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Recent Case: Commercial Paper - Holders in Due Course - Good Faith and Notice Requirements [*General Investment Corp. v. Angelini*, 58 N.J. 396, 278 A.2d 193 (1971)}

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Recent Cases

COMMERCIAL PAPER — HOLDERS IN DUE COURSE — GOOD FAITH AND NOTICE REQUIREMENTS

General Investment Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971).

The law of negotiable instruments is at odds with consumer protection where the sale of a note to a third party prevents the consumer from raising common defenses. As in the present case of *General Investment Corp. v. Angelini*,[1] a homeowner often contracts for home improvements, agrees to finance the work by signing a note, and thereafter the home improvement contractor sells the note for value to a finance company as a negotiable instrument. If the contractor defaults on the contract, the court must decide whom to protect against the contractor's default — the homeowner who contracted for the goods and services not delivered, or the finance company who paid value for a negotiable note on which the homeowner refuses to pay.[2] In *Angelini*, the New Jersey Supreme Court went to some length to protect the homeowner and to achieve what it considered to be a socially desirable result. To circumvent the traditional application of article 3 of the *Uniform Commercial Code* (UCC) and subject the defendant-finance company to the defense of failure of consideration, the court relied heavily on public policy considerations, related state statutes and pre-UCC precedent.

Anthony and Dolores Angelini contracted with Lustro Aluminum Products, Inc. to have aluminum siding, storm doors and windows installed on their house.[3] At Lustro's insistence, the Angelinis signed a contract and a note, both of which were executed on December 10, 1966. At that point the contract and the note were un-

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[1] 58 N.J. 396, 278 A.2d 193 (1971).

[2] Typically, the installment payment note is made at the highest permitted interest rate and finance charges. Most likely unknown to the consumer, the retailer thereafter sells the note at a discount to a financial institution before performing the contract or delivering the goods. After the retailer's default, the consumer is left with an independent obligation to pay off the note he signed. The note is subject to the separate body of negotiable instruments law (article 3, Commercial Paper, of the *Uniform Commercial Code* (UCC)), while the consumer is left with an action on the contract (article 2, Sales, of the UCC), against a retailer who has defaulted because of dishonesty or bankruptcy, or has left town. The individual consumer is severely limited financially, but is faced with a burdensome action against the financial institution and a virtually worthless action against the retailer.

[3] *See* note 24 *infra*.

dated.[4] The note itself did not provide when payments were to begin, although the contract specified that payments were not to commence until 60 days after Lustro had completed the work.[5] The note originally made in favor of Lustro was sold on December 19 to General Investment Corp., which regularly dealt with and was familiar with the operations of Lustro.[6] At that point, the note provided that payments would begin on February 19, 1967. As part of the transaction, Lustro falsely warranted to General Investment that the work on the Angelini house had been completed.[7] In fact, Lustro had failed to install the home improvements, subsequently became insolvent, and defaulted on their contract.

About December 24, 1966, the Angelinis received a payment coupon book for the note from General Investment. The first monthly payment was due on February 19, 1967 — exactly 62 days after the note had been discounted. The Angelinis returned the coupon book, calling to General Investment's attention the fact that the work had not been completed and that the contract required no payments until 60 days after completion. The matter remained dormant for several months, and then General Investment sued the Angelinis on the unpaid note.[8] General Investment prevailed at the

[4] The trial court settled this issue of fact. It found that the note, when executed by the Angelinis, bore no dates. 58 N.J. at 400, 278 A.2d at 195. *See* UCC § 3-114(1) which provides that the "negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated."

[5] The cash price for the work was $3600. Interest at the highest rate and finance charges brought the principal sum to $5363.40, payable in 84 monthly installments of $63.85. 58 N.J. at 399, 278 A.2d at 194.

[6] General Investment handles approximately 1800 home improvement loans annually from 300 contractors; 10 percent of this volume came from Lustro. When General Investment purchases a note it reads and keeps a copy of the work contract as part of its records. The *Angelini* court treated the contract and note as interrelated parts of a single transaction. 58 N.J. at 400, 278 A.2d at 195.

