STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

June 20, 1977

ATTORNEY GENERAL OPINION NO. 77- 206

Ms. Lovelle Frazier
Administrator
Department of Credit Unions
234 Kansas Avenue
Topeka, Kansas 66603

Re: Uniform Consumer Credit Code - Power of Attorney - Unconscionability

Synopsis: Although the power of attorney required to be executed by certain automobile loan recipients may be subject to a finding of unconscionability by a court of competent jurisdiction, it cannot be said, as a matter of law, that requiring the execution of this power constitutes an unconscionable practice under the UCCC.

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Dear Ms. Frazier:

You have inquired as to the legality of requiring a borrower to execute the Power of Attorney reproduced below:

> KNOW ALL MEN BY THESE PRESENTS THAT I, _____ do, make, constitute and appoint Forbes Credit Union (a corporation created by an act of Congress), its successors and assigns, true and lawful attorney, for me and in name to sign my name to assignments of titles, transfers of titles, applications for titles, or any other forms involving title to _____ Identification No. _____. This power of attorney to remain in effect until such time as Forbes Credit Union no longer has a security interest in the automobile.

> For that purpose to make and substitute, and to do all lawful acts requisite for effecting the permises; hereby ratifying and confirming all that the said attorney or its successors or assigns shall do therein by virtue of these presents.

As I understand the situation, one credit union has been requiring certain of its automobile loan recipients to execute two copies of this Power and keeping these copies in the loan file, in order to facilitate respossession of the car.

There is no statute prescribing such a document as a means of securing an interest in collateral; nor, is there any statutory prohibition of this precise type of document. However, this Power is quite similar in its ultimate effect to the confession of judgment, or cognavit, clause which is made illegal in consumer notes by K.S.A. 16a-3-306. Though this Power is not an authorization to confess judgment, it has a similar effect as to the collateral involved because once the collateral were repossessed, it could be conveyed by the creditor to a third party without any further judicial action being required to force assignment of title to the creditor. In this situation the borrower is not given a copy of the Power, nor is there any proof that the credit union adequately explains to the borrowers the scope and possible effect of this Power of Attorney. The borrower would ordinarily expect that in a title state, such as Kansas, the creditor, even after repossessing the automobile, could not dispose of the auto without obtaining the borrower's signature on the title. However, the additional time for negotiation or settlement of the account, which the borrower would ordinarily expect, would be unavailable where the creditor could seize the car by stealth one night and sell the car the following day, by virtue of the rights gained under the Power of Attorney. If it were ultimately decided that the creditor was justifiably in default, the borrower would have to settle for damages, since the sale of the car could probably not be rescinded.

K.S.A. 16a-5-112 gives the creditor the right to seize the collateral without judicial process upon default by the consumer, but only if this can be accomplished without entry into a dwelling and without the use of force or other breach of the peace. (The creditor is also restrained from seizing the collateral until twenty (20) days after notice is given to the consumer of his right to cure, under the provisions of K.S.A. 16a-5-111.) Repossession of most types of consumer goods without judicial process would thus be impossible absent the consent of the consumer. However, automobiles, because of their mobility, are capable of such repossession. The Power of Attorney under discussion here is

designed to assist in this process--and yet it is clearly the intent of the Consumer Credit Code, as embodied in K.S.A. 16a-5-112, that self-help repossessions be severely circumscribed.

Furthermore, these powers are used primarily in loans to military personnel, most of whom are young and financially inexperienced. The borrower does not receive a copy of the Power and there is no documentation to prove that each of these borrowers is given a clear and adequate explanation of the Power.

Considering the apparent violation of statutory intent, in combination with the circumstances in which these Powers are executed, a serious question arises whether use of these Powers of Attorney constitutes an unconscionable practice of the sort contemplated by K.S.A. 16a-5-108. That statute provides that a court need not enforce an agreement found to be unconscionable, or enforce it in such a way as to avoid an unconscionable result.

A court of competent jurisdiction which receives evidence to develop a full record of the facts and circumstances surrounding the case of the power in particular circumstances would have a proper basis to make such a determination. I cannot justifiably conclude, however, purely as a matter of law, that obtaining execution of the power of attorney, in and of itself, constitutes an unconscionable practice under the Act.

Very truly yours,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

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