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## RESTRICTING DISCLAIMER OF THE WARRANTY OF MERCHANTABILITY IN CONSUMER SALES: PROPOSED ALTERNATIVES TO THE UCC

In response to the widespread support for the abolition of the requirement of privity of contract in suits for breach of warranty,<sup>1</sup> the drafters of the Uniform Commercial Code offered alternatives A, B and C to section 2-318.<sup>2</sup> The primary motivation for the promulgation of these alternatives was the judicial recognition in at least twenty jurisdictions of the doctrine of strict liability in tort,<sup>3</sup> which was thought to be in conflict with the adoption of the Uniform Commercial Code and its intended purpose of pre-emption of the law of sales. To avoid this apparent court-legislature conflict in states which recognized the doctrine of strict liability in tort and to discourage other jurisdictions from adopting the tort theory, the alternatives were offered with the hope of regaining or preserving the uniformity intended by the Code.

There remains, however, one alluring aspect of the doctrine of strict tort liability which has not been incorporated into the Uniform Commercial Code, and its omission is likely to cause future problems; the Code recognizes disclaimers of warranty whereas strict liability in tort will not. Section 2-316 of the Code allows the seller to disclaim the implied warranty of merchantability by the use of appropriate lan-

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1. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.04[2][b] (1966) for a state by state analysis.

2. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 13 (1967) [hereinafter cited as UCC REPORT NO. 3].

3. See 1 CCH PROD. LIAB. REP. ¶ 4060 (1968). After California abolished the privity requirement by adopting a theory of strict liability in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), the theory was codified in the RESTATEMENT (SECOND) OF TORTS § 402A (1965), which states:

- 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - a) the seller is engaged in the business of selling such a product, and
  - b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- 2) The rule stated in Subsection (1) applies although
  - a) the seller has exercised all possible care in the preparation and sale of his product, and
  - b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

guage;<sup>4</sup> however, the tort theory gives no effect to such disclaimers because tort law does not recognize contractual devices.<sup>5</sup> Thus, the Code and the strict liability in tort doctrine continue to differ on this important point.

The Code, as previously noted, offered "optional" amendments to section 2-318 to allow the states to adopt new privity requirements by statute instead of by judicial fiat.<sup>6</sup> Why not promulgate in the same manner, either "official" or "optional" amendments to sections 2-314, 2-316, and 2-719 and bring the Code in line with recent developments reached under strict liability in tort?<sup>7</sup> Specifically, the drafters of the Code should reassess their position with respect to the disclaimer of the warranty of merchantability in the sale of new consumer goods by a merchant. Presently, no distinction between consumer and commercial buyer is made in section 2-316,<sup>8</sup> but due to differences in bargaining power and product sophistication, some distinction is necessary.

The purpose of this note is to inquire into the desirability of disclaimers of warranty, particularly with reference to consumer sales, and to formulate alternatives to sections 2-314, 2-316 and 2-719, in a manner similar to those formulated for 2-318, as a suggested course the drafters may follow in offering protection for the consumer comparable to that offered under strict liability in tort.

#### HISTORICAL PERSPECTIVE

Purchasers of certain goods in the Roman Empire were protected

4. UNIFORM COMMERCIAL CODE § 2-316.

5. See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). See generally Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 831 (1966). See also 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A[5][3] (1966).

6. See UCC REPORT No. 3, *supra* note 2.

7. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 W. RES. L. REV. 5, 43-45, suggests that the disclaimer of the implied warranty of merchantability may be prima facie unconscionable. Other recent proposals to rectify the situation include federal legislation, Note, *A Federal Consumer Products Liability Act*, 7 HARV. J. LEGIS. 568 (1970), extending section 402A of the *Restatement (Second) of Torts* to include "economic loss." See Note, *Consumer Protection and Warranties of Quality: A Proposal for a Statutory Warranty in Sales to Consumers*, 34 ALBANY L. REV. 339 (1970) for a proposed Uniform Consumer Warranty Act.

