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Consumer Protection: Article Two of the UCC

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CONSUMER PROTECTION: ARTICLE TWO OF THE UCC

I. INTRODUCTION

This is first and foremost a comment on consumer protection, with particular emphasis upon the low-income consumer, rather than an analysis of specific sections of the Uniform Commercial Code.¹ The UCC presently offers certain protection for those consumers who have been the victims of a "bad" contract. In the sales article, Article Two, there are two concepts which are especially important for the consumer: unconscionability, covered by section 2-302, and warranty, covered by sections 2-313 through 2-316. In discussing these sections, however, other sections must be mentioned, as one can rarely discuss one section of the UCC intelligently in any given situation,² without considering several other sections.

This comment proposes to examine consumer protection already available under the UCC, focusing upon the concepts of unconscionability and warranty. A brief history followed by an analysis of commentary and case law will be presented to demonstrate how the UCC may be utilized in numerous fact situations. Problems which hinder the application of existing protection will also be discussed, but this study is by no means exhaustive of the problems over which the UCC has no control.

In discussing protection for the consumer, this comment will not be speaking only of the ghetto dweller, although many of the cases do involve such persons. The consumer to whom this comment is or may be relevant can be a person of any economic level, but more than likely he is a lower middle-class individual and is "an

¹ The 1958 draft of the Uniform Commercial Code was adopted by the Seventy-third Session (1963) of the Nebraska Legislature. [hereinafter UCC].

² For example, the concept of "good faith performance" which is often mentioned in tandem with both the unconscionability and warranty sections must necessarily be included within this comment. See Farnsworth, *Good Faith Performance and Commercial Reasonableness—Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963) [hereinafter cited as Farnsworth], for an excellent discussion of this topic, in which Farnsworth examines which standard of "good faith" is required in Article Two transactions, that generally applied through UCC § 1-203 as defined in UCC § 1-201(19), or the "special merchant's definition of 'good faith' under which 'good faith' in that article [Article Two] means 'honesty in fact' and observance of reasonable commercial standards of fair dealing in the trade." *Id.* at 668.

increasingly frustrated and embittered man with \$10,000 desires, \$5,000 needs, and \$2,000 income."³ It is this comment's premise that the consumer does not need further commissions or governmental agencies (with the exception of more OEO lawyers) for protection because there now exist effective means to provide a good measure of protection. In fact, much of the legislation requiring truth in packaging or truth in lending may not be of any assistance to the low income consumer if that is to whom it is directed: "[I]t will be of little help to the poor because it pre-supposes values, motivation, and knowledge which do not generally exist among them."⁴

The type of protection which section 2-302 provides, limits or negates contract liability for a "bad deal." It may be paternalistic or it may subvert the freedom to contract (at least to do so badly), but that is what many feel the defense of unconscionability has always entailed.

Since it often costs the consumer as much in attorney's fees to break an "illegal" contract as it does to just pay it off, the protection available under the UCC has been useful mainly to the legal aid associations but to few others. If, however, the protection could begin to be utilized on a large scale, the need for further legislation creating governmental agencies to provide consumer protection would diminish.

The concepts of unconscionability and warranty, as they have evolved under decisions construing the UCC, can be the basis for an extension of consumer protection to business transactions involving not only the poor but others also. Courts have used the UCC as authority for providing protection to a greater degree than previously available, and have shown little hesitancy in expanding protection to the extent the next case has required.

II. UNCONSCIONABILITY

A. CONCEPT AND COMMENTARY

The business of "satisfying" the low income consumer's wants is very lucrative. Lack of ready money causes the poor consumer to rely on credit, and lack of knowledge about credit multiplies his dilemma. The merchant is the master of the situation herein considered, whereas the consumer lacks both buying and bargaining knowledge and skill. He depends upon the other party, the seller, to inform him of the "good deal" he is getting.

³ Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 200 (1963).

⁴ *Id.* at 201.

The type of sale in which the low income consumer most often becomes embroiled is one for personal or household goods, but cases have included instances of small farmers dealing for a tractor or a party buying a freezer for use in a boarding house.⁵ Whenever a dispute arises over a contract between parties of apparently unequal bargaining strength section 2-302⁶ of the UCC becomes important.

Section 2-302 authorizes a court to take evidence of the actual commercial setting existing at the time the parties bargained. This analysis of the "realities" of a contract's creation can be the key to unlocking contracts for the unwary consumer. The principle of section 2-302 does not subvert the freedom to contract; rather it allows enforcement only of contracts freely made. When inequality of bargaining power allows one party to include terms in a contract which "business risk" cannot justify, section 2-302 is the appropriate protection for the consumer.⁷

The history of section 2-302 is evidence of the expansive nature of the concept of unconscionability. There may, in fact, be two types of unconscionability: procedural and substantive.⁸ At least this is a distinction Arthur Leff feels should be made while emphasizing that "naughty bargaining" is a certain sign some type of unconscionability exists in any resulting contract. The early history of 2-302 concentrated on this bargaining unconscionability, or what Leff labels "procedural unconscionability."⁹ However, the later

⁵ Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

⁶ UCC § 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) 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 the effect to aid the court in making the determination.

⁷ Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1469 (1967) [hereinafter cited as Skilton & Helstad].

⁸ Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) [hereinafter cited as Leff]. There are two distinct situations involved in watching for unconscionable contracts, one growing out of the process of contracting and the other having to do with the resulting contract. Leff refers to bargaining naughtiness as "procedural unconscionability" and to evils in the resulting contract as "substantive unconscionability." *Id.* at 487.

⁹ *Id.* at 487.

drafts of the UCC moved away from this clear standard for finding "bad" contracts and he criticizes the statute, as it now reads, because "one cannot tell from the statute whether the key concept is something to be predicted on the bargaining process or on the bargain or on some combination of the two."¹⁰

The best answer to this criticism is perhaps a simple "Yes, that's true." The "beauty" of the section, however, may well be the fact that the court is free to "police explicitly against" anything which makes a particular contract unconscionable.¹¹

Substantive unconscionability, as Leff sees it in the present UCC, allows the court to strike from a contract any one particular clause which it finds has an unconscionable effect, yet keep the remainder of the contract in force. According to Leff, "the progression through the drafts of the idea of substantive unconscionability, from overall imbalance to one-clause naughtiness, is the most important single transformation disclosed by a study of drafting history."¹²

The vagueness of the UCC as to what constitutes substantive unconscionability is not cleared up by the official comment to 2-302. The cases listed therein rely heavily on the old equity cases which, Leff argues, are not good precedent for the application of the UCC unconscionability statute.¹³ The criticism advanced, that dramatic situations are often not present in the typical sales context, is of doubtful validity. In the absence of a delineation of what "dramatic situations which have produced the contracts" includes, it could be imagined that the sale of goods to a low income consumer who is very unlikely to meet his contract obligations, is no less dramatic.

Whatever the weight of Leff's criticism as to differentiation of the types of unconscionability and section 2-302's failure to distinguish between procedural and substantive unconscionability, the history of section 2-302 is replete with the drafters' concern over the injustice which both hold for a consumer. The direction and effect of the language in 2-302 instructing a court to police explicitly

¹⁰ *Id.*

¹¹ See Ochs, *Uniform Commercial Code—Unconscionability*, 7 WASHBURN L.J. 415 (1968); Stuntbecke, *The Doctrine of Unconscionability*, 19 MAINE L. REV. 513 (1967).

¹² Leff, note 8 *supra*, at 513.

