Providing Consumer Relief from Disclaimers

Shane H. Anderson
Wendy U. Larsen

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Shane H. Anderson & Wendy U. Larsen, Providing Consumer Relief from Disclaimers, 22 DePaul L. Rev. 794 (1973)
Available at: https://via.library.depaul.edu/law-review/vol22/iss4/5

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
COMMENTS

PROVIDING CONSUMER RELIEF FROM DISCLAIMERS

INTRODUCTION

Article 2 of the Uniform Commercial Code was drafted in part to correct the defects of common law warranty. Even a cursory glance, however, will reveal that the consumer would be in an extremely difficult position if he had to rely completely upon the Code to recover for a defective product. Fortunately, statutory and case law has developed to provide additional protection and to cure the defects of the Code. An examination of these developments exposes an only marginally improved recovery for the uninjured consumer with a defective product. A primary culprit in the failure of consumer advocates to obtain adequate redress has been the persistence of a belief in “freedom of contract.” It is a principal tenet of this theory that restraints should be minimal in the market-place so that individuals are free to negotiate the terms of their contracts. However, such a theory can only operate in a market composed of persons in relatively equal bargaining positions. Without such equality “free” contracts become adhesion contracts.

While it is true that collectively the American consumer wields a great deal of potential power, the consumer enters into contracts for the purchase of consumer goods on an individual basis with negligible bargain-

---


2. See pp. 802-803 infra.

3. The predicament of the consumer in this article will only be concerned with “economic harm,” that is, “damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits.” Note, 66 Colum. L. Rev. 917 (1966). UCC §§ 2-711, 2-714, 2-715.


From the consumer’s point of view, another glaring defect in Article 2 is that it regulates “contracts for the sale of goods” and does not cover sales of services and consumer leases. Some courts have implied a warranty by common law analogy to the warranties applicable to goods. See, e.g., W.E. Johnson Equipment Co. v. United Airlines, Inc., 238 So.2d 98 (Fla. 1970).
ing power to assert against the seller. Most consumer transactions are impersonal and involve form contracts, the terms of which are seldom subject to change. The consumer’s “freedom to contract” consists of being able to make the decision whether to buy or not to buy. Although he is the least able to assume the risk of defective products, he must do so when he makes the decision to purchase. Certainly a major contributor to this predicament is the warranty disclaimer, for it is through standardized disclaimer clauses, which sellers can force upon the consumer because of their superior bargaining positions, that sellers may completely avoid liability for defective products which have not caused injuries.

This paper will examine the nature of warranty protection under the Uniform Commercial Code; disclaimers; how disclaimers operate to the detriment of the consumer; and the remedial tacks which have been proposed, tried, and failed. It will become apparent that warranty protection under the Code is largely illusory and the evidence will sufficiently demonstrate the necessity for a National Warranty Act, which is provided as a conclusion to this paper.

** DISCLAIMERS AND WARRANTY PROTECTION**

While section 2-316(1) apparently protects the consumer from the negation of express warranties, this protection is subject to the parol evidence rule. Almost all major consumer sales transactions involve a writing which is intended by the parties as “the final expression of their agreement” and many standard contract forms have a printed integration clause which brings that contract under the parol evidence rule.

5. Even this is not a meaningful choice considering the fine distinction between a “necessary” and a “luxury” item.

6. UCC § 2-316(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 negation or limitation is inoperative to the extent that such construction is unreasonable.”

7. UCC § 2-202. “Terms with respect to which the confirmatory memorandum of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.”

8. 34 ALBANY L. REV. 339, 348 (1970): “[T]his order (contract) cancels and supersedes any prior agreement and as of the date hereof comprises the com-
thereby excluding any oral express warranties. In order to avoid the effect of the parol evidence rule on a contract without an integration clause, the consumer has the difficult burden of showing the existence of the express warranty, the presence of fraud, or that the writing was not intended as the final expression of agreement. It is manifest, therefore, that the consumer can find little solace in express warranties under the Code.

