

# William & Mary Law Review

---

Volume 35 (1993-1994)  
Issue 4 Symposium: *The Revision of Article 2 of  
the Uniform Commercial Code*

---

Article 10

May 1994

## Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process

Yvonne W. Rosmarin

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Commercial Law Commons](#)

---

### Repository Citation

Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35  
Wm. & Mary L. Rev. 1593 (1994), <https://scholarship.law.wm.edu/wmlr/vol35/iss4/10>

Copyright c 1994 by the authors. This article is brought to you by the William & Mary Law School Scholarship  
Repository.  
<https://scholarship.law.wm.edu/wmlr>

# CONSUMERS-R-US: A REALITY IN THE U.C.C. ARTICLE 2 REVISION PROCESS

YVONNE W. ROSMARIN\*

## I. INTRODUCTION

After setting forth several approaches to addressing consumer issues in the revision of U.C.C. Article 2, Professor Miller's article recommends a "principled approach."<sup>1</sup> Those with an intimate knowledge of how the U.C.C. affects consumers on a daily basis (i.e., those who practice consumer law and represent consumers) must be included in the process of revision, as Professor Miller points out.<sup>2</sup> This Article, on the other hand, is concerned more with the end result than with the exact approach used to reach it. Inclusion in the revision process is not sufficient if the end result does not reflect the realities of how consumer transactions vary from commercial ones and how the U.C.C. shapes and controls those transactions. While consumer advocates may disagree with some of Professor Miller's theory, they would probably agree with most of his suggested changes to Article 2, including his call for consumer provisions that are different from those applicable to commercial transactions. This Article will build upon Professor Miller's contentions and will set forth some minimum guidelines for reaching an end result that should allow consumer representatives and practitioners to support the revisions when they reach the state legislatures for enactment.

While a uniform Article 2 is the goal of all parties concerned, uniformity, however much desired, will not be attained unless the revised Article 2 is fair to consumers. The revision must deal

---

\* B.A., Ohio State University, 1972; J.D., Syracuse University College of Law, 1976. Ms. Rosmarin is an attorney with the National Consumer Law Center and an official Observer to the Article 2 Drafting Committee. The positions expressed herein do not necessarily represent the views of the National Consumer Law Center.

1. Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1571 (1994). Keep in mind, however, that Article 2 is not the only article of the Uniform Commercial Code that affects consumers. Articles 3 and 4, already revised and being enacted, and Article 9, which currently is being revised, substantially affect consumers.

2. *Id.* at 1570-71, 1573 n.33.

satisfactorily with the problems that have become apparent over the years in the area of consumer transactions under the Code.

Some would see consumers as a "special interest" group, like a manufacturers' association or purchasers' organization, but this view misses the point. Consumer transactions are not those of a special interest group, they are merely a subset of commercial transactions, which involve a commercial party on one side and an individual on the other. To characterize attempts to craft fair rules for those transactions as catering to "special interests" loses sight of the fact that every individual is a consumer and needs to purchase goods. Because no single person is an expert in all areas of goods, everyone is "unsophisticated" (as compared with merchants and commercial parties) in some transactions.

Some provisions and comments of the current Article 2 reflect a policy that consumers (and sometimes all nonmerchants) are to be judged by different standards than commercial parties (or merchants).<sup>3</sup> Two sections directly set forth different rules for consumer transactions.<sup>4</sup> The courts have modified other provisions of Article 2 to address the lack of consumer rules. Based on the general underlying policies of the U.C.C., such as liberal construction<sup>5</sup> and the intent of the parties being paramount to the written document,<sup>6</sup> some courts have used the U.C.C.'s imprecise language to interpret different standards for consumers and to recognize that consumer and commercial transactions are different.<sup>7</sup> With the revision of Article 2, the treatment of consumer transactions no longer should be left to general policy and

---

3. See, e.g., U.C.C. § 2-608 cmt. 5 (1990) ("Following the general policy of this Article, the requirements [of notice of revocation of acceptance] . . . are less stringent in the case of a non-merchant buyer."); *id.* § 2-607 cmt. 4 ("[A] retail consumer is to be judged by different standards [regarding time for notice and content thereof] . . ."); *id.* § 2-318 (addressing third-party beneficiaries of warranties and providing alternatives for different rules to cover consumer transactions); *id.* § 2-719(3) ("Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.").

4. *Id.* §§ 2-318, 2-719(3).

5. *Id.* § 1-102(1).

6. *Id.* §§ 1-201(11), 1-201(3), 1-201 cmt. 3, 1-205 cmt. 1.

7. See, e.g., YVONNE W. ROSMARIN & JONATHAN SHELDON, NATIONAL CONSUMER LAW CTR., SALES OF GOODS AND SERVICES §§ 9.3.2, 27.2.2.2, 30.3.2, 30.5.1 (2d ed. 1989 & Supp. 1993).

the vagaries of court interpretations with the resulting lack of uniformity for both consumer and commercial transactions. Now is the time to acknowledge the reality that today's commercial world includes an enormous number of consumer transactions for the sale of goods.<sup>8</sup> The revised Article 2 needs to address this troublesome area directly.

## II. CONSUMER GOALS IN REVISING ARTICLE 2

The goal of consumer representatives in revising Article 2 to deal with the special problems of transactions involving individual consumers and commercial parties is neither to turn the Code into a "regulatory" statute nor to "enhance consumer protections" to an ideal state. Rather, their purpose is to achieve fair treatment in all transactions, *including* consumer transactions, which comprise a large portion of all commercial transactions and which now finally have been recognized as significant both politically as well as economically. Article 2's basic assumptions of negotiability of contract, freedom of contract, and a level playing field are based on the commercial transaction model and, for the most part, the assumptions are valid in this scenario. Because not all transactions fit these original assumptions, however, the U.C.C. needs different rules and assumptions for consumer transactions. The Code's general policy of promoting fairness makes it imperative to include special provisions dealing with consumer transactions for the Code to be fair to all parties.<sup>9</sup> Since the revision effort is to update the law and look

---

8. The author knows of no reported statistics on the subject, but it appears patently obvious that consumer transactions for the sale of goods greatly outnumber purely commercial transactions.

9. Two of the current U.C.C. provisions addressing the issue of fairness, U.C.C. §§ 1-203, 2-302 (1990), are insufficient in consumer transactions. Section 1-203 imposes an obligation of good faith, but has failed, mostly as a result of unequal bargaining power, to prevent use of adhesion contracts in most consumer transactions involving a written contract. Instead, sellers use the Code's latitude to the maximum extent possible in the name of "freedom of contract." Section 2-302, allowing the invalidation of an unconscionable contract or contract provision, similarly has failed to ensure fairness in consumer transactions as unfairness alone may not rise to the required level of unconscionability. *Id.* § 2-302 cmt. 1 ("The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.") (citation omitted).

forward to the future needs of commerce, inclusion of such recognition in the new language of the statute itself obviously seems warranted.

No matter what the consumer's level of sophistication, when dealing with a commercial party the playing field in the ordinary consumer transaction is never level. As Professor Miller points out, the commercial party usually prepares the contract and other documentation with nonnegotiable terms.<sup>10</sup> These "adhesion" contracts are presented on a "take it or leave it" basis and the consumer cannot vary the terms of the standard form contract. The seller, as the commercial party, has all the economic power on its side. If the consumer buyer wants the goods, she will have to buy from either this seller, offering an adhesion contract, or another, offering a slightly different, but similar, adhesion contract. In such situations, the notion of "freedom of contract" means that the commercial party, with its economic advantage, is free to do whatever the Code allows it to do. Therefore, the Code should provide limits to its policy of "freedom of contract" in consumer transactions.

With the broad concept of fairness<sup>11</sup> as the basic premise of Article 2, the kinds of provisions that consumers need in revised Article 2 echo certain themes. Preservation of the reasonable

---

10. Miller, *supra* note 1, at 1565.

11. The Federal Trade Commission's (FTC) criteria for promulgation of a rule against unfairness, cited by Professor Miller, Miller, *supra* note 1, at 1569 n.14, are inappropriate as criteria for acceptance of consumer provisions in Article 2. These criteria, that the consumer injury outweigh the benefits of the practice and that there be a violation of an established public policy, are inapplicable to a U.C.C. analysis. The FTC uses these criteria as the basis for implementing affirmative consumer protection rules that are meant to eliminate, prevent, or regulate certain commercial practices that may be otherwise legal. See JONATHAN SHELDON, NATIONAL CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.3 (3d ed. 1991 & Supp. 1993).

The U.C.C. itself is the legal basis for the rules and system that it creates. No special requirements need be met before acknowledging the need for different rules for consumers in certain sections of the Code. One need only recognize how consumer transactions differ from commercial ones. This recognition merely goes back to the basics of what the U.C.C. is supposed to be: a codification of rules for sales transactions. The fact that the underlying assumptions upon which the current Article 2 is based do not adequately serve in the area of consumer transactions, the realities of modern commerce, and the Code's notion of fairness are sufficient "criteria" for changing the Code.

expectations of the consumer is one of the major themes. The use of commercial language that the U.C.C. sanctions but that consumers do not commonly understand<sup>12</sup> and merger clauses that attempt to disavow oral statements made to the consumer exemplify practices that Article 2 currently allows but that can defeat the consumer's reasonable expectations.

Several corollaries follow from the notion that consumers' expectations should be preserved. A seller should not be able to use boilerplate language that would defeat those expectations, whether the expectations arise from express oral warranties or from a belief that remedies are available for breach of warranty. Requiring language to be conspicuous in a consumer transaction<sup>13</sup> does not necessarily make it fair. Requiring that a contract term be signed or initialed separately or that it be conspicuous cannot assure that the party signing or initialing fully understands the meaning and consequence of the term. In many cases, a giant "AS IS" statement or a disclaimer clause in bold face and all capital letters disclaiming the implied warranty of merchantability and any other implied warranties may be unfair no matter how large or bold the words are. Consumers may not notice even a conspicuous or separately signed clause where, as in most cases involving a written contract or agreement, they are told to "just sign by the Xs" and have no opportunity to read the document.<sup>14</sup>

---

12. For example, the U.C.C. permits the use of the term "as is" to disclaim all implied warranties, U.C.C. §2-316(3)(a) (1990), however, many consumers fail to appreciate the significance of the term. See BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMM'N, SALE OF USED MOTOR VEHICLES: FINAL STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE (16 C.F.R. PART 455), at 262-66 (1978) (discussing consumers' lack of understanding of the term "as is" in used car sales); see also 16 C.F.R. § 455.2 (1993) (requiring car dealers to place on all vehicles the type of warranty available, and where the sale is to be "as is" to state that the term "as is" means that there are no warranties and the buyer must pay for all repairs).

