are not subject to the new ILA default rules. It often happens that a finance company will hold both a direct loan and a purchased credit sale contract from the same debtor at the same time.36 If the debtor defaults on both debts, radically different default rules will apply to the two transactions. Debtors and creditors both may find it difficult to determine their rights and obligations on default.

THE ILA DEFAULT RULES: SUBSTANTIVE PROVISIONS

Prior to enactment of the ILA default rules, Article Nine of Ne-

31. NEB. CONST. art. III, § 18.
32. NEB. REV. STAT. § 45-334 et. seq. (Reissue 1978).
33. See NEB. REV. STAT. §§ 45-334 to -353 (Reissue 1978); and § 45-137 (Supp. 1979).
34. See NEB. REV. STAT. § 45-137(1) (ILA 24%) (Supp. 1979) and § 45-338(1) (Installment Sales Act 18%) (Supp. 1979), as amended by L.B. 276, 1980 Neb. Laws 111.
35. See testimony of Mr. Chester Arnett before the Banking Committee of the Unicameral, Jan. 30, 1979, p. 56: "The finance industry not only makes small loans, but . . . also buys . . . installment sales paper. . . . We finance marine [boats] and keyboards and garden tractors and other things at the bank rate." The business of purchasing installment sale contracts is regulated by the Installment Sales Act and the Nebraska Department of Banking and Finance. See NEB. REV. STAT. § 45-375(11); and §§ 45-353 to -343 (Reissue 1978).
36. The ILA anticipates this situation when it excludes such purchased debts from the maximum aggregate indebtedness of $7000 in principal amount which a debtor may owe a licensee under the ILA. NEB. REV. STAT. § 45-138(1) and (2) (Supp. 1979).
Nebraska's UCC governed defaults on all debts secured by personal property, including loans under the ILA. The UCC, of course, still governs non-ILA loans, and many provisions of Article Nine still apply to ILA loans. Where the UCC and the ILA conflict, however, the ILA will control on loans under that Act. Therefore, in discussing the substantive provisions of the ILA amendments, this article will point out how the amendments differ from the default rules of Article Nine.

**Statutory Definition of Default**

Under the UCC, a lender may accelerate the debt, repossess the collateral, and sue on the debt whenever the debtor has committed an act of default as defined in the loan agreement or, under an insecurity clause, whenever the creditor has reasonable grounds to believe the prospect of payment is impaired. In the

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38. The drafters of the UCC were mindful of possible conflicts with state legislations aimed at the special problems of consumer credit. The comments to U.C.C. § 9-101 state that the UCC is not designed to supersede small loan or installment sales acts. *NEB. REV. STAT. (U.C.C.)* § 9-101. *NEB. REV. STAT. (U.C.C.)* § 9-203(2) (Reissue 1971), provides: 

> a transaction, although subject to [UCC Article Nine], is also subject to ... 45-114 to 45-158 [the ILA] ... and amendments thereto, in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control . . . .

39. *See NEB. REV. STAT. (U.C.C.)* § 9-501(1) (Reissue 1971), which begins with the words "when a debtor is in default under a security agreement . . . ." *See also* R. Henson, *Secured Transactions Under the Uniform Commercial Code* 350-51 (2d ed. 1979); Turner, *Uniform Commercial Code, supra* note 37, at 94-96.

40. Insecurity clauses purport to allow the creditor to accelerate, repossess and file suit at will, or whenever he feels insecure, even if no objective default as defined in the loan agreement has occurred. There is a split of authority on whether an unreasonable but honest feeling of insecurity suffices. U.C.C. § 1-206 permits invocation of an insecurity clause whenever the creditor *in good faith* believes himself insecure, and § 1-208 puts the burden of proving lack of good faith on the debtor. U.C.C. § 1-208 (1972 version). If good faith in this context means only "honesty in fact," under the U.C.C. § 1-201(19) definition of that term, then an unreasonable but honest feeling of insecurity would suffice for enforcement of the clause. Some courts do interpret U.C.C. § 1-208 to permit complete subjectivity. *See, e.g.*, Farmers Cooperative Elevator, Inc. v. State Bank, 236 N.W.2d 674, 678 (Iowa 1975); Van Hom v. Van de Woe, 6 Wash. App. 959, 497 P.2d 252, 253-54 (1972) (subjective standard for unsecured creditors only); Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196, 200 (Ky. 1964).

Other courts, including the Nebraska Supreme Court and most commentators, read U.C.C. § 1-208 as requiring the creditor’s basis for believing himself insecure to be not only honest but also reasonable. *See Nebraska State Bank v. Dudley, 198 Neb. 132, 137-38, 252 N.W.2d 277, 280 (1977); Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 721-23, 53 N.W. 670, 672 (1892); J.I. Case Flow-Works v. Marr, 33 Neb. 215, 217-18, 49 N.W. 1119, 1120 (1891); see also Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, —, 329 N.E.2d 620, 623-24 (1975); Blaine v. G.M.A.C., 82 Misc. 2d 653, —, 370
consumer loan area, creditors draft the contracts so loan agreements typically include an insecurity clause and define as defaults many acts and omissions in addition to nonpayment.\textsuperscript{41}

The ILA places no limits on the language which may be used in loan agreements; instead, it limits enforceability of contract definitions of default. Under the ILA, the creditor may resort to default remedies only if the debtor has failed to make a payment when due or if some event has "significantly impaired" the creditor's chance of payment or recourse to the collateral.\textsuperscript{42} The creditor under the ILA has the burden of proof of significant impairment.\textsuperscript{43} In this way, the ILA creates a two-step process for determining whether an enforceable default has occurred. First, as under the UCC, the lender must show that the act or event relied on is a default under the loan agreement.\textsuperscript{44} Second, the lender must show that the alleged default also fits within one of the two ILA default categories, either failure to make a payment or significant impairment.\textsuperscript{45} Only when both the loan agreement and the statute are satisfied is there a default on an ILA loan.

If the debtor fails to pay installments or charges when due, the creditor will have no more difficulty in establishing the existence of a default under the ILA than under the UCC. Where the creditor relies on some event other than failure to make a payment to establish default, however, interpretation of the significant impairment language of the statute will be required. The phrase "significant impairment" is taken directly from the UCCC,\textsuperscript{46} and some

N.Y.S. 2d 323, 327 (City Ct. 1975). Professor Gilmore rejects the idea that an insecurity clause is a creditor's "charter of irresponsibility." He states that § 1-208 allows acceleration of the debt only if a reasonable person in good faith would have done so. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.4 at 1197 (1965); see also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 26-3 at 1088-90 (2d ed. 1980).

\textsuperscript{41} See, e.g., 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.3 at 1193-95 (1965).

\textsuperscript{42} The relevant provision is NEB. REV. STAT. § 45-179 (Supp. 1979) which provides:

- An agreement of the parties to a loan, with respect to default on the part of the borrower, is enforceable only to the extent that:
  - (1) The borrower fails to make a payment on the loan or other charges required by the agreement; or
  - (2) The prospect of payment, performance, or realization of collateral is significantly impaired. The burden of establishing the prospect of significant impairment is on the licensee.

\textsuperscript{43} Id. at 45-179(2).

\textsuperscript{44} The statute provides: "An agreement of the parties to a loan with respect to default . . . is enforceable only to the extent that . . . . NEB. REV. STAT. § 45-179 (Supp. 1979). Thus, the loan agreement must define the event relied upon as a default before the § 45-179 test can be applied to see if the agreement will be enforced.

\textsuperscript{45} See note 39 supra.

\textsuperscript{46} See UNIFORM CONSUMER CREDIT CODE § 5.109(2) (1974 version). The atten-
guidance can be drawn from the comments to that statute and cases thereunder in other jurisdictions. Comment two to UCCC Section 5.109 indicates that the acts or events which significantly impair the creditor's prospects are those which "endanger the prospect of a continuing relationship." The comment then suggests as examples "insolvency, illegal activity, and impending removal of assets from the jurisdiction."