¹³ *Id.* at 533. Leff argues that (1) they only give the limits of procedural unconscionability and cannot define what kinds of clauses are substantively unconscionable because the only kind of substantive unconscionability the equity cases ever dealt with was over-all imbalance in a contract; and (2) the dramatic situations which produced the equity result are exceedingly unlikely to be reproduced in a sales context except on very rare occasions.

against unconscionable contracts, however, does seem to justify Leff's observation that:

[Neither] the dramatic situation of two persons bargaining nor the 'unbalance' or 'lopsidedness' or the quality of the resulting contract, but rather the emotional state of the trier which will justify his use of the section [mean] the attitudes relevant under section 2-302 are not those of the parties but those of the judges. The pictures sought in the facts are not of the varieties of oppressive or surprising negotiations . . . but rather of oppressed or surprised judges [with] pulses [racing] or their cheeks reddened. . . .¹⁴

Since, from the seller's viewpoint, the low income consumer may well represent a high risk, price and credit provisions of contracts with such parties may indeed read harshly before their necessity need be doubted. This does not mean, however, that a merchant seeking to hold the other party to such contract terms can neglect to take adequate measures to disclose to him the terms' existence, and explain their meaning to him during the bargaining stage of a contract. Factors like the price the consumer is actually paying for goods must be made painstakingly clear to him, for the courts have demonstrated a willingness to void unclear price provisions as unconscionable on the authority of 2-302. Nothing is really said in 2-302 to this end, but its mere presence perhaps dispels court hesitancy to go further than ever before in screening contracts.¹⁵

Section 2-302 specifically authorizes court scrutiny of the commercial setting, the purposes, and the effect of any agreement. Admittedly it has not universally been agreed that courts have any business concerning themselves with the particular terms of any contract, or how certain terms came to be included within a contract, but perhaps that philosophy was the product of another legal age soon to be discarded. Writers in the *Michigan Law Review*¹⁶ have suggested such by arguing that section 2-302 merely authorizes courts to take action which the due process clause of the fourteenth amendment requires they take.

In suggesting that consumers have a constitutional right not to have unconscionable contracts enforced against them, Robert Skilton and Richard Helstad believe that since judicial action is state action, and that since the state may not deprive a person of his property without due process of law, the enforcement of *procedural* safeguards in criminal law implies required observance of minimal standards of justice in a state judiciary proceeding on civil contract

¹⁴ *Id.* at 516.

¹⁵ Skilton & Helstad, note 7 *supra*, at 1474.

¹⁶ *Id.*

rights or liabilities. For example, a confession of judgment by power of attorney bestowed through a form contract, without giving the defendant notice of the power in the contract or of the actual proceeding so he can defend against the merits of the claim, may deprive that consumer of his property without due process of law.¹⁷

The implementation of *Shelley v. Kraemer*¹⁸ and *Barrows v. Jackson*¹⁹ may extend beyond the aspects of judicial action as state action therein involved.

Without going so far as to identify consumer protection with constitutional rights, the fundamental fairness of not enforcing unconscionable contracts, or particular provisions, the above is certainly not foreign to Anglo-American legal thought. Courts have always shown a willingness to guard against over-reaching or one-sided bargaining.²⁰ The hesitancy which the presence of section 2-302 dispels, is one courts should gladly put aside when the facts before them present a one-sided transaction in which one party has taken advantage of the other.

As previously mentioned the section on unconscionability, like any particular section of the UCC, is effected by the applicability of other UCC sections to a case at hand. More specifically, the defense of unconscionability is used by a consumer against his seller. Usually, however, a contract made by a merchant with a low income consumer is assigned to a finance company at the first opportunity, and the risk of collection is then someone else's problem. The relationship between the seller and the assignee is crucial under the UCC. The consumer may lose his opportunity to defend against a contract on the grounds of fraud or unconscionability if the assignee can meet the requirements UCC sections 3-302, 1-203, 1-201 (19), and perhaps 2-103(1) (b) impose on him.²¹ These sections have to do with being a holder in due course and the requirement of "good faith" under the UCC. Section 1-203 imposes an obligation on every contract or duty under the UCC of "good faith" in its performance or enforcement.²² "Good faith" is defined in 1-201(19) to mean or require "honesty in fact in the conduct or transaction concerned."²³

¹⁷ *Id.* at 1475.

¹⁸ 334 U.S. 1 (1948).

¹⁹ 346 U.S. 249 (1953).

²⁰ *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942).

²¹ *Farnsworth*, note 2 *supra*. For the text of the cited UCC sections see note 47 *infra*.

²² *Id.* at 666, *quoting*, UCC § 1-203.

²³ UCC § 1-201(19).

However, Article Two contains "a special merchant's definition of 'good faith' [which] in that article means 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.'" ²⁴ This requirement of "good faith" on the merchant is not only valuable for the purposes of deciding if an assignee is a holder in due course and thus immune from the buyer's defenses against the seller, but it is also valuable as a criteria for judging the unconscionability of any particular contract clause from a substantive point of view.

As E. Allen Farnsworth indicates, while many feel there is "no overriding general positive duty of good faith imposed on the parties to a contract," ²⁵ the courts of New York and California have continually asserted "that every contract includes an implicit obligation of good faith and fair dealing." ²⁶

The concept of good faith performance is also embodied in the UCC, and Farnsworth argues that "both common sense and tradition dictate an objective standard for good faith performance . . . based on decency, fairness or reasonableness of the community and not the individual's own belief as to what might be decent, fair or reasonable." ²⁷

Farnsworth also believes that sections of Article Two not expressly requiring good faith still are governed by the general obligation imposed by Article One. Moreover, in those situations where an obligation of good faith is imposed generally, sections of Article Two which are involved are governed by the special merchant's definition of good faith included in 2-103(1)(b), and incorporate the objective standard of commercial reasonableness. ²⁸ If, in examining the factual situations before it, a court is to judge the commercial setting, effect, and purpose of any contract by an objective standard of good faith and commercial reasonableness, then a determination of what amounts to substantive unconscionability under 2-302 is not in fact left to be accomplished without some objective guidelines. ²⁹

²⁴ Farnsworth, note 2 *supra*, at 666, quoting, UCC § 1-203.

²⁵ *Id.* at 671, quoting, Professor Raphael Powell.

²⁶ *Id.* at 671.

²⁷ *Id.* at 672.

²⁸ *Id.* at 675.

²⁹ "Still, the lesson is there, and the Code's concepts of good faith and commercial reasonableness await development, even beyond the bounds of the Code, at the hands of resourceful lawyers and creative judges." *Id.* at 679.

The requirements of good faith imposed on the assignee can allow the consumer to exert the defense of unconscionability when the court finds misconduct in the seller-assignee relations. In part II of this comment there are examples of the interplay between UCC sections on good faith and unconscionability and the reader should realize the tandem effect of the sections in providing consumer protection.

With a history of section 2-302 in mind, coupled with the drafters' indecision as to which "type" of unconscionability to include in the section, and the relationship that the UCC provisions on good faith may have on the finding of unconscionability or the use of it as a defense against an assignee of some consumer's purchase agreement, a case study of past UCC application to consumer problems would now be useful. The cases included below are not for the purpose of critical analysis of the legal theory involved, but as examples of available consumer protection. Some additional commentary on particular cases has been given when its thrust is to the usefulness of that case as a tool for the consumer's attorney.

B. CASE EXAMPLES

Price and credit provisions have been the basis of many court findings of unconscionability to date. A landmark case applying the unconscionability concepts inherent in section 2-302 (even though the UCC was not in effect at the time the disputed contract was made) is *Williams v. Walker-Thomas Furniture Company*.³⁰ In that case the plaintiff furniture company sued to replevy furniture on which the defendant, Mrs. Williams, still owed a balance. This actually included all items she had ever purchased from the plaintiff from the year 1957, as every sales contract she had signed subsequent to that year was "added-on" to the previous contract and a running balance for each particular item was maintained rather than an accumulated balance like that of a "revolving-charge" account. Thus there existed a balance always payable until the balances on every single item purchased were retired.³¹ The defendant had been able to pay off over one thousand fifty-six dollars of the more than fifteen hundred dollars worth of goods purchased from the defendant when she defaulted on her monthly payments.

³⁰ 350 F.2d 445 (D.C. Cir. 1965).

³¹ As Mrs. Williams made monthly payments the amount paid was prorated among her outstanding debts in ratio to the size of each individual balance to her total debt. There existed at all times a balance on each item ever purchased varying from three cents on a December 31, 1957 purchase of \$13.71 to a \$327.89 balance on the \$514.95 stereo purchase which caused the lawsuit. *Id.*

The default was largely caused by the acquisition of a five hundred fifteen dollar stereo unit, also by means of time-purchase. The back of the stereo sales contract which she signed stated her monthly income was two hundred eighteen dollars from welfare payments.