The implied warranty of merchantability may be disclaimed by a conspicuous writing which mentions "merchantability." The implied warranty of fitness may be disclaimed by a conspicuous writing. The underlying assumption of these requirements for effective disclaimers of implied warranties is that the seller may legitimately avoid liability for defective merchandise if the buyer is provided adequate notice. Consequently, section 2-316(3) provides logical exceptions to these specific and conspicuous notice requirements: (1) any language which in "common understanding" would call the buyer's attention to the exclusion of liability; (2) if the buyer has examined or refused to examine the product, implied warranties are excluded as to those defects which an examination would have revealed; (3) course of dealing or usage of the trade may extinguish implied warranties.

From the standpoint of the consumer there are many problems involved with section 2-316. One of the more obvious of these problems is the fact that even if the seller complies with the requirements provided by the Code for an effective disclaimer, it is unlikely whether anything meaningful has been communicated to the buyer. It is difficult for an attorney, for example, to explain the meaning of merchantability complete and exclusive statement of the terms of the agreement relating to the subject matters covered hereby. . . ." It is also a common practice to refer to a new vehicle warranty in a sales contract which disclaims express warranties. This disclaimer voids all other warranties except the new vehicle warranty. Note, 2 Val. L. Rev. 358 (1968). See Sterling-Midland Coal Co. v. Great Lakes Coal and Coke Co., 334 Ill. 281, 165 N.E. 793 (1929) wherein the court held the following clause to be sufficient to exclude express warranties: "[T]here are no understandings or agreement relative to this contract or its subject matter that are not fully expressed herein." See also Tracy v. Vinton Motors, Inc., 130 Vt. 512, 296 A.2d 269 (1972) in which the oral representations of a salesman were barred as a basis for recovery for a defective paint job, since the written contract disclaimed any warranty not acknowledged in the written agreement.

9. UCC § 2-314.
10. UCC § 2-316(2).
11. UCC § 2-315.
12. UCC § 2-316(2). "There are no warranties which extend beyond the description on the face hereof."
14. Shanker, supra note 1, at 41.
without a lengthy, complex discussion of section 2-314. Even in the unlikely situation where the seller specifically draws the attention of the buyer to the disclaimer, it is improbable that the consumer has any real understanding of the ramifications of that clause. Even if the consumer does understand the significance of the disclaimer, there is little he can do about it as he is almost completely without bargaining power and almost all consumer products are offered to the public on a "take-it-or-leave-it" basis. By providing specific requirements which must be met to adequately disclaim liability, the drafters of the Code have not provided the consumer with protection, but have merely provided a means whereby a manufacturer may prepare standard disclaimer clauses.

**LIMITATION OF REMEDIES AND WAIVER OF DEFENSE CLAUSES**

There are two other provisions in the Code which accentuate the difficulties consumers have with disclaimers. First, section 2-719 allows the parties to specify their own remedies and specifically authorizes the limitation of remedies to repair or replacement of the goods.\(^{15}\) The only check to this provision is section 2-719(2) which provides that if the remedy as limited "fails of its essential purpose," it may be struck down by the courts and the buyer may resort to other remedies as provided elsewhere in the Code.\(^{16}\) However, this section is operative only if the buyer is deprived of the "substantial value of the bargain," which presents a difficult burden of proof. Consequently, sellers have successfully limited the remedies of their buyers through form contracts. Consumers, uninformed of their legal remedies, believe that they are helpless.

The second section of the Code which further burdens the consumer is 9-206 which authorizes waiver of defense clauses. These clauses contain stipulations that the buyer will not assert defenses or claims against the assignee which he may have against the assignor. They are particularly onerous because of the prevalence of installment purchases where the usual practice is for the holder of the note to discount the instrument to a finance company or bank which usually has holder in due course status.\(^{17}\) In such a situation, if the buyer has purchased a defective product on an installment plan, he must continue payment of his obliga-

\(^{15}\) UCC § 2-719(1)(a).

\(^{16}\) UCC § 2-719(2) and Comment 1.

\(^{17}\) UCC § 3-305. A holder in due course takes the instrument free from personal defenses but subject to the real defenses of infancy, incapacity, duress, illegality, insolvency, misrepresentation in the inducement, and any other discharge of which the holder has notice.
tion to the finance company or bank regardless of the assignor’s (seller’s) breach of warranty.\(^{18}\)

There is an increasing trend both in the legislatures\(^{19}\) and in the courts\(^{20}\) to invalidate these clauses. The most comprehensive recent treatment of the waiver of defense clauses has been presented in the form of a proposed trade regulation rule by the Federal Trade Commission.\(^{21}\) This rule would: (1) prohibit sellers from honoring credit cards which required the holder to waive the right to assert claims or defenses against the issuer; (2) prohibit financing by a creditor who is closely related\(^{22}\) to

---

18. It is also a common practice for applications for credit cards to contain clauses which obligate the holder to continue payments despite problems which may arise as a result of purchases while using the card.