The prospect of payment might, of course, be significantly impaired if a debtor lost or quit his job. Illegal activity by the debtor which could threaten the creditor's recourse to the collateral would include using a car subject to a security agreement in the transportation of controlled substances, unregistered firearms or counterfeit currency, bringing the threat of forfeiture proceedings against the collateral by state or federal law enforcement officials. Even if the secured creditor were able to force the government to turn over the vehicle, that might come only after legal expense, irretrievable depreciation, and possible damage to the vehicle.

Removal of assets from the jurisdiction can impair a creditor's rights, but it need not do so significantly if the debtor notifies the creditor of his plans. Further, consumer groups have argued that

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47. UNIFORM CONSUMER CREDIT CODE § 5.109, Comment 2 (1974 version).
49. The federal forfeiture statute applicable to motor vehicles used to transport narcotics does not allow a secured party to reclaim the vehicle upon proof that he had no knowledge of the illegal use. 49 U.S.C. § 782 (1976). Thus, secured creditors can and do lose valuable autos, planes, and boats to the federal government even when the debtor has made only a minimal down payment. United States v. One 1969 Plymouth Fury, 476 F.2d 960 (5th Cir. 1973), cert. denied sub. nom., Ford Motor Credit Co. v. United States, 423 U.S. 838 (1975); United States v. One 1971 Lincoln Continental, 460 F.2d 263 (8th Cir. 1972).


Creditors have been held to have priority over local governments which have impounded cars for failure to pay parking tickets. See District of Columbia v. Franklin Inv. Co., Inc., 26 U.C.C. Rep. 1299 (D.C. 1979); Ford Motor Credit Co. v. Shapiro, 26 U.C.C. Rep. 1317 (N.Y. Sup. Ct. 1979).

50. See Comment, Caveat Venditor: Greater Restriction of Remedial Self-Help in Consumer Transactions, 9 SUFFOLK L. REV. 756, 766 n. 139 (1975); see also Shepard Federal Credit Union v. Palmer, 408 F.2d 1369, 1372 (5th Cir. 1969).
many reports to creditors of impending removal of assets are highly unreliable, coming from neighborhood enemies or estranged spouses.51 When a creditor relies on this ground for resort to repossession, or acceleration and suit, the apparent reliability of his information should be weighed in determining whether he has a real prospect of significant impairment.

The major problem with defining default in the statute is that it will help only those borrowers who read the statute or who have a lawyer to read it for them. The typical finance company borrower is more likely to turn to the loan agreement or the creditor than to the statute or a lawyer to learn what constitutes default.52 Over-reaching creditors, by retaining the broad language of default now commonly used in consumer credit contracts, may frighten debtors into unwise settlement or surrender of collateral when no default has occurred under the ILA. Consumer borrowers would be better protected if the statute also regulated the language of the agreement, prohibiting inclusion of overly broad insecurity clauses and unenforceable definitions of default.53

Right to Cure Defaults

In defining default, the drafters of the UCCC and the ILA took the position that missing a scheduled payment, without more, was much less serious than events falling into the second or "significant impairment" category of default. Non-payment of a single installment may be caused by many events not foreshadowing a debtor's inability or unwillingness to pay in the future. Therefore, "missed payments" are treated differently than more serious defaults as far as the creditor's remedies are concerned.54

The ILA, like Section 5-111(1) of the UCCC,55 provides that when the debtor has defaulted only by failure to make a payment when due, he has a statutory right to cure the default by paying the amount of the missed installment plus applicable late charges.56

52. Cf. Kalish, The Nebraska Residential Landlord and Tenant Act, 54 Neb. L. Rev. 603, 613-14 (1975) (tenant more likely to turn to lease than to applicable statute).
   (1) With respect to a loan, after a default consisting only of the borrower's failure to make a required payment, a licensee may neither accelerate ma-
The creditor, in that case, may neither accelerate the loan nor re-
possess the collateral without first giving the debtor written notice of his right to cure, and then waiting for the cure period to run. Since the written notice may not be given until at least 10 days after the missed payment was due, and the cure period runs 20 days after the notice is given, the result is that the creditor may not accelerate or repossess until at least 30 days after the default.

The debtor will have little opportunity to abuse this privilege, though, for the ILA gives the debtor the right to cure a late pay-
ment only once in each loan transaction. Assume a debtor once missed a payment, received a notice of cure, and then scraped to-
gether the money to make the payment within the time for cure. If he ever missed another installment on the same loan, even years later, he would have no further statutory right to cure. The credi-
tor could, if he chose, immediately accelerate and repossess after any subsequent default.

The right to cure is a larger change in law than in practice. Under the UCC, unless otherwise agreed, any default gives the creditor the immediate right to accelerate the debt and attempt to retake the collateral without notice to the debtor. If the creditor

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57. NEB. REV. STAT. § 45-180 (Supp. 1979) provides:
(1) With respect to a loan, after a borrower has been in default for ten days for failure to make a required payment, a licensee may give the borrower the notice described in this section. A licensee gives notice to the borrower under this section when he delivers the notice to the borrower or delivers or mails the notice to the last-known address of the borrower's residence.
(2) The notice shall be in writing and shall conspicuously state: The name, address, and telephone number of the licensee to which payment is to be made, a brief identification of the loan, the borrower's right to cure the de-
fault, the amount of payment and date by which payment must be made to cure the default, and that any credit insurance issued in connection with the loan contract may be canceled unless the borrower cures the default. The Department of Banking and Finance shall prescribe the form of such notice.
58. NEB. REV. STAT. § 45-181(1) (Supp. 1979), supra note 56.
59. NEB. REV. STAT. § 45-181(2) (Supp. 1979), supra note 56.
60. See NEB. REV. STAT. § 45-181(2) (Supp. 1979), supra note 56.
61. In Nebraska no demand for payment or notice of acceleration or repossession is necessary if the debtor is in default under the agreement. Nebraska State
does accelerate and repossess, the debtor may redeem the collateral only by paying the full unpaid balance and other charges, not merely the amount of the overdue payment.\textsuperscript{62}

In practice, however, creditors seldom accelerate and repossess immediately if a hitherto well performing debtor misses one installment. The National Commission on Consumer Finance found in 1972 that small loan companies waited an average of 16.5 days after a payment due date before declaring an account delinquent.\textsuperscript{63} The normal course of action would be to contact the debtor, find out what the problem was and whether he would be able to carry out the balance of his contract, with or without a further extension or refinancing. Only if it appeared the debtor was unable or unwilling to pay would the creditor resort to acceleration, repossession, and perhaps a deficiency suit.\textsuperscript{64}

This indicates the ILA right to cure is more a codification of current minimum practice than an imposition of any real restriction on creditors. It will be helpful to the debtor, of course, to have notice and a standardized time period in which to cure. The debtor could seek advice from friends or consult a lawyer if there were some dispute about the debt, or try to arrange some way to make the payment. Creditors will not be much inconvenienced since most currently contact the debtor before pursuing formal collection procedures.

There are several ways in which the ILA right to cure provisions could be improved. First, giving the debtor the right to cure a late payment only once per loan when new car loans commonly run for four years, and mobile home loans even longer, is too rigid. Certainly, creditors could be put to great expense if a debtor repeatedly missed payments and later cured only after written notice, phone contact, and meetings with the creditor; but limiting the right to a single experience regardless of loan length seems unjustified. Allowing cure once for every ten or twelve payments would be more helpful and yet would adequately protect the creditor.\textsuperscript{65}

Second, the Act does not clearly require that notice of right to

\textsuperscript{62} See Turner, Uniform Commercial Code, supra note 37, at 103-04.