Mrs. Williams contacted the Legal Assistance Office in Washington, D.C. to take her case. Its attorneys conceded the stereo unit should be returned to the defendant, but were not willing to agree to returning the remainder of the goods even though she may have still owed a bookkeeping balance on them. On appeal from a judgment in the store's favor, the court of appeals reversed and remanded the case for a determination as to whether the contract was unconscionable from its creation. The appeals court held that unconscionability as presented in the UCC was a defense at common law, and therefore available to the defendant even though the UCC had not yet been adopted by Congress as law in Washington, D.C. The elements of the defense included the absence of any meaningful choice, and the presence of terms unreasonably favorable to one party. The court listed criteria which the trial court could use in deciding if a meaningful choice was available to the defendant as a bargaining party.

The trial court should determine: (1) whether there existed gross inequality in bargaining power; (2) the manner in which the contract was entered; (3) whether there was evidence of one-sidedness on the face of the contract; (4) whether there could be a presumption of fraud from the unfair nature of the contract terms; and (5) what were the characteristics (bargaining power and commercial knowledge) of the parties themselves.³²

It is not difficult to understand *why* the court in the *Williams* case was willing to police explicitly against unconscionability. "For those of us [who] have an instinctive and infallible sense of justice (and which of us does not), any other result in this case is unimaginable."³³ But it is difficult to pinpoint exactly from what the *Williams* court has protected the consumer. Certainly the five criteria the court of appeals listed in their opinion are valuable aids for the examination of a commercial setting under 2-302(2), but

³² *Id.* at 449-50. See also, *In re Elkins-Dell Manufacturing Company, Inc.*, 253 F. Supp. 864 (E.D. Pa. 1966), where, in a bankruptcy proceeding involving a question of enforcement of a security agreement between the bankrupt and a creditor, which the referee found to be unconscionable, the appellate court remanded for another hearing and reminded the referee that unconscionability involved a showing of onerous terms with regard to any reasonable business relationship to the risks or commercial environment present.

³³ Leff, note 8 *supra*, at 552.

one cannot be sure if the actual decision in *Williams* is based upon the add-on clause or the naked act of selling such a luxury item to a welfare recipient.³⁴ It would appear though, that both procedural or bargaining unconscionability in the "Leff" sense, and substantive unconscionability, due to the terms of the contract, are targets of the criteria the court reviewed for finding unconscionability.

Another case concerning the price the consumer is ultimately paying for the goods he purchases is *Central Budget Corp. v. Sanchez*,³⁵ cited in *Williams*. There, a motion for summary judgment on an automobile sales contract was withheld until the buyer had a reasonable opportunity to present evidence of the commercial setting of the contract, pursuant to 2-302(2). Unless the court determined otherwise after seeing the evidence, the price charged for a 1959 Buick may have been so excessive that it was unconscionable. If the court had sustained the motion for summary judgment the buyer's liability for the purchase would have amounted to a total price of one thousand eighty-two dollars, which included the auto price of nine hundred thirty-nine dollars plus a credit service charge of two hundred forty-two dollars.

The lower court was directed to consider not only the obvious education (or lack thereof) of each party, but the probabilities that such education could have reasonably prevented an understanding of the contract terms. In addition, the effect of fine print and other deceptive sales practices used on the buyer was to be ascertained.

Both *Williams* and *Sanchez* emphasize the double-barrelled power of 2-302 to void contracts where the bargaining has prevented a consent from the buyer, and where the terms themselves are such that public policy will not allow them to be enforced in courts of law and equity. By evaluating factors like the education, bargaining knowledge, and skill and general personal characteristics of the consumer, the court is able to best judge the commercial setting which produced what looks like an unconscionable contract. If the UCC dispels court hesitancy in examining such factors as these, then effective consumer protection through use of the legal process can be a viable force.

Another source of unconscionable contracts has been door-to-door solicitation sales of food freezers. The sales techniques and prices charged in the sales contracts have been the main reasons for voiding such sales. In New York and New Jersey there have been a series of cases, all having the same basic factual circumstances, to

³⁴ *Id.* at 554. "[T]he act of having sold this expensive item to a poor person knowing of her poverty." *Id.* at 555.

³⁵ 53 Misc. 2d 620, 279 N.Y.S.2d 391 (1967).

which the courts have applied section 2-302 and the good faith requirements for an assignee in order to protect a consumer from an unconscionable deal.

A brief sketch of the facts in this type of case will serve both as an example of typical consumer problems, and as a necessary preface to a discussion of the legalities of the cases. A salesman from a company retailing the home freezers calls upon the consumer at his home to present to him "the bargain of a lifetime." The consumer is offered enrollment in a food club in which purchase of large amounts of food, at discount prices, will carry with it the "bonus" of a new freezer.

After getting the consumer's signature on the contract, which incidentally is a secured purchase agreement for a food freezer, the selling company quickly assigns such to a finance company. In all likelihood the consumer will never again hear from the salesman or the company. The food which the consumer expects to receive usually arrives within one month, but the case histories have revealed a rather unique assortment of groceries in the deliveries.³⁶ Only when the postman arrives delivering this previously "signed-in-blank" contract could the purchaser realize that he has signed not only a secured purchase agreement, but also a promissory note for the food freezer and perhaps even an attached power of attorney for a confession of judgment.³⁷

When the entire transaction has unfolded, the consumer finds he has purchased a food freezer worth two to three hundred dollars on installment payments over the next three years. His total liability is from nine to eleven hundred dollars (depending upon the size of commissions and credit charges).

While the above happenings cannot be labeled "honest dealings," the consumer would have difficulty proving them illegal. The merchant is providing something of value for the consumer's promise to pay, for after all, a food freezer is good consideration. The element of unconscionability comes from one of the other

³⁶ They have included plenty of soaps, kitchen cleaners, bathroom cleaners, and other non-freezables, but a scarcity of fresh frozen goods like fruit juices, vegetables, or meats. *Westfield Investment Co. v. Fellers*, 74 N.J. Super. 575, 581, 181 A.2d 809, 812-13 (1962).

³⁷ The terms of the installments have often called for thirty to thirty-six monthly payments of about \$30.00. The contract provisions which included the delivery of food are assigned to a food servicing agency, which agrees to make three deliveries of food to the consumer's address. The cost of these food deliveries is really a cost-of-sale item to the selling company added to the price of the food freezer and passed on to the consumer. *Id.*

advantages which was mentioned above as being integrated into the sales talk. The referral credit arrangements by which a buyer can retire most of the debt he has incurred for the contract have been the objects of the courts' disapproval. These plans promise that for every lead the buyer furnished to the seller an amount of money would either be paid directly to him, or credited to his account. The more sophisticated selling operations have been known to have actually sent a buyer some money, though never as much as owed under the terms of the arrangement.

All of this may sound too incredible to have actually happened, but the large number of these sales which have actually taken place is even more incredible, as was revealed in *Westfield Investment Company v. Fellers*.³⁸ In that case the local constable boasted he had repossessed three to five hundred freezers in one year alone.³⁹

In *Frostifresh Corporation v. Reynoso*⁴⁰ the court specifically held that the price provisions and the use of referral credit in selling practices rendered the contract therein unconscionable. The consumer in *Frostifresh* spoke only Spanish, thus the oral negotiations were conducted through an interpreter employed by the company, but the court gave no hint that that added to the actual finding of unconscionability. What it did find was that the contract terms were too hard a bargain. It limited the seller's default recovery to the actual cost of the freezer without commissions, legal fees, service charges or other overhead costs, and Reynoso kept the freezer. In doing so, the court felt obliged to reaffirm that the UCC allows parties to freely make whatever kind of contracts they desire, so long as no fraud or illegality exists therein, but the court also pointed out that under section 2-302 it had a duty to police contracts to prevent unconscionable dealings.