Lustro endorsed the Angelini note to General Investment "without recourse." *Id.* Endorsing without recourse was an attempt by Lustro to cut off any liability for the Angelinis' non-payment to General Investment or any subsequent holder of the note. In spite of this provision, General Investment later sought "adjustment" from Lustro when the Angelinis refused payment of the note because the work had not been completed. *Id.* at 402, 278 A.2d at 196.

[7] Lustro warranted that it had "furnished and installed all articles and materials and . . . fully completed all work which constitutes the consideration for which this note was executed and delivered by the maker." *Id.* at 400, 278 A.2d at 195.

The court noted that, although General Investment could have required a certificate of completion from Lustro signed by the Angelinis or inquired of the homeowner whether the work was in fact completed, it did neither. By statute the request for or acceptance of such certificate by Lustro from the Angelinis would have been unlawful since the work had not yet been completed. *See* Home Repair Financing Act of 1960, N.J. STAT. ANN. § 17:16C-66 (1960).

[8] The insolvent contractor, although a defendant below, was not an appellant before the supreme court for reasons not made explicit in the supreme court opinion.

trial and appellate levels,[9] both lower courts ruling that the plaintiff was a holder in due course, thus precluding the Angelinis' claim of failure of consideration as a defense.[10] After granting the Angelinis' petition for certification,[11] the New Jersey Supreme Court held that General Investment took the note subject to the defense of failure of consideration. Since Lustro's default on the contract was undisputed, the Angelinis prevailed.

Angelini adopted two independent rationales to justify its conclusion. First, the court denied holder in due course status to General Investment on the basis of UCC section 3-302.[12] And second, using section 3-119, it subjected the defendant to the conditional payment limitation in the accompanying contract, and thus to the defense of failure of consideration.

The UCC definitional requirements of holders in due course under section 3-302 provide that:

> (1) A holder in due course is a holder who takes the instrument
> (a) for value; and
> (b) in good faith; and
> (c) without notice . . . of any defense against or claim to it on the part of any person.

If General Investment lacked any of the above requirements, UCC section 3-306(c) would subject them to the defense of Lustro's failure of consideration.[13] The court limited its consideration of sec-

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[9] The trial court and appellate court opinions are unreported.

[10] The defenses that are cut off against a holder in due course are often called *personal* defenses and include such common defenses as failure of consideration, breach of warranty in the sale of goods, fraud in the inducement, and most cases of illegality. These defenses are derived from UCC § 3-306. *See* H. KRIPKE, CONSUMER CREDIT 255-56 (1970).

A holder in due course is still subject to what are known as *real* defenses, such as the less common defenses of infancy and other incapacities, forgery, and some instances of duress and illegality. *See* UCC § 3-305.

[11] 57 N.J. 238, 271 A.2d 429 (1970).

[12] For long a citadel in the law of negotiable instruments, holder in due course status has become vulnerable to limiting statutes and court decisions where it may affect the consumer. Recognizing the social evils that may flow from negotiability, some legislatures have forbidden negotiable instruments in consumer installment transactions and courts have stretched facts to deny finance companies holder in due course status. *See* Rosenthal, *Negotiability — Who Needs It?*, 71 COLUM. L. REV. 375, 379-80 (1971). The *Angelini* court followed this anti-negotiability trend in denying holder in due course status to a finance company that had purchased a consumer-made note. *Angelini* is remarkable for the lengths to which the court went in interpreting the UCC to protect the consumer and for its heavy reliance on public policy considerations.