19. Twelve states have enacted legislation specifically providing that such clauses are unenforceable in contracts for the sale of goods and five states impose some restrictions on the form of the clause or require that the assignee meet certain standards. Twenty-five states, however, have not spoken on the issue. See Note, 31 U. PITT. L. REV. 687, 689 nn. 8, 9, 10 (1970); MASS. GEN. LAWS ANN. ch. 255, § 12(c) (Supp. 1969); R.I. GEN. LAWS ANN. § 6-27-6 (1968). ILL. REV. STAT. ch. 1211/2, § 517 (Supp. 1970) invalidates waiver of defense clauses if the "assignee or holder has actual knowledge or has received notice from its course of dealing with the seller or from its own records of substantial complaints by other buyers that seller has failed or refused to perform his agreements with such buyers within a reasonable time after such complaints are made." Uniform Consumer Credit Code § 2.404, alternative A makes waiver of defense clauses unenforceable; alternative B provides limited protection for the assignee.

20. See, e.g., Fairfield Credit Corp. v. Donnelly, 158 Conn. 543, 264 A.2d 547 (1967) holding that waiver of defense clauses in consumer-goods conditional sales contracts are void as against public policy; Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); Quality Finance Co. v. Hurley, 337 Mass. 150, 148 N.E.2d 385 (1958). Illinois has typically deferred to the legislature for further action to invalidate the clauses. See The First National Bank of Elgin v. Husted, 57 Ill. App. 2d 227, 205 N.E.2d 780 (1965). See also G.E. Credit Corp. v. Hoey, 7 UCC Rep. Serv. 156 (N.Y. Sup. Ct. 1970). Waiver of defense clauses have also been invalided due to the "close connection" between the assignor and the assignee or due to facts which indicate that he took with notice of existing defenses or claims. Vasquez v. Superior Ct. of San Joaquin County, 4 Cal. 3d 800, 484 P.2d 789 (1970); CapitoI Dodge, Inc. v. Haley, — Ind. App. — [33 Ind. Dec. 388], 288 N.E.2d 766 (1972) where automobile purchasers brought an action against a seller for fraudulent misrepresentation of insurance coverage afforded by the purchase contract. The court held that the misrepresentation did not preclude recovery of the deficiency balance by the financing agency.


22. The proposed rule defines a related creditor: Any person, partnership, corporation or association which is engaged in making loans to consumers to enable
the seller unless the buyer is permitted to assert the same claims and defenses against the creditor as he could against the seller; (3) prohibit consumers from making agreements which would prevent him from asserting any claims or defenses against a creditor; (4) prohibit agreements which provide a time period for raising claims and defenses which is shorter than the time period provided for the installment payments; (5) provide for a notice to be supplied to the consumer when a consumer note is used which provides the rights and remedies of the consumer; and (6) provide for a provision in consumer notes which notifies subsequent holders of that note that they may be subject to any claims or defenses which the consumer may have against the seller.

This rule, if adopted by the Commission, would be a significant step toward relieving the burden upon the consumer. It will not, of course, be

---

payment to be made for consumer goods or services and which either participates in or is directly connected with the consumer transaction. Without limiting the scope of the immediately preceding language, there shall be a rebuttable presumption that a creditor is a related creditor under any one of the following circumstances:

1. the creditor is a person related by blood or marriage to the seller or to the seller's spouse.
2. the creditor prepared, supplied or furnished the seller with the forms or documents used to evidence or secure the consumer loan.
3. the seller prepared, supplied or furnished the creditor with the forms or documents used to evidence or secure the consumer loan.
4. the creditor is directly or indirectly controlled by, under common control of, or is otherwise affiliated with the seller.
5. the creditor and the seller are engaged in a joint venture to produce consumer obligations payable either directly or by transfer to the creditor.
6. the creditor directly or indirectly pays the seller any consideration for the referral of consumer borrowers.
7. the seller guaranteed the consumer loan or otherwise assumed the risk of loss by the creditor upon the loan.
8. the creditor made five or more loans within a 1 year period, the proceeds of which were used in transactions with the same seller following referral of the consumer to the creditor by the seller.
9. (i) the creditor knew or had reason to know that the loan proceeds would be used in whole or in substantial part to pay the seller for an obligation of the consumer, and (ii) the creditor had notice that the seller failed or refused to perform contracts with consumers, or failed to remedy complaints within a reasonable time.