The consumer, Reynoso, had continually told the seller he could not afford to enter a contract for so much money because he was to be laid-off his job in the near future. Evidently the salesman's assurances that the referral credit plan could help in meeting the contract obligations convinced Reynoso to make the purchase.

This case is exemplary of the type of protection the UCC can give the consumer against the "bad" contract.⁴¹ The court found a combination of substantive and procedural unconscionability, to borrow Leff's terms. Presumably the price in any contract is a

³⁸ 74 N.J. Super. 575, 181 A.2d 809 (1962).

³⁹ *Id.* at 590, 181 A.2d at 818.

⁴⁰ 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), *rev'd as to remedy*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (1967).

⁴¹ See *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).

reflection of supply and demand forces. If the court is finding the price a consumer is willing to pay for an item unconscionable, it is implying that a heavy burden rests on those sellers engaged in dealing with the low income consumer not to maximize profits to an extent which takes advantage of some increased demand force exerted by the low income consumer. The seller seems to have an affirmative duty to deal in a commercially reasonable manner, and not to drive "too hard a bargain." Of course, the court in *Frostifresh* could have grounded the decision on the use of the referral-credit ploy alone as an unconscionable bargaining technique which tainted any resulting contract in the same shade.

The New York court's disapproval of the reimbursement gimmick was revealed in *State v. ITM, Inc.*⁴² The Attorney General of New York, acting pursuant to executive law, brought suit to enjoin freezer sales and sellers utilizing fraudulent and illegal tactics. In granting the injunction, the court held there existed a duty on sellers involved in these programs to reveal to purchasers such things as their respective standing in the geometric progression of possible leads which grew out of the referral credit program. Citing as authority section 2-302, *Williams v. Walker-Thomas Furniture Company* and *American Home Improvements, Inc. v. MacIver*⁴³ the court concluded there was no doubt about the unreasonableness and unfairness of the sales agreement in the food-freezer transactions.

The court's issuance of an injunction was coupled with the following statement concerning the merchant-consumer relationship:

No longer do we believe that fraud may be perpetrated by the cry of 'caveat emptor!' We have reached the point where 'Let the buyer beware' is poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware, too!⁴⁴

In addition, the opinion outlined what is expected of sellers, if they are to deal fairly with the consumer:

⁴² 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966).

⁴³ 105 N.H. 435, 201 A.2d 886 (1964), held a contract signed in blank, to be sent to the purchaser on a later date and which included credit terms never revealed to him, violated state law and further was unenforceable because of the adoption of section 2-302 of the UCC. The price the consumer was to pay (\$1609 including an \$800 commission paid to the salesman) was unconscionable. For an in depth criticism of the *MacIver* decision see Leff, note 8 *supra*, at 550.

⁴⁴ *State v. ITM, Inc.*, 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321 (1966).

We also believe that it is right, proper, just and equitable to tell the consumer, clearly and adequately, that he is personally liable for the entire contract price and that he will be required to make stipulated monthly payments plus carrying charges etc., in language that the least educated person can understand.⁴⁵

If ever language was alien to the sales approach used by door-to-door salesmen, the calm, matter-of-fact disclosure the court felt was necessary to reveal contract realities of the bargain being presented certainly qualifies.

Coupling the challenge to "let the seller beware, too," with the argument that one may have a constitutional right to due process in the administration of civil law, and the policy and law established by existing cases on unconscionability, an idea of the scope of protection that section 2-302 can provide begins to emerge. However, no court has yet applied the *Lefkowitz* standards to a merchant's sales pitch, so we can not be sure of its extent. Traditionally, the seller has been able to rely on the buyer's ability to manage his own affairs in contract negotiation, but if courts move in the direction some of the decisions and commentary predict, the seller may have to carefully make sure the party across from him in bargaining is his equal before any resulting contract will be enforceable.⁴⁶

Before leaving the discussion of section 2-302, a more detailed look at how the requirement of good faith imposed by the UCC can affect the existence and use of unconscionability as a defense is in order.

C. UNCONSCIONABILITY AND GOOD FAITH UNDER THE UCC

Section 1-203 imposes an obligation of good faith on all transactions taking place under the UCC. Section 1-201 (19) defines what good faith means for the purposes of section 1-203.⁴⁷ In the sales transactions discussed above, it was mentioned that in most cases the seller quickly assigned any contract he made to a finance company. For that company to take the assignment as a holder in

⁴⁵ *Id.*

⁴⁶ As to the limitation of protection of section 2-302 see *Pearson v. National Budgeting Systems, Inc.*, 31 App. Div. 2d 792, 297 N.Y.S.2d 59 (1969), holding a buyer may not sue to recover punitive damages on authority of section 2-302.

⁴⁷ UCC § 1-203. Obligation of Good Faith.

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

UCC § 1-201. General Definitions.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

See also the discussion surrounding notes 13 through 21 *supra*.

due course, under section 3-202, it must have acted in good faith. If the assignee takes the contract in good faith it is immune from any defenses the buyer may have had against his seller.⁴⁸

In construing section 1-201(19), which provides that good faith means honesty-in-fact, the courts again have shown a willingness to examine the realities of the assignment transaction—the actual relationship existing between the seller and the finance company—before they find honesty-in-fact.⁴⁹ This has had the effect of circumscribing what was once almost blanket protection for a finance company-assignee, and thus has provided more consumer protection.

*Norman v. Worldwide Distributors, Inc.*⁵⁰ is a good example of the use of both the good faith sections and unconscionability protection. The buyer, Norman, petitioned to have a judgment obtained by an assignee of his promissory note set aside, and also have the contract rescinded on the grounds of fraud. The holder of the note appealed from the trial court's finding for the consumer. The named defendant in the suit is the selling agency with whom the contract was made; the actual holder of the note was a business called Peoples National Fund, Inc.

The sale was much like the freezer examples, but was for breakfront cabinets, not food-freezers. The sales pitch included the referral credit plan by which the buyer received five dollars for just submitting names which were contacted, and another twenty dollars if that party also purchased.⁵¹ When the previously signed purchase agreement arrived at the consumer's home the buyer learned he had agreed to pay \$35.95 for the next thirty months for a three hundred dollar cabinet.⁵² The contract was returned to him, not by the seller, but by the finance company, Peoples Fund. When he contacted Peoples about referral credits he believed were owed to him, Norman was told that the company knew such plans existed, but that the contract of Norman's they held contained no language

⁴⁸ See Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. Pa. L. Rev. 395 (1966), dealing specifically with the practical problems the consumer faces when a finance company buys a contract and asserts holder in due course immunity against a claim subsequently arising from the contract.

⁴⁹ See *Jones v. Approved Bancredit Corp.*, 256 A.2d 739 (Del. Super. 1969); *Norman v. Worldwide Distributors, Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

⁵⁰ 202 Pa. Super. 53, 195 A.2d 115 (1963).

⁵¹ Norman was told by Worldwide the check for eighty dollars owed to him for referrals would be forwarded when an ill treasurer returned to work. Evidently the illness was terminal and out of respect and grief for the deceased the seller retired the office of treasurer, for the consumer never received the check.

⁵² Later developments revealed that Peoples had purchased the \$1000 agreement and note for \$831. 202 Pa. Super. at 56, 195 A.2d at 117.

guaranteeing such payments and that they were not bound to give Norman any credit. Norman could not find a phone listing or an address for the seller, Worldwide, and thus he was apparently left with nothing but a large contract liability to an entity immune from his defenses.

Like the trial court, the appellate court did not find the finance company's story convincing. On the authority of sections 2-302, 1-203, and 1-201(19) it denied holder in due course immunity to the assignee, and further found the contract unconscionable. When an assignee claims immunity from a defense (like fraud) which appears good on its face, the burden of showing that it is a holder in due course shifts to the assignee as the claiming party.⁵³ The size of the discount at which the contract was offered to the finance company should have alerted it to inquire into the seller's business practices.⁵⁴

D. CONCLUSIONS

Article Two provides consumer protection against unconscionable contracts under section 2-302 by instructing the courts to police explicitly against such contracts and thereby prevent unnecessarily harsh terms from being inflicted in one-sided contract bargaining. Factors alerting the court to possible overreaching include a party's education, bargaining knowledge and skill, and other obvious personal characteristics, all of which tend to affect the equality of the bargaining.