13. See U.C.C. § 2-316(2) (1990) (allowing disclaimers of the implied warranties of merchantability and fitness for a particular purpose only when the written disclaimer is conspicuous).

14. The reader who has not personally experienced this uncomfortable situation already is encouraged to try reading any installment purchase contract, car rental agreement, or even hotel room agreement before signing and to observe the reaction of the other party.

In fact, requiring the disclosure of contract terms alone is insufficient to produce fair terms. This lesson can be drawn from the Magnuson-Moss Warranty Act.<sup>15</sup> The purpose of the Magnuson-Moss Act was to encourage sellers and manufacturers to provide consumers with better warranties on their products.<sup>16</sup> Covering a portion of the subject matter of Article 2, this federal statute was intended to encourage better products and better consumer warranties<sup>17</sup> largely through a series of disclosure provisions.<sup>18</sup> Substantively, the Act sets out federal "minimum" standards for certain warranties.<sup>19</sup> A warranty meeting those standards is considered a "full" warranty.<sup>20</sup> As a result, most written warranties now provided are "limited," with the least substantive requirements under the Act.<sup>21</sup> Not only are full warranties rare, but manufacturers generally use their "limited" Magnuson-Moss "written" warranties to limit the duration of implied warranties, as the Act permits.<sup>22</sup>

---

15. 15 U.S.C. §§ 2301-2312 (1988).

16. *Id.* § 2302(a).

17. Federal Trade Commission, Rules Including a Statement of Basis and Purpose Under Magnuson-Moss Warranty Act, Disclosure of Written Consumer Product Warranty Terms and Conditions and Pre-Sale Availability of Written Warranty Terms, Dec. 31, 1975.

18. 15 U.S.C. §§ 2302, 2303, 2305, 2306, 2308 (1988).

19. *Id.* § 2304.

20. *Id.* § 2303(a)(i).

21. *Id.* § 2302(a)(2). Full warranties most commonly are found on small, inexpensive items with no movable working parts. These items generally cost more to send back to the manufacturer than to replace. In this situation, the manufacturer generally can be sure that it will not have many, if any, warranty claims to honor.

22. Section 108(a) of the Act prevents the disclaimer or modification of implied warranties where a Magnuson-Moss "written" warranty is given. 15 U.S.C. § 2308(a) (1988). Section 108(b), however, permits limiting implied warranties to the duration of the "limited" "written" warranty. *Id.* § 2308(b). Virtually all such warranties contain these limitations.

As Professor David Frisch persuasively argued at one Article 2 Drafting Committee meeting, limiting the duration of an implied warranty runs counter to the concept of breach of an implied warranty in the current Article 2. Any breach of the implied warranty occurs at the time of delivery, even if it is not discovered until later (unless it is a future performance warranty). U.C.C. § 2-725(2) (1990). The seller's liability for breach of an implied warranty thus arises as of the time of delivery. The statute of limitations for bringing a claim based upon such a breach is four years from when the breach occurs. *Id.* § 2-725(1)-(2). Therefore, limiting the "duration" of the warranty to a specified period of time is irrelevant because the breach theoretically has already occurred, even though it has not yet been discov-

Another theme necessary to level the playing field between consumers and commercial parties and to counter the superior economic power of the commercial seller is the desirability of reducing the likelihood of litigation. The commercial seller or manufacturer is more likely to have the resources for litigation, especially for protracted litigation, than is a consumer, who may have difficulty even in finding an attorney both willing to represent him on a relatively small claim and experienced in the fields of consumer law and the Code. This consumer disadvantage makes bright line tests, rather than provisions necessitating a court's interpretation, especially important in small dollar transactions, such as consumer transactions. Such bright line tests would eliminate the need for much litigation and make summary judgments and settlements more likely in whatever litigation does result.

The standards that the revised Article 2 provides for consumer transactions should be nonwaivable. Article 2 essentially contains the default provisions for contracts. Because consumer contracts are seldom, if ever, negotiated, they almost always use these default terms (unless the commercial party's standard form contract contains provisions even more favorable to the commercial party). In fact, virtually all standard form consumer contracts contain as many waivers, disclaimers, merger clauses, and other limitations as Article 2 currently allows. Perhaps these form contracts are just the result of drafting by transaction attorneys. But the reality of consumer transactions is that any limitations permitted will be used widely by commercial sellers against consumers.

---

ered. Section 108(b) of the Magnuson-Moss Act does not address the statute of limitations for bringing the claim of breach.

Limiting the duration of the warranty, as permitted by the Act, would comport better with a statute of limitations by which accrual of the cause of action occurs upon discovery of the breach. Section 108(b) then could be viewed as permitting the warrantor to place an outside limit on the time during which a cause of action could accrue, and the buyer would have to discover the breach within that period of time. Professor Miller also proposes a statute of limitations based on a discovery rule. Miller, *supra* note 1, at 1582-83.

Section 108(b) would fit Article 2's current statute of limitations scheme if the implied warranty of limited duration is treated as a future performance warranty, i.e., that no defect in the goods will occur during the limited time period.

### III. UNIFORMITY AND THE NEED FOR CONSUMER PROVISIONS

Consumers and commercial entities need uniformity in their transactions with each other as much as the commercial parties need uniformity among themselves.<sup>23</sup> A large number of consumer sales involve manufacturers or sellers who do business nationwide. National advertisements tout the products on television and radio, and in magazines and newspapers. Since the U.C.C. was first drafted, the nature of the nation's economy has changed dramatically. Mass marketing, mass distribution, and mass contracting have shifted the nature of sales transactions away from the classic two-party contract paradigm. The typical consumer transaction is no longer a local one with a local merchant or supplier.

Even the concept of consumer protection is much the same throughout the nation. Every state has some version of an unfair and deceptive acts and practices (UDAP) statute.<sup>24</sup> Though many of the statutes are very similar, they vary from state to state.<sup>25</sup> Such variations probably are related more to the local legislative process than to differing standards of consumer protection.<sup>26</sup>

Uniformity in UDAP statutes, however, is not as critical as in the sale of goods. UDAP statutes do not require multistate sellers and manufacturers to jump through different hoops depending on the state in which the transaction occurs. These multistate parties need not research fifty different laws that might govern their behavior, because they can always choose not to act unfairly or deceptively. However, in a sales transaction, these same multistate parties need some certainty as to the terms of warranties, remedies, disclaimers, and the like. A manufacturer selling its goods nationally will not want to draft fifty different contracts or warranty documents to deal with the different laws governing consumer transactions in every state.

---

23. See Frederick H. Miller et al., *Introduction to Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449, 1451 (1991).

24. SHELDON, *supra* note 11, §§ 3.4.1.2.3, 3.4.1.2.4.

25. See *id.*, app. A at 527-42 (outlining state UDAP statutes).

26. See *id.* § 3.4.1.

Adding provisions to Article 2 acknowledging a distinction between consumer transactions and purely commercial ones is not really "consumerism," as suggested by Professor Miller.<sup>27</sup> Rather than stating a jurisdiction's public policy, such new provisions would help define the contract between a consumer and a commercial party. The policies of fairness and preservation of the parties' expectations and their real bargain are embodied in the Code already and all jurisdictions enacting the Code presumably have agreed on its policies. Addressing consumer issues in Article 2 is merely a matter of defining how contract law will work to achieve those policies with regard to consumer transactions. The Article 2 revision process provides an opportunity to set national standards for sales of goods involving consumers in a national economy.

To refuse to include consumer provisions in Article 2 today, based on negative experiences in the past, such as the "limited success" of the Uniform Consumer Credit Code (U.C.C.C.) twenty or more years ago,<sup>28</sup> is to ignore what has happened since that time. As Professor Miller points out, the consumer movement has "become a legislative force"<sup>29</sup> and consumer law has "become an accepted concept to modify or supplement commercial law."<sup>30</sup> Both consumer protection and the economy are very different now. The strong tradition of consumer protection was in its infancy at the time of the U.C.C.C.'s enactment.<sup>31</sup> The routine practices of twenty years ago are no longer acceptable, and more "consumer protection" laws are on the books.

NCCUSL and the ALI should present a Uniform Commercial Code encompassing all transactions for the sale of goods, including nonconsumer transactions, to the state legislatures for enactment. Since the U.C.C.C. was presented to the states twenty

---

27. See Miller, *supra* note 1, at 1567, 1572-73.

28. See Fred H. Miller & Ralph J. Rohner, *In Search of a Uniform Policy—State and Federal Services of Consumer Financial Services Law*, 37 BUS. LAW. 1415, 1418 (1982).

29. See Miller, *supra* note 1, at 1570.

30. *Id.*

31. See Edward Rubin, *Efficiency, Equity, and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 556 n.28 (1991) (pointing to the mid-1960's as the beginning of the consumer movement in the United States).

years ago, no nonconsumer group with national authority, such as NCCUSL or the ALI, has made any concerted effort to pass any legislation designed for consumer transactions. A prediction that state legislatures could not pass a revised Article 2 containing special consumer provisions without problems and resulting nonuniformity therefore is premature.<sup>32</sup> If NCCUSL had tried recently to pass such legislation and had been unsuccessful, one might argue for restraint in directly addressing the needs of consumers in the revision of Article 2. With appointed commissioners representing each state, NCCUSL has political influence and power in the state legislatures. This power and influence, along with its credibility and that of the ALI, could give a revised Article 2 containing consumer provisions a strong chance for success.

The original Code drafters attempted a forward-looking approach.<sup>33</sup> NCCUSL should use its leadership to do the same now by taking an affirmative, aggressive approach to adding appropriate consumer provisions to the revised Article 2. These additions will be necessary for the Code to reflect the state of the law and commercial practices not only today but for many years to come. Those involved in revising Article 2 have recognized that the use of electronic data and the growth of the computer software industry will continue to have a major impact on commercial practices in the sale of goods.<sup>34</sup> The drafters also should recognize that the different nature of consumer transactions warrants a forward-looking approach to the law governing those transactions. Such an approach could ensure that the revised Article 2 is not outdated before its presentation for en-

---

32. Cf. Miller, *supra* note 1, at 1573.

33. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 183 n.186 (1960) ("[O]pen-ended drafting, with room for courts to move in and readjust over the decades, had been a basic piece of the planning [of the U.C.C.]").

