Consumer Issues and the Revision of U.C.C. Article 2

Fred H. Miller
I. INTRODUCTION

A. What Is Consumer Law?

Consumer law developed as a discrete body of law to address perceived deficiencies resulting from the application of commercial law rules to transactions involving a merchant seller on one side and a nonmerchant purchaser of property, credit, or services primarily for a personal, family, or household purpose on the other side. In such transactions, the nonmerchant often does not know which transaction terms are customary and which are not, and arguably is not capable of understanding, or is not afforded a reasonable opportunity to understand, the writing evidencing the transaction. Moreover, the writing usually is prepared by the merchant, and the terms of it are not bargained for—except perhaps price, delivery, and similar matters. Even if an attempt to bargain were made, it would not be successful (except within narrow limitations on issues such as price) because, to the merchant, the loss of one transaction is of no particular consequence, and the cost of tailoring the transaction far exceeds its value.¹

¹ Kenneth McAfee Centennial Professor and George Lynn Cross Research Professor, University of Oklahoma College of Law. Executive Director, National Conference of Commissioners on Uniform State Laws.

The discussion in this Article raises a number of positions for consideration by the Drafting Committee revising U.C.C. Article 2. The positions do not necessarily represent the views of the author, or of the National Conference of Commissioners on Uniform State Laws.

1. Fred H. Miller, Consumer Leases Under Uniform Commercial Code Article 2A, 39 ALA. L. REV. 957, 957-58 (1988). At least, this position represents the standard learning. One might question whether consumers today are not more sophisticated and better educated (or at least better able to acquire representation) and whether business is as predatory as the learning suggests, or whether competition significantly lessens business’ ability to impose terms against customer interests. Of course, there always will be an underclass for which the conventional wisdom holds true, but perhaps special regulatory legislation should be adopted for this underclass rather than alter the rules that work reasonably well for others.
Accordingly, consumer law rules attempt to address the perceived imbalance by mandating segregated or highlighted disclosure of terms so that the consumer can quickly review and understand the salient terms of the transaction (as determined by the legislative body) and can refuse to close the transaction if those terms are not agreed upon or are not sufficiently favorable. Consumer laws also can regulate the terms themselves when the consumer, even with adequate disclosure, is unlikely to be able to negotiate reasonable terms because of inequality of bargaining power, lack of competing choices, or similar conditions.

B. Uniformity and Nonuniformity in Consumer Law

While the rationale giving rise to consumer law is uniformly accepted, the uniform application of that rationale has been far less common. In the 1960's and 1970's, several major efforts to encourage the development of a uniform consumer law began. The Uniform Consumer Credit Code achieved very limited suc-

One view believes that this same learning applies in the case of small business. No doubt that may be true in many cases, but the repetitive nature of business as well as its greater ability to afford representation arguably make the risk of having special rules for this class of persons or transactions outweigh the benefits.


Of course, absent pre-closing disclosure allowing the consumer to shop around and compare customary terms, disclosure is of limited utility. Disclosure laws thus normally mandate or encourage pre-closing disclosure. See, e.g., Truth in Lending Act, 15 U.S.C. §§ 1637, 1637a, 1638, 1681 (1988); 16 C.F.R. § 702 (1993) (Magnuson-Moss regulations).

A less effective variant is to flag a particular term in the contract. Article 2 contains several examples of this approach. See, e.g., U.C.C. § 2-316(2) (1990) (requiring the presence of the term "merchantability" to disclaim the warranty).

3. See, e.g., Truth in Lending Act, 15 U.S.C. § 1643 (1988) (setting limit of liability for unauthorized use on credit cards); id. § 1647 (limiting home equity line terms in some cases); Magnuson-Moss Warranty Act, 15 U.S.C. § 2302(c) (1988) (prohibiting the conditioning of a warranty on the use of additional goods or services); id. § 2308 (limiting a warrantor's ability to disclaim an implied warranty).
cess on the state level. Seven states and Guam enacted the 1968 version of that statute,\(^4\) and only four states enacted the updated and more consumer oriented 1974 version.\(^5\) The Uniform Consumer Sales Practices Act was even less successful. With only four state enactments, and those with substantial deviation, it has been reduced to "model act" status.\(^6\) Thus, in most jurisdictions, legislatures have grafted special consumer rules on to the general statutory treatment of the area of perceived need, whether it be usury, insurance, or something else, rather than enacting them in a unified and uniform way. Consequently, because the state laws in these areas are diverse, the resulting consumer rules are equally diverse.\(^7\) In addition, the individual states, to some extent, have varying perceptions of the areas in need of special consumer legislation and wide diversity of opinion as to the extent of any protection needed. In the end, as one commentator noted:

[Consumerism, like politics, is basically local. A consumer agenda that might delight an activist group in Massachusetts could find rejection with a similar group in Texas, which, of course, had its own agenda. Legislatures in the 1960s and

\[^{5}\text{UNIF. CONSUMER CREDIT CODE, 7A U.L.A. 1 (1985) (1974 Act). Moreover, one of those states, Wisconsin, enacted a far more consumer oriented version, and virtually none of the enactments were in substantially uniform form. On the other hand, various states, like Alabama and Louisiana, borrowed a substantial number of provisions from the Uniform Consumer Credit Code, as did the Federal Truth in Lending Act. See, e.g., ALA. CODE §§ 5-19-1 to 5-19-31 (1975); LA. REV. STAT. ANN. §§ 9:3510-9:3573.8 (West 1991 & Supp. 1993).}\]
\[^{6}\text{NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1992-93 REFERENCE BOOK 106. A "uniform act" is one for which there is substantial reason to anticipate enactment in a large number of jurisdictions; conversely a "model act" may promote uniformity and minimize diversity but a significant number of jurisdictions may not adopt the act in its entirety. Id. at 99. In fairness, provisions akin to those in the Consumer Sales Practices Act often have appeared as a part of a broader deceptive practices statute in many states.}\]
\[^{7}\text{See, e.g., BARBARA A. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (ALI-ABA 1965). Where the basic law is more uniform, however, the consumer rules also tend to be more uniform, even when they are separated from the basic law. See, e.g., [State U.C.C. Variations] U.C.C. Rep. Serv. (Callaghan) (noting nonuniform state amendments restricting disclaimers throughout); 3 WILLIAM D. HAWKLAND, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 2-608:03.5 (Supp. 1993) (discussing liability limits and providing a chart of state lemon laws). Perhaps this observation is an important one for future guidance.}\]
1970s delighted in passing laws that addressed the latest creditor outrage that was featured in the media. Consumer protection statutes usually cost the state nothing and, whether effective or not, are invariably popular with constituents. Legislatures had no wish to give up this pursuit in the interest of uniformity. Consumer frauds, though universal, are not uniform.8

The other major effort to create a uniform consumer law occurred on the federal level, and, in contrast, was outstandingly successful. Beginning with the Truth in Lending Act9 in the late 1960’s, Congress enacted an avalanche of legislation that created an extensive body of federal consumer law10 that, subject to varying case interpretation,11 was uniform nationally. While the volume of this legislative activity has diminished in the 1980’s and 1990’s, it has not ceased, and further enactments have appeared periodically,12 as have regulations that bear much resemblance to statutory enactments.13