8. UNIFORM COMMERCIAL CODE § 2-316.

by specific warranties arising from a sale.<sup>9</sup> The early guild regulations in England extended protection to buyers of certain goods,<sup>10</sup> but by the 17th century the guild regulations had become ineffective and were replaced by caveat emptor.<sup>11</sup> The expression "caveat emptor" developed from an inaccurate quotation of the statute of Westminster II<sup>12</sup> in *Moore v. Hussey*<sup>13</sup> and was repeated in subsequent cases, the most famous being *Chandler v. Lopez*.<sup>14</sup> In America caveat emptor, supported by strong notions of freedom of contract, became an absolute doctrine of sales law.<sup>15</sup>

However, in 1815, in the case of *Gardiner v. Gray*,<sup>16</sup> Lord Ellenborough recognized an implied warranty of merchantability in the sale of goods which the buyer had not inspected:

I am of the opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty this is an implied term in every such contract. When there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.<sup>17</sup>

As Lord Ellenborough stated, to be merchantable, goods had to conform to the description in the contract. This requirement was refined by subsequent cases<sup>18</sup> and was eventually formalized in the English

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9. See generally BUCKLAND, A TEXT-BOOK OF ROMAN LAW 488-91 (1921).

10. See Kessler, *The Protection of the Consumer Under Modern Sales Law, Part 1, A Comparative Study*, 74 YALE L.J. 262, 266 (1964). See also Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1141-56 (1931) for an extensive treatment of the development of the local, guild and national regulation scheme in early England.

11. See Kessler, *supra* note 10, at 263-64.

12. See Hamilton, *supra* note 10, at 1165-66.

13. 80 Eng. Rep. 243 (K.B. 1601).

14. 79 Eng. Rep. 3 (K.B. 1603). See Hamilton, *supra* note 10, at 1166-67.

15. E.g., *Hoe v. Sanborn*, 21 N.Y. 552 (1860); *McFarlund v. Newman*, 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839).

16. 171 Eng. Rep. 46 (K.B. 1815).

17. *Id.* at 47.

18. E.g., *Jones v. Just*, [1868] 3 Q. B. 197.

Sale of Goods Act<sup>19</sup> and the Uniform Sales Act.<sup>20</sup> Both the Sale of Goods Act and the Uniform Sales Act designated the warranty arising from the description in the contract of sale as an implied warranty, but section 2-313 of the Uniform Commercial Code designates the warranty arising from the contract description as an express warranty.<sup>21</sup>

In stating that "the purchaser cannot be supposed to buy goods to lay them on a dunghill,"<sup>22</sup> Lord Ellenborough recognized the fundamental concept of merchantability as it exists today under the Code: that goods in order to be merchantable must be fit for the ordinary use for which such goods are purchased.<sup>23</sup> Thus, when a dealer sells an automobile, the buyer reasonably expects that it will be fit for driving, and if for some reason it fails to perform the automobile is not merchantable. The common law implied warranty of merchantability arose only from a sale by a merchant,<sup>24</sup> and this requirement is continued by the Uniform Commercial Code.<sup>25</sup> The justification for a distinction between a sale by a merchant and a sale by a non-merchant rests on the fact that a buyer cannot reasonably expect to receive merchantable goods from a seller not in that business.<sup>26</sup>

#### DISCLAIMERS AND FREEDOM OF CONTRACT

The imposition of warranties of quality on "merchants" was an ob-

**19. ENGLISH SALE OF GOODS ACT, 56 & 57 Vict., c. 71, § 13.**

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

**20. UNIFORM SALES ACT § 14:**

Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

*See also id.* § 15(2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be a grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." *See also* ENGLISH SALE OF GOODS ACT, 56 & 57 Vict., c. 71, § 14(2).

**21. UNIFORM COMMERCIAL CODE § 313(1)(b).**

**22. Gardner v. Gray, 171 Eng. Rep. 46, 47 (K.B. 1815).**

**23. UNIFORM COMMERCIAL CODE § 2-314(2)(c).**

**24. See ENGLISH SALE OF GOODS ACT, 56 & 57 Vict., c. 71, §§ 13, 15(2); UNIFORM SALES ACT §§ 14, 15(2).**

**25. UNIFORM COMMERCIAL CODE § 2-314(1).**

**26. See, e.g., Zielinski v. Potter, 195 Mich. 90, 161 N.W. 851 (1917).**

vious burden on sellers of unmerchantable goods. As a result, sellers attempted to extricate themselves from warranty liability by including language in the contract of sale which presumably constituted notice to the buyer that his seller was not willing to make certain promises regarding the quality of the goods.<sup>27</sup> This attempt to disclaim warranty liability was required to be included in the contract at the time of execution.<sup>28</sup>