34. In fact, special committees meet and produce reports and presentations to advise the Article 2 Drafting Committee. These electronic data and software committees even have official liaisons to the Drafting Committee. The organizers of the Drafting Committee apparently have no trouble seeing these areas as subsets of the larger world of commercial law possibly needing special rules. However, no comparable committee has been charged with studying and reporting on the special problems of consumer transactions, a more widespread and voluminous subset of commercial sales.

actment. Otherwise, the revised Article 2 may be opposed by consumer groups or legislators concerned about its impact on their consumer constituents, or met with nonuniform amendments as each state tries to provide consumer rules not included in the revised Article 2.<sup>35</sup>

Ignoring consumer provisions in the revision of Article 2 will guarantee nonuniformity, as pointed out by Professor Miller.<sup>36</sup> Problems arising with Articles 3 and 4 during their enactment resulted from the lack of consumer involvement and input in the drafting process.<sup>37</sup> Consumer criticism or opposition, nonuniform amendments, a need for further drafting and amendments, and nonuniformity in final form have characterized the enactment process for these articles.<sup>38</sup> Troublesome nonuniform amendments were proposed to the articles because of the perceived deficiencies in consumer protection, not because the states considered them to be too liberal.<sup>39</sup> Not only must a re-

---

35. The leaders of NCCUSL, ALI, and the Article 2 Drafting Committee must take an affirmative, perhaps even aggressive, approach to ensure that the final draft of Article 2 addresses consumer needs. See generally Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799 (1992) (providing a detailed description of the drafting committee process). These leaders are to be commended for appointing consumer representatives and practitioners as official observers in the revision process. The very small number of these representatives, however, reflects the fact that consumer law is practiced mainly by understaffed and underfunded nonprofit organizations and a small number of widely dispersed private attorneys practicing alone or in very small firms.

The small number of consumer observers to the Drafting Committee is no match for the representatives of commercial sellers and manufacturers, who are able to attend the Drafting Committee meetings in large numbers. Although the revision process has provided an opportunity for full discussion of consumer issues at Drafting Committee meetings, the Committee should continue to ensure that the large number of commercial representatives, whose clients have superior economic power sufficient to control the terms of consumer transactions, do not likewise determine the provisions for consumer contracts for years to come. The leadership of the Drafting Committee is instrumental in leveling the playing field during the drafting process, so that in turn the revised Article 2 can level it for consumers.

36. Miller, *supra* note 1, at 1571-72.

37. See Rubin, *supra* note 31, at 592 (noting in his conclusion that "the drafting process of the revisions [of Articles 3 and 4], like that of the original, was dominated by banking interests").

38. *Id.*

39. See, e.g., Hillebrand, *U.C.C. Articles 3 and 4 in the California Legislature: A New Focus on Consumer Protection in Uniform Law Proposals*, 47 CONSUMER FIN. L.Q. REP. 123, 128 (1993) (discussing California's modifications to Articles 3 and 4).

vised Article 2 provide fair rules for consumers, but it must also satisfy the legislators, who will be asked to enact it, that the article treats their consumer constituents fairly.

#### IV. THE WRONG WAYS TO GO

Needless to say, the first two approaches that Professor Miller explored and rejected, to leave Article 2 as it currently stands or to eliminate any consumer provisions from it and leave the rules for consumer transactions to other law,<sup>40</sup> would be unsatisfactory to consumers. Leaving Article 2's treatment of consumers in its present form does not sufficiently consider the issues examined above. Professor Miller's second rejected approach, to omit consumer coverage altogether, does not differ that much from the first rejected approach, as Article 2 presently contains very few consumer provisions.<sup>41</sup> However, this approach would mean taking away from consumers the little protection that Article 2 now provides.

The rights and remedies now available to consumers in Article 2, although insufficient, are important and are used currently by practitioners representing consumers. For example, the provisions for rejection<sup>42</sup> and revocation of acceptance<sup>43</sup> codify a belief or assumption in most consumers, though ignorant of any legal basis therefor, that they have a right to return purchased goods to the merchant. In fact, most retail businesses, either as a courtesy or as an official policy, will accept returned merchandise without regard to defects, at least for a specified period of time.<sup>44</sup> After the consumer has taken action based on this assumed right to return, her attorney may use the Article 2 rights to support the client's assumptions.

The current dearth of consumer provisions in Article 2 has led courts to fill the gaps with tortured interpretations of Article 2's

---

40. Miller, *supra* note 1, at 1571-72.

41. See *supra* note 4 and accompanying text.

42. U.C.C. § 2-601 (1990).

43. *Id.* § 2-608.

44. Probably due to this practice, some consumers believe that they always have a right to return goods if they change their mind. For some merchants, such as automobile dealers, this belief is not true, perhaps due to the nature of the goods. The revisions may need to address returns not based on defects.

provisions. In attempts to accommodate consumer cases in which applying the rules intended for commercial transactions would be unfair, the courts sometimes fail to distinguish consumer and commercial cases or to limit application of these decisions. When these interpretations are argued in subsequent commercial cases, courts may misapply the interpretations, with unfair or unintended results. With better statutory provisions as guidance, the courts would be less likely to bend the rules in the first instance.

Protections outside of Article 2 for consumer buyers are inadequate to counter the incorrect assumptions underlying the Article 2 provisions affecting consumer transactions. Most non-Article 2 protections at the transaction stage merely regulate credit terms of the sale and disclosures.<sup>45</sup> The FTC Used Car Rule,<sup>46</sup> which governs some aspects of the sale of used cars, is mainly a disclosure rule and does not provide the consumer with a private right of action.<sup>47</sup> Other FTC rules cover only limited aspects of certain transactions and are mainly disclosure rules as well.<sup>48</sup>

Consumer advocates would oppose the development of a separate consumer law of sales to be completed at some later date. Under this scenario, either the commercial rules, or the common law and *Restatement*, would be applied to consumer transactions in the meantime. Continued application of existing commercial law would result in unfairness to the consumer, as previously

---

45. The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1988), is a partial exception. It does regulate *some* terms of the sale (warranties) and provides for disclosures. However, the Magnuson-Moss Act is very limited in its application. Its substantive provisions apply only to express written warranties of a very specific type, *id.* § 2304(a), or to implied warranties where such an express written warranty is also given (or where a service contract is involved), *id.* § 2308. Moreover, many of its substantive provisions are irrelevant to most consumer sales because these sales do not provide "full" warranties. *See supra* note 21.

46. F.T.C. Used Motor Vehicle Trade Regulation Rule (Used Car Rule), 16 C.F.R. § 455 (1993).

47. Requirements of the Used Car Rule may be enforceable by a claim under the state's UDAP statute, depending on whether the statute recognizes violations of the FTC Act and rules as violations of the state statute's provisions. *See* SHELDON, *supra* note 11, at 222 n.567.

48. *See, e.g.*, F.T.C. Credit Practice Rule, 16 C.F.R. § 444.3 (1993); F.T.C. Rule Concerning Preservation of Consumer's Claims and Defenses (Holder Rule), 16 C.F.R. § 433 (1993); F.T.C. Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. § 429 (1993); F.T.C. Mail Order Merchandise Rule, 16 C.F.R. § 435 (1993).

discussed.<sup>49</sup> A reversion to the common law and *Restatement* would result in uncertainty both for consumers and for the commercial parties dealing with them. The uncertainty would have even more impact on the consumers because the fewer number of bright lines in the law would lead to more litigation. Consumers would be at a severe disadvantage because they do not have attorneys on retainer and have much less money for litigation, especially for cases involving a relatively small amount. Consumers and the commercial parties engaging in consumer transactions are entitled to the same certainty in these transactions as are commercial parties in an entirely commercial transaction.

The revision process for any of the U.C.C. articles is a long one, taking several years to complete.<sup>50</sup> To create an entirely new consumer sales code most likely would require an even more extended period. The same careful thought and expert study that go into drafting and enacting a uniform commercial transactions law and the weight of NCCUSL should be available for consumer transactions. However, NCCUSL and the ALI may not be as committed to a new consumer sales code and its subsequent enactment as they are to revision of the existing U.C.C.

## V. SPECIFIC CONSUMER PROVISIONS THAT ARE NECESSARY

### A. *General Consumer Concerns*

In general, Professor Miller's "principled approach" accommodates many of the needs of consumers in revising Article 2. However, the approach to consumer issues need not be as limited as he describes. This Section will explore those specific provisions that are essential for consumers in a revised Article 2. The general policies of the Code and Article 2 serve as a backdrop for these provisions, which would represent a codification of those general Code policies. These principles need to be stated explicitly for consumer transactions to serve as bright lines and to otherwise eliminate much of the uncertainty leading to litigation. Their codification would recognize the realities of the current

---

49. See *supra* notes 10-22 and accompanying text.

50. See William D. Warren, *U.C.C. Drafting Method and Message*, 26 LOY. L.A. L. REV. 811, 813-16 (1993).

national economy in which consumers lack full freedom of contract and equal bargaining power.

Protecting the reasonable expectations of the parties is one of the overriding policies of the U.C.C.<sup>51</sup> Because consumers are not commercial parties, their expectations and the standards of reasonableness by which these expectations are judged will vary drastically from those in many purely commercial transactions. The provisions offered here also strive to accommodate the Code policy of preserving the actual bargain of the parties and assuring that this actual bargain prevails over any writing to the contrary.<sup>52</sup> In determining the terms of that bargain and the consumer's reasonable expectations, the facts and circumstances surrounding the transaction are relevant.<sup>53</sup> The burden should be shifted to the commercial party to show that the writing that it drafted or provided is the parties' real agreement.<sup>54</sup> Taking these policies into account and injecting consumer provisions into Article 2 where needed, the Drafting Committee may keep the courts from torturing the Code to fit consumer fact situations and thereby creating precedent that later may be applied inappropriately to commercial cases.

### B. Warranties

Article 2 currently contains provisions on how express and implied warranties are created or arise in the absence of permitted disclaimers.<sup>55</sup> However, Article 2 does not provide for any mandatory, nondisclaimable warranties. In contrast, state

---

51. See U.C.C. § 1-205 & cmt. 1 (1990).

52. See *supra* note 6 and accompanying text.

53. U.C.C. § 1-201 (3) & cmt. 3 (1990); *id.* § 2-301 cmt.

54. At the time of this writing, the Drafting Committee has preliminarily agreed to a new provision in the parol evidence rule of revised Article 2 by which a merger clause is not conclusive of a determination of intent under § 2-202. U.C.C. § 2-202(b) (Discussion Draft Dec. 21, 1993). Consumers should applaud this provision as a step in the right direction. However, this provision was not embraced unanimously and is subject to change. To completely invalidate merger clauses in consumer contracts, or at least to place on the seller a burden to prove that the consumer understood and expressly agreed to the merger clause, would address the problems with consumer transactions and recognize their economic realities even better.