\textsuperscript{64} See U.C.C. § 9-506 (1972 version).


\textsuperscript{65} Compare Neb. Rev. Stat. § 45-181(2) (Supp. 1979) with Wis. Stat. Ann. § 429.105(3) which allows the consumer to cure once during any twelve-month period, thus keying the frequency of cure to loan length.
cure be sent to guarantors, though it would help both creditors and debtors if guarantors were made aware of a default before the time for cure had run. A similar problem arose under Article Nine of the UCC in the context of resale of collateral after repossession. UCC Section 9-504(3) requires that "the debtor" be notified of the repossession sale, but the UCC does not expressly state that guarantors are also entitled to notice. The Nebraska Supreme Court, however, has held that the creditor must notify a guarantor as well as the principal debtor of any repossession sale. The guarantor could protect his interest, and help the creditor and principal debtor as well, by seeking potential buyers, bidding at the sale himself, and overseeing the commercial reasonableness of the sale.

A guarantor on an ILA loan needs notice of the right to cure for reasons very similar to those advanced for giving him notice of repossession sales under Article Nine. He could discuss the principal debtor's difficulties with him and help make the payment if the difficulties were temporary. If the debtor were clearly unable to pay the debt, the debtor, with the guarantor's help, could consider voluntary surrender of the collateral or some other arrangement with the creditor. In this manner, the guarantor could better protect his interest, and advance the creditor's interest as well, if he received notice of the right to cure so that he could intervene at an early point after default. The ILA should be interpreted to require that notice of right to cure be sent not only to the principal debtor but also to any guarantor or cosigner other than a spouse at the same address as the principal debtor. An amendment clarifying that the term borrower includes guarantors for notice of cure purposes would solve this problem.

66. The 1979 ILA amendments provide that any cosigner other than the borrower's spouse must be provided with a copy of the loan agreement and a separate notice informing the cosigner that he is liable for the loan in question. Neb. Rev. Stat. § 45-183 (Supp. 1979).

However, the provision on notice of right to cure indicates only that the licensee must send notice to the borrower. Cosigners are not mentioned. Neb. Rev. Stat. § 45-180(1) (Supp. 1979), supra note 57.

67. U.C.C. § 9-504(3) (1972 version); see also U.C.C. § 9-105(d) (1972 version) (defining debtor).

68. U.C.C. § 9-504(3) (1972 version).


A third change needed in the right to cure provisions of the ILA is to revise the contents of the notice to give the debtor more information. Specifically, the notice should tell the debtor that if he does not cure and if the creditor retakes the collateral, the debtor will have no further personal liability on the debt if the unpaid balance at time of repossession is $3,000 or less. This information could help the debtor to make an intelligent decision whether to cure. When cure cannot be made, the information might encourage voluntary surrender, saving time and money for all concerned.

Repossession

The ILA places new limits on self-help repossession. After default and expiration of the time to cure, if any, the creditor may use self-help to retake the collateral only if he can do so “without entry into a dwelling or a locked, unoccupied motor vehicle and without the use of force or breach of the peace.” This language, except the reference to motor vehicles, was taken from Section 5.112 of the UCCC. The prohibition of breach of the peace merely restates the UCC Section 9-503 limitation on self-help, while the restrictions on the use of force and entry into dwellings were intended to express the existing rules under the UCC and pre-Code repossession law. The prohibition on entering a locked unoccupied motor vehicle, however, is new.

Self-Help Repossession of Household Goods

Under the UCC, the majority of jurisdictions hold that a creditor may not force his way into a house to repossess collateral. He may, however, present himself at the door, knock, and demand ad-
mission or surrender of the goods. Unless the debtor or other adult answering his knock is willing to object clearly and strenuously, courts will find the creditor's entry legitimated by consent.\textsuperscript{78}

The drafters of the UCCC and the ILA did not intend an absolute prohibition on self-help repossession of household goods. The relevant sections in both statutes are prefaced with the words “unless the [debtor] voluntarily surrenders the goods,” and the comments to the UCCC state “dwellings cannot be entered absent the consent of the occupants except under the supervision of the court.”\textsuperscript{79}

Under the ILA, self-help entry into a dwelling is intended to be the exceptional case, permitted only if the debtor consents or voluntarily surrenders the goods. When the debtor voluntarily surrenders household goods collateral, it will often be convenient for all if the creditor's agents may enter the home to retake the goods. Absent the debtor's voluntary consent to entry, however, self-help repossession of goods in a dwelling is prohibited, and the creditor may pursue the collateral only by bringing a replevin action and obtaining a judgment for possession.\textsuperscript{80} The sheriff, not the creditor's agents, would then retake the collateral.\textsuperscript{81}

**Self-Help Repossession of Motor Vehicles**

The prohibition against self-help repossession of locked, unoccupied motor vehicles changes both law and practice, for automobile loans are one area where self-help repossession has had free rein.\textsuperscript{82} Courts have usually approved self-help taking of automobiles, locked or not, from private driveways, public streets, parking lots, service stations, and even open carports, so long as the debtor was not present and vigorously objecting.\textsuperscript{83} While a creditor using self-help to seize a car sometimes subjects himself to liability for injury to the vehicle caused by his entry, or for con-

\textsuperscript{78} J. White & R. Summers, Uniform Commercial Code § 26-6 at 1095 (2d ed. 1980).
\textsuperscript{82} J. White & R. Summers, Uniform Commercial Code § 26-6 at 1097 (2d ed. 1980).
version of personal property within the car, for the most part creditors have been found not to have breached the peace in retaking cars.

Under the ILA default rules, however, so long as the vehicle is locked and unoccupied, and the debtor has not voluntarily surrendered it, self-help repossession is barred. Inclusion of the term "unoccupied" is confusing for the legislature certainly did not mean to allow self-help repossession of locked but occupied motor vehicles. If the vehicle were occupied and the occupant did not voluntarily get out, any self-help seizure of the occupied vehicle would surely breach the general prohibition of use of force or breach of the peace. Locked would seem to be the only operative word.

The rule against self-help repossession by entry into a locked motor vehicle is likely to create many interpretive and evidentiary problems that could have been avoided by prohibiting all self-help repossession of motor vehicles except where the debtor voluntarily surrenders the vehicle. To be sure, there are some reasons for distinguishing between locked and unlocked vehicles in this context. Certainly the debtor has a greater expectation of privacy in a locked automobile or motor home, and he is more likely to leave personal property not covered by the security agreement inside a locked vehicle than an unlocked one. Permitting self-help only on unlocked vehicles may avoid depriving the debtor of goods not subject to the security agreement. Further, repossession of an unlocked vehicle often can be accomplished without injury to the vehicle, so that its resale value would not be reduced. Breaking into a locked car, at least without duplicate keys, could damage it, given the new anti-theft devices on late-model automobiles.

However, permitting self-help when a car is unlocked invites profitless litigation over whether a vehicle was in fact locked days, weeks or months earlier. Whether a car was locked at some time in the past is a fact generally subject to proof only through a swearing contest, since no physical evidence would remain. The contest would be one in which the debtor would seldom have a clear recollection of the truth and in which both sides might have reason to lie.

86. Id.
87. In common understanding, a car is not considered locked merely because the ignition key has been removed. Instead, the term usually means that all the
Further questions are raised by the fact that the statute literally prohibits self-help repossession of locked motor vehicles only if the repossession is done by "entry into" the vehicle.\(^8\) Does this mean that motorcycles, open boats, and other more or less open motor vehicles are always subject to self-help repossession, even if they are as locked as their structure permits, because repossession can be accomplished without entry into a completely enclosed space? Or can a locked automobile lawfully be repossessed by self-help if it is merely towed away, carried off, or immobilized without immediate intrusion into the interior?