Prior to the adoption of the Uniform Commercial Code, disclaimers took many forms. Agreements which contained stipulations that the buyer takes the goods "as is"<sup>29</sup> or "with all faults"<sup>30</sup> were commonly interpreted as relieving the seller of all warranty obligations. Often the seller would exclude all express and implied warranties arising from the sale, give his own express warranty and then limit damages to replacement of parts.<sup>31</sup> Section 71 of the Uniform Sales Act permitted the disclaimer of "any right, duty or liability arising under a contract to sell or a sale by implication of law . . . by express agreement or by the course of dealings between the parties to the contract. . . ." <sup>32</sup> The drafters of the 1941 Revised Uniform Sales Act attempted to limit section 71 by providing that implied warranties could not be disclaimed "if the circumstances indicate that a reasonable person in the position of the buyer would, despite such general language, be in fact relying on the merchantable quality of the goods."<sup>33</sup> Unfortunately, this limitation was never enacted into law.

At present, disclaimers of implied warranties are controlled by section 2-316 of the Uniform Commercial Code. This section allows the exclusion of implied warranties only by the use of explicit language in the contract of sale. In the case of the implied warranty of merchantability, the word "merchantability" must be mentioned.<sup>34</sup> The ex-

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27. *E.g.*, *Baglehole v. Walters*, 170 Eng. Rep. 1338 (K.B. 1811) ("with all faults").

28. *E.g.*, *Ward v. Valker*, 44 N.D. 598, 176 N.W. 129 (1920).

29. *E.g.*, *Union Trust Co. v. Detroit River Transit Co.*, 162 Mich. 670, 127 N.W. 780 (1910).

30. See note 27 *supra*. See also Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 158 (1943).

31. *E.g.*, *Minneapolis Threshing Mach. Co. v. Hocking*, 54 N.D. 559, 209 N.W. 996 (1926).

32. UNIFORM SALES ACT § 71. See generally Note, *Sales—Warranties—Contractual Disclaimers of Warranty*, 23 MINN. L. REV. 784 (1939).

33. REVISED UNIFORM SALES ACT § 15(6) (2d draft 1941). Prosser states that "[t]his seems to be an excellent statement of a desirable rule." Prosser, *supra* note 30, at 165.

34. UNIFORM COMMERCIAL CODE § 2-316(2). But see *id.* § 2-316(3).

clusion may be oral or written, but if written, the disclaimer clause must be conspicuous.<sup>35</sup> If the clause satisfies the 2-316 requirements, it constitutes a valid disclaimer under the Code and is presumably enforceable.<sup>36</sup>

Freedom of contract, the doctrinal basis for disclaimers of warranty, developed from the general philosophy of individual freedom of the 18th century. This concept was later influenced by the theories of *laissez-faire* economics.<sup>37</sup> Gradually, "freedom of contract" became the fundamental maxim of contract law:

... [I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.<sup>38</sup>

This "natural right" to contract without judicial or governmental supervision was early recognized in both state<sup>39</sup> and federal courts.<sup>40</sup> However, state and federal legislators were quick to realize that the assumptions upon which freedom of contract were based were not supported by the realities of the human condition.<sup>41</sup> Gradually, freedom of contract has been restricted where one party has attempted to take advantage of his superior bargaining position to the detriment of

35. *Id.* § 2-316(2).