[13] Moreover, once the Angelinis established the defense of failure of consideration, the finance company had the burden of proving by a preponderance of the evidence that they were a holder in due course in all respects. UCC § 3-307(3).

tion 3-302 to the good faith requirement. Historically, the test for this requirement has vacillated between two standards — one subjective, the other objective. The subjective standard looks to the mind of the particular holder to ensure there was no dishonest motive or knowledge of a defense or defect at the time of the taking of the instrument. The objective standard places on the taker the duty of a reasonable and prudent inquiry into the circumstances at the taking to discover any defect or defense. Reasonableness is determined by the generally accepted commercial standards of the particular business. The UCC has basically adopted the subjective standard for determining good faith, which traditionally has been preferred by the courts.[14]

Although *Angelini* indicated that good faith would be determined using the subjective standard,[15] the court relied on the authority of *Unico v. Owen*[16] — a case actually using the objective standard. On the basis of *Unico*, the court found General Investment not to have taken in good faith because of their closeness to the transaction. *Unico* reasoned that the closer the holder stands to the underlying transaction, the more he controls, participates and becomes involved in it, and the less he needs the protection afforded a holder in due course.[17] But in *Unico* the finance company was completely dependent upon the retailer for its business and, on the facts, stood far closer to the seller of the note than General Investment did to Lustro.[18] Although *Unico* can be distinguished from the instant case on these grounds, the court relied on it to show the interrelation of the work contract and the note, which together were taken to establish General Investment's closeness and lack of good faith.

The court further examined the existence of good faith under

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[14] The UCC definitionally adopts the subjective standard as set out in section 1-201 (19). The subjective test of "honesty in fact" is the basic standard throughout article 3 of the UCC. There are few exceptions employing the objective standard in article 3. The New Jersey Study Comments criticized the UCC for continuing the "bad law" of the objective standard rather than making the subjective standard applicable throughout. *See* New Jersey Study Comment 1B to UCC § 3-302. (New Jersey has adopted, as law, a unique set of Study Comments as well as the official Comments to the UCC.) UCC § 3-302 (1) (b) does not specify that anything broader than the subjective standard should be used to determine good faith in holders in due course.

[15] 58 N.J. at 403, 278 A.2d at 196. The court stated that good faith is to be determined by "looking to the mind of the particular holder" and cited UCC § 1-201(19), which defines good faith as "honesty in fact."

[16] 50 N.J. 101, 232 A.2d 405 (1967).

[17] *Id.* at 109-10, 232 A.2d at 410.

[18] Unico was a partnership formed expressly for the purpose of financing its parent's operations. General Investment is an independent corporation, with only 10 percent of its volume originating with Lustro.

the standard enunciated in *Joseph v. Lesnevich*.[19] *Lesnevich* held that circumstances surrounding the negotiation of the note that raised questions as to whether the promise to pay was conditional were of probative value in deciding the question of good faith.[20] The *Angelini* opinion acknowledged the traditional rule that a holder is under no duty to investigate possible defenses where a note is negotiable and regular on its face. But the court held that unique policy considerations in consumer home repair transactions require close scrutiny for the existence of good faith.[21] Under this approach — which goes well beyond *Lesnevich* — a lack of good faith can be established in such transactions if the holder's failure to inquire arose from a desire to avoid an investigation he believed would disclose a defense arising from the transaction.[22]

Thus, on the issue of defeating good faith, the court in reality applied an objective standard. While declaring it would look to the mind of the particular holder, the favored subjective standard, the court employed, and even exceeded,[23] the limits of the objective — inquiry into surrounding circumstances — standard. The court's inquiry into these objective, surrounding circumstances yielded the following. General Investment required the work contract be submitted when it discounted the note, and therefore it knew the Angelinis' liability to commence payment was dependent upon completion of the work in a good and workmanlike manner. The court further commented that, in spite of the substantial nature of the work required on the house,[24] General Investment accepted Lustro's false representation that the work had been completed in nine days. Although General Investment could have requested that Lustro ob-

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[19] 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959).

[20] *Id.* at 348, 153 A.2d at 354.

[21] 58 N.J. at 403, 278 A.2d at 197.

[22] *Id., citing* Joseph v. Lesnevich, 56 N.J. Super. 340, 349, 153 A.2d 349, 354 (App. Div. 1959).

[23] The court exceeded the objective standard in that it apparently would have demanded General Investment to thoroughly investigate the time required for full performance of the substantial home improvements specified under Lustro's work contract. Furthermore, *Angelini* indicates that a finance company must have personal knowledge of the fact of completion of such work. *See* notes 24-27 *infra* & accompanying text.