11. At one point, case law interpretation of the Truth in Lending Act was quite diverse. See Fred H. Miller, Truth in Lending Act, 34 BUS. LAW. 1405 (1979) [hereinafter Miller, Truth in Lending]. Subsequent amendments alleviated the problem. However, the problem exists with any uniform act, federal or state, including the Uniform Commercial Code. Compare Garden Check Cashing Serv., Inc. v. First Nat’l City Bank, 267 N.Y.S.2d 696 (App. Div.), aff’d, 223 N.E.2d 566 (N.Y. 1966) with Sequoyah State Bank v. Union Nat’l Bank, 621 S.W.2d 683 (Ark. 1981). These cases view the rights as to money orders very differently. Again, subsequent amendments should alleviate the problem. See U.C.C. § 3-104 cmt. 4 (1990) (describing Article 3’s treatment of money orders). Moreover, the Commentary project of the Permanent Editorial Board should substantially curtail the development of future problems in this respect. See, e.g., Fred H. Miller, Is Karl’s Kode Kaput?, 26 LOY. L.A. L. REV. 703, 710 n.25 (1993) [hereinafter Miller, Karl’s Kode].
13. E.g., Federal Trade Commission “Holder” Rule, 16 C.F.R. § 433 (1993); Credit
Understandably, agencies can promulgate regulations without becoming bogged down in the diversity and irregularity of the various state approaches to a matter, but how can Congress enact legislation in areas where the state legislatures cannot? One commentator explained the phenomenon as follows:

In Congress, [a] bill [is in] the province of a subcommittee, having life or death control over the measure, with a chair and staff that might have been quite unfamiliar with the complexities . . . . Roles would have been played; voices would have been raised. But no one would have listened because everyone would have understood that the real work was being done in private. Access to the subcommittee members and the staff would determine the shape that the final legislation would take. The issues would have been publically aired but privately brokered.

Congress, after all, need not seek consensus. With a few key subcommittee members, a dedicated staff and a sympathetic leadership, Congress can act decisively in the face of considerable opposition. One can only conclude that the patient, conciliatory, consensus-building approach [of the state uniform law process] is not the approach to enhanced consumer protection.

---


15. Id. at 822. Perhaps the two most salient recent examples that support this view are the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010 (1988), where Congress took a problem that was not a national one and used it to modernize the check collection system, something that the state process was unable to do in the never-adopted New Payments Code, see Edward L. Rubin, Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising Articles 3 and 4, 26 LOY. L.A. L. REV. 743, 745 (1993) (discussing the “unfortunate end” of the NPC), and the Truth in Savings Act, 12 U.S.C. §§ 4301-4313 (1988 & Supp. IV 1992),
C. The Problem for the 1990's

At this juncture, a dilemma surfaces. Commercial law, in particular the law of sales on which the current focus rests, is primarily state law,\textsuperscript{17} and there does not appear to be substantial sentiment to change that approach.\textsuperscript{18} Of course Article 2 originally was prepared in the 1950's, before the consumer movement had become a legislative force and before consumer law had become an accepted concept to modify or supplement commercial law.\textsuperscript{19} Today, in contrast, consideration of consumer issues is necessary in conjunction with any revision of commercial law; not to do so is a guarantee of difficulty in enactment and, equally important, is a failure to adequately consider what is desirable for a fair and balanced legal regime.\textsuperscript{20} Thus, as the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) move forward to revise Article 2 of the U.C.C.,\textsuperscript{21} they must address consumer

which seems to be legislation that no one, except certain members of Congress and several interest groups, seemed to want.

17. The Magnuson-Moss Act is the major federal intrusion on the subject. See 15 U.S.C. §§ 2301-2312 (1988). The Act preempts limited aspects of the law of sales such as limiting warranty disclaimers, \textit{id.} § 2308, but for the most part, it supplements sales law, adding disclosure requirements, \textit{id.} § 2303, and addressing forms of what may be viewed as deceptive warranty practices, \textit{id.} § 2304.


19. Warren, \textit{supra} note 8, at 819. U.C.C. Article 2 in its present form contains only one provision with an express consumer law rule, § 2-719(3), which provides that in the case of consumer goods a limitation of consequential damages for personal injuries is prima facie unconscionable. Of course, the merchant standard of § 2-104(1) and § 2-104(3) operates to create higher duties on such persons that may benefit consumers as in § 2-209(2), for example. For the most part, however, any consumer protection for buyers is afforded outside of and not within Article 2. See U.C.C. § 2-102 (1990) (leaving unimpaired statutes regulating sales to consumers); Miller, \textit{supra} note 1, at 957 (discussing the limited consumer protection provisions in Article 2A).

20. This broader process was followed in the creation or revision of U.C.C. Articles 2A, 3, and 4. Of course, it is debatable how far consumer protections should extend. See, e.g., Gail Hillebrand, \textit{Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective}, 42 ALA. L. REV. 679 (1991); Rubin, \textit{supra} note 16.

21. The first step in the Article 2 revision process was a study completed under the auspices of the Permanent Editorial Board (PEB). See PEB Study Group: Uni-
issues. The problem arises because this must be accomplished, at least in part, in a forum (state law) that in the past has proven inhospitable to a successful resolution of these matters. The drafters need a principled approach to deal with this dilemma. At the same time, the approach must contain a formula affording a reasonable chance for success.

II. DESIGNING A PRINCIPLED APPROACH

A. Possible Alternatives

Under the above standard, several possible approaches can be rejected quite easily. One unacceptable plan would leave consumer issues in Article 2 in their current form. As pointed out above, virtually no provisions in present Article 2 address consumer issues, and this approach would continue to leave the protection of consumer interests to the development of law outside the Code. A safe prediction is that consumer groups would rather use the leverage that could accrue from their participation in the revision of Article 2 to obtain further provisions addressing consumer issues than accept the task of designing and attempting the enactment of separate consumer legislation on their own. Accordingly, consumer groups likely will oppose this approach. Moreover, such an approach would assure nonuniformity, as a considerable number of nonuniform amendments to Article 2 now exist, and consumer groups certainly would not accept the repeal of these modifications. A final disad-

form Commercial Code, Article 2 Executive Summary, 46 BUS. LAW. 1869 (1991). Upon receipt of the study report, the two sponsoring organizations, the NCCUSL and the ALI, formed a drafting committee to rewrite Article 2. The chair is Lawrence J. Bugge, a past president of the NCCUSL. The Reporter is Richard E. Speidel, Beatrice Kuhn Professor of Law, Northwestern University School of Law, and chair of the Article 2 Study Group. The Reporter for technology issues is Raymond T. Nimmer, Leonard Childs Professor of Law, and now Acting Dean, University of Houston Law School. The Drafting Committee is assisted by advisors and observers from interested constituencies, including consumer representatives. A more detailed description of the process appears in Fred H. Miller, The Uniform Commercial Code: Will the Experiment Continue?, 43 MERCER L. REV. 799 (1992).