This section of the proposed rule provides the most comprehensive and significant relief for the consumer.

23. It has been argued that an invalidation of waiver of defense clauses will merely result in the lessening of available credit. However, in 1947 Pennsylvania enacted the Motor Vehicle Sales Financing Act, PA. STAT. ANN., tit. 69, §§ 601-637 (1965) which denies holder in due course status to assignees of installment contracts for the purchase of cars. It has been noted that such contracts have continued to be marketed freely. See Note, 31 U. PITT. L. REV. 687, 709 (1970). It is also argued that eliminating waiver of defense clauses places an unfair burden
effective unless the consumer has any claims or defenses against the seller. It will not, therefore, provide any meaningful relief if the seller has adequately disclaimed his liability.

UNCONSCIONABILITY

Some legal commentators have suggested that section 2-302 can be used to strike down all disclaimers. While it may be true that the unconscionability clause can be used to invalidate unconscionable disclaimers, it is unlikely that the clause can be used to provide more meaningful relief to the consumer by striking valid disclaimers. The draftsmen did not intend that the courts could freely disturb the "allocation of risks [merely] because of superior bargaining power," rather, the goal of this section was to prevent surprise and oppression. But how can a buyer show surprise when the seller has complied with the conspicuous requirements of 2-316? How can a consumer claim oppression when he has been provided statutory notice?

on the financing company. But nothing prohibits the assignor and the assignee from making their contract "with full recourse."

24. UCC § 2-302(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.

25. Murray, Unconscionability: Unconscionability, 31 U. PITT. L. REV. 1, 48 (1969); Shanker, supra note 1, at 43-45 suggests that disclaimer of implied warranty of merchantability may be prima facie unconscionable.


27. Accord, Hawkland, Limitation of Warranties Under the UCC, 11 HOW. L.J. 28 (1965); Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA. L. REV. 485, 523 (1967) where the author argues that if 2-316 is complied with, unconscionability is inapplicable: "Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section, the comments to which disclose full awareness of the problem at hand. It contains no reference of any kind to 2-302, although nine other sections of Article 2 contain such references. In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of 2-316 might still be strikable as 'unconscionable' under 2-302 seems explainable, if at all, as oversight, wishful thinking or (in a rare case) attempted sneakiness." See also UCC § 2-719, Comment 3.


29. UCC § 2-302, Comment 1.
It is highly unrealistic to depend on 2-302 to provide relief for the consumer from the disclaimer even if these objections could be overcome. The development of the case law in this area has been very meager and disappointing. When the doctrine of unconscionability has been applied, extremely high pressure situations which exclude the average consumer transaction have been involved. A great number of courts have turned in frustration to the theory of strict liability in tort to provide relief, thereby avoiding the Uniform Commercial Code and 2-316 entirely.

THE TORT-CONTRACT CONFUSION

If the concept of a uniform commercial code is desirable in sales law, then some re-evaluation of the direction the courts are taking when pre-

---

30. The greatest difficulty is that no one seems to know what unconscionability is—Professor Murray calls it the "unconscionability muddle." Murray provides a three-step analysis based on the assent of the purchaser for determining whether unconscionability may be used. Murray, supra note 25, at 60. The question from the consumer's standpoint is whether anyone should ever be able to assent to a defective product. If the answer to this question is negative, then disclaimers are unconscionable per se. The Code obviously did not wish to go this far.

31. Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966); Williams v. Walker-Thomas Furniture Company, 350 F.2d 445 (D.C. Cir. 1965). Cases which involve exorbitant prices have been the primary target of the use of 2-302. But these cases have merely produced more confusing language primarily because the question of what is an excessive price is really a question of what is excessive profit, thereby introducing the problems and complexities of anti-trust cases. See generally 20 ME. L. REV. 159 (1968); 22 CATHOLIC U.L. REV. 187 (1972).