55. See U.C.C. §§ 2-313 to 2-316 (1990) (providing for express and implied warranties and their exclusion or modification).

lemon laws<sup>56</sup> and the federal Magnuson-Moss Act<sup>57</sup> do provide for what can be considered mandatory warranties and for the terms of those warranties, albeit under limited circumstances.<sup>58</sup> At a minimum, the revised Article 2 should include those substantive and remedial<sup>59</sup> provisions of the Magnuson-Moss Act that are relevant to the subjects within the scope of Article 2, and that are currently the law in spite of contradictory provisions in the current Article 2.<sup>60</sup>

For example, disclaimers of the implied warranties of merchantability and fitness for a particular purpose should not be permitted when a warranty that qualifies as a Magnuson-Moss "written warranty" is given or a service contract is sold within ninety days of the sale of the goods.<sup>61</sup> Any such attempted disclaimer or modification should be ineffective.<sup>62</sup> In addition, Article 2 should account for remedies and other duties that the Magnuson-Moss Act imposes. Such an accounting could incorporate explicitly requirements and limitations by reference to those in the Magnuson-Moss Act.<sup>63</sup>

Express warranties can be difficult for the consumer to prove. While they often are made orally, contracts virtually always

---

56. See ROSMARIN & SHELDON, *supra* note 7, at app. I (providing a table of all lemon laws).

57. 15 U.S.C. §§ 2301-2312 (1988).

58. *Id.* §§ 2304, 2308.

59. Inclusion in the revised Article 2 of all the disclosure provisions of the Magnuson-Moss Act seems unnecessary.

60. The difference between Article 2's warranty provisions and those of the Magnuson-Moss Act currently creates much confusion for consumer transactions regarding the actual amount of warranty protection. This confusion occurs because the Magnuson-Moss Act, when applicable, provides more protection than the official version of Article 2 and less protection than some states' variations on the warranty disclaimer and privity provisions. See Donald F. Clifford, *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV. 1011 (1993). Moreover, the Magnuson-Moss Act preempts any provision of revised Article 2 offering less protection. See, e.g., 15 U.S.C. § 2308(c) (1988) (making ineffective all "disclaimer[s], modification[s], or limitation[s] made in violation of the Act").

61. See 15 U.S.C. § 2308 (1988).

62. See *id.* § 2308(c).

63. However, such a revision need not require resort to a dispute settlement mechanism, as contained in the Magnuson-Moss Act. This requirement is merely for suing under the federal statute. *Id.* § 2310(a)(3). A dispute settlement procedure should not be required in any other cases under Article 2.

contain a merger clause and/or a disclaimer of any oral statements by the seller's employees.<sup>64</sup> Merger clauses thus can be viewed as defeating the true bargain of the party, in violation of the underlying policy of preserving it. For this reason, they should be ineffective in consumer transactions unless the party seeking to use a merger clause proves that both parties actually intended its substance. The prevalent use of merger clauses in consumer transactions, without the buyer's knowledge or agreement, demonstrates that disclosure alone in such transactions is insufficient.<sup>65</sup>

Revised Article 2 should clarify that a manufacturer is a seller in relation to a consumer buyer and that any manufacturer's warranty is express within section 2-213.<sup>66</sup> Furthermore, the revised Article 2 should not require that an express warranty be the basis of the bargain or that the consumer buyer rely on it. Thus, express warranties would include advertisements directed at the public and manufacturers' warranties that consumers are not aware of or that are read only after purchase of the goods. Fairness would seem to require this approach. All consumers purchasing the goods will pay a price which includes the manufacturer's calculation of its cost to comply with the warranty extended or advertised standards. However, some consumers may be unable to prove that they saw the warranty or advertisement let alone relied upon it. Even if they did not see it, they should receive the same benefit for the same price paid. Moreover, requiring consumers to prove that they saw an express written warranty or a particular advertisement would unnecessarily drive up the cost of litigation for consumers.

### C. *Disclaimers of Warranties*

Disclaimer of implied warranties, especially of the implied warranty of merchantability, is one of the most important and

---

64. Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1414.

65. Professor Miller's suggestion of an affirmative disclosure to the consumer on the impact of the parol evidence thus would not be effective. See Miller, *supra* note 1, at 1574-75 n.37.

66. See discussion of privity *infra* part V.G.

needed areas of revision in Article 2. Disclaimers are often a troublesome area in consumer transactions. Disclaimers of warranties in consumer sales transactions are used so frequently that the absence of disclaimers is conspicuous.<sup>67</sup> Virtually all consumer sales concluded by written agreement attempt to disclaim or limit implied warranties.<sup>68</sup> Article 2 currently allows a seller to disclaim or modify warranties, but places no limitation on its ability to do so, unlike the Magnuson-Moss Act.

The notion that a purchased product should be fit for its ordinary purposes, essentially the most common aspect of the warranty of merchantability to apply to consumer transactions, is so basic that most consumers will assume it, without ever having heard of the term "merchantability." Allowing merchants and manufacturers to disclaim the implied warranty of merchantability means allowing a seller to say that it does not promise that the goods will be fit for their ordinary purposes, most likely the purpose for which the consumer is buying the goods. In most cases, if consumers fully understood such a disclaimer, they probably would not agree to buy something under those terms. Because most consumers thus truly have not agreed to the disclaimer of the warranty of merchantability, the disclaimer in the form contract is not the true bargain of the parties.

Allowing disclaimers by clauses in contracts or written warranties,<sup>69</sup> most of which are the seller's standard forms, further illustrates how the supposed sufficiency of disclosure is inappli-

---

67. In fact, the typical clause disclaiming implied warranties often attempts to disclaim any express warranties as well, contrary to the express language of § 2-316(1). Debra L. Goetz et al., Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1258 (1987).

68. When the warranty is only limited in duration and not disclaimed entirely, a Magnuson-Moss "limited written warranty" generally has been given because the warrantor by federal law cannot disclaim implied warranties, but is permitted to limit their duration to the duration of the "limited warranty." 15 U.S.C. § 2308 (1988); see also *supra* note 22 (discussing limiting the duration of implied warranties).

Although the warranty of fitness for a particular purpose is very important when applicable, because the warranty of merchantability affects all consumer sales transactions, it is the area in which most problems occur.

69. Those disclaimers in written warranties that the consumer may see only after the sale are especially invidious and clearly do not indicate the agreement of the parties at the time of the sale.

cable to consumer sales transactions.<sup>70</sup> No matter how conspicuous the disclaimer,<sup>71</sup> if the typical consumer contract is not read or the consumer has no ability to negotiate different terms, disclosure of the disclaimer does not suffice and is irrelevant. Additionally, because typical consumers presumably would not buy the goods if they believed that there was no assurance of fitness for their ordinary purpose,<sup>72</sup> disclaimers of the warranty of merchantability in consumer transactions are not fair.

Prohibiting the disclaimer of warranties of merchantability would acknowledge the realities of consumer transactions and would help eliminate the economic inequities in those transactions. A substantial number of states already either prohibit or restrict such disclaimers.<sup>73</sup> Prohibiting such disclaimers achieves Article 2's policy of fulfilling the reasonable expectations of the parties. The current language of Article 2 would have to be substantially altered, but the substance would not be changed. Under the current Article 2, a consumer can assert a breach of the warranty of merchantability even though the contract contained a form disclosure to which he did not knowingly agree. However, to prove that no agreement existed would require substantial litigation and effort.<sup>74</sup> Revising Article 2 to

---

70. Whether this method is a disclosure at all may be questioned in most cases. In the typical consumer transaction, a consumer's reading of the entire contract is either not permitted or discouraged as a practical matter. In many transactions, the consumer may be unable to read at the level of complexity at which the contract is written or to read English at all.

71. A written disclaimer must be conspicuous. U.C.C. § 2-316(2) (1990). The expression "as is," however, may be inserted to exclude all implied warranties, and need not be conspicuous. *See id.* § 2-316(3)(a).

72. Some would say that disclaimers of the merchantability warranty should be allowed because some consumers may want to buy merchandise that is flawed, "irregular," "seconds," or salvage (e.g., a junked car on which to learn auto mechanics). The response to this argument is easy. By its terms, the warranty of merchantability means only that the goods be fit for their *ordinary* purpose or "pass without objection in the trade under the contract description." *Id.* § 2-314(2)(a) & (c). Thus, "seconds" or "salvage" goods, clearly labeled as such, would have a lower quality as the expectation for fulfilling the warranty. A similar analysis would apply to used goods. Eliminating disclaimers of the merchantability warranty clearly would not impose some kind of strict liability on all transactions, as Professor Miller suggests. *See Miller, supra* note 1, at 1583 n.71.

73. *See Clifford, supra* note 60, at 1021, 1025-27, 1030-34.

74. Comment 1 to § 1-205 states:

prohibit merchantability disclaimers explicitly would merely draw the bright line necessary for consumers. Without a bright line, litigation is often necessary, and merchants may assert disclaimers to discourage consumers from pursuing legitimate claims. Few consumers would realize that they could challenge the language in a contract.<sup>75</sup> Anything less would neglect the Code's underlying policies and would encourage the continued use of form disclaimers or boilerplate language in consumer form contracts drafted in accordance with the lesser standards.

#### *D. Remedies That Work Are Necessary*

Although a minimum statutory remedy for damages, which Professor Miller discusses,<sup>76</sup> may be useful in Article 2 and is certainly appropriate in some other parts of the Code,<sup>77</sup> this remedy is not a primary goal for consumers in a revised Article 2.<sup>78</sup> Rather, the need for some clarification and adjustment of

---

This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

U.C.C. § 1-205 cmt. 1 (1990); see also ROSMARIN & SHELDON, *supra* note 7, § 9.2.5.

Of course, to convince a court to throw out the terms of a written contract completely would take much persuasion and evidence of the circumstances surrounding the transaction. In many cases, the evidence may consist of one party's word against the word of the other. Such proof would require litigation and perhaps more financial resources than possessed by the average consumer with a merchantability warranty claim.

75. See *supra* note 6 (listing U.C.C. sections that provide the agreement should be interpreted in the context of the surrounding circumstances and intent of the parties).

76. Miller, *supra* note 1, at 1576-77.

77. Article 9 currently has a remedy for minimum statutory damages in consumer transactions. U.C.C. § 9-507(1) (1990). Unlike Article 2, Article 9 gives the commercial party, a creditor, the broad extrajudicial self-help remedy of repossession. *Id.* § 9-502(1).