22. See supra note 19.
vantage of this approach is that Article 2 would continue to apply rules designed for commercial transactions to consumer transactions, and thus motivate courts to interpret the rules in a way which can only cause questions when the interpretation is applied in commercial cases.25

A second approach would eliminate the last two problems by simply carving consumer transactions out of Article 2 entirely—leaving it as a solely commercial article. However, this could not eliminate the initial difficulty with the first approach: that of securing consumer support or neutrality for revised Article 2. Without any quid pro quo in the way of support for the development of separate appropriate consumer rules, reciprocal acceptance of a revised Article 2 by consumer groups is unlikely. Moreover, this approach would place a great deal of pressure on drawing the line between a consumer and a commercial transaction in revised Article 2. Finally, it would leave consumer sales transactions, at least for the foreseeable future, to an uncertain body of law.26 The law governing consumer transactions might consist of codifications of older contract law27 or common law that, even if the Restatement28 were commonly followed, still would involve significantly more uncertainty than rules in the Code. Accordingly, any new rules would have to be developed without broad support and in an inappropriate forum.29

This last objection perhaps could be addressed by turning to a forum which has proven more hospitable for the development of consumer law. Thus, a third approach might be to combine the first or second approach with the development of related consumer laws in Congress.30 A major difficulty with this plan, however, is that no procedure exists for coordinating the development of state law with the development of federal law.31

---

26. See, e.g., id.
29. See supra notes 4-8 and accompanying text.
30. See supra notes 9-12 and accompanying text.
Whereas the creation of a procedure might be desirable, to do so while also developing coordinated consumer law would involve accomplishing two major efforts at the same time, thus substantially reducing the probability of a successful effort. Moreover, it is open to serious question whether such a procedure would be acceptable to many interested parties who could have significant concerns both about the soundness of the procedure and the quality of the legislative package that the procedure might produce.\textsuperscript{32}

A final approach that probably has no greater chance of acceptance is to insert substantial consumer rules into the revision of Article 2. This plan would alleviate all of the problems with the approaches suggested earlier, but clearly conflicts with the past experience of state consumer law efforts, which suggests that this forum “is not the approach to enhanced consumer protection.”\textsuperscript{33} Moreover, to the extent that consumer law statutes and decisions already exist in a given jurisdiction as a result of the previous approach, this plan would either upset balances long struck or result in a lack of uniformity if those balances were maintained.\textsuperscript{34}

\begin{flushright}
\textsuperscript{32}See supra note 16 and accompanying text.
\textsuperscript{33}Warren, supra note 8, at 816. In the past, however, consumer representatives and persons representing the interests of providers of goods, services, and other products, did not discuss these issues extensively with each other during the drafting process. However, there was far more advocacy or discussion of consumer views than some writers have surmised or admitted. Compare id. at 819-22 (discussing the incidents of consumer activism during the drafting of U.C.C. Articles 3 and 4) \textit{with} Rubin, supra note 16, at 755 (noting that “the task of pointing out the potential difficulties for consumers fell largely on law professors”). True joinder on many issues, however, never occurred due to the historical approach of the Code, past experience with consumer issues, and other factors. The revision of Article 2, however, is blessed with not only a new concentration on consumer issues because of past difficulties but additionally involves persons on the Drafting Committee with considerable consumer law experience and several advisors or observers that represent consumer interests in their work. To date, this has given rise to strong discussion and a much improved atmosphere for reaching consensus.
\textsuperscript{34}There has been some experience of this sort—even with the much more modest inclusion of consumer provisions within Article 2A. Another reason suggesting that this alternative is not appropriate lies in the nature of consumer law in comparison to commercial law. The latter, unlike the former, relies heavily on freedom of contract and private enforcement without sanctions and promotes the efficiency and benefit of the system as opposed to the interests of a particular class. Fred H. Miller, \textit{U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope}, 42 ALA. L. REV.
B. A Roadmap to Follow

These observations nonetheless would seem to point the way toward a principled approach with a reasonable chance for success. That approach not only gains validity as a result of the analysis and rejection of the alternative approaches previously mentioned, but also has some history by which to judge acceptance because it was implemented in Articles 2A, 3, and 4.35 The suggested approach is to: (1) retain both special consumer rules and the rules that treat merchants differently,36 (2) retain or add sufficient protections so that traditional Code principles of freedom of contract and assumptions like the ability to bargain over terms do not result in undue disadvantage or abuse to consumers,37 (3) add any provisions on which a broad consensus


35. See generally Miller, supra note 1; Miller, supra note 34. Unlike Article 2A, explicit consumer provisions do not exist in Articles 3 and 4, but a number of provisions essentially favor consumers. See, e.g., U.C.C. art. 3 prefatory note (Benefits to Users). As of December 1993, Article 2A has been enacted in 40 jurisdictions, [State U.C.C Variations] U.C.C. Rep. Serv. (Callaghan) xiii-xiv (Dec. 1993), and Articles 3 and 4 in 31 jurisdictions, id. at xix-xx, so the plan evidences some chance of success.

36. In Article 2, these would include § 2-719(3) (making prima facie unconscionable the limitation of consequential damages, for injury to the person, in consumer goods transactions) and the merchant differentiations in § 2-103(1)(b) (good faith), § 2-201(2) (statute of frauds), § 2-205 (firm offers), § 2-207(2) (additional terms in acceptance), § 2-209(2) (agreements restricting modification), § 2-314(1) (implied warranty of merchantability), § 2-509(3) (risk of loss), § 2-603 (rightfully rejected goods), and § 2-609(2) (assurance of performance). Although they may not go far enough today, § 2-302 (unconscionability), § 2-316 (restriction of disclaimers), and § 2-318 (third-party beneficiaries of warranties) can be considered consumer rules as well. Retaining these sections is not an absolute mandate; amendment and even deletion may be in order in some instances. For example, consumer representatives have expressed skepticism over whether the separate signature requirement of § 2-209(2) does more harm than good. Perhaps the ability to create a private statute of frauds authorized by § 2-209(2) should be withdrawn entirely for consumer transactions. It seems unlikely that the door thus would be opened to much fraud, particularly if § 2-201 were deleted. Furthermore, the unfair surprise to consumers from a private statute of limitations clause that the separate signature requirement of § 2-209(2) seeks, perhaps ineffectually, to prevent, would be eliminated.

37. In Article 2, this would include § 2-103(1)(b) (defining merchant good faith), § 2-302 (unconscionability), the other restrictions on agreement in § 1-102(3), the requirement of good faith in § 1-203, restrictions on disclaimers in § 2-316, and remedies in §§ 2-718 and 2-719. Additions to consider would include the expanded unconscionability provisions of § 2A-108 and some limitation on the ability of the parol
has arisen since the Code was first adopted and which would otherwise conflict with provisions in the Code, and (4) defer to the evidence rule of § 2-202 to exclude representations on which the consumer may reasonably have relied or, alternatively, an affirmative disclosure concerning the possible impact of the parol evidence rule akin to the Federal Trade Commission "Used Car Rule" requirements, 16 C.F.R. § 455.2 (1993). See also infra text accompanying notes 40-105 (discussing other possible additions). However, any provision that would benefit consumers, or any other class of persons, at the expense of efficiency in the system, and thus at the expense of all of the other parties participating in the system, should be adopted only in rare circumstances. Cf. Miller, supra note 34, at 414-16 (discussing efficiency considerations in Articles 3, 4, and 4A). An example might be a rule that would preserve the statute of frauds for all contracts because of concern over the opportunity for fraud in consumer contracts and in the belief that consumers could not protect themselves adequately against false allegations.