32. The courts had previously turned to strict liability in tort for relief from the privity requirements in contract suits for breach of warranty. In response to this movement away from the Code, the drafters offered three alternatives to section 2-318. See generally Note, 12 WM. & MARY L. REV. 895 (1971). It is interesting to note at this point that jurisdictions which have adopted strict liability in tort have done so largely as a response to the work of Dean Prosser. It has been noted that this is an example of judicial willingness to consult well-developed professional literature when custom fails. A similar development may occur with unconscionability as there is voluminous literature on point.

33. A number of other individuals have turned to further legislation to provide the answer—the dispute between Professors Murray and Leff is really an argument about the appropriate forum for resolving the difficulties with unconscionability. Murray claims that the legislature has expressly delegated to the courts the task of interpreting 2-302 (this view finds support in Comment 1), but as Leff appropriately demonstrates, this means that the seller only loses if the buyer chooses to litigate. Is it not better to face the offensive clauses (including disclaimers) and regulate them out of existence? Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, 31 U. PIT. L. REV. 349, 354 (1970).

It has also been suggested that violations of legislation such as the Uniform Deceptive Trade Practices Act could be prima facie evidence of 2-302. See also H.B. 1381, 78th General Assembly of the State of Illinois (1973) which would
sented with a consumer with a defective product (with liability ade-
quately disclaimed) is needed. Hence, the courts have in many cases
realized that an injustice is being perpetuated upon the consumer by the
denial of adequate remedies against manufacturers who sell defective
products, and, seeking to correct this injustice, the courts have chosen
generally two courses of action: (1) they have ignored the Code alto-
gether and applied tort law;\(^3\) \(^4\) (2) they have distinguished the provi-
sions of section 2-316 to such an extent that it is difficult to see how a
manufacturer can adequately extinguish or limit his liability.\(^3\) Other
courts, of course, have refused to provide any relief, thereby compound-
ing the confusion and uncertainty.\(^3\)\(^6\)

In 1965 two state supreme courts vividly demonstrated the confusion
of legal theories while granting relief to consumers with defective prod-
ucts. Santor v. A. & M. Karagheusian, Inc.\(^3\)\(^7\) granted the most favor-
able relief to the consumer-plaintiff. While the New Jersey Supreme
Court awarded damages based on the implied warranty of merchant-
ability, it characterized the contract between the manufacturer and an ul-

---

34. See generally Kessler, The Protection of the Consumer Under Modern Sales Law, 74 Yale L.J. 262 (1964); Shanker, supra note 1. Note, 114 U. Pa. L. Rev. 539 (1966); Note, 12 Wm. & Mary L. Rev. 895 (1971); Note, 77 Harv. L. Rev. 318 (1963); Franklin, When Worlds Collide: Liability Theories and Dis-
claimers in Defective-Product Cases, 18 Stan. L. Rev. 974 (1966). At least one author is not bothered at all by the mixture in theories, the contract being the "occasion for the tort," Bayne, Replacement vs. Repair: A Consumer's Brief Chal-
lenges General Motors, 24 Syracuse L. Rev. 639 (1973). See also Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 804 (1966): "[C]ourts at once agreed that the proper theory was not one of warranty at all, but simply a strict liability in tort divorced from any contract rules. The number of them is already sufficient to make it reasonably certain that this is the law of the immediate and the distant future. There are still courts which have continued to talk the language of 'warranty;' but the forty-year reign of the word is ending, and it is passing quietly down the drain."


37. 44 N.J. 52, 207 A.2d 305 (1965). Following the precedent of Santor, the New Jersey District Court broadly stated the position of the New Jersey courts: "The theory of the courts in New Jersey is to place an enterprise liability upon a manufacturer; so that a manufacturer is liable for defective products which it has placed into the channels of trade, and this irrespective of the relationship, if any, between the manufacturer and the aggrieved party." Fashion Novelty Corp. of N.J. v. Cocker Machine and Foundry Co., 331 F. Supp. 960, 965 (D.C. N.J. 1971).
timate consumer as "hybrid, having its commencement in contract and its termination in tort." Chief Justice Traynor, while providing economic relief for the consumer-plaintiff in Seely v. White Motor Co., maintained that tort law was developed to deal with the problem of physical injuries, while sales law was intended to govern commercial relationships. Justice Peters, however, in a concurring opinion, argued that tort law should apply in a "consumer sale" and sales law in a "commercial sale." Both the Santor court and Justice Peters in Seely are apparently unconcerned about the effect their holdings may have on a fully developed set of statutes which were available to settle the controversies in question. As Professor Franklin has pointed out: "At best, we have judicial lack of awareness of the possible relevance of sales law. At worst, we have open judicial defiance of apparent statutory commands."