78. Professor Miller states the concern that minimum statutory damages may be inflexible and lead to increased litigation, similar to the increase in litigation brought about by the Truth in Lending Act and the Fair Debt Collection Practices Act. Miller, *supra* note 1, at 1577 & n.41. This concern is contradicted, however, by his later acknowledgment that "no known evidence clearly shows that allowing recov-

Article 2's existing remedies and a commitment to keep other remedies free of waivers and limitations is more urgent. For example, a revised Article 2 should clarify the recoverability of expenses incurred from financing the sale as consequential damages.<sup>79</sup> It also should clarify limitations on the ability to restrict consequential damages contained in section 2-719. Consumers expect at least a "fair quantum of remedy for breach of the obligations or duties" in the contract.<sup>80</sup> This expectation requires more restrictions on the commercial party's ability to limit the consumer's remedies for the commercial party's breach than currently provided in section 2-719.

Section 2-717, which allows the buyer to deduct damages resulting from a breach from the balance of the price still due, should be clarified for consumer buyers. This section is useful

---

ery of at least attorney's fees and costs for consumers in Code actions would prompt undue litigation." *Id.* at 1577 n.45. Moreover, the Truth in Lending Act and the Fair Debt Collection Practices Act are not comparable to Article 2. Unlike Article 2, the Truth in Lending Act is a disclosure statute. Minimum statutory damages are a necessary deterrent because actual damages resulting from nondisclosure would be very difficult to prove in most cases.

The federal Fair Debt Collection Practices Act is another example that actual damages can be difficult to prove. The injury caused is often a coercion of the consumer into paying a bill that he may not have paid at that time without the debt collector's deceptive or unfair actions, perhaps leaving the consumer without the money to pay a more pressing debt, such as residential rental payments or a secured car loan. Damages of emotional distress for harassment may be difficult to prove in some circumstances, especially if the consumer did not seek medical attention or if the harassment did not result in physical symptoms.

Article 2 contains the substantive rules of contract formation, performance, and remedies. It is not a disclosure statute. As noted by Professor Miller, the Equal Credit Opportunity Act, another substantive statute, has generated a different litigation experience despite its provision for punitive damages. *See Miller, supra* note 1, at 1577 & n.44. Moreover, damages for violation of Article 2's requirements or for breach of the contract generally are included under its damages provisions. U.C.C. §§ 2-713 to 2-715 (1990).

79. *Compare Lone Star Ford, Inc. v. McGlashan*, 681 S.W.2d 720 (Tex. Ct. App. 1984) (holding that finance charges could be considered actual damages resulting from misrepresentation made during the sale of a used car) *with Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 735 F.2d 177 (5th Cir. 1984) (holding that finance charges incurred in the purchase of an airplane were not incident to the seller's breach and therefore not recoverable as consequential damages). In addition, loss of use, sales tax, registration fees, repair costs, lost wages, and storage costs clearly should be included in a consumer's consequential damages.

80. Article 2 currently calls for this remedy. U.C.C. § 2-719 cmt. 1 (1990).

for consumers because it allows the consumer buyer to make an appropriate adjustment in the purchase price without being in default. It avoids the unfair result of having to pay the full price after a problem has developed and later sue for damages. What is not completely clear is whether the installment credit consumer buyer can deduct damages from the next installments due or must wait until the last installment payments are due.<sup>81</sup> A simple clarification in the comments may lessen the chances of a creditor thrusting the matter into litigation by declaring a default and repossessing the collateral or beginning a collection action when a consumer buyer deducts damages from current installments due under an installment credit contract.<sup>82</sup>

In fashioning remedies that will work for consumer buyers, the Drafting Committee should recognize the need for an alternative to cover.<sup>83</sup> Rarely a practical remedy, cover is often impossible for consumers, who may not have the financial resources to invest in duplicate goods<sup>84</sup> or whose need for the goods may be immediate.<sup>85</sup> Rejection and revocation of acceptance are thus essential for consumer transactions.<sup>86</sup> These tools must remain easily available. Furthermore, Article 2 must retain its existing flexibility in allowing very informal notice for those remedies, and for breach in general.<sup>87</sup> The ability of sellers to prevent rejection and revocation through a limitation of remedies<sup>88</sup> should be eliminated or greatly restricted.

---

81. See ROSMARIN & SHELDON, *supra* note 7, § 29.3.4.2. This issue may be critical for installment buyers.

82. The language of U.C.C. § 2-717 and its supporting policies favor allowing an immediate deduction. See *id.* § 29.3.4.2.

83. See U.C.C. § 2-712 (1990) (providing that the buyer may purchase goods in substitution for those due from the seller upon breach of the contract).

84. For example, a consumer may not have the resources to purchase another car.

85. For example, the consumer who buys a new video camera to take on vacation and discovers, in trying it out, that the product does not work properly may need an immediate replacement.

86. See U.C.C. § 2-602(a) (1990) (providing that the buyer may reject goods "within a reasonable time after their delivery or tender"); *id.* § 2-608 (stating the circumstances under which a buyer may revoke his acceptance).

87. See *id.* § 2-607 cmt. 4.

88. *Id.* § 2-719 (permitting an agreement limiting the buyer's remedy).

### 1. *Attorney's Fees*

At a minimum, attorney's fees and costs should be included as consumers' remedies under Article 2. This remedy is necessary to encourage the representation of consumers, who, unlike many commercial parties, have no in-house counsel or attorneys on retainer. When claims are relatively small, sometimes less than the costs of pursuing the claims, retainer fees can make legal representation prohibitive for consumers. The availability of fees would encourage attorneys to take consumers' cases without requiring a retainer up front. Attorneys would have a reasonable prospect of recovering fees and reimbursement of costs.<sup>89</sup>

Awarding attorney's fees also serves a deterrent function. The risk of doing bad business increases when getting "caught" means exposure to liability for attorney's fees. Moreover, the availability of attorney's fees would increase the likelihood of getting "caught" doing bad business because a consumer who has suffered damages would be better able to sue for them. As Professor Miller points out, experience has not demonstrated that attorney's fees would prompt undue litigation or cause any deleterious effects, rigidity, or inflexibility.<sup>90</sup> The only flexibility that these fees would decrease is the commercial party's "flexibility" to breach the contract or violate the law. Exposure to liability for fees and costs also has a tendency to cut down on litigation and encourage settlement because commercial parties have less incentive to stall the litigation until the case goes away. This ability to stall is especially implicated when the commercial party has the resources to continue the litigation while wearing down the resources of the consumer.

As Professor Miller points out, the contract, prepared by the commercial party, most likely will provide for attorney's fees and

---

89. Attorney's fees are important for both consumers ineligible for free legal services and those represented by legal services programs. The fees that legal services programs receive from litigation encourages them to take on cases that might otherwise be seen as a drain of resources and as low priority or not a priority at all. Once the case is taken, the potential of cost recovery would allow the attorney, whether in a private or legal services practice, to pursue the claim zealously, knowing that costs, such as those for necessary depositions, can be awarded at the end of the case.

90. See Miller, *supra* note 1, at 1577-78 nn.45-46.

costs of litigation necessary for the seller to enforce the contract.<sup>91</sup> The statutory availability of attorney's fees and costs to a prevailing consumer is another way to level the playing field between the consumer and commercial parties to the transaction. Because the contract terms in a consumer transaction generally are not negotiable, statutory provision of fees and costs recovery will provide the needed balance.

## 2. *The Problems with Alternative Dispute Resolution*

One of the major problems with any potential use of alternative dispute resolution in consumer transactions is the growing trend to include compulsory arbitration clauses in standard form contracts.<sup>92</sup> Such clauses could, and most likely would, become a routine part of the boilerplate of consumer contracts, much like merger clauses and warranty disclaimers are now. Compulsory binding arbitration would impact negatively on consumers in several ways.

One important right that is lost if binding arbitration is required is the right to a jury trial. In many consumer cases, the availability of a jury is critical. The potential of a jury trial and jury verdict are frequently a serious consideration by merchants and creditors in settling a case before trial. Because juries generally sympathize with a consumer who has been taken advantage of, access to a jury may be the difference between winning and losing the case.<sup>93</sup> Arbitrators, on the other hand, have generally been involved in arbitrating nonconsumer commercial disputes and may be unfamiliar with consumer protection provisions or may be more sympathetic to the commercial party in consumer disputes. If arbitration clauses are buried in the boilerplate of consumer contracts, the consumer would not be knowingly giving up the right to a jury trial.

---

91. *Id.* at 1576-77 n.40.

92. Portions of this Section are drawn or adapted from a previous work by the author, *Creditors Increasingly Require Arbitration of Consumer Claims*, 11 NCLC REPORTS, DECEPTIVE PRACTICES & WARRANTIES EDITION 5 (Sept./Oct. 1992).

93. One factor leading to the decisions of the Bank of America and Wells Fargo Bank, both California banks, to institute an alternative dispute resolution program was a poll showing that the public harbors a great deal of hostility to banks and other lenders. *Id.*

Another consequence of compulsory binding arbitration can be the loss of an opportunity to appeal. The arbitration process provides little or no right to appeal. Moreover, the arbitrator is not necessarily bound to follow judicial precedent. The arbitrator also has broad discretion to choose a remedy, and arbitrators have a tendency to use this discretion to award actual damages only under basic common law notions. Where attorney's fees are available for consumers, this tendency often results in failure to award them.

Very little discovery occurs in an arbitration beyond basic document production. This lack of discovery is a drawback to consumers, but not to the merchants and creditors, who will already have available to them from their own files all of the information they need to proceed. In addition, this process has no real format for preliminary motions which may streamline a case and eliminate extraneous issues. Arbitration proceedings generally proceed directly to the merits of the claim.

An arbitration may cost much more than an action in court.<sup>94</sup> Indigent consumers would be able to file *in forma pauperis* in most courts and waive the fees required to bring an action in that forum. Even if a compulsory arbitration program had a provision for waiver of fees for indigent consumers, the issue still would arise as to large fees charged to consumers who may not quite qualify as indigent yet nevertheless could not afford the fee.