Large price variations between value and cost of contract items, large discount rates to assignees and illusory reimbursement plans may also be enough to render a contract unconscionable. The bargaining itself, when some combination of the above factors is present, can render any resulting contract unenforceable. Also, the terms themselves, when some of the above are evident, may be substantively unconscionable, that is, of such a nature that public policy dictates they not be upheld.

Section 2-302 may not distinguish between procedural and substantive unconscionability clearly enough for students of contract theory, but to the advocate trying to provide consumer protection for his clients the section is clear enough. It does not restrict courts to any one set of criteria, but allows the courts to examine a sales contract in the light of the facts of the commercial setting.

⁵³ *Id.* at 58, 195 A.2d at 118.

⁵⁴ In the *Norman* case, Peoples and Worldwide were in truth operated by the same personnel, so inquiry would have imposed no burden as such but was a meaningless act since the left hand rarely is unaware of what the right hand is doing. See also *Unico v. Owen*, 50 N.J. 101, 232 A.2d 1405 (1967).

III. WARRANTY

Many consumers do not become involved in unconscionable transactions. They buy from reputable merchants, who aggressively maximize their profit, but who also expect the consumer to adequately protect his own interests. The need for consumer protection in these sales, as in the unconscionable sales, is great. Whenever the merchant either offers, or attempts to limit the warranty for the goods he sells, and that warranty is one of the considerations influencing the buyer's choice of that product, there is clearly a need to protect the consumer's reliance. While this comment does not attempt to analyze warranty law history, the origins of the UCC warranty sections are an important source that the lawyer needs to use in ascertaining the intended effect of the UCC warranty provisions. "The warranties of the Sales Act [the Uniform Sales Act, hereinafter USA] have been reclassified and expanded by the Code."⁵⁵ The USA has been the law governing many of the cases used as examples in part B of this warranty discussion.

Five sections of Article Two, concerning warranty protection applicable to the consumer, will be examined. Sections 2-313 through 2-317⁵⁶ respectively entail the following concepts: express warranty; implied warranty of merchantability with regard to trade usage; implied warranty of fitness for a particular purpose; exclusion or modification of warranties; and cumulation and conflict of warranties, express or implied. The warranty concepts involved in product liability cases are not included within the scope of this comment, as they are on the borderline of tort law, and consumers usually have little difficulty finding an attorney or getting protection in these circumstances.⁵⁷

A. GENERAL HISTORY

1. *Express Warranty*

Section 2-313 concerns the creation and application of express warranties. Involved is the separation of harmless "puffing" from promises meant to form a part of the basis of the bargain. There is no concrete test applicable to contract bargaining to differentiate

⁵⁵ Davenport, *The Nebraska Uniform Commercial Code: An Introduction and Articles 1 and 2*, 43 NEB. L. REV. 671, 699 (1964) [hereinafter cited as Davenport]. The article contains not only a review of the warranty sections, but, as the title implies, all of Article Two.

⁵⁶ See appendix, *infra*, for the text of these sections.

⁵⁷ See, Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 WEST. RES. L. REV. 5 (1965); Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 WEST. RES. L. REV. 10 (1966).

between the two, but under the UCC, descriptions of goods, and samples or models which are used in a sales talk, can become a basis of the bargain and thus an express warranty that the goods will be as represented would arise.⁵⁸ An affirmation of the value of goods, or a statement purporting to be the seller's opinion or commendation of the goods, does not create a warranty;⁵⁹ therefore, the consumer may be in a difficult position in trying to decide what was meant to be a basis of the bargain promise.

Like section 2-302, the warranty provisions encourage the taking of evidence of the commercial setting in which the parties bargained.⁶⁰ Clearly this is sound policy if, "[i]n effect the ordinary contracts of sale are contracts of adhesion, presented to consumers under conditions of haste, ignorance and compulsion."⁶¹ In such a case "the conflict between a printed public presentation and a printed denial that any representation was made should not be resolved by the signature of the buyer beneath the denial."⁶²

Basically the basis of the bargain test in section 2-313 is a carry-over from the express warranty provision of the USA, but there have been some changes in the old section twelve. The creation of a warranty by use of description, or samples of goods, is one such alteration.⁶³ The effect which section 2-209(1)⁶⁴ gives to a modification, made without consideration, of a signed contract by interpreting such an action as a promise meant as a warranty,⁶⁵ is another change. A further difference from section twelve of the USA, and the common law requirements of express warranty, is the negative language that "merely the seller's opinion [of value] or commendation of the goods does not create a warranty"⁶⁶

⁵⁸ Davenport, note 55 *supra*, at 699.

⁵⁹ UCC § 2-313(2). See *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 154, 84 N.W.2d 151, 161 (1957).

⁶⁰ The Nebraska Supreme Court has demonstrated a willingness to examine the true commercial setting of a disputed contract with regard to warranty creation, rather than render judgment on the appearance of a bargained for acceptance of the seller's interpretation of the offer. See *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957); *Lloyd v. Gutsell*, 175 Neb. 775, 124 N.W.2d 198 (1963).

⁶¹ Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 328 (1963) [hereinafter cited as 77 HARV. L. REV.].

⁶² *Id.* at 329.

⁶³ Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430, 1432 (1966) [hereinafter cited as 64 MICH. L. REV.].

⁶⁴ UCC § 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

⁶⁵ 64 MICH. L. REV., note 63 *supra*, at 1433.

⁶⁶ UCC § 2-313(2). See 64 MICH. L. REV., note 63 *supra*, at 1432-35.

2. *Implied Warranties*

Before an implied warranty of merchantability attaches, section 2-314 requires that the merchant making a sale be one who normally deals in the type of goods sold.⁶⁷ The comprehensive tests listed under subsection two⁶⁸ are not exhaustive, and "often, implied warranties may arise from the course of dealing or usage of trade."⁶⁹ The language used refers to standards of the trade, generally an objective test, which applies with equal force to all consumers regardless of their income level or personal characteristics.

Conversely, the creation of an implied warranty of fitness for a particular purpose, the subject of section 2-315, is dominated by the needs of a particular consumer or buyer:

'[P]articular purpose' differs from the ordinary purpose for which goods are used in that it envisages a special use by the buyer which is peculiar to the nature of the business whereas ordinary purposes for which goods are used are those envisaged in the merchantability and go to uses which are customarily made of the goods in question.⁷⁰

The buyer need not make known the specific purpose for which he purchases; it is enough that the seller have knowledge of the buyer's reliance on the seller's choice of particular goods for his needs.⁷¹ This language focuses on the buyer's needs, not the standards of the trade, in determining if a warranty has been created. The creative advocate uses the facts about his consumer-client under section 2-315, whereas under 2-314 any warranty creation is limited to the usage of the trade in which a consumer has been dealing.

Both the merchantability and fitness concepts, as they appear in the UCC, are identical to their counterparts, section fifteen, subsections two and three, in the USA.

3. *Exclusion or Modification*

Section 2-316 is of particular importance to the consumer, for it controls any limitation or negation of warranties which the seller may attempt. Generally, actions or provisions tending to create and/or negate warranties should be construed consistently whenever possible. Parol evidence⁷² may be used to resolve conflicts under this section, pursuant to the restrictions placed upon its use by subsection one to the extent negation or limitation may be inop-

⁶⁷ UCC § 2-314(1).

⁶⁸ See appendix, *infra*, for text of section.

⁶⁹ UCC § 2-314(3).

⁷⁰ UCC § 2-315, Comment 2.

⁷¹ 77 HARV. L. REV., note 61 *supra*, at 319.