These questions are not worth answering; a statute regulating small loans should not raise them, since small loan cases rarely reach an appellate court to generate a reported decision. If the reason for prohibiting self-help retaking of locked vehicles is the ever present danger of a breach of the peace, the chance that the debtor or someone else will react violently in the belief that the car is being stolen, that danger seems nearly as great when the car is unlocked. If the reason for the prohibition is that cars are necessary to the livelihood of the debtor and his family, or that borrowers against cars so frequently have meritorious defenses that their cars should not be taken without some opportunity for a judicial hearing, it is irrelevant whether the car was locked. Further, so long as the collateral is adequately insured, the debtor's decision to leave it unlocked for his own convenience does not impair the creditor's security.

Wisconsin prohibits sellers and lessors (but not lenders) from all prejudgment self-help repossession of consumer goods, except goods voluntarily surrendered by the debtor.\(^8^9\) Absent surrender, the creditor must get a judgment for possession in a replevin suit before retaking the goods.\(^9^0\) To reduce costs, Wisconsin allows non-lawyers to file replevin suits, and permits post-judgment use of self-help if there is no breach of the peace.\(^9^1\) Predictions that restricting self-help to that extent would greatly reduce consumer
credit availability have not proven true.92 The Wisconsin Consumer Act's repossession rules might serve as a model for amending Nebraska's ILA, but at a minimum, the ILA should be changed to prohibit self-help repossession of motor vehicles regardless of whether they are locked.

**Election of Default Remedies**

After an enforceable default and expiration of any cure period, the ILA rules require the secured creditor, in some circumstances, to elect his remedy. The first option is to retake the collateral, whether by voluntary surrender, replevin, or where permitted, self-help.93 If the unpaid balance of the debt is $3,000 or less at the time of repossession, the debtor has no further personal liability on the debt.94 If the creditor's resale of the collateral does not net enough to cover the debt and the sale costs,95 the loss falls on the creditor, for no deficiency judgment will be allowed. Where the unpaid balance at the time of retaking is more than $3,000 the creditor retains the right to a deficiency, although that right will be forfeited if the resale is not in good faith or not commercially reason-


(1) A borrower is not liable for a deficiency unless the licensee has disposed of the collateral in good faith and in a commercially reasonable manner. (2) If the licensee takes possession or voluntarily accepts surrender of goods in which the licensee has a security interest to secure a loan and at the time thereof the unpaid balance due on the loan is three thousand dollars or less, the borrower is not personally liable to the licensee for the unpaid balance of the debt arising from the loan and the licensee's duty to dispose of the collateral is governed by the provisions on disposition of collateral, Article 9, Part 5 of the Uniform Commercial Code. (3) The borrower may be liable in damages to the licensee if the borrower has wrongfully damaged the collateral if, after default, failure to cure and demand, the borrower has wrongfully failed to make the collateral available to the licensee. (4) If the licensee elects to bring an action against the borrower for a debt arising from a loan, when under this section the licensee would not be entitled to a deficiency judgment if the licensee took possession of the collateral, and obtains judgment (a) the licensee may not take possession of the collateral, and (b) the collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.


The creditor's second option after uncured default is to forego the collateral, leaving it in the debtor's hands, and to seek a judgment on the debt. The creditor who follows this second path when the unpaid balance is $3,000 or less may not execute his judgment on the collateral he has elected to forego.

The revival of an election of remedies in many consumer protection statutes has apparently been prompted by the belief that repossession of consumer goods is more often a technique of coercion than an economically sound source of repayment for the creditor, and that subjecting the debtor to a deficiency judgment after the goods have been repossessed is too great a hardship. Denial of deficiency judgments is intended to influence creditors to choose suit on the debt rather than repossession, except where the collateral would bring a resale price high enough to cover a substantial part of the debt.

Especially in the non-purchase money situation, where the creditor has not enabled the debtor to buy the collateral, the harm to the debtor and his dependents from repossession or even the threat of repossession of household goods, may far outweigh the legitimate resale value of that collateral to a creditor. Where the debtor has waived his exemptions and pledged his household goods, these goods are likely, at time of default, to have relatively little resale value. When repossession and resale charges are deducted, little remains to apply to the debt from the sale of used beds, a torn couch, and a scratched television.

Repossession and resale of such collateral does not tend to recoup for the creditor any significant part of his losses on the debt in default. The real advantages to the creditor of retaking or threatening to retake household goods are in deterring defaults.
and inducing reaffirmation. A hardpressed debtor faced with the loss of all he owns, for failure to pay some amount much less than the replacement cost to him of his household goods, may divert what little money he has to repay the debt or reaffirm it.

The coercive potential of non-purchase money security interests in household goods has led to restrictions in other statutes intended to discourage these loans. For example, the Bankruptcy Code of 1978 invalidates waivers of exemptions given to unsecured creditors in Section 522(e), and allows the debtor to avoid judicial liens and non-purchase money security interests in otherwise exempt property. The UCCC limits the taking of many non-purchase money security interests in consumer transactions. The proposed Credit Practices Rule of the Federal Trade Commission would make it an unfair practice to take a non-purchase money security interest in household goods.

Similar problems of coercion prevail in the context of purchase money security interests in consumer goods. The National Commission on Consumer Credit reported that use of the UCC default provisions “virtually guarantees” that a defaulting consumer will be subject to a deficiency judgment, for collateral purchased and borrowed against at retail prices is generally resold after repossession for wholesale prices at best. Further, most defaults come relatively soon after purchase of the collateral, before the debt has been much reduced but after the collateral has depreciated greatly due to the abrupt change from new to used, so the difference between the unpaid balance and the resale price is likely to be particularly wide.

Both the National Commission and the drafters of the UCCC recommended that in consumer credit sales and some purchase money loans, an election of remedies be required where the original balance of the loan was $1,765.00 or less. The dollar figure, to be recomputed annually, was intended to exempt from

103. Id. at § 522(f).
105. See the Proposed Trade Regulation Rule on Credit Practice, 40 Fed. Reg. 16347, § 444.2(4) (1975).
107. Id.
108. Id. at xvi, 30-31.
deficiency judgments most major household appliances and furnishings, as well as used cars. New car loans, even in 1972, were generally in excess of $1,765.00, so the election of remedies would not have applied and a creditor could both repossess and sue for a deficiency on those loans.110 New cars were exempted from the election because the used car market is well organized, and resale could bring prices high enough to cover the costs of repossession, resale, and most if not all of the debt. Thus, retaking late-model automobiles from defaulting debtors can be economically productive, not just a means to harass the debtor.111

It has been suggested that denial of deficiency judgments will not discourage repossession by lenders, rather than sellers of goods.112 Merchants of consumer goods customarily take security interests only in the goods sold, but lenders, it is argued, are free to request as much collateral as they please before granting credit.113 If a lender demands and obtains collateral worth 200% of the debt, there will be no deficiency after resale. Denial of a deficiency judgment would present no deterrent to repossession in that case.

It seems to this writer that the argument just outlined overstates the freedom of lenders, especially finance companies, to fully secure their loans. If finance companies are to stay in the small loan business, they must make loans to a reasonable percentage of the would-be borrowers who enter their offices. Most of those borrowers do not have enough unencumbered assets to completely secure the loans they want, or they could and usually would obtain credit elsewhere at lower rates.