36. There is disagreement as to whether or not a valid 2-316 disclaimer clause is subject to judicial scrutiny by use of section 2-302 dealing with unconscionable contracts. See generally Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 523 (1967). But see *Willman v. American Motor Sales Co. & Chrysler Corp.*, 44 Erie Leg. J. 51, 1 UCC REP. SERV. 100 (Erie County Ct. C. P., Pa. 1961), where the court in dictum stated that section 2-302 applied to an "unconscionable" 2-316 disclaimer. See also *Walsh v. Ford Motor Co.*, 298 N.Y.S.2d 538, 59 Misc. 2d 241 (Sup. Ct. 1969). The Walsh case was cited as holding the 2-316 disclaimer prima facie unconscionable in Shwartz, *A Products Liability Primer*, 33 AM. TRIAL LAWYER'S L.J. 64, 92 (1970). *Contra*, Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 72 n.218 (1969). Although the case is not clear, the court seems to be using the prima facie unconscionable phrase to void the limitation and exclusion of damages under section 2-719(3) and not the disclaimer itself.

37. See Pound, *Liberty of Contract*, 18 YALE L. J. 454, 456 (1909); Williston, *Freedom of Contract*, 6 CORNELL L. Q. 365, 366 (1921).

38. *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, 465 (1875).

39. *E.g.*, *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419 (1887).

40. See Pound, *supra* note 37, at 479-81.

41. *Id.*

the other party.<sup>42</sup> Where consumers are involved, the courts now realize that while freedom of contract supports many agreements in form, it supports very few in fact; and for this reason, the courts are beginning to examine the actual bargaining process in determining the enforceability of a contract.<sup>43</sup>

#### PRESENT STATUS OF THE DISCLAIMER

At present, forty-nine jurisdictions have adopted the Uniform Commercial Code and its attendant provisions providing for the existence and exclusion of warranties and for the limitation or exclusion of remedies for breach of those warranties.<sup>44</sup> In addition to the Code's statutory scheme, as noted previously, approximately twenty states have judicially adopted strict liability in tort<sup>45</sup> which operates independently of the Code.<sup>46</sup> Because Article 2 of the Code contains explicit warranty provisions and presumably applies to all contracts for the sale of goods, it is difficult to reconcile the superimposition by the judiciary of strict liability in tort with the legislative intent as expressed in the adoption of Article 2 of the Code.<sup>47</sup> It should be remembered, however, that the adoption of strict liability in tort is justified by the courts on strong public policy grounds.

Article 2 of the Code is a complete, integrated body of statutory law which was promulgated to regulate "transactions in goods"<sup>48</sup> and more particularly "contracts for sale of goods."<sup>49</sup> The definition of "goods" in section 2-105 includes "all things which are moveable at the time of identification. . .";<sup>50</sup> thus encompassing virtually all consumer products. Likewise, sections 2-313, 2-314, and 2-315 impose and define the scope of seller's obligations as to the quality of the goods sold. Section 2-316, allows modification or exclusion of all warranties, including the

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42. See Williston, *supra* note 37, at 374-80.

43. See Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401, 406-15 (1961), for cases leading to the development of section 2-302 of the Uniform Commercial Code.

44. UNIFORM COMMERCIAL CODE §§ 2-314, -315, -316, -719.

45. See 1 CCH PROD. LIAB. REP. ¶ 4060 (1968).

46. See note 3 *supra*.

47. See Shanker, *supra* note 7. See also Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 989-90, 992 (1966).

48. UNIFORM COMMERCIAL CODE § 2-102.

49. *Id.* § 2-106(1).

50. *Id.* § 2-105(1).

warranty of merchantability and fitness for a particular purpose, if specific requirements are met.<sup>51</sup> Section 2-719 provides for contractual modification or limitation of remedies by agreement of the parties unless the modification or limitation should "fail of its essential purpose."<sup>52</sup> Section 2-719(3) allows limitation or exclusion of consequential damages if not found to be unconscionable, but a limitation in the case of personal injuries is declared to be prima facie unconscionable.

While it is not clear whether section 2-302, dealing with unconscionable contracts, applies to section 2-316, the fact that the section might be used to strike down an "unconscionable" disclaimer cannot be doubted.<sup>53</sup> Few decisions have utilized the unconscionability doctrine,<sup>54</sup> and the majority of those that did fail to explain the working elements of the doctrine.<sup>55</sup> No court has as yet held that section 2-302 can be used to strike down a 2-316 disclaimer<sup>56</sup> and commentators are divided on the question.<sup>57</sup> Assuming that section 2-302 does apply to disclaimers, the consumer has the burden of proving unconscionability, and to do this he must have some notions as to what constitutes "unconscionability." But the problem is that there is little case law,<sup>58</sup> and therefore the doctrine may be years in evolving on a case-by-case basis. During this time period, the consumer will have no effective warranty protection if manufacturers and dealers of defective goods continue to effectively disclaim all warranty liability under section 2-316. Some courts apparently feel that the consumer who is injured by a defective product should be protected under any circumstances and for this reason are turning to strict liability in tort as an "alternative" remedy to the Code.<sup>59</sup>

51. *Id.* § 2-316(2).