[24] The work contract provided that Lustro would:

> Supply & Install Gold Bond Plasticrylic Avocado Siding with Grey Sills & Trim. Apply Heavy *Quilted* Breather Foil on all wall areas around complete house. Corner posts to be green, all mullions to be fabricated in grey aluminum. Supply & install 2 anodized storm doors (Rear & Side Entrances). All overhangs & trim to be covered with special Marine Paint in grey color (as close as possible to Oxford grey trim).
>
> This will include cleaning up the job. 58 N.J. at 399, 278 A.2d at 197.

tain a certificate of completion[25] from Angelini at the discounting event, it neither demanded such a certificate nor personally inquired of the homeowner as to completion. The *Angelini* court inferred from these facts that the company failed to seek actual knowledge because it feared that inquiry would disclose the defense of failure of consideration. According to the court, this failure to inquire evidenced an "intentional closing of the eyes and mind to any defects in or defenses to the transaction."[26] Thus, not only did *Angelini* fail to apply the narrower subjective standard it purported to apply, it even gave an unusually broad interpretation to the objective standard in the name of consumer-homeowner protection. The facts in *Unico* are easily distinguishable, and the theory of *Lesnevich* had to be expanded to encompass *Angelini* and allow a broad inquiry into the contract performance, as well as the circumstances surrounding the sale of the note.[27]

The UCC subsection 3-302(1)(c) requirement that a taking be without notice of any defense or claim to the instrument was ignored in the *Angelini* opinion. Apparently because the court concluded that good faith was lacking in the transaction, it felt there was no reason to proceed further with section 3-302. But *Angelini*'s sole dependence upon the good faith requirement is questionable. As the court's discussion of good faith shows, the critical issue was whether General Investment had notice of the defense of failure of consideration at the time of the taking. The court's entire reason for finding a lack of good faith was General Investment's knowledge of the payment condition of the work contract and the circumstances surrounding the negotiation. But this is more precisely the issue of notice of a defense than the lack of good faith and consequently should have been approached under subsection 3-302(1)(c). Subsection 3-304(4)(b), which explains the elements of notice to a purchaser, specifies that mere notice of a separate executory work contract alone does not prevent a party from taking in due course.[28] In that provision, notice to a purchaser is limited by the following:

> (4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim
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> . . .
>
> (b) that it was issued or negotiated in return for an executory

[25] *See* a discussion of the certificate of completion in note 7 *supra*.

[26] 58 N.J. at 405, 278 A.2d at 197.

[27] The court justified its expansion of the language of *Lesnevich* simply on the grounds of unique policy considerations. *Id.*

[28] *See* UCC § 3-304, Comment 9.

> promise or accompanied by a separate agreement, *unless the purchaser has notice that a defense or claim has arisen* from the terms thereof . . . . (emphasis added)

Notice to General Investment would have turned on whether it knew at the discounting event that the defense of failure of consideration had arisen from the terms of the contract. Thus, the mere fact that the note was taken on an executory contract cannot of itself have given rise to notice of a defense. A fortiori, where General Investment received a warranty of completion, they cannot be held to have taken with notice of a defense. To hold otherwise would unjustifiably penalize the finance company for accepting what appeared to be a protection to all parties, including the consumer-homeowner. General Investment had no duty to investigate or any reason to question Lustro's warranty since nine days were more than sufficient to complete such home improvements.

Moreover, had General Investment checked with the Angelinis on December 19 to see if the work had been completed, the fact that it had not been completed on that date would have been inconclusive since Lustro had two days to finish the work. The first payment was due on February 19, and 60 days prior to that was December 21. Thus, on December 19 the defense of failure of consideration could not yet have arisen, since UCC subsection 3-304(4)(b) requires that the purchaser have notice that a defense has already arisen at the time of the taking.