However, there is another type of security lenders can, and finance companies do, request which might allow lenders to circumvent the election rule. Nothing in the ILA forbids a lender from securing his loan with both an Article Nine security interest in goods and the signature of a guarantor on the note.114 When the

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110. REPORT OF THE NATIONAL COMMISSION ON CONSUMER CREDIT 30-31 (1972).
111. The recent efforts of the Federal Trade Commission to force resale of repossessed cars at retail rather than wholesale indicate that resale in these inflationary times often covers not only the debt and costs of retaking and resale, but also results in a surplus to be returned to the debtor. See In re Ford Motor Co., 27 U.C.C. Rep. 1118 (F.T.C. 1979), also reported in [1980 Transfer Binder] 2 Trade Reg. Rep. (CCH) 9121, 622; see also Lobell & Gelb, Repossession Under the Federal Trade Commission Act, 35 Bus. Law. 1324 (1980).
113. Id.
114. The ILA amendments contain a provision directed at cosigners. See NEB. REV. STAT. § 45-183 (Supp. 1979). THE ANNUAL REPORT OF THE NEBRASKA DEPARTMENT OF BANKING AND FINANCE 29 (1979) indicates that in 1978, about 1.5% of all loans made by licensed finance companies had a cosigner. The Annual Report does
lender obtains both collateral and a guarantee, Nebraska's election rule is open to several interpretations. One reading would allow the lender to collect the full amount of the debt and the debtor to lose the collateral under both alternatives of the election. This would undermine the values protected by the election.

Assume a young man borrows $3,000 from a finance company to buy a used car. The debtor's father cosigns the note. When the balance is $2,100, the debtor loses his job, defaults, and fails to cure. If the finance company repossesses the car, it loses the right to sue "the borrower" for any deficiency judgment. Borrower is not defined in the ILA, so it is unclear whether it includes guarantors in this context. Clearly the son, the principal debtor, is released from personal liability to the creditor, but the statute does not say that the debt is extinguished. Further, under UCC Section 3-606, a creditor may release one party to a note without releasing a guarantor, if the creditor has obtained the guarantor's consent to the release. This consent can and usually would be included in the boiler-plate of the original note; it need not come at the time the creditor's decision to release one debtor is made.

If repossession does not release the guarantor as well as the principal debtor, the creditor could recover the deficiency from the guarantor. Once the guarantor has been forced to pay the balance, it would be unjust to deny him his traditional right of reimbursement from the principal debtor, who after all received the benefits, temporary though they were, of the loan. The creditor has then retaken the collateral and collected the deficiency judgment, while the debtor has lost the goods and, if the guarantor enforces his rights over against the debtor, paid the full price. The creditor has circumvented the election rules and accomplished indirectly what the statute forbids him to do directly. This reading of the election rule upsets the legislature's allocation of losses in small loan defaults, and makes repossession a more attractive alternative than was intended.

not disclose the percentage of loans with both a cosigner and a U.C.C. Article Nine security interest in personal property.

118. U.C.C. § 3-606 (1972 version).
The better interpretation is to construe the term borrower to include guarantor in both the election\textsuperscript{121} and right to cure contexts\textsuperscript{122} so that both are released if the creditor retakes the collateral on loans within the election bracket. This way, repossession would be even less attractive on loans with a guarantor than without, because at least where the guarantor is solvent, suing him for the full unpaid balance would often net more than repossession and resale where no deficiency is allowed.

Let's follow the consequences of choosing that alternative using the example above. Assume that when the young man defaults, the finance company decides to sue on the debt rather than retake the collateral. That choice bars the finance company not only from later repossessing but also from executing on the car to satisfy its judgment on the loan.\textsuperscript{123} Under the UCC, this "release" of the collateral would not free the guarantor from liability if the original note contained a clause consenting to release of collateral.\textsuperscript{124} The guarantor would end up paying most or all of the judgment and, thereafter, would have a right of reimbursement from the debtor.\textsuperscript{125}

 Guarantors on small personal loans tend to be close relatives of the debtor and may often choose not to enforce this right. If the guarantor did seek reimbursement, however, he should be free to execute on all the debtor's non-exempt assets. Extending the prohibition on levying against the collateral from the creditor to the guarantor in this situation seems too harsh, for a debtor who needed a guarantor in the first place probably had few assets other than the one for which the guarantor has now paid. In the absence of a clear indication from the legislature that the cosigner as well as the creditor may not execute on the collateral, the guarantor should have the right to pursue all non-exempt assets.

On loans to which they apply, the restrictions on repossession and denial of deficiency judgments may increase creditor willingness to try to work out the debtor's problems with the debtor and thus save the transaction if possible. In Wisconsin, after prejudgment repossession of automobiles was prohibited,\textsuperscript{126} the empirical studies available suggest that creditors have restricted credit modestly, but have relied much more on workouts\textsuperscript{127} than on post-judg-

\textsuperscript{121} NEB. REV. STAT. § 45-184(2) (Supp. 1979), supra note 93.
\textsuperscript{122} See notes 66-70 and accompanying text supra.
\textsuperscript{123} NEB. REV. STAT. § 45-184(4) (Supp. 1979), supra note 93.
\textsuperscript{124} U.C.C. § 3-606(1)(b) (1972 version).
\textsuperscript{125} See note 120 supra.
\textsuperscript{126} See WIS. STAT. ANN. § 425.206(1) (West 1974).
\textsuperscript{127} Workout has been defined as "an agreement between a creditor and a de-
ment repossessions as a collection technique. Thus, the election of remedies and restrictions on repossession may induce creditors to allow debtors more leeway than will the minimal requirements of the right to cure portion of the statute.

If the election induces more workouts on loans of $3,000 or less at time of default, it may have the opposite effect on loans with a balance greater than $3,000. If the balance is $3,001, the creditor retains his full UCC rights to a deficiency judgment and to execute against the collateral if he obtains a judgment on the debt. Thus, a creditor faced with an uncured default on a loan with a balance in excess of $3,000, especially just three or four payments over the $3000 mark, might decide he would be better off to take a stubborn stance and enforce his remedies at that point, while the full panoply is available to him, than to allow the debtor already once in default to work the balance down far enough to trigger the election rules, with the collateral depreciating all the while.

Perhaps this problem is one reason the UCCC and the National Consumer Act triggered their election of remedies on the original loan balance, rather than on the amount outstanding at time of repossession. If that rule were followed, both debtor and creditor could know at the outset which remedies would be available in the event of default and there would be less creditor temptation to take a hard line early on the loan to evade election.
Election of remedies and limitation of self-help repossession should, as intended, discourage creditors from retaking the collateral, except when it is particularly valuable or the debtor has no other non-exempt assets. The creditor to whom self-help is barred may retake the goods by filing a replevin suit, attending a hearing and posting a redelivery bond, but that process is expensive and time consuming. In addition, denial of deficiency judgments where the loan balance is $3,000 or less will often make filing suit on the debt and foregoing the collateral a more attractive alternative. Even if this choice leaves the debtor “with the dissatisfaction of his merchandise” and a judgment hanging over his head, the legislature's choice seems reasonable. The collateral will generally be more valuable to the debtor than to the creditor and persuading the creditor to leave consumer goods with the debtor accords with recent trends in other state and federal rules. The election provisions of the ILA should be amended to provide that cosigners as well as principal debtors are not liable for deficiencies if the election is to do its job of discouraging repossession.

prospect of final judgment well below $3000, due to rebate of unearned interest. It seems incongruous not to apply the election to a loan on which the creditor has no right to a judgment of more than $3000, but that result follows from basing the election on the post-default balance rather that the original principal amount.

32. See notes 98-99 and accompanying text supra.

33. See notes 80-81 and accompanying text supra.

34. The phrase is taken from Professor Homer Kripke, who criticizes denial of deficiency judgments as unlikely to benefit the debtor since the creditor may opt to sue on the debt. “The personal obligation will still lead to judgment, garnishment, possible loss of job, and the other train of evils.” Kripke, Gesture and Reality in Consumer Credit Reform, 44 N.Y.U.L. Rev. 1, 32 (1969).