⁷² UCC § 2-202.

erative where unreasonable.⁷³ The real consumer protection is found in subsection two's requirement that any language or writing excluding or modifying warranties of merchantability must mention merchantability and be conspicuous. As to any attempt to exclude or modify warranties of fitness, it must be in writing and it must be conspicuous.⁷⁴

Examples of language sufficient to exclude some warranties, and buyers' actions which may prevent warranty creation under section 2-316 of the UCC are included therein.⁷⁵ By complying with section 2-316 the seller may, of course, also protect himself.

Subsection four allows remedies for breach of warranty to be limited in accordance with the Article Two provisions on liquidation and limitation of damages, or contractual modification of remedy.⁷⁶ This comment does not embrace the UCC remedy protection available⁷⁷ to the consumer, but in passing it should be pointed out that any limitation of the common law remedies will not be enforced under the UCC if they are unconscionable under 2-302.

4. *Cumulation and Conflict*

While express and implied warranties should be construed consistently, or cumulatively, the parties may in fact want to specify which are dominant in the case of conflict, or the unreasonableness of consistent construction.⁷⁸ Three rules for the ascertainment of which warranties may prevail are included in section 2-317. They call for technical specifications, samples from existing bulk, or express warranties to displace irregularities in the models and general descriptions, inconsistent language, or implied warranties other than fitness for a particular purpose.⁷⁹ It is reasonable to give added weight to any language, or object, which is on its face more specific than an alternative, when, as in these cases, one is trying to determine what was the standard that the goods were supposed to meet.

⁷³ UCC § 2-316(1) and Comment.

⁷⁴ UCC § 2-316(2) and Comment.

⁷⁵ Language such as: "There are no warranties which extend beyond the description on the face hereof" is sufficient to exclude all implied warranties of fitness. In addition, examination of goods, samples or models to the extent the buyer desires, or a refusal to examine goods, negates any implied warranties to the extent of defects such an examination should have revealed. UCC § 2-316(3)(c). Of course the buyer may have an argument he was not allowed to examine goods to the extent desired.

⁷⁶ UCC § 2-316(4).

⁷⁷ See UCC §§ 2-718, -719.

⁷⁸ UCC § 2-317.

⁷⁹ UCC § 2-317(a), (b), (c).

5. *Third Party Beneficiary*

Another section of the UCC which is relevant to this comment is section 2-318⁸⁰ which controls the extension of the warranty protection, discussed under other sections, to third parties. While the official comment declares that the section is neutral,⁸¹ that is, does not restrict or enlarge developing case law in the area, Alternative A, adopted in thirty states, limits beneficiaries of the seller's warranty protection to the family, household, or guests of a buyer. This is a reduction of coverage afforded by the original section 2-318, now present as Alternative B.⁸²

6. *Conclusion*

As in the unconscionable contract, the consumer in warranty actions may need to overcome holder in due course immunity to assert his defenses, or claims, arising from a sale. The same factors discussed above concerning the relationship between the assignor and assignee of a contract, will govern whether a buyer may assert breach of warranty as a defense against an assignee suing for default.

Before demonstrating how the warranty protection available under Article Two could be argued in a typical consumer situation involving bait advertising, a study of some of the cases utilizing warranty concepts to provide consumer protection will demonstrate how effective these sections can be.⁸³

B. CASE EXAMPLES

In *Brown v. Globe Laboratories*,⁸⁴ the Nebraska Supreme Court had to distinguish puffing from promises meant to be accepted as the basis of the bargain.⁸⁵ After Brown had purchased and used a bacterial substance to immunize his sheep, they became diseased. He brought suit against the producer-seller alleging, among other things, breach of warranty, express and implied, on the part of the

⁸⁰ See appendix *infra*.

⁸¹ Editorial Board Note on 1966 Amendment, UCC § 2-318. This section is more correctly the subject of an in depth study.

⁸² UCC § 2-318, Alternative B.

⁸³ For an excellent study of the many unsolved problems still facing the consumer see, Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

⁸⁴ 165 Neb. 138, 84 N.W.2d 151 (1957).

⁸⁵ See, *Donnelson v. Fairmont Foods Co.*, 252 S.W.2d 796 (Tex. Civ. App. 1952), holding an express warranty is an affirmation of fact or promise by seller relating to goods, which has a natural tendency to induce the buyer to purchase goods.

defendant. In affirming the jury verdict for the plaintiff, the court found sufficient evidence of the creation of a warranty to approve the trial court's instructions as to their existence.

The language "as good as any obtainable" amounted only to puffing or sales talk and did not create express warranties.⁸⁶ However, the company's printed circular, mailed to many customers and generally available for distribution, contained large capital-letter type setting out statements as to the development and duration of immunity resulting from the product's use. These were sufficient to create an express warranty as the "jury could have properly found that there was both express and implied warranty [to] establish a positive degree of immunity from [disease] and that it was reasonably fit for such purpose."⁸⁷

While the sales talk used by the company's representative included puffing, it was also competent to create certain implied warranties under the USA provisions applicable at the time of the contract; the provisions are the same as sections 2-314 and 2-315 of the UCC.⁸⁸ When the consumer made known his particular purpose for buying and it appeared, or should have reasonably appeared, to the seller that the buyer was relying on the seller's skill and judgment in the selection of one particular product, the goods recommended carried an implied warranty of fitness for such known purposes.⁸⁹

While the sales language used in the bargaining may not in and of itself have created a warranty, the combination of the seller's printed advertising and his knowledge of the consumer's reliance on the selection of the particular product the seller held out to satisfy the buyer's needs, affected the commercial transaction to the extent that both express and implied warranties secured the contract's performance to the buyer's satisfaction.

The role of advertising in warranty creation was also emphasized in *Ghera v. Ford Motor Co.*⁹⁰ In an action for fire damage to his car, the consumer-plaintiff appealed a nonsuit judgment of the trial court. The appellate court reversed, holding that one who engages in advertising to bring goods, and their quality, to the public's attention, and thereby engender demand for the goods, must reasonably know representations constitute an express warranty running directly to the buyer purchasing the goods in reliance thereon.⁹¹

⁸⁶ 165 Neb. at 154, 84 N.W.2d at 161.

⁸⁷ *Id.* at 157-58, 84 N.W.2d at 162.

⁸⁸ See discussion of these sections under section III A *supra*.

⁸⁹ 165 Neb. at 157, 84 N.W.2d at 162.

⁹⁰ 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966).

⁹¹ *Id.* at 652, 55 Cal. Rptr. at 103.

The recognition of advertising as a source of warranty creation could provide the consumer a prolific source of arguments to use against a seller.⁹²

*Loomis Bros. Corp. v. Owen*⁹³ is another case where the existence of an implied warranty for fitness may have protected the consumer from liability for goods which were of no use to him. The consumer purchased storm windows after examining samples of the same in his home. The windows delivered conformed to the samples shown him, and, in effect, met the standards of merchantability, but they failed to keep out the wind and weather of the climate in which the home of the buyer was located. The court found there was a sufficient question of breach of warranty of fitness for purposes intended to put the issue to a jury, and opened a confession of judgment entered by authority of the sales contract.

The result of these few cases was that if goods did not meet needs of which the seller was aware, then the buyer's purchase was futile. Where the buyer's wants remain unsatisfied in this manner there has been a failure of consideration and the contract should not be enforced. To hold a buyer to a contract from which he received nothing of value would be unconscionable. A case using both warranty and unconscionability concepts, to make sure a buyer had the performance he had bargained for, was *Vlases v. Montgomery Ward & Company*.⁹⁴ The suit against the defendant department store chain was for breach of warranty in the sale of one day old chicks to the plaintiff. The court, in construing sections 2-314 and 2-315 of the UCC, found both were designed to protect buyers of goods from bearing a loss where merchandise delivered does not violate any express promise, but still does not conform to normal commercial standards or meet a buyer's particular use. The chicks died after a very brief period in the buyer's possession and it was found that the cause of illness must have occurred while in the seller's possession. Failure to imply that certain standards should govern the conduct of the seller could render the entire bargain unconscionable. Sections 1-102(3)⁹⁵ and 2-302 prohibit enforcement

⁹² See, Miller, *Labels and Advertising That Lead to Liability*, 1966 ABA SECT. INS., NEG. & COMP. LAW 918 (1966); Comment, *Cigarette Advertising: Deceptive and Against the Public Interest*, 17 KAN. L. REV. 688 (1969). Cf. *Funk v. Kaiser-Frazer Sales Corp.*, 23 App. Div. 2d 771, 258 N.Y.S.2d 553 (1965), which held a buyer may reasonably rely upon representations by his seller through mass media advertising.