52. *Id.* § 2-719(2).

53. See note 36 *supra*.

54. See Murray, *supra* note 36, at 50-72.

55. *Id.* See also, Leff, *supra* note 36, at 547-58.

56. See note 36 *supra*.

57. *Id.*

58. See Leff, *supra* note 36, at 547-58.

59. E.g., Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, —, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962):

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that

Strict liability developed from a desire to extend relief to consumers not in privity with the manufacturer of defective products,<sup>60</sup> but the concept was quickly recognized as a convenient method for avoiding the effect of disclaimer clauses in consumer contracts. Disclaimer clauses in automobile sale contracts often designated "express warranties," were the first to be "avoided" by the application of strict liability in tort.<sup>61</sup> The Code declares the limitation of consequential damages for personal injury to be prima facie unconscionable. Thus, when any warranty is given, recovery for personal injury cannot be excluded.<sup>62</sup> However, it should be noted that recovery for personal injury can be prevented simply by disclaiming all warranties. Limitation or exclusion of consequential damages to property or for commercial loss is subject to section 2-302's unconscionability provisions,<sup>63</sup> but no case has as yet held such a limitation or exclusion unconscionable. Recovery on the theory of strict liability is not impeded by the presence of a disclaimer clause because strict liability is a tort concept and accordingly is not affected by contract defenses.<sup>64</sup> Therefore a recovery for personal injuries and property damages on the theory of strict liability is permitted in the face of an effective disclaimer.<sup>65</sup> As previously stated, the results reached under the tort theory can be justified on public policy grounds in consideration of the consumer's needs and expectations. The editors of the Uniform Commercial Code might determine to propose alternative amendments to the warranty, disclaimer and limitation of remedies sections of the Code so as to attain the same results reached under strict liability in tort.

#### THE UNDESIRABILITY OF THE DISCLAIMER OF THE IMPLIED WARRANTY OF MERCHANTABILITY IN A SALE OF CONSUMER GOODS

In order to support the conclusion that the Code should offer amend-

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the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

60. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

61. *E.g.*, *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). *See generally* Prosser, *supra* note 5. The automobile disclaimer has been subjected to much criticism and for good reason. *See* Note, *supra* note 7, at 356-58 wherein it is stated that Consumer's Union has reported a steady decline in automobile quality since volume purchases and easy credit were introduced in the middle 1950's.

62. UNIFORM COMMERCIAL CODE § 2-719(3).

63. *Id.*

64. *See* note 3 *supra*.

65. *E.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

ments to restrict the use of the disclaimer in the sale of consumer goods, one must first determine whether or not a disclaimer of the implied warranty of merchantability in a consumer sale is undesirable because it is in contravention of public policy. Because the majority of consumer contracts are presently contracts of adhesion,<sup>66</sup> the consumer is forced to assume the risk that the product may be defective on a take-it-or-leave-it basis. The consumer does not in fact bargain for disclaimer terms because, individually, the consumer's bargaining power is obviously inferior. The disclaimer terms, which are grounded on "freedom of contract" have become meaningless in the typical consumer contract, and therefore it would perhaps be more accurate to designate the transaction between merchant and consumer as something other than a "contract."<sup>67</sup>

As previously stated, for goods to be merchantable they must be fit for the ordinary purposes for which such goods are used.<sup>68</sup> The *implied* warranty of merchantability was created to protect buyers of defective goods and its exclusion would seem to be a contradiction in terms unless the "agreement" between the parties was truly the result of a bargained for exchange.<sup>69</sup> Section 2-302 of the Code was drafted to allow courts to inquire into the bargaining process behind the adhesion contract, but it is not clear that it applies to a valid 2-316 disclaimer.<sup>70</sup> Even if it does apply, the consumer has the burden of proving its "unconscionability."<sup>71</sup>

Assume that the consumer, by some change in the market structure, is able to bargain with an automobile dealer for a lower price due to the inclusion in the contract for sale of a disclaimer of the implied warranty of merchantability. Section 2-316 of the Code requires that "subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention mer-

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66. See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631-32 (1943).