In a more recent case, Hawkeye Security Insurance Co. v. Ford Motor Co., the Iowa Supreme Court took judicial notice of the "seeming" conflict between tort and warranty recoveries. Justice Rees maintained that given the proper fact situation, both theories could be pursued in the same action. However, he proceeds to confuse his discussion by quoting from Justice Traynor and Justice Peters, without attempting to resolve the conflict inherent in their views, and concludes that both theories should be allowed since both are designed to meet the "needs of society."

38. Id. at 64, 207 A.2d at 311.
40. 63 Cal. 2d at 27-29, 403 P.2d at 157-58, 45 Cal. Rptr. at 29-30. There is at least some support in the UCC for evidence that the drafters intended consumer transactions to be governed by different principles than those which govern transactions among businessmen. UCC § 9-101 and Comments. A consumer was awarded damages for economic loss from a defective product in Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1971) (this case also contains a good discussion about all the confusing theories).

41. Professor Shanker has called this apparent lack of concern a "judicial eclipse." Shanker, supra note 1, at 8. At least one legal commentator has suggested that there is "a certain judicial impropriety in ignoring a statute dealing with substantially the same area as the case before the court." Note, 114 U. Pa. L. REV. 539, 549 (1966).
42. Franklin, supra note 34, at 979. Professor Franklin also suggests that with the publication of the Second Restatement of Torts §§ 402 A and 402 B, more courts are likely to apply tort theory in spite of the applicability of the Code. Id. at 989 n.89.
43. 199 N.W.2d 373, 381 (Ia. 1972).
44. 199 N.W.2d at 382.
Case law has, therefore, made it difficult for the manufacturer to predict the consequences of his contractual relationships with consumers. While he can rely on some courts to literally apply the provisions of 2-316 to his form contracts which comply with the requirements for adequate disclaimers, he is also likely to encounter very narrow constructions of the disclaimer which deny protection for rather improvised reasons. In Rehureck v. Chrysler Credit Corp., for example, the disclaimer was held ineffective because it was on the back page of a retail installment contract in small print even though the buyer had actually read the clause. The conspicuous disclaimer in the manufacturer's warranty booklet has been held insufficient to disclaim implied warranty by the dealer and ineffective against the purchaser because it was given to him after the sale. At least one court has held an otherwise effective disclaimer invalid because the buyer had not actually been shown the clause.

Many groups and individuals have despaired over the muddle in the courts and turned to legislation as the solution. The National Consumer Act, for example, flatly prohibits all warranty disclaimers or limitations on remedies available to the consumer due to breach of warranty. Other legislation has been proposed in Congress.

**LEGISLATIVE PROPOSALS**

1971 was a productive year for consumer advocates but the most

45. 262 So.2d 452 (Fla. App. 1972). This procedure would seem adequate to prevent "oppression" and "surprise." See Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968) which seems to indicate that it would be enough if the buyer's attention were specifically drawn to the limitations and explained in detail.

46. Illinois has reached this conclusion at an earlier date, denying the protection of a disclaimer in a warranty booklet which was not specifically pointed out to the purchaser at the time of sale. Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965). See also Overland Bond and Investment Corp. v. Howard, 9 Ill. App. 3d 348, 356, 292 N.E.2d 168 (1972) for a spurious distinction between "good condition" and "present condition" in order to deny effect to a disclaimer.