38. Such an approach might result in limitations on choice of law and forum, such as those found in U.C.C. § 2A-106 (for which an exception must be made in U.C.C. § 1-105), provisions compatible with the Magnuson-Moss Act on preclusion of disclaimers, compare 15 U.S.C. § 2308(a) (1988) (forbidding disclaimer of implied warranties) with U.C.C. § 2-316 (1990) (allowing parties, pursuant to certain requirements, to disclaim implied warranties), and abrogation of any privity requirement for written warranties, compare CURTIS R. REITZ, CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS § 8.02 (2d ed. 1987) (discussing the provisions of federal law) with U.C.C. § 2-318 (1990) (partially eliminating, depending on the alternative chosen, traditional privity requirements). Perhaps additional coordination as to remedy provisions for full and other warranties also must be considered. Compare 15 U.S.C. § 2302(b)(3) (1988) (extending period of warranty for repair attempts under the Magnuson-Moss Act) with U.C.C. § 2-725 (1990) and infra note 71 (no explicit tolling of statute of limitations); compare also 15 U.S.C. § 2304(a) (1988) (describing minimum warranty protections which the warrantor must accept) with U.C.C. § 2-719 (1990) (allowing parties to alter by contract the U.C.C.'s remedy provisions). However, additional provisions, such as extensive disclosure requirements, presumably would not be added, even though doing so might enhance enforcement, as the Code is not a regulatory statute. See Miller, supra note 34, at 413; see also UNIF. CONSUMER CREDIT CODE prefatory note, 7A U.LA. 1 (1985) (1974 Act) (Federal Pre-emption of Disclosure).

However, careful consideration must be given to any coordination with the Magnuson-Moss provisions. First, one should consider whether the coordination should extend beyond "written warranties," 15 U.S.C. § 2301(6) (1988), to "express warranties," U.C.C. § 2-313 (1990), or whether Magnuson-Moss' limited goal of only preventing deception in connection with written warranties by these limiting provisions as to disclaimer and privity will be maintained. Arguably, express warranties beyond written warranties do not involve the same possibility for deception, and it might be inadvisable in any event to extend some Magnuson-Moss provisions, such as the provision disallowing a limitation on duration, 15 U.S.C. § 2308(b) (1988), beyond what is mandated for coordination with the federal law. Compare U.C.C. §§ 2-725(1), 2-719 (1990) (detailing the ability of parties to alter by contract remedies and to shorten the U.C.C.'s statute of limitations) with 15 U.S.C. § 2308(b) (1988); see also REITZ, supra, § 7.03. Second, full coordination with the Magnuson-Moss Act
and perhaps even suggest development of other law outside the Code which may provide additional protection to designated classes of persons or transactions.\footnote{The Code commonly defers to other law on consumer protection issues. See, e.g., U.C.C. §§ 2-102, 2A-104, 3-302(g) (1990). It also, on occasion, has specifically suggested appropriate topics for additional legislation to supplement its rules. See id. § 4-101 cmt. 3.}

III. IMPLEMENTING THE SUGGESTED APPROACH

A. Additional Dispute Resolution Mechanisms

The key to a successful implementation of the suggested approach is to identify what additional protective provisions should be added to Article 2 to satisfy consumer concerns without destroying a broad consensus in support of the approach or materially affecting the principle that the Code, and in particular Article 2, is not a regulatory statute. Initially, the details of this approach could be effected by a decision to implement improved or alternative dispute resolution provisions in Article 2. Clearly a major problem in the acceptability of the present Article 2 approach for consumers is the lack of incentive in the statute and the absence of resources outside of the statute to enforce or contest contracts under the statute. As the Code is not regulatory, no state agency enforces it as an alternative.

One solution would be to provide a minimum remedy, including recovery of attorney's fees and costs.\footnote{Often, this remedy structure is expressly included in the agreement for the}
rience that has occurred under certain federal acts were to result, however, this cure could be fatal to the nature of the Code. The necessary statutory sanctions for violations could produce debilitating rigidity and lack of flexibility. At the same time, however, other federal and state statutes, arguably similarly structured, have not produced these same effects, and the nature and context of the asserted violation may be more important than the remedy. Moreover, the drafters could segregate consumer and commercial rules so that whatever rigidity and inflexibility did result from effective provisions to enforce consumer rules would not impair the commercial operation of the statute. Arguably, any deleterious effect on the consumer side is simply the price of the benefits gained that might be paid in any event.


42. See U.C.C. § 1-102(2) (1990); supra note 34.

43. Miller, supra note 34, at 413.


45. The litigation under the prior Truth in Lending Act and under the Fair Debt Collection Practices Act involved contests over detailed form disclosures in default situations. See, e.g., Laurie A. Lucas & Alvin C. Harrell, 1992 Update on the Federal Fair Debt Collection Practices Act, 47 BUS. LAW. 1309 (1992); Miller, Truth in Lending, supra note 11. In contrast, where proof of violation is more difficult because the questions raised in the asserted violation involve factors that are not so concrete, and where the dispute involves a substantive complaint rather than a mere technical defense to a clear default, the litigation may be viewed as being limited to more meritorious cases. In any event, no known evidence clearly shows that allowing recovery of at least attorney's fees and costs for consumers in Code actions would prompt undue litigation. Some evidence suggests otherwise. See, e.g., UNIF. CONSUMER CREDIT CODE § 5.108, 7A U.L.A. 1 (1985) (1974 Act); infra note 46.

46. Presumably the same effect would stem from any separate consumer legisla-
Another alternative route would be to build into Article 2 encouragement for private dispute resolution procedures that would more easily allow consumers to raise and obtain adjustment of claims without expensive litigation. The Magnuson-Moss Act contains such provisions that could be written into Article 2 in modified form and presumably plugged into the federal structure of approved procedures, or into an existing or newly created state agency structure operated by a consumer protection agency or a division of the state attorney general's office. Other possibilities might include encouragement of arbitration or a state operated ombudsman's office.

B. Substantive Areas of Consumer Concern

However, assuming the dispute resolution structure of Article 2 remains essentially unchanged, or that any changes in the manner of resolving Article 2 disputes do not significantly affect the nature or extent of changes to substantive provisions, what additional protective changes might be considered within the suggested approach and guidelines stated previously? For discussion, the possible changes can be grouped into three distinct areas: (1) property interests, (2) warranty, and (3) breach and remedies.

---

47. See 15 U.S.C. § 2310(a) (1988); see also 16 C.F.R. § 703 (1993). For a discussion, see Reitz, supra note 38, ch. 11. Professor Reitz indicates that there has been less than full utilization of the Magnuson-Moss structure to date, but with the increased emphasis on alternative dispute resolution, that picture may change.

48. The use of arbitration clauses in consumer contracts is increasing. Commentators have mixed views on this development. See Edward C. Anderson, Pre-Dispute Arbitration Agreements in Consumer Finance Contracts, 45 CONS. FIN. L.Q. REP. 373 (1991); ITT Consumer Financial Corp.'s Loan Collection/Arbitration Program Unconscionable, 11 NCLC REPORTS: DEBT COLLECTION & REPOSSESSION ED. 17 (1993).