⁹³ 46 Del. Co. 79, 17 Pa. D. & C. 402 (1955).

⁹⁴ 377 F.2d 846 (3d Cir. 1967).

⁹⁵ UCC § 1-102. Purposes: Rules of Construction; Variation by Agreement.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the

of sales contracts, which might be deemed unconscionable, when goods exchanged are found to be totally worthless.⁹⁶

Implied warranties are imposed by law for the protection of the buyer, and their creation does not depend upon the affirmative intention of the parties.⁹⁷ A finding of unconscionability is also an operation of law which can override a party's apparent intention to agree to oppressive contract terms. *Vlases* applies both concepts to a situation where one party finds a promise has not been reciprocated with consideration or an acceptable substitute therefore.

As outlined above, any attempt to limit a contract warranty must be conspicuous, if in writing, and designed to attract the buyer's attention if section 2-316 is to uphold the limitation. When the seller fails to make his intention obvious, the buyer may still enjoy any and all implied warranties normally accompanying a particular sale.

Case decisions indicate that the conspicuousness of the print may be more important than the clarity of the qualifying language itself. For example, language held not sufficient to exclude all warranties when it was printed in the same type size as the rest of the contract, read: "Buyer acknowledges delivery, examination, and acceptance of said car in its present condition."⁹⁸ The meaning is clear enough, but the likelihood of its catching a consumer's eye is slight. Alerting the buyer to the existence of terms essential to the contract offer is as crucial as the impact of the terms themselves.

obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

⁹⁶ 377 F.2d at 850.

⁹⁷ *Kopet v. Klein*, 275 Minn. 525, 148 N.W.2d 385 (1967). The transaction in this case occurred while the USA provisions, identical to those of UCC § 2-315, were in force. The dispute was over a defective water softening unit which allegedly breached an implied warranty of fitness. Since the creation of such a warranty operates at law for the buyer's protection, in contemplation of a business transaction profitable to both parties, the court held the doctrine should be extended rather than restricted.

⁹⁸ *First National Bank of Elgin v. Husted*, 57 Ill. App. 2d 227, 205 N.E.2d 547 (1965). *But see* *Ryan v. ALD, Inc.*, 140 Mont. 300, 427 P.2d 533 (1967), in which bold print on the front of a contract directed buyer's attention to reverse side of paper by stating, "conditions on the reverse side which are a part of this agreement," was held sufficient notice to consumers of essential terms excluding warranties even though the terms were printed in difficult to read, dim, small, and blurred type. As to the UCC definition of conspicuous see UCC § 1-201(10); *Minikes v. Admiral Corp.*, 48 Misc. 2d 1012, 266 N.Y.S.2d 461 (1966); and *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969).

When the chances are reasonably good that the *existence* of important terms, affecting the buyer's rights, will be realized, the size and clarity of the print covering those terms is not as crucial. Since the buyer apparently knows of contract qualifications he is put on inquiry to take the time to find out what those terms are, even if that includes reading "fine print."⁹⁹

C. CONCLUSION

Perhaps the best way to summarize or conclude what part II of this comment has said about the use of warranty law under the UCC, to provide consumer protection, would be to apply that "law" to the hypothetical facts of a typical consumer problem. One problem which has especially plagued the low income consumer has been the bait and switch sale, or bait advertising. Recognition of the vital role of advertising in the creation of both express and implied warranties may lay the groundwork for using warranty arguments to void sales growing out of bait advertising.

When an advertisement reads "Furnish your living room and bedroom with two beautiful suites of furniture for only \$299," the consumer should know that the probability of the "bait and switch" sale is great. If upon visiting the advertising store the consumer finds the merchandise is nowhere in sight, or is told by a salesman it is so bad that *he* (the consumer) would not want it in his home, there should be no doubt that the consumer is in the middle of a bait advertising game. All the other merchandise which the consumer will be shown, as the kind of goods *he* would want in his home, costs hundreds of dollars more than did the bait. The sales approach which plays upon the low income consumer's strong desire not to be below a standard of living enjoyed by most Americans, and emphasizes the consumer's "good taste" in buying quality merchandise, rather than the "bait," is effective.

Even consumers of average income, who are able to make the larger than planned monthly payments, may find their monthly budgets soon fail under the strain of the expense of quality furniture. Here warranty protection, as it has been approached in the first part of this discussion, may void the burdensome contract. Reasoning from *Brown* and *Gherna*, the seller should reasonably know the buyer, particularly the low income buyer who has not, or does not, shop around for the best buy, may be relying on the seller's representation of "beautiful furniture" at prices the buyer can afford, as truly being the kind of a purchase he can afford to make. Arguably the goods sold to the buyer in the bait advertising sale

⁹⁹ Ryan v. ALD, Inc., 140 Mont. 300, 427 P.2d 533 (1967).

may be warranted to fit the particular purpose which the buyer requires. Furthermore, the advertisement expressly promised beautiful suites of furniture at a bargain price. Why isn't the advertisement merely puffing or permissible sales talk?

Certainly those who use bait advertising know their advertisement attracts the attention of those who find it most necessary to stretch limited incomes if they are to approach minimum standards of a comfortable life. The seller's advertisement does have more than a routine offer of furniture in its language, as it promises a chance to enjoy beautiful goods at a price within reach of the reader.¹⁰⁰ The language dispels consumer hesitancy to make a buying decision and he enters the store making the offer predisposed to the idea of purchasing "beautiful suites of furniture for \$299."

In a court of law it would involve simply a proof of fact to demonstrate how bait advertising affects the low income consumer. Statistics could prove:¹⁰¹ (1) the magnified desires of this consumer class to enjoy a good living standard and (2) the high frequency with which those attracted by bait advertising actually do "buy up" to more expensive goods than the offer presented. Theoretically it may be no different to hold a seller to a promise to immunize sheep effectively, than it is to hold him to a promise to provide "two beautiful suites of furniture for \$299." This is especially true when the seller knows the real concern of the buyer is not just for beautiful furniture, but for beautiful furniture within his ability to pay.

While no authority is directly on point for a price warranty argument, the liability that one must incur to buy goods is one of the most essential contract terms. To the low income consumer living in a rich nation, it may be *the single most important characteristic* of the goods. Since one can get quality goods if one can pay the asking price, the real problem for the low income buyer is to find goods which satisfy consumers' needs, which include durability and some attractiveness, selling at a price within his ability to pay. The price to the low income consumer is just as important a quality of the goods as is the durability or the attractiveness which concerns buyers of all income levels.

¹⁰⁰ Cases involving a very similar problem are those in which a consumer treats an advertisement as an offer to sell and he accepts the offer upon reading, then must go to the advertiser to inform him of the acceptance and pick up the goods. See *Lefkowitz v. Great Minnesota Surplus Store*, 251 Minn. 188, 86 N.W.2d 689 (1957); *Craft v. Elder & Johnston Co.*, 38 N.E.2d 416 (C.A. Ohio 1941).

¹⁰¹ Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 416 (1966) [hereinafter cited as 114 U. PA. L. REV.].

Incorporating *Loomis*, it may not be enough to give a buyer merchantable goods, for the more expensive furniture is admittedly worth the money to one who can use it (that is, pay for it), as the storm windows which Loomis bought were merchantable goods which conformed to the samples shown him. But if, like the storm windows which were worthless to Loomis because they could not keep the weather out of his home, the expensive furniture is worthless to the consumer because he cannot pay for it (enjoy it) then perhaps an implied warranty of fitness for a particular use, and an express promise as to price, has been breached.¹⁰² The price of the furniture is the overriding consideration for the low income consumer in making his decision to buy, a seller capitalizing on this sensitivity should be held to the promise held out to the buyer in the advertisement—that the goods are priced within his reach or needs. When the advertising promise makes the subsequent sale close to a certainty then the promise should be kept, if not for reasons of contract law then certainly for reasons of public policy.