48. NATIONAL CONSUMER ACT § 3.302. See also NATIONAL CONSUMER ACT § 3.304 which eliminates privity requirements and NATIONAL CONSUMER ACT § 3.301(2) which defines "merchantability" as including a warranty that "the goods conform in all material respects to applicable state and federal statutes and regulations establishing standards of quality and safety of goods. . . ." The National Consumer Act is a model act for consumer protection prepared by the National Consumer Law Center, Boston College Law School.
astonishing of all the legislative proposals was Senator Magnuson's Consumer Product Warranties and Federal Trade Commission Improvements Act. This bill proposed three major changes to warranty law. First, the FTC is empowered by this Act to make rules and regulations governing written warranties for consumer goods costing over $5.00. These rules and regulations may establish the standards for a "full warranty." Any product which does not have a warranty which meets these standards must be clearly labeled to indicate its coverage. Second, warranties implied by state law cannot be disclaimed. Third, purchasers who prevail in litigation against sellers or manufacturers are entitled to recover damages, costs and attorney's fees. Aside from the fact that Senator Magnuson was not able to convince his opponents of the soundness of his

49. S. 986, 92d Cong., 1st Sess. (1971); Fair Warranty Disclosure Act, S. 1221, 92d Cong., 1st Sess. (1971) a companion bill. The predecessor of these bills, S. 3074, 91st Cong., 1st Sess. (1969) was passed by the Senate. Among other consumer bills proposed in 1971 are: Consumer Class Action Act, S. 984, 92d Cong., 1st Sess. (1971); Consumer Fraud Prevention Act, S. 1222, 92d Cong., 1st Sess. (1971); Consumer Product Warranties and Federal Trade Commission Improvements Act, H.R. 4809, 92d Cong., 1st Sess. (1971); Warranty Protection Act, H.R. 10673, 92d Cong., 1st Sess.; Consumer Products Warranty and Guarantee Act, H.R. 5037, 92d Cong., 1st Sess. (1971). See also Exec. Order No. 11,583, 36 Fed. Reg. 3509 (1971) establishing an Office of Consumer Affairs and declaring "buyers' rights": (1) the right to make an intelligent choice among products and services; (2) the right to accurate information on which to make a free choice; (3) the right to expect that the health and safety of buyer is taken into account by those who seek his patronage; (4) the right to register dissatisfaction and have complaint heard and weighed, when a buyer's interests are badly served.

50. The minimum standards for inclusion in the "full warranty" are: (1) it would have to promise to repair or replace without charge any such malfunctioning or defective product within a reasonable time or make a refund; (2) it would be prohibited from placing unreasonable duties on the purchaser for securing the warranty performance; (3) if the purchaser misused or failed to maintain the product, the warrantor would not be required to repair or replace; (4) although implied warranties could not be disclaimed, they can be limited in duration as long as reasonable, conscionable and conspicuous. This bill is a significant improvement over the warranty provisions in the UCC particularly because of its emphasis upon clear communication to the consumer of the extent of his warranty protection.

51. Senators Ribicoff and Percy have introduced a bill this year, S. 707, 93d Cong., 1st Sess. (1973), which if passed would establish a Consumer Protection Agency. Presumably this agency could require a warranty similar to the one conceived by Senator Magnuson in 1971. In addition, H.R. 6168, 93d Cong., 1st Sess. § 207 (1973) establishes an Office of Consumer Counselor which is empowered to examine any matter before the President with respect to economic stabilization, require public hearings, and advise consumers.

It was argued when Sen. Magnuson's bill was introduced that the legislation would deaden competition, drive up prices and preempt the prerogative of state legislatures. The counter of this argument is that if the manufacturer is prohibited from disclaiming liability, he will either increase prices to cover his dam-
bill, there are two defects: (1) the full warranty is voluntary; (2) there is no provision to invalidate waiver of defense clauses.

There have been a few attempts in legal literature to improve upon legislative suggestions, but they all share a glaring defect—they do not adequately grapple with the problem of consumer ignorance and sense of futility. None of them seem to realize that a consumer will benefit from their legislation only if he is adequately educated, financed, and angry enough to sustain himself through an extensive litigation process.

CONCLUSION

It must be apparent that the law which protects consumers from defective products is in great need of revision. The Uniform Commercial Code serves primarily commercial interests by attempting to maintain freedom of contract. However, the normal restraints of competition and free enterprise do not operate to check the detrimental effects of disclaimers, integration and waiver of defense clauses, limitation of remedies, and the parol evidence rule. Sellers have used the Code to formulate form contracts to completely avoid liability for defective products. In response, some have suggested that unconscionability could be used to protect the consumer. Others have tried obscure legal theories which have served to increase the confusion and disarray of the law. Still others have suggested piecemeal legislation which is inadequate in vision. None of these tactics have succeeded.