The *Angelini* court also concluded that UCC section 3-119 provided an independent basis for denying holder in due course status to General Investment. That section provides:

> (1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

Since the New Jersey courts had not yet interpreted section 3-119 and no pertinent cases from any other jurisdiction were brought forward, the court merely commented that their pre-UCC "case law [was] generally in line with" the rule that section lays down.[29]

In interpreting section 3-119, the court relied primarily upon *General Contract Purchase Corp. v. Moon Carrier Corp.*[30] In *Moon*, decided 28 years prior to the present case, the notes which had been

[29] New Jersey Study Comment to UCC § 3-119.

[30] 129 N.J.L. 431, 29 A.2d 843 (Ct. Err. & App. 1943).

purchased by General Contract, a finance company, explicitly limited the liability of the maker on the basis of a specific accompanying agreement. Citing *Moon*, the *Angelini* court said:

> The Court of Errors and Appeals denied recovery saying that where a note refers to or is accompanied by a collateral contemporaneous agreement which limits the scope of liability on the note, or if the purchaser of the note has actual knowledge of such an agreement *even if it neither accompanies the note, nor is referred to therein, he takes it subject to the terms of the agreement.*[31]

Applying such a broad holding to interpret the language of section 3-119 is at least questionable. The Comments to section 3-119 indicate that it deals with terms of payment. In *Moon*, the notes were accompanied by such a limitation on the terms of payment. In the present case, however, the issue was not a term of payment, such as an acceleration of payment clause or the like, but a *condition* of payment expressed in the work contract.

The problem with the *Angelini* court's interpretation of section 3-119 is obvious: if notice of a contract is to be considered a limitation making payment of the note conditional on performance of that contract, then the note is no longer a negotiable instrument. UCC subsections 3-104(1)(b)-(c) provide that a negotiable instrument must contain an unconditional promise to pay a sum certain at a definite time or on demand. If a note is conditional upon eventual completion of the work 60 days in advance of payment, then it does not meet the requirements. This result cannot be the intent of the statute because section 3-119 speaks in terms of an instrument, meaning a negotiable instrument.[32]

The conclusion that *Angelini* misinterpreted section 3-119 is further supported by subsection (2) of that section, which provides that a separate agreement does not affect the negotiability of an instrument. Official UCC Comment 5 to that section states that negotiability is always determined by what appears on the face of the instrument alone.

Moreover, UCC subsection 3-105(1)(c) specifically says that a promise to pay is not made conditional by the fact that the note states that it (the note) arises out of a separate agreement. This subsection was intended to reject earlier cases which had held — as did *Angelini* — that "a reference to a separate agreement [meant] that

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[31] 58 N.J. at 406, 278 A.2d at 198 (Emphasis added).

[32] *See* UCC § 3-102(1)(e).

payment of the instrument must be limited in accordance with the terms of the agreement, and hence was conditioned by it."[33]

Finally, as previously mentioned, subsection 3-304(4)(b), which is to be read together with sections 3-105 and 3-119,[34] appears to conclude that the mere knowledge of the conditions of a separate contract (whether executory or not) tendered with a negotiable note does not amount to notice of a defense having arisen therein. If attaching the contract to the note renders the note nonnegotiable, as *Angelini* implies, then subsection 3-304(4)(b) will never operate because notice is only at issue once you have a negotiable instrument. It is, of course, fundamental that one does not interpret part of a statute so as to render another part of it permanently inoperative.

This is not to say that the purchaser of a note accompanied by a contract takes subject to none of the terms of the contract. If the contract changes the time of payment or date of payment and the purchaser takes with notice of these limitations, the contract would control. However, the official Comments indicate that section 3-119 was intended to cover all such matters. In deciding that section 3-119 could be used to make the note subject to the conditions of the contract, the *Angelini* court apparently did not realize that the effect of their reasoning would be to generally defeat the negotiability of notes accompanied by contracts.

The court achieved its desired result of granting relief to a particular consumer note-maker caught in the grip of commercial paper, and of giving effect to the policy of removing home repair notes from the working of negotiable instruments law. UCC sections 3-119 and 3-302(1)(b) were chosen as the vehicles for a strongly, and perhaps correctly, desired public policy. But in the process, section 3-119 suffered, as did article 3 generally. All note-takers having any knowledge of a retail contract will no longer be taking negotiable instruments if the present interpretation of section 3-119 is applied elsewhere. Possibly recognizing this problem, the court shut the door tightly on the present holding, limiting it to the immediate facts.[35]

The overriding public policy considerations were clearly set out in the opinion, and their power in determining the result was acknowledged. The court found and filled a need for less stringent

[33] UCC § 3-105, Comment 3.