50. See supra notes 36-39 and accompanying text.
1. Property Interests

Several obvious changes clearly would result in the improvement of consumer protection with regard to property interests, and several other possibilities deserve consideration. The obvious provisions are (1) an exception for consumer consignors to the rule that consignors lose to creditors of the consignee absent the filing of a financing statement or other form of notice;\(^5\) (2) a clarification of when a voidable title under U.C.C. section 2-403(1) becomes a void title due to action of the person entitled to rescind the sale, which action may be entirely unknowable by a bona fide consumer purchaser;\(^6\) and (3) a rule that a person entrusted with goods has the ability under the shelter principle to pass the power conferred by entrustment to a transferee, who is then able to pass that interest to a consumer buyer in the ordinary course of business.\(^7\)

One possible provision that is less obvious and deserves further analysis is one that would allow greater latitude for consumer buyers who have paid all or part of the purchase price to obtain goods identified in their contracts.\(^8\) Such buyers are not

---

52. See U.C.C. § 2-403(1) (1990); Car & Universal Fin. Co. v. Caldwell, [1965] 1 Q.B. 525 (holding that when a buyer absconds, any overt means falling short of communication or repossession is sufficient to evince an intention to hold the contract void); cf. Hartford Accident & Indem. Co. v. Walston & Co., 234 N.E.2d 230 (N.Y. 1967) (holding that a stockbroker must show the exercise of reasonable commercial diligence to learn essential facts of a transaction in order to qualify as a bona fide purchaser).

Consideration of extending further protection to consumer buyers against stolen, as opposed to entrusted, goods under an adaptation of the English doctrine of "market-overt" may well be in order, particularly if many used goods dealers, such as pawnbrokers, are otherwise regulated so as not to allow too much opportunity for thieves to cleanse stolen titles. Along the same lines, a consumer buyer who acquires goods from a dealer who acquired the goods subject to a security interest might be protected beyond the protection in U.C.C. § 9-307 and the interpretation of U.C.C. § 2-403 in Executive Financial Services, Inc. v. Pagel, 715 P.2d 381 (Kan. 1986). This approach would internalize losses from dishonest debtors and careless dealers while protecting secured parties from loss resulting from fraud.

54. U.C.C. §§ 2-502 and 2-716 afford very limited remedies to buyers on the
always sophisticated enough to protect themselves by bargaining for, obtaining, and perfecting a security interest to secure the seller's obligation\textsuperscript{55} and, if necessary, a subordination agreement. Moreover, the preference that would result from greater protection would not appear to be significant or different in kind from that suggested in U.C.C. section 2-326(3).

A second matter for consideration is whether consumer buyers should have unwaivable protection from risk of loss until receipt of the goods. This is the basic statutory rule when the seller is a merchant,\textsuperscript{56} but it does not apply in a shipment contract\textsuperscript{57} or when the risk of loss is allocated by agreement.\textsuperscript{58} It would appear that sellers are better able to process claims against carriers and are in a better position to know whether the goods were delivered or damaged. It also seems unlikely that consumer buyers will notice risk-shifting agreements or procure insurance prior to delivery of the goods. Thus, unwaivable protection may make sense.

2. Warranties

The warranty area, even beyond the suggested coordination with the protections Magnuson-Moss affords, is an area ripe for the consideration of additional or modified consumer provisions. The proposals that clearly deserve consideration are (1) clarifying the coverage of express warranty to extend to manufacturers' whole. Cf. Proyectos Electronicos, S.A. v. Alper, 37 B.R. 931 (Bankr. E.D. Pa. 1983). Even if the matter can be controlled by contract, see, e.g., R.L. Kimsey Cotton Co. v. Ferguson, 214 S.E.2d 360 (Ga. 1975); Martin v. Sheffer, 403 S.E.2d 555 (N.C. Ct. App. 1991), a consumer buyer is unlikely to so contract.

55. Nonetheless, the Article 2 Study Group suggests that the matter be left to Article 9. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE, ARTICLE 2, PRELIMINARY REPORT 132-33 (1990) [hereinafter PRELIMINARY REPORT]. Of course, this does not necessarily mean that the protection must be a regular security interest. Id. However, the Article 9 Study Group report seems to focus solely on the commercial context. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 194-98 (1992). Article 2 seems the appropriate place to provide limited protection in the consumer area which is not dependent on a security interest.

57. See id. § 2-509(1)(a).
58. See id. § 2-509(4).
warranties given to consumer buyers which presently may not fit clearly within the U.C.C. section 2-313 definition;\(^59\) (2) precluding disclaimers of implied warranties in consumer sales of new and non-second goods;\(^59\) (3) clarifying limitations of liability for breach of warranty, including liquidated damages provisions, to require a fair minimum remedy under the reasonably foreseeable circumstances,\(^61\) to recognize a differentiation be-

---

59. The U.C.C. defines an express warranty as an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." U.C.C. § 2-313(1)(a) (1990); see also American Bar Ass'n 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, 1002-09, 1103-05 (1991). Absent inclusion under Article 2, contract law may govern the status of such warranties and, even if the rule is appropriate, may still result in solutions with unwarranted differences from the rules of Article 2 for express warranties. A related issue that is not as easy to resolve is whether there needs to be reliance on, or at least knowledge of, an express warranty, such as when the buyer finds the warranty agreement in the glove compartment after delivery. Compare Cuthbertson v. Clark Equip. Co., 448 A.2d 315, 321 (Me. 1982) (holding that affirmations in the owner's manual not relied upon by the purchaser were not part of the basis of the bargain) with Interco Inc. v. Randustrial Corp., 533 S.W.2d 257, 261-62 (Mo. Ct. App. 1976) (finding that a statement in the seller's sales catalogue known to the buyer was an affirmation of fact which was part of the basis of the bargain) and Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643, 654-55 (Neb. 1973) (holding that a pamphlet statement constituted an express warranty even absent reliance), rev'd on other grounds sub nom. National Crane Corp. v. Ohio Steel Tube Co., 332 N.W.2d 39, 43 (Neb. 1983). Arguably, one additional plaintiff should make little difference to a seller who intends to induce a broad class by the disputed representation. However, enforcement of an express warranty which never was relied upon as the basis of the bargain creates difficult issues in other contexts, see, e.g., Hellman v. Kirschner, 191 N.Y.S. 202, 203-04 (App. Div. 1921), and seems to strike at the very heart of why such warranties are enforced.

60. See Clifford, supra note 25, at 1100-03. Variations on this approach may be debated, such as extending the ban to all goods absent a clearly known and compensated choice between acquiring the goods under warranty and acquiring them "as is." A statutory scheme also could preclude warranty disclaimers but allow warranties to be subject to time limitations.