35. See, e.g., UNIFORM CONSUMER CREDIT CODE § 5.103 (1974 version); WIS. STAT. ANN. § 425.209 (West 1974); MASS. GEN. LAWS. ANN. CH. 255, § 131(e) (West 1973) (denial of deficiency judgments in some consumer transactions); see also the Bankruptcy Reform Act of 1978, Part I, Ch. 5, § 522(e) and (f) of Pub. L. No. 95-598, 92 Stat. 2549 (1978) [to be codified at 11 U.S.C. § 522(e) and (f)].

36. As we have seen, filing suit on the debt in election cases forfeits the creditor's security interest in the collateral. If the creditor has recorded his security interest in the goods, however, the debtor will not have full freedom to dispose of the collateral until the record is cleared. For example, a security interest in a motor vehicle used as consumer goods in Nebraska will have been perfected by noting the lien on the car's certificate of title. Under the U.C.C., buyers from a consumer debtor would not take free of a security interest in a motor vehicle perfected by notation on the title, so a buyer would be unwilling to give the debtor full value on a sale of the car until a clear title was issued. U.C.C. §§ 9-103(2), -306(2), -307 (1972 version).

Under the Nebraska version of the U.C.C., a creditor has no affirmative duty to clear the record when a security interest has been discharged by payment or by the election rule. The creditor need act only if the debtor makes a written demand, and then all that is required is that the creditor send a termination statement to the debtor, leaving the consumer-debtor to figure out how and where to file the statement. NEB. REV. STAT. (U.C.C. § 9-404(1)) (Reissue 1971).

The Official Version of the U.C.C., on the other hand, places the burden on the
PRIVATE REMEDIES FOR VIOLATIONS OF THE ILA DEFAULT RULES

The ILA does not give Nebraska's Department of Banking and Finance power to enforce the ILA default rules nor is violation of those rules a criminal offense. The only remedies afforded by the ILA for violations of the default rules are private civil actions.\textsuperscript{137}

The private remedies of the ILA are a modification of those in the UCCC. The UCCC allows recovery of actual damages plus a statutory penalty,\textsuperscript{138} and permits a creditor two defenses: first, that he corrected his violation before the debtor notified the creditor of it;\textsuperscript{139} and second, that the violation was unintentional and occurred despite adoption of procedures designed to avoid such errors.\textsuperscript{140}

The ILA adopts the UCCC's two defenses,\textsuperscript{141} but the actual-damages-plus-penalty formula could not be translated without al-


\textsuperscript{138} See Uniform Consumer Credit Code § 5.201(1) (1974 version).

\textsuperscript{139} Id. at § 5.201(7).

\textsuperscript{140} Id. at § 5.201(7). The defense that the error occurred despite adoption of procedures designed to avoid errors of that type is also part of the Truth in Lending Act, 15 U.S.C. § 1640(c) (1976) and recent cases under that Act should be helpful in determining the boundaries of this defense. See, e.g., Gallegos v. Stokes, 553 F.2d 372 (10th Cir. 1977); Mirabel v. G.M.A.C., 557 F.2d 471 (7th Cir. 1977); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974).

teration into Nebraska law, because Nebraska has a well-established prohibition of awards of punitive damages to individuals.\textsuperscript{142}

It has been a fundamental rule of law in this state that punitive, vindictive or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injuries sustained.\textsuperscript{143}

Therefore, the ILA provides that the debtor injured by violation of the ILA rules may recover, except in a class action, "liquidated damages" of $500 and $1000; the exact amount to be determined by the court.\textsuperscript{144} Only one award within that range is permitted in a single suit even if multiple violations are proven.\textsuperscript{145} The court is also directed to award costs and attorneys fees to a victorious debtor.\textsuperscript{146}

The remedy provisions raise several problems. First, the maximum award may be too low to make private suits a viable means of enforcement. Second, even these modest remedies may run afoul of Nebraska's rule against awards of penalties to individuals. Third, the statute leaves open the question whether the liquidated damage remedy is exclusive, so that a debtor with provable actual damages in excess of $1000 is limited to recovery of that amount.

The maximum statutory award is $1000 plus costs and attorneys fees.\textsuperscript{147} So small an amount will probably not tempt many consumers to file actions to collect the penalty. Instead, the more common course would be to use the statute defensively, to raise the question of a violation as a setoff in a suit by the creditor on the debt or for a deficiency. Denying plaintiffs in class actions the right to make use of the liquidated damage remedy,\textsuperscript{148} seems to insure that private enforcement of the Act will be spotty at best.

In essence, what the drafters of the ILA default rules did was drop the reference to actual damages in the UCCC, and transmute the penalty of that statute into "liquidated damages."\textsuperscript{149} There is reason to question whether this careful choice of words can validate this part of the statutory scheme. The statutory award has some characteristics of a penalty. The award is not truly liqu-
dated, that is, no certain sum is fixed in advance nor is there a statutory formula yielding a predictable amount. Instead, the amount of the award within the range is left to the discretion of the court. This leaves open the possibility of basing awards on considerations more punitive and deterrent than strictly compensatory. Also, the fact that only intentional and negligent violations subject the creditor to liability discloses a deterrent rather than compensatory aim. After all, the debtor's damages may be as great from an unintentional violation, but the likelihood of repetition is less in such cases, and hence, the need for and the possibility of deterrence is reduced.

The Nebraska Supreme Court has approved statutory provisions for liquidated damages awards to individuals:

... [If the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards,

Certainly it will be difficult to prove the amount of actual damages caused by some, though not all, violations of the small loan default rules. The $1000 ceiling on awards is not clearly unreasonable, vindictive or "... so oppressive as to offend constitutional requirements as to due process." Perhaps the liquidated damage provision can be sustained on these grounds as a reasonable attempt at compensation.

Another consideration is whether the liquidated damage provision is exclusive, that is, whether it deprives the debtor of the option of suing for actual damages if those exceed $1000. Wrongful repossession, for example, perhaps followed by commercially unreasonable resale of the collateral, can temporarily or permanently deprive the debtor of valuable property. Often these losses can be proven with reasonable certainty under the usual rules of evidence. In cases where the greatest actual damages are likely to occur, debtors had common law and statutory causes of action long before the ILA amendments were enacted. It seems unlikely

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154. The Uniform Commercial Code provides for recovery of actual damages for any creditor violation of the default provisions of Article Nine, which would include wrongful repossession and commercially unreasonable resale. U.C.C. § 9-507(1) (1972 version).

Prior to the U.C.C., Nebraska recognized a debtor's cause of action in conver-
that the legislature intended to displace these remedies in small loan cases by limiting injured debtors to recovery of less than actual damages.

The Nebraska Supreme Court, however, has questioned in *dicta* the constitutionality of allowing an election between liquidated damages and recovery of actual damages.155 The court reasoned that the debtor would always choose the greater of the two, and if the liquidated amount were the greater, it would be more than mere compensation and would violate the rule against punitive damages.156

More recently, the court has allowed the legislature more leeway in damage provisions of remedial statutes. Allowing an election of remedies by the debtor under the ILA seems reasonable. As argued above, for many violations, actual damages are almost certain to occur but will be difficult to prove. The statutory ceiling on liquidated damages and the court's discretion to award less than the maximum amount mean that even when the debtor seeks recovery of the liquidated award, rather than actual damages, the liquidated damages might not be clearly disproportionate to the harm done. In any event, allowing the debtor to recover actual damages could never violate the rule against recovery of punitive damages. It is only the liquidated damage awards which might be constitutionally suspect. Thus, where debtors are willing and able to prove actual damages in excess of the liquidated damage provisions of the Act, they should be permitted to do so.