### *E. Limitations of Remedies*

Comment 1 to section 2-719 currently requires "at least a fair quantum of remedy for breach of the obligations" under the contract and states that "it is of the very essence of a sales contract that at least minimum adequate remedies be available."<sup>95</sup> This commentary language should be moved into the language of the statute, at least for consumer transactions. The same limitation placed on liquidated damages by section 2-718(1) should be placed on any limitations on consumers' remedies.<sup>96</sup> Any limita-

---

94. An arbitration program required in ITT's standard form loan contracts involved a \$750 hearing fee.

95. U.C.C. § 2-719 cmt. 1 (1990).

96. See *id.* § 2-718 (limiting liquidated damages to that which is reasonable and

tion of remedies should be "reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy."<sup>97</sup>

The typical limitation under section 2-719 limits a consumer's remedies to repair or replacement of the goods.<sup>98</sup> In many cases, this remedy is adequate. However, in many other cases it is not. In some cases, the nature of the goods make repair or replacement unacceptable to a consumer under any circumstances. For instance, it may be important to the consumer to feel that the goods are truly new and of first quality.<sup>99</sup> After all, the amount the consumer has spent on the product likely represents a larger proportion of the consumer's assets than an individual purchase would represent for the typical commercial party. In other cases, the problems that have occurred or the unsuccessful repair attempts by the seller or manufacturer may have shaken the consumer's faith in the product or left the consumer with a feeling that the goods are unsafe.<sup>100</sup>

The consumer should be able to obtain a refund rather than repair or replacement without having to prove that the limited remedy failed of its essential purpose, at least after a minimum number of repair attempts. Again, this rule draws a bright line that the consumer can use without resort to litigation. Such a provision has precedent in lemon laws, available in almost every state to purchasers of new motor vehicles.<sup>101</sup> Application of ex-

---

rendering any unreasonable damages void as a penalty).

97. *Id.* § 2-718(1).

98. *Id.* § 2-719(1)(a).

99. For example, this quality may be important to the buyer of a wedding gown, new car, or computer.

100. A child's safety seat, a parachute, rappelling gear, or a canoe are examples of goods in which a consumer's shaken faith may be critical. The "shaken faith" doctrine was first articulated in *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195 (N.J. Super. Ct. 1968) (finding that the purchaser of a new car with a defective transmission did not have to accept a substitute that contained a transmission of unknown origin). See also *ROSMARIN & SHELDON*, *supra* note 7, § 31.3.2.

In yet other cases, repair may not be acceptable because the consumer may have an immediate need for the goods. In such cases, the limited remedy would seem to fail its essential purpose.

101. See *ROSMARIN & SHELDON*, *supra* note 7, app. I.

isting lemon laws generally is limited to new motor vehicles,<sup>102</sup> and the period during which one can rely upon them is relatively brief.<sup>103</sup> The underlying concept, however, that at some point a consumer should be able to demand a replacement or refund rather than the warrantor's continued repair attempts, is one upon which consensus appears to have been reached, as Professor Miller points out.<sup>104</sup> In addition, potential liability for a refund after a specified number of repair attempts would provide added incentive for sellers to make effective and timely repairs. A forward-looking revision process should have little trouble applying this concept to all consumer transactions to provide a minimum adequate remedy to consumers.<sup>105</sup>

Any ability to limit remedies in the revised Article 2 should not prevent the consumer from rejecting or revoking acceptance of the goods. Prohibiting limitations that deny consumers those remedies would provide the solution to cases such as those described above. Any revocation of acceptance already would be limited by the current requirement that the breach substantially impair the value of the goods to the buyer.<sup>106</sup> Statutory language or a comment also could clarify that a subjective standard, which takes into account the individual buyer's purposes and needs, is to be applied to determine substantial impairment in consumer cases.<sup>107</sup>

The perfect tender rule should remain the standard for rejection in consumer transactions.<sup>108</sup> A minor defect in a consumer product may be sufficient to make it unacceptable to that consumer.<sup>109</sup> Because consumers do not have bargaining power

---

102. A few states also have lemon laws covering used cars. *Id.* § 34.12.

103. Usually a lemon law claim must be presented within one to two years after the purchase of the car. *See id.* § 34.4.

104. *See Miller, supra* note 1, at 1590.

105. *See id.* At the very minimum, big ticket items other than motor vehicles, such as mobile homes, major appliances, boats, recreational vehicles, and electronics equipment, should be subject to lemon law-type provisions.

Whatever the actual terms of any lemon law-type provisions in the revised Article 2, the language should make clear that any existing state lemon laws with more favorable provisions for consumers are not preempted.

106. U.C.C. § 2-608(1) (1990).

107. *Id.* § 2-608 cmt. 2; *see also* ROSMARIN & SHELDON, *supra* note 7, § 27.3.2.

108. U.C.C. § 2-601 (1990) (providing that the buyer is not obligated to accept goods that "fail in any respect").

109. For example, a large scratch in the paint on a new car door may be a rep-

equal to that of commercial parties, they cannot avoid limitations on the right to reject imposed by the commercial parties. Permitting limitations of the right to reject therefore essentially abrogates the perfect tender rule. That rule should remain as it currently is in section 2-601, with the burden on the seller, before acceptance, to demonstrate that the goods are conforming.<sup>110</sup>

Another limitation of remedies common to consumer transactions is the exclusion of incidental and consequential damages. Under the current language of Article 2, "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose," all of the remedies in Article 2 are available despite the limitation.<sup>111</sup> An issue arises, however, as to the continued validity of the limitation on incidental and consequential damages.<sup>112</sup> The majority of courts considering this issue, especially in consumer cases, have allowed incidental and consequential damages when the limited remedy fails of its essential purpose.<sup>113</sup> The language of the revised Article 2 should clarify that, in consumer cases, incidental and consequential damages are reinstated whenever the limited remedy is no longer valid.

#### *F. Rejection, Revocation, and Acceptance*

Merchants often fail to acknowledge and accept the consumer's attempts to use the self-help remedies currently provided in Article 2. Consumers are generally unaware of the exact nature of the rejection and revocation remedies. They may believe that they have no choice but to keep the goods and continue to use them when a merchant refuses to acknowledge their

---

arable minor defect, but the consumer may not want a new car that starts out with a door that has been repainted outside of the factory because it may be more susceptible to rust and the car might have a lower resale value.

110. See, e.g., *Latham & Assoc., Inc. v. William Raveis Real Estate, Inc.*, 589 A.2d 337, 340 (Conn. 1991) (finding that the seller of a defective computer system had the burden of demonstrating that the defect resulted from the buyer, once the buyer had shown that the product "failed in any respect"); *Flowers Baking Co. v. R-P Packaging, Inc.*, 329 S.E.2d 462 (Va. 1985) (finding that the seller of wrapping material had the burden of proving the goods conformed to the contract).

111. U.C.C. § 2-719(2) (1990).

112. See *ROSMARIN & SHELDON*, *supra* note 7, § 32.4.3.

113. See *id.* at 467 n.62 (citing cases).

rejection or revocation. Alternatively, consumers faced with such a response from a seller simply may leave the goods at the seller's place of business.<sup>114</sup> They may consult an attorney, if available, only at a later point and only then become aware of their rights. To enforce these rights, consumers must resort to litigation, or in many cases, defend a deficiency action to collect the alleged debt after repossession of the goods for the consumer's rightful refusal to pay. Including bright line rules in the Code for consumer cases would go a long way toward solving this problem.

Revised Article 2 should clarify that a consumer's use of the goods after rejection or revocation does not necessarily constitute acceptance (or reacceptance, in the case of revocation). If the seller has refused to acknowledge a consumer's rejection or revocation, the consumer's use should never constitute acceptance. The facts and circumstances of each case must be considered before use can amount to acceptance. The consumer may have no choice but to use the goods if they are needed and if the consumer cannot afford to replace the goods because the seller has not acknowledged rejection and returned the money paid for them. Use also may be necessary to preserve or protect the buyer's security interest under section 2-711.<sup>115</sup> The revision should clarify that acceptance cannot occur while the seller's attempt to cure through repair is ongoing. The consumer also may need sufficient time after the seller has completed its attempted cure to inspect the goods adequately. Adequate inspection before or after repair attempts itself may require a certain amount of use to demonstrate defects not immediately apparent.

In any of the above situations, the consumer's justifiable use of the goods should not entitle the seller to compensation,<sup>116</sup>

---

114. The seller's treatment of the rejection or revocation as a "voluntary" repossession often further complicates this situation. See U.C.C. § 9-503 (1990) (discussing a secured seller's right to possession after default).

115. See, e.g., *Mobile Home Sales Management, Inc. v. Brown*, 562 P.2d 1378 (Ariz. Ct. App. 1977) (finding that the buyers were preserving a mobile home for the benefit of the seller as well as holding it for their own security); *Jones v. Abriani*, 350 N.E.2d 635 (Ind. Ct. App. 1976) (finding the continued use of a mobile home was pursuant to the buyers' security interest and that there was no showing of prejudice to the seller).

116. For example, if a consumer discovers a flaw in the finish of a wooden dining

especially when the seller's breach and subsequent refusal or inability to remedy the situation occasions that use.

### G. Privity

As commercial parties, sellers and manufacturers in the distribution chain can negotiate with each other. They can contract for the risks of breach and insolvency of any of the parties, the extent of liability, as well as the nature and extent of any indemnification. The consumer is unable to negotiate such allocations of risk and liability and must rely upon Article 2's provisions to provide for fairness and, as Professor Miller points out, an effective remedy for a defective product.<sup>117</sup>

Consumers should be able to assert their claims against remote sellers, without being limited by the contract between the remote seller and its buyer. The remote purchaser or user should be able to do the same. Because warranty under Article 2 is an obligation imposed by law and not a matter of agreement, as explained by Professor Miller, privity is not inherent but rather derives from the case law.<sup>118</sup> Therefore, one party need not be in privity with another for the law to impose an obligation. Section 2-318 on privity should be revised with a view toward clarifying and expanding the requirements of both vertical and horizontal privity in consumer transactions.

To advance the underlying policies of the Code, a revised Article 2 thus should eliminate any requirement of privity to recover for all losses proximately sustained, including both personal injury and economic loss, in consumer transactions. This revision should be done explicitly in Article 2 as a matter of policy, and should not be left to the courts to decide, as Professor Miller suggests.<sup>119</sup> Courts may feel constrained both by common law notions of privity and by the precedential value that their decisions on privity in consumer cases may have on later

---

room table after delivery, the consumer's family should not be required to eat all meals at restaurants while waiting for the seller to replace the table just to avoid liability to the seller for such use.

117. Miller, *supra* note 1, at 1566, 1585 & n.81.

118. *Id.* at 1583 n.72.

119. *Id.* at 1584.

commercial cases. The Code is not and should not be merely an attempt to codify existing law as it has developed. Instead, it should recognize the realities of commerce and formulate rules that account for those realities as well as for the needs and growth of commerce for years to come.