67. See Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 352 n.18 (1970). Professor Leff suggests calling the transaction between consumer and merchant a "product" rather than a "contract."

68. UNIFORM COMMERCIAL CODE § 2-314(2) (c).

69. See Prosser, *supra* note 30, at 160: "Any general language of the disclaimer, no matter how comprehensive it may be, is contradicted to some extent in such a case by the description of the goods to be sold."

70. See note 36 *supra*.

71. UNIFORM COMMERCIAL CODE § 2-302(2) states, "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

chantability and in the case of a writing must be conspicuous. . . .”<sup>72</sup> The reason for requiring the mention of the word “merchantability” in section 2-316 is to “protect a buyer from unexpected and unbargained for language of disclaimer. . . .”<sup>73</sup> Does the mention of “merchantability” actually *disclose* to the consumer the nature of the risks being shifted to his side of the contract? It seems safe to assume that most consumers do not fully appreciate the phrase “there is no implied warranty of merchantability” because they do not normally know what “merchantability” means.<sup>74</sup> If the consumer is to be protected “from unexpected and unbargained for language of disclaimer . . .” it would seem necessary that he be familiar with the meaning of “implied warranty of merchantability” and with the language necessary to effectively disclaim this warranty.<sup>75</sup> If the consumer understands the nature of the risks being shifted and agrees to accept them, then the disclaimer should be given effect.

If manufacturers and dealers are prohibited from disclaiming the implied warranty of merchantability in sales of consumer goods, the manufacturing process will not cease<sup>76</sup> unless the product is so defective that competition is no longer feasible.<sup>77</sup> Moreover, there is no good reason to shift liability from the manufacturer of unmerchantable products to the consumer,<sup>78</sup> who in terms of the effective distribution of

72. *Id.* § 2-316(2). See *id.* § 2-316(3):

Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty. . . .”

73. *Id.* § 2-316, Comment 1.

74. See Franklin, *supra* note 47, at 980, 982 for a discussion of the word “defect” and a possible misunderstanding of the difference between breach of warranty of merchantability and that of fitness for a particular purpose in *Seely v. White Motor Co.*, 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). “[Defendant] would be liable for business losses of other truckers caused by the failure of its trucks to meet the *specific* needs of their business. . . .” *Id.* at 9, 403 P.2d at 150, 45 Cal. Rptr. at 22 (emphasis added).

75. If the disclaimer is to be effective, why not disclose its meaning as is being done in other areas of consumer protection, *e.g.*, “truth in lending.”

76. “Nor indeed would the world, even the commercial world, come to an end if parties were forbidden either to disclaim warranties or to withhold from each other any of the total panoply of remedies for breach of contract which the Code provides.” Leff, *supra* note 36, at 516.

77. See Note, *supra* note 7, at 570-73.

78. See *Ford Motor Co. v. Lonon*, 398 S.W.2d 240, 250 (Tenn. 1966).

risk is least able to bear the loss.<sup>79</sup> By allowing the risk of loss to be placed on the consumer, the Code is subsidizing manufacturers of defective products and permitting such producers to compete with manufacturers of merchantable goods.<sup>80</sup> By prohibiting the use of disclaimer clauses in consumer contracts the manufacturers of defective products will be forced either to increase the price of their products to protect themselves against damage recoveries and thereby lose their market,<sup>81</sup> or to increase the quality of their product.<sup>82</sup> In either event, the potential hazard to the consumer from defective products will be lessened.