61. See U.C.C. §§ 2-719 cmt. 1, 2A-503(2) (1990). Repair or replacement is often a fair minimum remedy. However, where new goods are seriously defective, a refund or other monetary relief may be necessary. See, e.g., Hartzell v. Justus Co., 693 F.2d 770 (8th Cir. 1982); Kusens v. Bodyguard Rustproofing Co., 23 Ohio Op. 3d 440 (Ohio Ct. App. 1980). In other cases, recovery of consequential damages may be necessary, such as when a defect in an automobile causes a fire which destroys the automobile and other property. See Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649, 655-56 (W.D. Pa. 1968), aff'd, 422 F.2d 1205 (3d Cir.), cert. denied, 400 U.S. 826 (1970); Ford Motor Co. v. Reid, 465 S.W.2d 80, 84 (Ark. 1971); A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 119-20 (Ct. App. 1982); Durham v.
tween commercial and consumer transactions as to the amount of restitution to be made to the buyer;\(^62\) and to classify limitation of liability clauses as subject to the liquidated damages test;\(^63\) and (4) changing the statute of limitations for warranty in a consumer sale to adopt as a general rule a breach and discovery point for accrual of the statutory period.\(^64\) This last change would obviate the legions of cases in which a buyer strains to characterize the warranty as extending to future performance,\(^65\) including the clearly unfair results that occur when, for example, a painting is discovered to be a forgery too late,\(^66\) goods are found to be stolen,\(^67\) or a latent defect later causes injury.\(^68\) While the policies behind the present rule are salutary,\(^69\) modification of the rule in the interests of justice

---


\(^{63}\) See, e.g., Simpson v. Phone Directories Co., 729 P.2d 578, 581 (Or. Ct. App. 1986). This would prevent the result reached in Fretwell v. Protection Alarm Co., 764 P.2d 149 (Okla. 1988), and other cases such as Fireman’s Fund American Insurance Co. v. Burns Electronic Security Services, Inc., 417 N.E.2d 131 (Ill. App. Ct. 1980) (upholding a low damage limitations clause in a contract for a security system where the failure of the system resulted in foreseeable and substantial losses). Alternatively, the cases could be handled under a clarified U.C.C. § 2-719. See supra note 61; cf. Kusens, 23 Ohio Op. 3d 440 (holding that a limitation of damages to “repair or refund” was illusory because the purchaser gets no benefit whatsoever from the warranty and damage limitation).

\(^{64}\) See, e.g., U.C.C. § 2A-506(3) (1990).


\(^{67}\) See, e.g., Weaver v. Casey, 816 P.2d 1126 (Okla. 1991) (illustrating but not discussing the problem).


\(^{69}\) According to the comment to U.C.C. § 2-725, the statutory period accords with
would not upset the overall spirit of Article 2.\textsuperscript{70} A related change would provide clarity and perhaps a better answer to the question of when the statute of limitations begins to run when the seller has given an express warranty promising repair or replacement, and fails to perform adequately.\textsuperscript{71}

One final matter that needs consideration in this area is the requirement of privity. Any law outside the Code\textsuperscript{72} that requires vertical or horizontal privity\textsuperscript{73} with respect to the ultimate consumer or user\textsuperscript{74} should be abrogated by U.C.C. section 2A-506, which has engendered virtually no discussion in the enactment process. Forty jurisdictions have adopted Article 2A as of August 1993. As exposure in the case of a lease is limited by its term, however, the two contexts are not completely parallel. For a related issue, see infra note 71 and accompanying text.


In addition, to the extent that Article 2 restricts the ability to disclaim and limit liability in the ultimate consumer transaction, and thus becomes more akin to strict liability in tort, the Code limitation period may warrant a reduction as well. See supra notes 61-63 and accompanying text. Perhaps an ultimate point of repose ought to be included, so as not to cause undue exposure to an unlimited liability. Finally, a longer limitations period in which to sue a dealer should be coordinated with the dealer's ability to recover from the dealer's seller, if such basis is not disclaimed or limited.

\textsuperscript{72} Warranty under the Code is an obligation imposed in certain sales transactions and is not a matter of agreement. See U.C.C. §§ 2-316(1), 2-317(c) (1990). Privity of contract is not, therefore, an inherent requirement and must derive, if at all, from other considerations.

\textsuperscript{73} Vertical privity involves the distributive chain. Horizontal privity involves persons who come in contact with the goods while they are in the hands of the buyer.

\textsuperscript{74} Several factors support an argument for maintaining a privity requirement for other than the consumer. Parties have less experience with commercial transactions...
2-318 for all types of injuries, both personal and economic, to the extent determined by the courts in cases decided either before or after the enactment of revised Article 2. In short, the privity requirement arose in non-U.C.C. case law, and should be dealt with there as well. While this might extend consumer rules beyond what is needed for coordination with the Magnuson-Moss Act, it would not result in extending abrogation beyond what courts have done in the area of strict liability in tort, with which, as a practical matter, the Code must coexist. Nor should it matter in reaching a decision on this issue whether Article 2 may preclude disclaimers and restrict the ability to limit remedy for breach in the ultimate consumer transaction. In fairness, however, the statute should address

lacking privity because they are not covered under strict liability. The lack of privity raises many difficult issues, such as the validity of remedy limitations on the nonimmediate buyer. See generally REITZ, supra note 38, § 8.03. Arguably, these matters need not be addressed as commercial parties are, on the whole, better able than consumers to deal with the problems that support the argument in favor of the relaxation of privity. However, a full analysis is beyond the scope of this Article.

Some might also argue against abrogation of a privity requirement even for a consumer where the consumer buys a brand name product from a retailer and the manufacturer is unknown. Id. at 124. The likelihood of an attempt to circumvent the retailer in such a case is remote, and why shouldn't the consumer who purchases a drill manufactured by Black and Decker from a local dealer, for example, be able to sue the manufacturer?

75. See U.C.C. § 2A-104(1)(c) (1990) (taking a similar approach in a different context).


77. See supra note 38.

78. Nor would the result go beyond what many courts have done under present U.C.C. § 2-318 case law, based on the invitations stated in comment 2 to § 2-313 and comment 3 to § 2-318. For an example of a case arising under Alternative A to § 2-318, see Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849 (Okla. 1979) (abrogating vertical privity in a case involving economic loss).

79. Compare Cline v. Prowler Indus., 418 A.2d 968 (Del. 1980) with U.C.C. § 2A-216 (1990). Before completely dismissing this issue, however, it might be productive to consider having only one law to govern these issues—a revised Article 2. Such an approach may make more sense than the current scheme, which includes Article 2, case law on strict liability, and perhaps a separate products liability statute, particularly since the doctrine of strict liability was created largely in response to legal rules that even at the time were no longer fully applicable. See 3A WILLIAM D. HAWKLAND & FREDERICK H. MILLER, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 2A-212:13 (1993). The report of the Article 2 Study Group was much more timid on this issue, but it did address the matter. See PRELIMINARY REPORT, supra note 55, at 97-98.

80. See supra notes 60-61 and accompanying text. The defendant, for example, a
the relationship between a manufacturer and a dealer, and, as relevant, other parties in the distributive chain. Thus, if the manufacturer by disclaimer or liability limitation has insulated itself wholly or in part from suit by the dealer and it now must respond to a suit by a consumer, the manufacturer arguably should have a statutory cause of action against the dealer although now the manufacturer will bear the risk of the dealer's insolvency. Even if the manufacturer remains liable to the dealer in warranty, the statute ought to determine whether the manufacturer should be able to recover the excess of what was

manufacturer, might not be subject to these limitations except as to the consumer plaintiff. See infra note 81. Therefore, a manufacturer who does not warrant the product directly to the consumer could be liable beyond its contract with a person who is subject to these limitations, such as a dealer. Arguably, no concern is warranted as to this matter because the issue is addressed in strict liability where disclaimers and other contractual limitations generally are not valid. See William J. McNichols, Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree, 28 OKLA. L. REV. 494 (1975). To the extent the loss is economic, and thus perhaps beyond the purview of strict liability, the issue should be largely inconsequential, as any amounts involved in the consumer context are likely to be relatively small. Moreover, certainly policy should dictate that others in the distributive chain who are better able to bear or spread such losses should assume them, rather than consumers. See, e.g., Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976). Nonetheless, merely because strict liability in tort leaves the chips to fall where they may, or because the amounts involved in single cases are relatively de minimis, is no reason not to provide a complete statutory structure.

