

To: Bill Henning, *Chair, Consumer Issues Subgroup*
CC: Ed Smith, Steve Harris, Juliet Moringiello; Mark Budnitz
Date: May 6, 2021
Re: Final Report of the Consumer Issues Subgroup – Remote Disablement

1. The idea of placing limits on the use of remote disablement is posed in the May 3, 2021 agenda issued by the Consumer Issues Subgroup, but it is not accompanied by any information about the cases, market practices, or existing nonuniform statutory law (if any) on the subject. Accordingly, the committee is being asked to consider making changes based on ignorance. Cannot information – impartial information – first be supplied on these matters?

2. Mark Budnitz's memo of May 6, 2021 follows the Consumer Issues Subgroup in framing the subject of remote disablement largely as though it were a *de novo* question. (*E.g.*, "If remote disablement is permitted in consumer transactions ...") Of course it is not. Article 9 authorizes disablement after default of "equipment" (9-609(a)(2)), but that is a gap-filling provision that operates when the security agreement is silent. Section 9-601(a) provides generally for enforcement of remedies that parties have agreed to, so under the UCC I know of no reason why disablement shouldn't be enforced as a general matter as to consumer goods and other non-"equipment," if agreed to. Again, if the UCC is to be changed on disablement of consumer goods it would be important to know whether courts are following that reading.

3. Grant Gilmore & Co. avoided addressing consumer issues in Article 9 because different states have very different attitudes toward consumer protection, and hence should be left to fight out such issues individually rather than holding enactment of Article 9 hostage to a set of pre-ordained rules on consumer protection. That dynamic is prominent for remote disablement of consumer goods. General principles, such as a principle that disablement should not be allowed for "essential goods," or if disablement would "create a danger to health or safety" may sound well enough until considered in detail. Enactment of either principle would mean that an auto financier would risk massive damages if it ever disables a consumer's car, even sitting parked in front of the consumer's residence, because the consumer might really really need later to get somewhere (*e.g.* to a doctor). Some might prefer exactly that result, but the financiers of the world won't, and I doubt that many would honestly think that disablement in such a situation is unconscionable. I seriously doubt that this committee could come up with rules governing the disablement of a consumer's car (to pick just one example; the list goes on) that has any possibility of being enacted uniformly. In any event, information about what is going on in the cases and in the marketplace would be a predicate to beginning responsible consideration of the subject. (*E.g.*, the list of imaginable statutory restrictions on remote disablement that appears in the Consumer Issues Subgroup's agenda begins with a restriction on disablement of "goods that provide medical benefits." To what extent, if any, is that happening? Have vendors of pacemakers really been pulling the plug on their customers?)

KCK