[34] UCC § 3-304(4)(b) is to be read together with §§ 3-105 and 3-119 as to when a promise is unconditional and as to other writings affecting the instrument. *See* UCC § 3-304, Comment 9.

[35] 58 N.J. at 409, 278 A.2d at 200.

rules to deal with commercial paper arising in consumer goods transactions.[36] The New Jersey Home Repair Financing Act of 1960 and its 1969 supplement[37] were used as "aids" to the court in interpreting section 3-119. The 1969 law, the court noted, made home repair notes subject to the terms and conditions of the work contract and no longer treated them as negotiable instruments under article 3 of the UCC. These statutes were intended to protect the homeowner from being victimized by the oppressive and unconscionable tactics of irresponsible and untrustworthy contractors.[38] The strong purpose of this policy argument was held to impose upon the court an obligation to liberally construe the UCC, and section 3-119 in particular, in favor of the homeowner note-maker.[39]

In a very real sense, the *Angelini* court transferred the risk of loss brought on by a defaulting third party from the note-maker to the note-holder. This changes the concept of caveat emptor. The traditional victim, the buyer of goods and services, is protected in favor of a new victim, the buyer of commercial paper who must now be careful from whom he purchases. The broad judicial intention in cases such as the present one is evident in the following excerpt from a case decided 18 years before *Angelini*, where the closeness of the finance company to an installment sales transaction was the basis for denying holder in due course status and subjecting the note to the defense of failure of consideration:

> It may be that our holding here will require some changes in

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[36] *Id.* at 407, 278 A.2d at 199. The court cited UCC § 9-206, Comment 2, in support of its policy argument denying such rights and protections to the finance company in the present case. But article 9, Secured Transactions, etc., which is inapplicable to this case neither adopts nor rejects the judicial doctrine that a holder may have been too close to the underlying transaction to be granted holder in due course immunity.

[37] The 1969 supplement to the Home Repair Financing Act of 1960 reads in pertinent part:

> No home repair contract shall require or entail the execution of any note unless such note shall have printed the words "*Consumer Note*" in 10-point bold type or larger on the face thereof. Such a note with the words "*Consumer Note*" printed thereon shall be subject to the terms and conditions of the home repair contract and shall not be a negotiable instrument within the meaning of chapter 3 (Commercial Paper) of the Uniform Commercial Code. N.J. STAT. ANN. § 17:16C-64.2 (1969).

[38] 58 N.J. at 407, 278 A.2d at 199. The strong language the court used to characterize home repair contractors resembles the wording and intent of UCC § 2-302, which deals with unconscionability.

The court also cited Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), a landmark decision in unconscionable installment sales contracts.

[39] 58 N.J. at 409, 278 A.2d at 199. The 1969 supplement to the Home Repair Financing Act of 1960 was not enacted in time to govern this case. Nevertheless, the court arrived at the same result as that new law dictates by applying the policy of that act retroactively. *See* note 37 *supra* for the pertinent text of the 1969 law.

> business methods and will impose a greater burden on finance companies. We think the buyer — Mr. & Mrs. General Public — should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer's insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers.[40]

Historically, it was believed that protecting the good faith purchaser helped the unfettered flow of commerce. The doctrines of negotiable instruments law assumed that the good faith holder took free of all personal defenses. Business development would presumably be facilitated by the free circulation of credit and money fostered by these policies.[41] But in recent years courts and legislatures have yielded to a rising awareness of the social and economic disutility of negotiable instruments in consumer transactions.[42]