81. Any disclaimer or limitation of liability that is valid against the dealer should not be valid against the ultimate consumer. To hold otherwise would defeat the unifying purpose of affording a consumer a remedy for a defective product by banning disclaimers, limiting the ability to unduly restrict liability, and abrogating privacy. This policy would change the current explicit rule set forth in comment 1 to U.C.C. § 2-318 and in U.C.C. § 2A-216, but that rule is not always observed now. See, e.g., Karzewski v. Ford Motor Co., 382 F. Supp. 1346 (N.D. Ind. 1974), aff'd, 515 F.2d 511 (7th Cir. 1975); Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49 (Mo. Ct. App. 1981); Velez v. Craine & Clark Lumber Corp., 305 N.E.2d 750 (N.Y. 1973).

This approach seems superior to that of some statutes which extend the ban against disclaimers and limitations to all levels. See Clifford, supra note 25, at 1103. When the goods first enter distribution, an accurate prediction cannot always be made as to whether the ultimate sale will be a consumer transaction. Moreover, the approach of a general ban also prohibits the commercial parties from addressing the matter by contract between themselves and thus it unnecessarily restricts a basic Code tenet. See supra note 34 and accompanying text. Whether the policy should be different in commercial transactions is beyond the scope of this Article.
paid to the consumer over what the manufacturer received from the dealer, or some part of that amount.\textsuperscript{82}

3. Breach and Remedies

The final area where modified or additional consumer provisions should be considered is that of breach and remedies. Arguably, Article 2 should deal more comprehensively with what constitutes a breach by a buyer,\textsuperscript{83} and regulate the freedom of a seller to stipulate a remedy therefor to the extent such limitations are fair. In that regard, limitation of the seller's ability to accelerate installment debt and to invoke remedies for a first time failure to make payment promptly would appear to meet this fairness test.\textsuperscript{84} Limitations on prohibiting the transfer of an interest in the purchased property in a credit sale or making the transfer a breach also might survive under the fairness standard.\textsuperscript{85}

Assuming a breach by the seller,\textsuperscript{86} clarification of the type of notice that a consumer must give and to whom is crucial. On the

\textsuperscript{82} Other issues still exist. See PRELIMINARY REPORT, supra note 55, at 109-14 (discussing the privity requirement with respect to third party beneficiaries of warranties). That the dealer may not be able to sue the manufacturer is no different than the case now if the dealer's contract with the manufacturer contains a valid disclaimer and the dealer is liable in strict liability in tort.

\textsuperscript{83} U.C.C. § 2-703 currently lists four types of breach by a buyer: (1) wrongful rejection; (2) wrongful revocation of acceptance; (3) failure to make a payment due on or before delivery; and (4) repudiation. U.C.C. § 2-703 (1990). Certainly some contracts add other possibilities. If related to secured credit, such matters may be covered by Article 9. See id. § 9-501(1). Many matters also may relate to collateral or ancillary obligations which Article 2 does not govern. See id. § 2-701. Additionally, Article 2 already provides some regulation of contracts that are not performed by accepting delivery and making payment at one time. See, e.g., id. §§ 2-306, 2-612. What may be left in the consumer context may not be of great significance, although unsecured credit remains an area of concern. Cf. id. § 2A-501(1) (default procedures); id. § 2A-523 (lessor's remedies).

\textsuperscript{84} See UNIF. CONSUMER CREDIT CODE §§ 5.109-5.111, 7A U.L.A 1 (1985) (1974 Act). Additional research is needed to determine if enough states have similar laws and whether enough contracts provide a similar scheme, absent a law compelling them, to make uniformity desirable on this topic.

\textsuperscript{85} This topic might be regulated substantively as was done in the real estate area, see 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 5.21-26 (2d ed. 1985), or merely subjected to disclosure requirements, see U.C.C. § 2A-303(3) (1990).

\textsuperscript{86} See U.C.C. § 2-711(1) (1990).
latter point, whether a consumer must notify a person with whom the consumer is not in privity of breach is unclear both as to rule\textsuperscript{87} and policy.\textsuperscript{88} While the Code provides some guidance for what notice of revocation and notice of breach under U.C.C. section 2-607(3)(a) must contain,\textsuperscript{89} none exists as to notice of rejection. The Code should provide more concrete guidance as to the content of notices to be given by consumers, perhaps by suggested language in a comment and further specificity as to timing and other matters also would be helpful.\textsuperscript{90}

\textsuperscript{87} Comment 5 to U.C.C. § 2-607 seems to go both ways, and literally the statute only requires notice from a “buyer” to the “seller.” Id. § 2-607 cmt. 5; cf. id. § 2A-516(3)(a) (requiring notice to the lessor and to the supplier, if any); see also Tomczuk v. Town of Cheshire, 217 A.2d 71 (Conn. Super. Ct. 1965) (holding that a manufacturer was a seller only as to the retailer and not as to purchasers, who thus were not required to give notice); Frericks v. General Motors Corp., 363 A.2d 460 (Md. 1976) (same).

\textsuperscript{88} Three policies support requiring notice of breach: notice evidences a good faith claim, allows negotiation, and allows adjustment. The first two are relevant in this context, but the last is not, at least not directly. Because there is likely to be other evidence of a valid claim in serious consumer claims—and one usually negotiates more seriously after suit is instituted—on balance the notice requirement in this context, at least as a bar rather than a basis for recovery of any provable detriment, is unwarranted in consumer transactions. Indeed, because the above is true even where the seller and the buyer have contracted with each other—and a seller can cure or otherwise adjust after suit is instituted even though damages may have increased by that time, given that an exasperated consumer buyer is quite likely not to communicate with a seller until the time when the seller demands payment—the notice requirement as a condition to any remedy probably should be eliminated in all consumer cases. See Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983); see also Fischer v. Mead Johnson Labs., 341 N.Y.S.2d 257 (App. Div. 1973); cf. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3, at 47-48 (1967).

A related point is the requirement in U.C.C. § 2-717 that a buyer notify a seller in order to withhold damages. While the seller’s need to know is clear, the right ought not to be lost because notification was not given. The seller will demand payment and can be given notice then.

\textsuperscript{89} See U.C.C. § 2-607 cmt. 4 (1990); id. § 2-608 cmt. 5. See also § 2-605(1)(a), which is likely to cut even more sharply in a consumer case than in a commercial case. See, e.g., Industrial Fiberglass v. Jandt, 361 N.W.2d 595 (N.D. 1985) (barring a commercial buyer from recovery absent notice of specific defects which were not cured in a timely manner).