#### A CHANCE FOR THE CODE

The Permanent Editorial Board for the Uniform Commercial Code released Report No. 3 on December 15, 1966 setting forth "alternative versions" A, B and C to section 2-318.<sup>83</sup> The Board explained that it had acted to "prevent further proliferation of separate variations from state after state"<sup>84</sup> and so retain some semblance of uniformity. Alternative A makes no change in the present statutory language. Alternative B abolishes the requirement of vertical privity by adopting the 1950 draft of section 2-318, and alternative C was "drawn to reflect the trend of more recent decisions as exemplified by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965)."<sup>85</sup> It has been argued that since the state legislatures adopted the Uniform Commercial Code intending thereby to pre-empt this area of the law the judicial recognition of strict liability in tort is an infringement on legislative prerogative. In a similar manner, it would seem that the reasons given by the Permanent Editorial Board for promulgating alternatives A, B and C to section 2-318, also support the adoption of alternative amendments to sections 2-314, 2-316 and 2-719. The confusing theories resorted to by some courts in sustaining strict liability in tort<sup>86</sup> are justified only by

79. See Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L. J. 216, 225 (1965).

80. See Note, *supra* note 7, at 570-73.

81. *Id.*

82. *Id.*

83. UCC REPORT No. 3, *supra* note 2.

84. *Id.*

85. *Id.*

86. "A breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises, but is a tortious wrong. . ." *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 294 (1963). See also *U. S. Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244,

the policy of consumer protection.<sup>87</sup> Modification of the Code would help reduce this lack of uniformity and also achieve the results now reached under strict liability in tort.

## PROPOSED AMENDMENTS TO THE UNIFORM COMMERCIAL CODE

### Section 1-201

The following proposal could serve as an "optional" or "official" amendment to section 1-201.

Add subsection (10.1) as follows:

*(10.1) "Consumer goods" means any product intended for or customarily used for personal, family, or household purposes.<sup>88</sup>*

### Section 2-314

The following proposals could serve as "optional" or "official" amendments to section 2-314.

Alternative A: Retain the present wording.

Alternative B: Add subsection (4) as follows:

*(4) Modification or exclusion of the implied warranty of merchantability in the case of consumer goods is prima facie unconscionable.*

Alternative C: Add subsection (4) as follows:

*(4) A merchant may not exclude or limit the operation of this section with respect to consumer goods.*

COMMENT: Alternative A makes no change in the existing section and if no change is made in section 2-316, the warranty of merchantability would still be subject to disclaimer.

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257 N.E.2d 380 (1970) where the court held that if a plaintiff, suing for property damage caused by breach of implied warranty of merchantability, is in privity with defendant the four year *Uniform Commercial Code* statute of limitation applies, but if there is no privity with defendant the two year statute of limitation for tort actions applies. See Shanker, *Pigeonholes, Privity, and Strict Products Liability*, 21 CASE W. RES. L. REV. 772 (1970).

87. Compare, *Seely v. White Motor Co.*, 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) with *Santor v. A & M Karaghension, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

88. See Note, *supra* note 7, at 575.

The purpose of alternatives B and C is to eliminate the possibility of a disclaimer of the implied warranty of merchantability in the case of consumer goods. From a practical standpoint, there is little that the manufacturer or dealer can do to overcome the prima facie burden imposed by alternative B.<sup>89</sup> Few disclaimers, if any, will be upheld because the consumer engages in very little bargaining before entering into an "agreement," and at present courts do not favor disclaimers in consumer sales.<sup>90</sup> An additional cross-reference to section 2-302 would be necessary to avoid confusion.

Alternative C eliminates disclaimers of the implied warranty of merchantability in consumer sales and avoids the vagueness of the unconscionability concept set forth in section 2-302.<sup>91</sup> By avoiding section 2-302, the probability of greater uniformity is retained. No doubt, alternative C embodies strict liability in tort, but the necessity of this alternative is apparent when one considers that at least twenty jurisdictions now recognize strict liability independent of the Code.

### Section 2-316

The following proposals could serve as "optional" or "official" amendments to section 2-316.

Alternative A: Retain the present wording.

Alternative B: Add subsection (5) as follows:

*(5) Modification or exclusion of the implied warranty of merchantability in the case of consumer goods is prima facie unconscionable.*

Alternative C: Add subsection (5) as follows:

*(5) A merchant may not exclude or limit the implied warranty of merchantability with respect to consumer goods.*

COMMENTS: Alternatives A, B and C to section 2-316 are intended to parallel alternatives A, B and C to section 2-314. Alternative A makes no change in the existing section. The adoption of either alternative would avoid possible confusion and make clear the legislative intent

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89. See Franklin, *supra* note 47, at 1017.