Elimination of the privity requirement for consumer transactions also would accommodate the parties' reasonable expectations. Manufacturers and sellers placing goods into the stream of commerce both reasonably expect the goods to end up in the hands of an individual consumer. Often, the manufacturer itself makes a warranty to the ultimate consumer. The damages that may be incurred by any individual, whether the buyer, another user, or a bystander, due to a breach of warranty in a consumer transaction, then, would not be out of the realm of their reasonable expectations. Similarly, a consumer might reasonably expect the manufacturer to stand behind its product, no matter who is using it.

Any argument to retain privity usually addresses the possibility that a remote seller ultimately may be liable for consequential damages resulting from a breach and may want the certainty of being able to limit this potential.<sup>120</sup> There are two answers to this argument. First, as stated above, the commercial parties are better able to negotiate terms with one another to cover any necessary indemnification.<sup>121</sup> Second, as Professor Miller states: any damages that would not come within the purview of strict liability (not limited by privity) would be "largely inconsequential" and "certainly . . . others in the distributive chain who are better able to bear or spread such losses should assume them, rather than consumers."<sup>122</sup>

Revised Article 2 need not limit itself to the scope of the Magnuson-Moss Act, but should expand beyond Magnuson-Moss on privity and other issues. Coverage of the Magnuson-Moss Act is limited to a specific type of "written warranty."<sup>123</sup> Many of

---

120. See generally ROSMARIN & SHELDON, *supra* note 7, § 19.

121. A revised Article 2 could provide for an indemnification claim between the commercial parties involved as the default rule in the absence of a contract with contrary terms.

122. Miller, *supra* note 1, at 1585 n.80.

123. 15 U.S.C. § 2303 (1988). It also applies to the sale of service contracts and to

its requirements are limited to "full" warranties not commonly found in consumer cases.<sup>124</sup> A revised Article 2 can apply the principles of Magnuson-Moss to a broader range of situations. One of these principles is to make any supplier or warrantor giving a Magnuson-Moss written warranty liable to any consumer damaged by a breach of the written warranty or of any implied warranty, without regard to privity.<sup>125</sup> Revised Article 2 should apply these principles to all warranties, express and implied, in consumer sales transactions.

### *H. Notice*

Notice requirements for consumer transactions should be kept minimal and informal. They should continue to be interpreted liberally in accordance with the rule that the purpose of notice is "to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."<sup>126</sup> As Professor Miller explains, the policies behind the requirement for notice either are irrelevant to consumer transactions or can be accommodated in other ways.<sup>127</sup> The rights of the consumer should not be lost because of a lack of notification. Most consumers are not aware of the specific requirements for notice of breach, rejection, revocation, and deduction of damages from the balance owed. Nevertheless, they most likely will say or do something to indicate their position to their immediate seller or to the manufacturer. A revised Article 2 should preserve the rule that the notice required of consumers can be informal, vague, and need not be in writing.<sup>128</sup>

A further clarification is needed to state explicitly that notice may be given to any party, without regard to privity. Consumers may think that notice to a car dealer, their immediate seller, is sufficient for breach of the manufacturer's warranty. This assumption is not unreasonable, given that consumers obtain war-

---

the breach of any implied warranties. *See id.* §§ 2306, 2308.

124. *See supra* note 21.

125. *See* 15 U.S.C. §§ 2301(3), 2310(d)(1) (1988).

126. U.C.C. § 2-607 cmt. 4 (1990).

127. Miller, *supra* note 1, at 1587 n.88.

128. U.C.C. § 2-607 cmts. 4, 5 (1990); *id.* § 2-608 cmts. 4, 5; § 2-717 cmt. 2; *see also* ROSMARIN & SHELDON, *supra* note 7, §§ 27.2.2.6, 27.3.8, 30.5.

ranty documents from and deal directly with the dealer. Moreover, the dealer generally displays the manufacturer's name and logo, is licensed by the manufacturer to sell its cars, and services the car under the manufacturer's warranty. The very same policies that permit notice to be informal dictate that notice to any party in the distribution chain should be sufficient.<sup>129</sup>

### *I. Breach by the Buyer: Sellers' Liquidated and Consequential Damages*

Consumer representatives would agree with Professor Miller that Article 2 should regulate the freedom of a seller to determine what constitutes a breach by the buyer and what additional remedies for the seller can be specified in the contract.<sup>130</sup> Consumer installment contracts, the most common type of written contract in consumer transactions, typically add many other events considered to be a breach or default of the contract to those listed in section 2-703. These contracts frequently specify that, upon default, the debt is accelerated and the entire amount owed becomes due immediately. Some state laws covering consumer transactions already limit the ability to accelerate for failure to pay promptly, at least for the first time.<sup>131</sup>

When a consumer buyer breaches, the seller should not be entitled to consequential damages. Article 2 currently has no provision for sellers' consequential damages and none should be added. The number of times when a consumer buyer's breach could occasion consequential damages for the seller and the likelihood that such damages would be substantial are very low. Allowing such damages would introduce new factual questions and encourage more costly litigation. In addition, sellers could allege consequential damages as a matter of course in routine collection actions, where many of the cases are decided by de-

---

129. Notice to any party that the consumer is withholding the amount of damages from the price under § 2-717 should be sufficient as against an assignee of the contract. The assignee of a consumer contract most likely takes the contract subject to any claims and defenses that the consumer has against the seller, pursuant to the F.T.C. Holder Rule, 16 C.F.R. § 433 (1993). Moreover, the assignee can negotiate a repurchase agreement or other type of indemnity with the seller.

130. Miller, *supra* note 1, at 1586.

131. See, e.g., UNIF. CONSUMER CREDIT CODE § 5.111 (1993).

fault judgments. Those default judgments are sent to collection agencies after it is too late to reopen and challenge the judgment. Moreover, if revised Article 2 permits consequential damages for sellers and does not restrict the seller's ability to limit a consumer buyer's right to consequential damages, standard form consumer contracts very probably would contain a provision for the seller's consequential damages and a limitation on the buyer's right to receive them from the seller.

Liquidated damages, which are not negotiated in a consumer contract, should not be available to sellers. Such damages have no place in a consumer contract, where they can become part of the boilerplate language in standard form contracts.<sup>132</sup> Moreover, the considerations underlying their need in commercial contracts are not relevant to consumer transactions. One example of a liquidated damages clause in a consumer contract is the typical vehicle purchase order, which provides that if the buyer does not complete the purchase, the seller has the right to retain the buyer's deposit. In most such cases, the vehicle ultimately is sold to another buyer if the first fails to complete the transaction and the seller will not incur any out of pocket expenses.

The amount of the deposit, thus, bears no relation to any injury suffered by the dealer and is merely a penalty borne by the consumer. Section 2-718(1) currently provides that damages may be liquidated "but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy."<sup>133</sup> A deposit, such as that described above, does not meet the current Article 2 requirements for liquidated damages, and in fact would be "[a] term fixing unreasonably large liquidated damages" and would be "void as a penalty."<sup>134</sup> However, consumers rarely challenge

---

132. See ABA Task Force, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1240 (1991) ("We suggest that if the Study Group's recommendation is implemented, an exception should be made for consumer transactions. Otherwise, there is a risk that consumers will regularly become subjected to penal damages by standardized contract terms over which they have no real bargaining leverage.").

133. U.C.C. § 2-718 (1) (1990).

134. *Id.*

such provisions because of the relatively small amounts involved (although relatively larger to the consumer than to the seller) and the necessity of litigation to obtain a refund.<sup>135</sup> A complete prohibition of liquidated damages in consumer transactions by the revised Article 2 would draw a bright line to prohibit these damages and avert litigation in most cases.

### *J. Unconscionability*

Currently covering only substantive unconscionability, section 2-302 explicitly should include procedural unconscionability as well.<sup>136</sup> With no explicit regulation of procedural unconscionability in Article 2, case law and sources outside of the Code must be relied upon for authority. Procedural unconscionability addresses the parties' conduct, as opposed to the substance of the contract.<sup>137</sup> In consumer transactions, the merchants or other commercial parties have many opportunities to engage in unconscionable conduct, all of which the Code should regulate. The Code should reach conduct both prior to and following the time of contracting, such as inducement to enter the contract<sup>138</sup> and

---

135. Awarding attorney's fees could be especially helpful in this area both in recovering the consumer's damages and in deterring such liquidated damages provisions in the first instance.

136. Some courts have considered procedural unconscionability (or the lack thereof) in determining substantive unconscionability. *See, e.g., A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982) (requiring proof of both procedural and substantive unconscionability and suggesting that because the two are tied together the greater the substantive unconscionability, the less procedural unconscionability is required to find unconscionability); *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. 1971) (finding an excessive price claim only one element of procedural unconscionability); *ROSMARIN & SHELDON*, *supra* note 7, § 40.6; Steven E. Main, Comment, *Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions*, 16 PAC. L.J. 247, 248 (1984).

137. *See* *ROSMARIN & SHELDON*, *supra* note 7, § 40.4.

138. Unconscionable inducement covers a wide range of conduct. *See, e.g., Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979) (misrepresentation of contract terms); *Northwest Acceptance Corp. v. Almont Gravel, Inc.*, 412 N.W.2d 719 (Mich. Ct. App. 1987) (using high pressure sales); *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enterprises, Inc.*, 396 N.Y.S.2d 427 (App. Div. 1977) (slipping unexpected documents among those the buyer is signing); *Olivo v. Bob Turner's Ford Country, Inc.*, Civ. No. 91-428JP/RWM (D.N.M. complaint filed May 2, 1991) (alleging false imprisonment in car dealer's showroom for over four hours, until after closing, until consumers signed contract); *see also* Karen Peterson, *Couple Sues Albu-*

conduct in connection with the performance and enforcement of the contract.

Article 2A has such a provision. Section 2A-108(2) provides that if a court finds that unconscionable conduct either induced a consumer lease or occurred in the collection of a claim arising from a lease, the court may grant appropriate relief.<sup>139</sup> An analogous provision should be added to a revised section 2-302. The Code should not assume that unconscionable conduct, either prior to the contract or in the enforcement of it, is more likely to occur in consumer lease transactions than in the sale of consumer goods. Consumer buyers subjected to unconscionable conduct should have the same recourse under the law as those whose contract terms are in themselves unconscionable.