**FEDERAL EXTENSION OF THE ILA TO OTHER LENDERS**

Despite the state legislature's intent to limit the privileges of charging ILA rates to licensed small loan companies,157 two federal statutes permit many other lenders to make installment loans at the interest rates of Nebraska's Installment Loan Act. The National Bank Act of 1864 allows national banks to charge state small loan rates,158 and the recent Depositary Institutions Deregulation and Monetary Control Act of 1980 (DIDA) may be interpreted to afford a similar privilege to state banks, savings and loans, and

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157. See notes 16-36 and accompanying text infra.
credit unions if they carry federal deposit insurance. This poses the question whether, when these lenders make loans at ILA rates, they will be bound by the ILA default rules. This article takes the position that the rules follow the rates; that the federal policy of competitive equality between state and federally-chartered lenders would subject all loans at ILA rates to the same default rules.

The history of interest rate regulation of national banks may shed some light on the problem. National banks are the creation of Congress, and Congress could undertake detailed regulation by statute of all the terms and conditions on which these banks extend credit. However, Congress has thus far been content, for the most part, to adopt state usury and commercial law as the federal rules governing national bank loans. When the National Bank Act was under debate, Congress expressly rejected a proposal to set a uniform usury rate for national banks. Instead, Congress adopted a provision allowing national banks to charge the higher of one percentage point above the 90-day discount rate of the local Federal Reserve Bank or the rates allowed by the laws of the state in which the national bank is located. The phrase "rates allowed by [state] law" has been interpreted by the courts to mean the highest rate any lender may charge under state law. By granting national banks interest rate equality with the state's most favored lenders, Congress sought to enable national banks to compete effectively with other lenders and avoid discrimination under state law. This most favored lender status has long been

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159. See Title V, Part C, §§ 521-23 of Pub. L. No. 96-221, 94 Stat. 132 (1980) (to be codified in scattered sections of 12 U.S.C.). This act was approved on March 31, 1980, and took effect the next day. Id.
161. The provision which became § 85 of the National Bank Act was originally drafted as, "Every [national bank] may take . . . interest at a rate not exceeding seven percent per annum . . . ." Cong. Globe, 38th Cong., 1st Sess. 2123 (1894).
162. 12 U.S.C. § 86 provides in part:
Any association may take, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal reserve district where the bank is located. . .
163. In Tiffany v. National Bank of Mo., 85 U.S. (18 Wall.) 409 (1873), the United States Supreme Court held that national banks in Missouri could charge 10% on their loans, despite a state law limiting banks to an 8% rate, because individual lenders were permitted to charge 10%. Individuals in this case were the state's most favored lenders, and national banks had a federal right to charge rates equal to those allowed the state's most favored lenders.
164. See Daggs v. Phoenix Nat'l Bank, 177 U.S. 549, 555 (1900); Tiffany v. National
held to authorize national banks to charge small loan act interest rates.\textsuperscript{165}

During the credit crunches of the 1970's and early 1980, the interest rate advantages enjoyed by national banks became a source of controversy. State banks and several commentators argued that the National Bank Act had been incorrectly interpreted to allow national banks to charge interest rates higher than those allowed state banks.\textsuperscript{166}

In 1980, Congress responded to the plight of lenders competing with national banks by enacting the DIDA.\textsuperscript{167} Instead of restricting national banks to state law rates, DIDA apparently extends most favored lender status to federally insured state banks, savings and loan associations, and credit unions. DIDA preempts state usury laws and authorizes federally insured lenders to charge interest at the higher of one percent above the local Federal Reserve Bank's discount rate or "the rate allowed by [state]...


In 1936, the Comptroller of the Currency rendered an opinion that national banks could charge the rates allowed to small loan companies under the Iowa Small Loan Act, \textit{see} Commissioner of Small Loans v. First Nat'l Bank of Md., 268 Md. 305, —, 300 A.2d 685, 689-90 (1973). That opinion has become a part of the Comptroller's regulations, which today provide:

A national bank may charge interest at the maximum rate permitted by state law to any competing state-chartered or licensed lending institution.

If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law relating to such class of loans that are material to determination of the interest rate. \textit{For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company . . . without being so licensed.}

12 C.F.R. § 7.7310 (1980) [emphasis added]

In Fisher v. First National Bank of Omaha, 548 F.2d 255 (8th Cir. 1977), the Eighth Circuit Court of Appeals upheld the right of national banks to charge the rates allowed by Nebraska's Installment Loan Act on credit card loans, even though state-chartered banks were then limited by Nebraska's Personal Loan Act to a lower rate and were prohibited from obtaining a small loan license. 548 F.2d at 259-61.


This language echoes the usury provision of the National Bank Act, and should be interpreted to give DIDA lenders interest rate parity with national banks.

If national and state-chartered banks, savings and loans, and credit unions have a federal right to charge the high interest rates allowed under Nebraska's Installment Loan Act, the question arises whether availing themselves of those rates subjects them to the ILA default rules imposed on licensees. The precise question seems not to have arisen in any other state, perhaps because Nebraska is unique in having a completely different set of default remedies under its ILA than those applicable to other consumer credit transactions.

Analogous cases have faced the argument frequently made by national banks that they may use a particular interest rate allowed by state law without complying with other rules tied to those interest rates, such as limits on compounding, loan amount, and loan length. Some cases exempt national banks from these state law limitations on loans made at particular interest rates, a result which casts doubt on whether the ILA default rules would apply to federal lenders. Several cases hold, for example, that national banks may apply state law interest rates in ways forbidden to all state lenders. The United States Supreme Court and the Sixth Circuit Court of Appeals have held that the National Bank Act authorizes national banks to compute interest to produce a higher effective yield than state law would allow.

Further, the Comp-

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169. See notes 162-72 and accompanying text infra.

170. The Federal Home Loan Bank Board interprets DIDA as extending most favored lender status, including the right to charge small loan act interest rates, to federally insured savings and loan associations. See Opinion Letter by Rebecca H. Laird, Senior Associate General Counsel of the Federal Home Loan Bank Board (Sept. 29, 1980).

Another section of the DIDA permits the Federal Home Loan Board to allow savings and loans to invest up to 20% of their assets in secured or unsecured loans for personal, family or household purposes. This means that savings and loans, previously limited to real estate loans, will soon be able to compete with commercial banks and other creditors in making consumer loans and buying consumer paper. See Title IV, part C, § 401 of Pub. L. No. 96-221, 94 Stat. 132 (1980).

171. In 1919, the Supreme Court held in Evans v. National Bank, 251 U.S. 108 (1919), that national banks could discount loans at the highest rate allowed by state law, despite state decisional law prohibiting other lenders from discounting. The result of the discounting, or deducting the entire interest at the outset of the loan, of course, was to allow the national bank to obtain an effective yield greater than the numerical rate allowed by state law. 251 U.S. at 114.

More recently, the Sixth Circuit Court of Appeals relied on Evans in Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855 (6th Cir. 1972), to hold that a Michigan national bank could discount a 5-year 7% secured loan to pro-
troller of the Currency's Regulations include the statement that a national bank relying on its most favored lender status to use a state law interest rate "is subject only to the provisions of state law relating to such class of loans that are material to determination of the interest rate."\textsuperscript{172}

The better interpretation of federal banking law would be to hold that use of the ILA rates requires compliance with the ILA default rules by all lenders. The United States Supreme Court recently held that the content of federal law governing priorities on default for the federal government's direct lending ventures was the same as the commercial law of the state in which the loan was made, even though that law was not completely uniform among the states.\textsuperscript{173} The content of federal law governing default remedies for federal lenders using Nebraska's ILA rates ought similarly to be drawn from state law, where Congress has not provided a different rule.

Further, the Eighth Circuit Court of Appeals has questioned whether the United States Supreme Court would today repeat its 1919 holding that national banks may manipulate a state interest rate to produce an effective yield greater than permitted by state law. The Eighth Circuit in \textit{First National Bank of Mena v. Nowlin},\textsuperscript{174} held that the National Bank Act encompasses the whole body of state statutory and decisional law on permissible yields, not just the numerical rate in the state usury statute. The court based its decision on the policy of competitive equality which underlies the National Bank Act.