Still, a condemnation of the effects of negotiability on the consumer is perhaps unwarranted. The consumer who has signed a negotiable note is effectively in the same position as a cash purchaser who has paid in full. The obligation to pay and the payment in full have both been completed.[43] The limited remedies available against a retailer who subsequently defaults are the same in both situations. Furthermore, where negotiability has been removed by statute, it has been suggested that the businessman and consumer alike suffer economic ill-effects.[44] Nevertheless, judicial fact-stretching to deny finance companies holder in due course status is

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[40] Mutual Finance Co. v. Martin, 63 So. 2d 649, 653 (Fla. 1953), *cited in* Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

[41] It can be argued that small merchants and minority businessmen struggling to gain a foothold would still benefit from the free negotiability doctrines. However, stronger considerations of consumer protection, it is also argued, should outweigh this. *See* H. KRIPKE, *supra* note 10, at 260-61.

[42] Negotiability has been criticized for its severe and unfair impact upon the poorest members of the community, particularly in reference to the law governing consumer installment purchases. Revision of the law in this sphere of consumer activity, it has been suggested, will help alleviate more general social ills. *See* REP., NAT'L ADV. COMM. ON CIVIL DISORDERS (Kerner Commission) 274-77 (N.Y. Times ed., 1968).

[43] An alternative contrivance is for the buyer to make an independent loan and then pay for the purchase of goods or services in cash. The obligation to pay is then theoretically independent of the transaction and thus immune to any defense in that transaction. In this context, a straight cash purchaser is similarly at the sole mercy of the retailer with whom he has dealt. The same theory can be reversed in application to a home repair contractor. If the contractor borrows independently on his accounts receivable to finance work proposed under an executory contract — rather than selling a related note, as in *Angelini* — the risk falls on him and not the homeowner.

[44] A recent study of the Connecticut Home Solicitation Sales Act of 1967, CONN. GEN. STAT. ANN. §§ 42-134 — 42-143 (Supp. 1968), suggests that where negotiability protections were cut off by statute in the home improvement business, available credit was significantly reduced, dealers lost some business and the consumer ultimately faced higher costs. *See* Note, 78 YALE L.J. 618 (1969).

increasingly being coupled with the legislative remedy of statutes forbidding the use of negotiable instruments in consumer installment transactions.[45]

The New Jersey Supreme Court in *Angelini*, however, failed to limit itself to judicial fact-stretching. The direct statutory remedy of the 1969 supplement to the New Jersey Home Repair Financing Act of 1960 was not yet available to the court, so it chose to give the UCC a skewed interpretation in the guise of consumer protection. While the UCC does establish different rules for commercial and non-commercial situations, these distinctions should not be forged through judicial gloss. The harm done article 3 by *Angelini* may upset legitimate commercial needs if the instant case is given future authority beyond its limited holding. Perhaps the valuable applications of negotiability rules are limited to the purely commercial sphere. But the removal of these rules from the domain of consumer transactions seems best left to the legislature, and not to judicial interpretations of article 3 of the UCC.[46]

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[45] *See, e.g.*, Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); MASS. GEN. LAWS ANN. c. 255, § 12 F, *as added by* Acts 1970, c. 457; N.Y. PERS. PROP. LAW § 403(3), (6), *as amended by* L. 1970, c. 299; UNIFORM CONSUMER CREDIT CODE §§ 2.403-.404; Rosenthal *supra* note 12. *See also* the proposed regulation of the Federal Trade Commission, which if adopted would make the use of a promissory note to cut off a buyer's defenses a deceptive trade practice. 36 Fed. Reg. 1211 (Jan. 1971).

[46] In Rosenthal, *supra* note 12, at 401-02, the author concluded that:

> Negotiability has been an extremely valuable concept, which has kept open channels of commerce and permitted transactions to take place with a minimum of inquiry and investigation. It is not suggested here that where negotiability serves such purposes it should be curtailed. The eternal ingenuity of the legal profession, however, has been such that devices and techniques designed for one purpose are often employed for another, and significantly different, purpose. . . . [T]here is no reason why we cannot pick and choose, retaining negotiability where it serves worthy ends and eliminating it where it produces harmful or aimless results.

Thus, article 3 of the UCC should be retained in purely commercial transactions, while the legislatures can immunize the consumer to the inequities in the law of negotiability.