90. *E.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, —, 161 A.2d 69, 95 (1960). See generally Note, *supra* note 32.

91. See generally Leff, *supra* note 36.

to pre-empt the field. If alternative B is adopted, an additional cross-reference to section 2-302 would be necessary.

### Section 2-719

The following proposals could serve as “optional” or “official” amendments to section 2-719.

Alternative A(1): Retain the present wording.

Alternative A(2): Reword subsection (3) to read as follows:

*(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation or exclusion by a merchant of consequential damages for injury to the person in the case of consumer goods is not permitted under this section.*

Alternative B(1): Reword subsection (3) to read as follows:

*(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages by a merchant for injury to the person or property of the buyer in the case of consumer goods is not permitted under this section.*

Alternative B(2): Reword subsection (3) to read as follows:

*(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation or exclusion of consequential damages by a merchant for injury to the person or property of the buyer in the case of consumer goods is not permitted under this section.*

Alternative C(1): Reword subsection (3) to read as follows:

*(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation or exclusion of consequential damages by a merchant in the case of consumer goods is prima facie unconscionable.*

Alternative C(2): Reword subsection (3) to read as follows:

*(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation or exclusion of*

*consequential damages by a merchant in the case of consumer goods is not permitted under this section.*

COMMENTS: The expansion of warranty protection provided for in alternatives B and C to section 2-314 and 2-316 would afford little protection to the consumer if the merchant-seller could limit or exclude consequential damages under section 2-719(3). Presently under Code Section 2-719 limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. Alternative A(2) eliminates the limitation of consequential damages to the person in case of consumer goods in unequivocal language and avoids the use of "prima facie unconscionable," and therefore represents only a small change to the present section. A cross-reference to section 2-302 is already a part of section 2-719.

Alternatives B(1) and B(2) are intended to prohibit the limitation or exclusion of consequential damages to person and property by using either the "prima facie unconscionable" or unequivocal language approach. Again, each alternative will provide approximately the same result.

Alternatives C(1) and C(2) eliminate the limitation or exclusion of all consequential damages in sales of consumer goods by a merchant. There is probably no reason to draw a distinction between commercial loss, property damage and personal injury in consumer transactions;<sup>92</sup> 1500 dollars of commercial loss, property damage or personal injury equals 1500 dollars of loss to the consumer. If one accepts the premise that the merchant must stand behind his goods then the type of consequential damage flowing from a breach of the warranty of merchantability should not determine which party bears the loss.

Alternatives B(1) and B(2) create a problem by requiring that a distinction be made between property damage and commercial loss. The Code includes the term "commercial loss" in section 2-719(3) which sets forth the rules restricting limitation of *consequential* damages. But section 2-715(2)(b) defines consequential damage in case of breach of warranty as "injury to person or property proximately resulting from any breach of warranty." The questions are now whether or not 1) "commercial loss" is included in "consequential damage" as the Code seems to suggest, and 2) whether or not the term "commercial loss"

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92. See *Seely v. White Motors Co.*, 63 Cal. 2d 1, —, 403 P.2d 145, 153, 45 Cal. Rptr. 17, 25 (1965) (Peters, J., dissenting).

embodies any kinds of property damage. No attempt is made to distinguish between property damage and commercial loss under the Code. This must be done only on a case-by-case basis.

#### CONCLUSION

The proposals set forth herein as alternatives to sections 2-314, 2-316 and 2-719(3) of the Uniform Commercial Code are intended as examples of the changes which the Permanent Editorial Board of the Code should consider to prevent a usurpation of the warranty field by the doctrine of strict liability in tort. The objective of proposing these alternatives is the achievement of a uniform system of consumer warranty protection similar to that now afforded by strict liability in tort.

The results now reached under the Code fail to reflect the growing trend in the consumer products liability area. Unless the Code is changed to incorporate these new consumer trends, the law of products liability will become the common law of torts.

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