Section 2-302 may have relevance to the bait and switch sale. Inequality of bargaining power because of the education, bargaining skill, and other general characteristics of the parties is probably instrumental in the success of bait and switch situations. The arguments found in the law review articles, and in the cases under part I on unconscionability would probably be appropriate in many of the bait and switch sales. The warranty approach concerns itself with actual promises exchanged, however, and when parties of apparently equal ability have struck a bargain in the bait and switch situation, the consumer who was originally attracted by the offer in the advertisement still has a right and a need to force the seller to honor his original presentation. If the UCC law of warranty continues to progress in the direction it is now heading, consumer protection can be expected to grow along with it.

IV. RELATED PROBLEMS

Other problems which have blocked effective consumer protection under the UCC are being solved. The holder in due course immunity, which shielded assignees from buyer's defenses in a contract, is now subject to a finding of fact that the holder should not or could not have known of misconduct on the part of his assignee. Factors which should alert the court to possible collusion or knowledge of the assignee of over-pricing and faulty service in a contract are large discounts in the sale of the contracts to the

¹⁰² Barber, *Government and the Consumer*, 64 MICH. L. REV. 1202, 1226 (1966).

assignee, or almost instantaneous assignment of purchase agreements by a selling agency.¹⁰³

However, any advantages the consumer may have acquired by the limiting of holder in due course immunity are eroded by the organized bar's ignorance of the case law. An attorney for a large finance company admitted he used the holder in due course immunity doctrine "to scare away lawyers . . . and you can count the ones that know about the *Norman* case on your fingers."¹⁰⁴

Some state legislatures have passed "cooling off" bills¹⁰⁵ which can be used to fight high pressure door-to-door selling techniques. These bills usually allow from twenty-four to seventy-two hours to post a letter to a company with whom one has contracted, through a door-to-door salesman, to inform the company of an intention to cancel the contract. Proof of the buyer's intention is a postmark within the allotted time period, and not acknowledged receipt at the company's offices within the time provided.¹⁰⁶

Consumer business education can curb the lack of knowledge about bargaining and buying realities which trap many economically poor consumers. Proposals have suggested beginning courses in grade school which would combat unethical business practices. Such courses would teach students how to read labels and contracts in light of truth in lending and truth in packaging requirements.¹⁰⁷

One last problem in providing consumer protection cannot be rectified by education or legislation, and it directly affects use of the UCC. The cost of using the legal process to fight an "illegal" contract is often equal to or greater than paying the contract debt. In the *Williams* case, Mrs. Williams would have been defenseless without the Legal Aid organization operated by the Washington, D.C. bar association. The Chief Staff Attorney, Pierre Doslert, wrote in a letter to Robert H. Skilton, "[the] trial, appeal to the D. C. Court of Appeals, and then to the U.S. Circuit Court took 210 manhours of legal work for which the appellants were not obligated to pay."¹⁰⁸ What will become of clients like Mrs. Williams when offices like Legal Aid have full case loads and consumers must be turned away?

¹⁰³ *Norman v. World Wide Distributors, Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963). See also the discussion of unconscionability and holder in due course immunity in section I *supra*.

¹⁰⁴ 114 U. PA. L. REV., note 101 *supra*, at 416.

¹⁰⁵ The Nebraska Unicameral moved such a bill to final reading before it became burdened with amendments and was killed on the floor. See L.B. 827, 80th Neb. Leg. Sess. (1969).

¹⁰⁶ See, e.g., L.B. 827, 80th Neb. Leg. Sess. (1969).

¹⁰⁷ 114 U. PA. L. REV., note 101 *supra*, at 447-48.

¹⁰⁸ Skilton & Helstad, note 7 *supra*, at 1480.

Consumer class action suits could be one alternative, but the mechanics and perhaps the theory of these could prove difficult.¹⁰⁹ Solicitation of clients, which would help identify those having claims against any one merchant, is forbidden. The prohibition is based on the theory that the practice of law is properly a branch of the administration of justice and not a mere money-making trade.¹¹⁰ That premise does not seem relevant to the realities of representing financially deprived consumers against fraudulent businessmen. Legal Aid offices are permitted to use the public airways to broadcast messages encouraging those who feel they have need for legal help to contact them. Under restrictive controls perhaps private attorneys could likewise publish the existence of a suit against some particular merchant to encourage others who have dealt with this defendant to join the lawsuit. By doing this, legal protection could be provided without "reduced rates," which are improper, and the cost of these suits would be distributed among the plaintiffs.

V. CONCLUSION

This comment has not attempted to examine how the UCC, and cases construing it, have changed long legal histories of cherished doctrine; rather, it presents cases and articles representative of the types of arguments which could be used to provide consumer protection under the UCC and Article Two. Unconscionability and warranty concepts extend protection to consumers to negate or limit liability for contracts unreasonably made, whether because of price or quality considerations.

A creative advocate should treat the UCC not as a body of static or inflexible rules, but rather as an outline of pliable legal concepts which may be shaped by the contracting parties to the facts of their particular transaction. While the cases used in this comment have often dealt with low income consumers, the arguments for allowing unconscionability or warranty protection can apply to a consumer of any station.

Courts are showing an impatience with commercial law which has permitted one party to take advantage of another.¹¹¹ The right to due process should extend to the enforcement of a contract when the judiciary is used to accomplish the satisfaction of contract liability.

¹⁰⁹ See Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407 (1969); Comment, *The State-Consumer Antitrust Class Action*, 49 NEB. L. REV. 840 (1970).

¹¹⁰ *Barton v. State Bar of California*, 209 Cal. 677, 682, 289 P. 818, 820 (1930).

¹¹¹ See *State v. ITM, Inc.*, 52 Misc 2d 39, 275 N.Y.S.2d 303 (1966).

Warranty protection, traditionally available when goods or services purchased did not meet contract or trade standards, should be a source of further consumer protection. When a buyer has made it reasonably clear to a seller that he relies on his selection of goods to fulfill the buyer's needs, the commercial setting is similar to that of the unequal bargaining situation where one party has power to dictate terms to another. Just as courts will police against unconscionable contracts arising from those situations, they may hold a seller to the promise (expressly or impliedly made) that his selection of goods represents the goods the buyer needs. The goods then must in actuality fulfill the buyer's needs.

When a seller has advertised to attract a party to his goods (engender a demand) and he knows that the advertisement implies and expressly promises certain things to a particular buyer, then the promise held out should be enforced against the offeree. Admittedly, warranty has usually not encompassed price provisions, but cases on the offer made by mass advertisement¹¹² are close to doing so. The court's willingness to scrutinize price provisions for unconscionable dealing may be evidence of a growing tendency to examine the cost of goods in a contract from more than just the viewpoint that "it was decided upon."

Government on both the state and federal levels is showing an interest in consumer affairs. It is time for the legal profession to utilize the unique power it wields in the judiciary to make the ideals of consumer protection realities. The legislative and the executive branches cannot be as directly or as immediately responsive to the public's needs—or as successful in answering them. The job of the advocate was clearly stated in the appellant's brief in *Williams*:

Nothing is harder to explain in this world to those people [low income consumers] than the injustice produced by the unwillingness of the bench to deal with the substance of a transaction. These persons cannot appreciate the limitations of the application of strict legal principles of law, nor should they be required to reason with the astuteness of a legal mind.¹¹³

Just as the *Williams* court showed a willingness to deal with the substance of the transaction, so must the bar and bench if consumer protection is to be a reality and not just an ideal.

Douglas F. Duchek '71

¹¹² Note 100 *supra*.

¹¹³ Brief for Appellant at 11, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

APPENDIX

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

- (a) Any 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 creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(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; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

§ 2-317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2-318. Third Party Beneficiaries of Warranties Express or Implied

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.