Many courts already examine the seller's conduct for procedural unconscionability.<sup>140</sup> Both the U.C.C.<sup>141</sup> and a similar provision in the U.C.C.C.<sup>142</sup> addressing unconscionable induce-

*querque Car Dealer: Salesman Held Them Prisoner Until They Signed Deal, Pair Says*, ALBUQUERQUE J., May 3, 1991.

139. Specifically, the section states:

With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

U.C.C. § 2A-108(2) (1990).

140. *See supra* note 138 (discussing unconscionable inducement).

141. The official comment to U.C.C. § 2A-108 states in part as follows: "To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable." U.C.C. § 2A-108 cmt. (1990).

142. Comment 1 to U.C.C.C. § 5.108 states in part as follows:

[The UCCC unconscionability provision], as does UCC Section 2-302, provides that a court can refuse to enforce or can adjust an agreement or part of an agreement that was unconscionable on its face at the time it was made. However, many agreements are not in and of themselves unconscionable according to their terms, but they would never have been entered into by a consumer if unconscionable means had not been employed to induce the consumer to agree to the contract. It would be a frustration of the policy against unconscionable contracts for a creditor to be able to utilize unconscionable acts or practices to obtain an agreement. Consequently [§ 5.108(1)] also gives to the court the power to refuse to enforce an agreement if it finds as a matter of law that it was induced by unconscionable conduct.

UNIF. CONSUMER CREDIT CODE § 5.108 cmt. 1 (1985) (1974 Act).

ment state the public policy concerns leading to the adoption of those sections. These concerns essentially recognize that permitting unconscionable conduct to induce a consumer into an agreement frustrates the policy against unconscionable contracts.<sup>143</sup>

To say that abusive post-contract collection efforts are addressed adequately in other laws is no answer. Except in limited instances, the federal Fair Debt Collection Practices Act<sup>144</sup> does not cover a seller or other creditor collecting its own debt.<sup>145</sup> Only twenty-three jurisdictions have state debt collection laws that would address this situation.<sup>146</sup> The fact that nearly half the states have laws that would regulate the collection activity of a seller shows some consensus on the need for regulation of such conduct.

Section 2-302 sets a high standard for substantive unconscionability.<sup>147</sup> Use of that standard alone, without procedural unconscionability, to challenge even an outrageously high price for goods is very difficult.<sup>148</sup> A revised Article 2 should take into account that many consumers may not know the real value of the goods or may have no choice but to pay an outrageously high price.<sup>149</sup> This section or a comment should clarify that, in some cases, a price term alone may be so high as to be unconscionable.

---

143. See also Memorandum from Consumer Advocacy Committee, Legal Services Section, State Bar of California, to Larry Doyle (Nov. 3, 1993) (available from the California State Bar).

144. 15 U.S.C. § 1692 (1988).

145. See *id.* § 1692a(6).

146. See ROBERT J. HOBBS, NATIONAL CONSUMER LAW CTR., FAIR DEBT COLLECTION app. L (2d ed. 1991 & Supp. 1993).

147. Relief is available "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made . . . ." U.C.C. § 2-302(1) (1990).

148. See ROSMARIN & SHELDON, *supra* note 7, § 40.5.6.

149. This scenario often occurs with low income consumers, especially those living in inner city areas, whose transportation, lack of sophistication, or other factors may limit them to shopping in the local stores carrying overpriced low quality merchandise. See DAVID D. TROUTT, CONSUMERS UNION, THE THIN RED LINE 27-30 (1993).

### *K. Modifications and Waivers*

Section 2-209, which deals with waivers and modifications of a contract, should not permit the use of clauses that require any modification of the contract to be in writing in consumer transactions. These clauses currently are in widespread use. The existing section 2-209(2) requires that these "no modification except in writing" clauses be separately signed.<sup>150</sup> As explained above, a separate signature requirement is insufficient to protect consumers' reasonable expectations.<sup>151</sup>

For example, a creditor suddenly may declare a default for a consumer's late payment, although the creditor has in the past accepted late payments under an installment credit contract. The courts have held in such cases that by accepting late payments, the creditor has modified the contract or has waived its right to rely on the default provisions of the contract requiring timely payments. Having done so, it must give the consumer notice that timely payments henceforth will be required before it can rely on the self-help remedy of repossession again.<sup>152</sup> With a "no modification except in writing" clause, the creditor can claim that its acceptance of late payments has not modified the consumer's agreement to pay promptly because there was no written modification. Where such a clause exists some courts have found that there was no waiver or modification.<sup>153</sup> This scenario leaves the creditor unrestricted in its ability to immediately repossess without any notice to the consumer, who reasonably would expect that the late payment would be accepted just as the previous ones had been. By prohibiting such clauses in consumer transactions, the Code will further its policy of preserving the parties' reasonable expectations.

The revised Article 2 should not require consumers' reliance on a seller's waiver for that waiver to be effective. This require-

---

150. U.C.C. § 2-209(2) (1990).

151. See Douglas K. Newell, *Cleaning up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487, 498 (1990).

152. See, e.g., *Margolin v. Franklin*, 270 N.E.2d 140 (Ill. App. Ct. 1971); see also JONATHAN SHELDON & ROBERT A. SABLE, NATIONAL CONSUMER LAW CTR., REPOSSESSIONS § 4.4.2 & n.135 (2d ed. 1988 & Supp. 1993).

153. See, e.g., *General Grocer Co. v. Bachar*, 365 N.E.2d 1106, 1109 (Ill. App. Ct. 1977) (examining commercial case).

ment would only introduce more factual issues and encourage or require litigation. Because an individual consumer in a situation otherwise giving rise to a seller's waiver very probably relied on the seller's conduct in one way or another, no specific proof requirement should be imposed. The cost of proving reliance in every case would far outweigh the benefits of requiring proof in the rare case in which the consumer did not rely at all.

The revised Article 2 also should prohibit the waiver of provisions protecting consumers in their transactions with commercial parties. The inequality in bargaining power and the nature of adhesion contracts virtually assure that any waiver of a consumer's rights would not be the true and knowing agreement of the parties and that the consumer would not have received some compensation for having waived the rights.<sup>154</sup> As a matter of Code policy, these rights should be explicitly nonwaivable standards rather than merely default rules. The purpose of codifying these rights is to protect the consumers' reasonable expectations and to equalize bargaining power. If commercial parties can extract waivers from consumers, they destroy the equality intended and thereby nullify the Code's protections.

#### *L. The Statute of Limitations*

As Professor Miller suggests, the statute of limitations in Article 2 should be based on discovery rather than on the date of delivery.<sup>155</sup> The types of problems that consumers have with goods purchased in consumer transactions are more related to the condition of or title to the goods than to pre-delivery occurrences, as may be the case in a purely commercial sale transaction. Breaches relating to the condition of or title to the goods frequently are based on defects that are not immediately apparent upon delivery, and some may be discovered only after many years.<sup>156</sup> A consumer limited to bringing claims within four

---

154. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 95 (N.J. 1960).

155. Miller, *supra* note 1, at 1582-83.

156. See, e.g., *Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3 (1st Cir. 1988) (holding that the cause of action accrued at the time of the sale of the fake painting rather than at the time of the discovery of the forgery); *Anderson v. Deere & Co.*, 622 F. Supp. 290 (D. Colo. 1985) (holding that the statute of limitations began to run at the time of the sale of the defective product even though the plaintiffs were not par-

years of delivery may have just discovered the defect or may not yet have discovered it by the time the statute of limitations has run. For example, if any consumer reasonably would expect the product to last for six years and it instead fails after four years due to an inherent defect, the consumer is currently without a remedy. The consequences to the consumer of losing a remedy can be proportionally greater to the consumer than to a commercial party.

A discovery statute of limitations would not make a seller liable for defects in the product indefinitely. In determining the existence of a breach, the reasonable useful life of the product and the condition of the goods as sold would be relevant. A discovery rule would comport with the Magnuson-Moss notion of a duration limitation on implied warranties.<sup>157</sup> Such limitations are prevalent in manufacturers' Magnuson-Moss warranties.

### *M. Definitions and Scope*

For Article 2 to take into account the special needs of consumers, it must distinguish when the rules for consumer transactions are applicable. The most logical way to do so is to create a definition of "consumer transaction" or "consumer contract," currently lacking in the Code. Using "consumer product"<sup>158</sup> or "consumer buyer" can be either too broad or too limited in application to particular transactions. The definition of "consumer transaction" or "consumer contract" should be stated in terms of the intended use of the goods at the time of the transaction, not in terms of what the goods are "normally used for."<sup>159</sup> Defining consumer transactions as those in which the goods are pur-

---

ties to the sale); *Wright v. Cutler-Hammer, Inc.*, 358 So. 2d 444, 446 (Ala. 1978) (holding that the statute began to run at time of delivery of the crane even though the breach was not discovered until four years after delivery).

157. See Magnuson-Moss Warranty Act, 15 U.S.C. § 2308(b) (1988) (permitting a written warranty to limit the duration of implied warranties to the duration of the express warranty); see also *supra* note 22.

158. The Magnuson-Moss Act, 15 U.S.C. 2308(1) (1988), uses this term to determine its applicability. As a result, the Act applies even if a business buys goods considered to be "consumer products." Use of the same term with a different definition could confuse the parties to a contract and the courts interpreting it.

159. 15 U.S.C. § 2301(1) (1988) (defining "consumer product" in terms of what the goods are "normally used for").

chased "primarily for personal, family or household purposes" employs those terms commonly used by consumer protection statutes to distinguish consumer transactions.<sup>160</sup>

## VI. CONCLUSION

Very important in practice to consumers, Article 2 is used extensively both to pursue and to defend claims arising out of consumer transactions.<sup>161</sup> Even now, it is not a pristine "commercial-only" law, nor can or should it be. Those involved in revising the Code must discard any such notion and recognize that commerce involves consumers. They also must recognize that the modern national economy needs uniform rules to provide the framework and certainty to transactions. Times have changed significantly from when consumer transactions were essentially local in nature. The revision should take account of the present nature of this area of commerce and fashion a forward-looking law to serve both sides of consumer transactions for years to come. If the end product does not sufficiently address these needs, however, consumer representatives in every state will be forced to oppose its enactment at the legislative level.

---

160. See, e.g., Truth in Lending Act, 15 U.S.C. § 1602(h) (1988); Consumer Leasing Act, 15 U.S.C. § 1667(1) (1988); Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5) (1988); Truth in Lending Act Regulation Z, 12 C.F.R. § 226.2(a)(2) (1993); Truth in Lending Act Regulation M, 12 C.F.R. § 213.2(a)(6) (1993).

161. See, e.g., ROSMARIN & SHELDON, *supra* note 7, § 9.2.2.