The policy of competitive state-federal equality . . . puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders.\textsuperscript{175}

Other cases have held that national banks may use state interest rates only on the types of loans to which those rates apply under state law. For example, in \textit{Partain v. First National Bank of Montgomery},\textsuperscript{176} a federal district court refused to allow a national bank to evade the limitations on principal amounts which were a part of Alabama's Small Loan Act. The Alabama statute permitted

\begin{itemize}
  \item \textsuperscript{172} See 12 C.F.R. § 7.7310 (1980), set out in part in note 165 supra.
  \item \textsuperscript{174} 509 F.2d 872 (8th Cir. 1975).
  \item \textsuperscript{175} Id. at 880.
  \item \textsuperscript{176} 336 F. Supp. 65 (M.D. Ala. 1971), rev'd on other grounds, 467 F.2d 167 (5th Cir. 1972).
\end{itemize}
licensed finance companies to charge 36% on loans of less than $300. The court held that the bank could charge 36%, but only on loans within the $300 limit.\textsuperscript{177} Similarly, in \textit{Deak National Bank v. Bond},\textsuperscript{178} a New York state court held that a national bank could not rely on a state interest rate of 15% for finance company loans of $2,500 or less to justify charging 15% on the bank's loan of $20,000.\textsuperscript{179}

Further, the Comptroller's regulation set out earlier\textsuperscript{180} should not be understood to refer to default rules when it exempts national banks from compliance with non-interest rate provisions of small loan acts. The only provisions usually included in these acts other than the details of interest computation are the state licensing, reporting, and examination requirements.\textsuperscript{181} To subject national banks, with their federal charter, to this state supervision could impede their functions by unnecessary duplication and possible inconsistency of reporting and examination requirements. It would seem the Comptroller's regulation should be interpreted to refer to the provisions incompatible with federal banking law, not to default rules like those found in Nebraska's ILA.

To allow lenders chartered or insured by the federal government to charge ILA rates and yet not bind them to the default rules which were the \textit{quid pro quo} for state authorization of those rates,\textsuperscript{182} would certainly undermine the Congressional policy of competitive equality and give those lenders unconscionable advantages.

Assuming federal law subjects these lenders to the ILA default rules, those rules will apply only on loans made in reliance on the ILA, not to all consumer loans. Deciding whether a particular loan was made in reliance on the ILA rather than some other statute is a complex question. The key is the rate of interest. If any usury statute other than the ILA allows the lender to charge the rate in question on such a loan, then the lender can justify the rate charged under that statute, and none of the provisions of the ILA would apply. On the other hand, if a lender charges a rate of inter-

\begin{itemize}
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} 89 Misc. 2d 95, 390 N.Y.S. 2d 771 (Sup. Ct. 1976).
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} See note 170 and accompanying text supra.
\item \textsuperscript{182} The bill containing the 1979 amendments to the ILA raised the interest rates as well as loan ceilings and maturities. The legislative history of L.B. 87 makes it clear that absent acceptance of the new default rules, the new higher interest rates would not have passed. See remarks of State Senator John DeCamp during floor debate, March 7, 1979, at page 1236-37.
\end{itemize}
est higher than allowed by any statute other than the ILA, the
lender must be presumed to have relied on the ILA in making the
loan and would be subject to all its consumer protection rules.

This means that in Nebraska, the interest rate charged deter-
mines which default rules will apply to the loan. For example, as-
sume a national bank decided on August 1, 1980, to loan Mary Doe
$3,000 to purchase a used car. The bank could look to several usury
statutes other than the ILA in deciding what interest rate to
charge. One option would be to charge one percent above the local
Federal Reserve's 90-day discount rate under the National Bank
Act. Other alternatives are the general usury rate of 16%,\textsuperscript{183} and
Nebraska's Personal Loan Act rate of 19%.\textsuperscript{184} Only if the bank
wanted to charge more than 19% on the loan would it need to rely
on the ILA, which authorizes a rate of 24% on the first $1,000.\textsuperscript{185}
Any rate not in excess of 19% would avoid the ILA default rules.\textsuperscript{186}

The pattern of coverage of the ILA default rules is complex
and illogical. When a borrower has surrendered the collateral, lia-
bility for a deficiency judgment should not depend on whether the
lender was a finance company rather than a bank, nor should it
depend on the Federal Reserve's rediscount rate the day the loan
was made. Yet the ILA itself makes the remedies available upon
default turn on the type of lender, and the two federal statutes
made the rules depend at times on the discount rate.

CONCLUSION

The new default rules of the Installment Loan Act were in-
tended to encourage workouts and discourage repossession of con-
sumer loans by finance companies, in exchange for permitting
those lenders to charge interest rates greater than the General
Usury Rate. However, the narrow scope of the Act, the limitations
on the substantive rules themselves, and the denial of governmental
as opposed to private enforcement make it unlikely that much
change will be effected in practice.

\textsuperscript{183} L.B. 276, 1980 Neb. Laws 112.
\textsuperscript{186} To these complexities, one can add the fact that banks regularly purchase
installment credit contracts, just as finance companies do. J. Honnold, Law of
Sales and Sales Financing 454-55 (1976). Considerable confusion may result if a
bank holds several debts of a single debtor and different default rules apply. For
example, the bank might hold, in addition to Mary Doe's auto loan, a credit card
cash advance to her and an installment sales contract assigned to the bank by one
which sold furniture to Mary Doe on credit. The furniture contract is not within the
ILA default rules, since it is not a loan. The cash advance and the car loan are
loans, and thus the default rules applicable depend on the source of the interest
rate.
The initial problem with the ILA default rules as a consumer protection device is that the rules are tied to direct loans at particular interest rates, rather than extended to the broad field of consumer credit transactions. The narrow scope of the ILA default rules will inevitably produce confusion and unnecessary losses for both debtors and creditors. If creditors mistakenly apply the rules to a transaction not covered by the Act, they may forego a repossession or deficiency suit to which they were entitled. On the other hand, creditors may find it simple to structure transactions to avoid the rules, and less scrupulous creditors may mislead debtors as to available remedies on loans to which the ILA rules do apply. Since the rules cover so few transactions, debtors are less likely to become aware of the protections afforded them.

Certainly the potential for confusion on which loans are covered is not entirely the Unicameral's fault; that body could not have anticipated passage of the Depositary Institutions Deregulation Act. The cure, however, is in the Unicameral's power. A more logical approach to consumer protection from unfair debt collection practices would be to follow the lead of the Uniform Consumer Credit Code and the federal Consumer Credit Protection Act (Truth-in-Lending), and apply relatively uniform rules to all consumer credit transactions. Keying credit rules to the type of borrower and purpose of the credit rather than to the lenders and interest rates would better fulfill the purpose of avoiding creditor overreaching and undue hardship on individual debtors and their families. Both debtors and creditors could be more certain of their rights and duties on each debt.

Whether or not the scope of the rules is expanded, the substantive provisions need improvements. The frequency of the right to cure should be liberalized and there should be additional information provided to the debtor and guarantor in the notice of right to cure. To make the repossession provisions effective, self-help repossession of motor vehicles, rather than just locked, unoccupied motor vehicles, should be prohibited. Further, treatment of guarantors under the election of remedies needs clarification.

Finally, the penalty provisions of the ILA default rules need strengthening. The Department of Banking and Finance should have authority to enforce compliance with these rules as it does for all other provisions of the ILA, and consistent violation should be made grounds for revocation of the lender's small-loan license. Since few finance company borrowers will retain counsel to advise them before or after default, enforcement by the state seems a necessary addition to private remedies.