\textsuperscript{90} Clearly, the drafters of the U.C.C. generally intended a loose test. For example, notice of breach is sufficient when “the content of the notification . . . let[s] the seller know that the transaction is still troublesome and must be watched.” U.C.C. § 2-607 cmt. 4 (1990). However, although not expressly forbidden by the U.C.C., oral or equivocal notices have not fared well in the courts. See, e.g., Oda Nursery v.
Assuming notice of breach is given, rejection may follow, absent an installment contract or a contract limitation, for virtually any deficiency. This "perfect tender" rule puts the burden on the seller, where it should reside in a consumer transaction. However, just what constitutes an acceptance—which ends the right to reject—is unclear. In consumer cases, the seller may argue that taking and using the goods before there is a reasonable opportunity to inspect constitutes acceptance, or that acceptance occurs when the seller is attempting to remedy deficiencies in the goods, although the buyer might not contemplate that by allowing that process, as may be required under U.C.C. section 2-508, the buyer may waive a substantial right. The Code should provide additional clarity not only as to this point, but also as to when the seller has a right to overrule rejection by a tender of cure under U.C.C. section 2-508(2). In the consumer context, for example, should a seller be able to cure a breach by repairing a television set, or even by delivery of a new set? In

Garcia Tree Lawn Inc., 708 P.2d 1039 (N.M. 1985) (holding that a buyer's references to "deterioration" of plants did not contain sufficient particularity). The content of the revocation notice should inform the seller unequivocally that the buyer does not wish to keep the goods. Furthermore, the notice should set forth the nonconformity in the goods that materially impairs their value to the buyer, in order to be in good faith, prevent unfair surprise, and permit reasonable adjustment. U.C.C. § 2-608 cmt. 5 (1990).

Concerning the rejection notice, four factors are relevant: (1) the difficulty of discovering the defect; (2) the terms of the contract; (3) the relative perishability of the good; and (4) the course of performance after the sale and before the formal rejection. See generally JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 361-64, 374-75, 484-85 (3d ed. 1988).

92. Id. § 2-607(2).
94. See, e.g., McCullough v. Bill Swad Chrysler-Plymouth, 449 N.E.2d 1289 (Ohio 1983) (assuming the acceptance occurred in the course of seller's repair attempts); Sarnecki v. Al Johns Pontiac, 3 U.C.C. Rep. Serv. (Callaghan) 1121 (Pa. C.P. 1966) (buyer's attorney apparently made same assumption). In these cases, the defects were serious enough to allow later revocation, but that may not always be true. A better analysis is that in Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976).
95. Compare Wilson v. Scampoli, 228 A.2d 848 (D.C. Ct. App. 1967) (holding that the seller was entitled to attempt to repair defective goods) with Zabriskie Chevrolet, Inc. v. Smith, 240 A.2d 195 (N.J. 1968) (holding that the seller was not entitled to attempt cure because the defective automobile substantially impaired the buyer's
the consumer context, arguably some issues deserve different treatment even if the above efforts would constitute acceptable commercial cures.

The buyer still may have a right to revoke acceptance even after acceptance has occurred. In the consumer context, the issues in this situation are both more numerous and more difficult to resolve than in the commercial context. Such issues include: (1) what is the standard for substantial impairment; (2) what, if any, use may the buyer make of the goods after revocation; (3) is revocation possible if alterations have been made; (4) is a seller entitled to compensation for any allowed faith in the good).


97. See, e.g., McCullough, 449 N.E.2d 1289 (illustrating that shaken faith and undermined confidence in product is relevant); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977) (holding that a series of annoying difficulties, although not sufficient themselves, in combination constituted substantial impairment). The difficult case is one in which a very minor adjustment is all that is needed but the performance of the goods before the adjustment is made suggests a serious defect. See Rozmus v. Thompson's Lincoln-Mercury Co., 224 A.2d 782 (Pa. Super. Ct. 1966). A proper test should consider whether a particular buyer is satisfied but should require adequate proof if unusual circumstances were involved. See, e.g., Colonial Dodge, Inc. v. Miller, 362 N.W.2d 704 (Mich. 1984) (finding that the failure to include a spare tire was a substantial impairment under the circumstances).

98. See, e.g., North River Homes, Inc. v. Bosarge, 594 So. 2d 1153 (Miss. 1992) (holding that failure to move out of mobile home after revocation was not unreasonable where the seller repeatedly assured the buyer that repair would be made); McCullough, 449 N.E.2d 1289 (holding that continued use did not waive revocation where the buyer was in no financial position to return automobile and obtain another while awaiting the seller's acceptance of revocation). But see Cardwell, 423 A.2d 355 (stating that continuing monthly payments and using mobile home for storage after moving out is reacceptance). A borderline but questionable case is Fiat Auto U.S.A., Inc. v. Hollums, 363 S.E.2d 312 (Ga. 1987) (painting vehicle, paying taxes and insurance, repairing it, and driving vehicle over 6000 miles constituted reacceptance). Use of the goods to meet the buyer's duty to preserve them, see U.C.C. § 2-602 (1990), or to protect the buyer's security interest, see id. § 2-711(3), as might be the case where the goods are a mobile home, is not inconsistent with revocation. See Jorgensen v. Pressnall, 545 P.2d 1382 (Or. 1976). But see Cardwell, 423 A.2d 355 (buyer's use exceeded these circumstances). These cases illustrate the need for a case-by-case analysis. A buyer may continue to use the goods, depending on the buyer's circumstances and whether or not the buyer is the breaching party; it is unlikely, however, that a flat rule will prove fair or feasible.

use;\textsuperscript{100} and (5) how much use and time can expire before revocation is no longer possible.\textsuperscript{101} The latter issue is related to the question of whether the Code should incorporate lemon laws that now exist in most of the states. Those statutes provide a much more concrete context for when and under what circumstances a buyer may have a remedy or be able to revoke acceptance in transactions involving major consumer purchases.\textsuperscript{102} Incorporating these laws certainly would benefit the industry because of the resulting uniformity, and would comport with the approach of adding consumer provisions when consensus exists.\textsuperscript{103}

IV. CONCLUSION

No doubt some other changes could be added to those suggested so far. Indeed, two might be the inclusion of restrictions on waivers of consumer rights\textsuperscript{104} and codification of those cases that find a waiver or estoppel against the creditor in a pattern of

answer should not be a flat no, but should depend on the nature of the alteration. See, e.g., Paige Steel Co. v. Great Northern Steel Co., 5 U.C.C. Rep. Serv. 2d (Callaghan) 1368 (Pa. C.P. Bucks County 1987) (holding that by processing steel coils, buyer substantially changed the goods).


101. See Stridiron, 578 F. Supp. 997; Fitzgerald v. Don Darr Ford, Inc., 729 S.W.2d 256 (Mo. Ct. App. 1987). Clearly this is a highly specific fact issue and probably no general rule can be fashioned other than a direction to the court to consider what was reasonable in the circumstances. One way to provide further guidance would be to discuss a variety of cases in a lengthy comment to indicate the kind of resolutions that appear to be fair, and those that do not appear to be.

102. See Clifford, supra note 25, at 1050-53. To extend these laws beyond their present scope would, of course, go beyond the approach of adding consumer provisions only when substantial consensus exists, and may be otherwise inadvisable as well. Id. at 1105. Thus, again a detailed comment may be the best that can be devised for many situations.

103. See WHITE & SUMMERS, supra note 90, at 368-77 (discussing the buyer's right to revoke acceptance).

accepted late payments. This Article, however, does not attempt to provide an exhaustive list of consumer provisions that might be incorporated in a revised Article 2. Rather, it suggests a principled plan for accomplishing whatever changes are to be made, as well as an illustration of the application of the principles suggested with examples. Clearly, unless we identify some common ground for going forward with the revision of U.C.C. Article 2, notwithstanding some past success at Code revision without sufficient attention to consumer issues, it is unlikely that U.C.C. Article 2 can be rewritten and enacted without an unacceptable loss of uniformity.