We need legislation which provides uniformity, which adequately informs both the consumer and the manufacturer of their rights and obligations and which provides meaningful remedies for both. We have proposed a National Warranty Act which if enacted will accomplish these goals. More importantly, it will eliminate the primary culprit in the "consumer predicament"—the disclaimer. This Act is proposed as a national act because amendments to the UCC are ultimately too burdensome for the manufacturer who would have to mold his warranties to all the variations which would be imposed by the states.

---

52. A Federal Consumer Products Liability Act, 7 Harv. J. Legis. 568 (1970); Note, 12 Wm. & Mary L. Rev. 895 (1971); 34 Albany L. Rev. 339 (1970) which includes a good proposal for the invalidation of the waiver of defense clause. See also Eovaldi and Gestrin, Justice for Consumers: The Mechanisms of Redress, 66 Nw. U. L. Rev. 281 (1971), which suggests the development of non-judicial forums and arbitration procedures to provide an effective means of redress for consumers.
§ 1-1 DECLARATION OF PURPOSE

It is the purpose of this Act to provide a uniform written warranty to accompany manufactured consumer products which are in or affecting interstate commerce. This warranty is expressed in simply understood terms, with remedies clearly stated, in order to assure full disclosure of warranty terms to consumers. The remedies provided to the consumer in this warranty are meaningful and efficient. This warranty will also provide manufacturers of consumer products with a clear conception of the nature of their duties and responsibilities to the consumer. No provisions of any state law or the Uniform Commercial Code shall have the effect of limiting or modifying the protection given to consumers by this Act.

§ 1-2 SCOPE OF THE ACT

This Act will encompass:
1. The sale or lease to consumers of new consumer products with a manufacturer’s selling price of $5.00 or more.
2. Sales of utilities, gasoline, fuel oil, food, drug and cosmetic products are excluded from the coverage of this Act.
3. The warranty provisions of this Act become operative only upon the purchase or lease by a consumer of consumer products.

§ 1-3 DEFINITIONS

1-3.1 Consumer—Any natural person, not a merchant with respect to the goods, who purchases a consumer product and uses such product primarily for personal, family, household or agricultural purposes.53

1-3.2 Consumer Product—Any new manufactured product purchased or leased by a consumer from a merchant and used by the consumer primarily for personal, family, household or agricultural purposes.54

53. The term “consumer” was adapted from both the UCC § 9-109(1) and the Truth in Lending Act, 15 U.S.C. § 1602(h) (1970).
54. “Consumer product” is defined to distinguish this class of goods from “commercial products,” primarily because a basic tenet of the Uniform Commercial Code—the ability of contracting parties to bargain over terms of a sale, including the terms of warranty protection—is operative in commercial transactions between merchants. Not only does a businessman have much greater financial leverage in
1-3.3 Defective—A defective consumer product is an article which is not fit for the ordinary purposes for which it is intended to be used or is likely to be used by the consumer, or which does not conform to the promises or affirmations made on the container or label, if any, or which is not in conformity with all state and federal regulations governing the safety and quality of the product, or which contains defects in materials or workmanship.65

1-3.4 First Purchaser—When used with respect to consumer goods the term means the first person, other than a merchant, to whom possession thereof is transferred pursuant to a retail sale or lease. In the case where possession is first transferred to an agent or employee of a dealer with the expectation that such consumer goods will subsequently be sold or leased as part of the agent or employee's normal business, and such subsequent sale or lease does take place, the purchaser or lessee under such subsequent sale or lease shall be considered a first purchaser.66

1-3.5 Household Appliance—Any article, product, machine or device which is manufactured, produced or assembled primarily for use as a fixture in private residences or for any other household or family use, and which is operated by electrical energy, gas, gasoline or any other petroleum product.67

1-3.6 Manufacturer—For purposes of this Act, manufacturer means any person engaged in business in or affecting interstate commerce, who

55. The definition of the word "defective" stems from the merchantability requirements codified in the UCC. Because these requirements are known to all parties in the distribution chain, this Act purposely brings the definition of "defective" close to the UCC definition of "unmerchantable." This term is one upon which there exists a judicial "gloss" which will assist the courts in their interpretation of this Act. See Franklin, When Worlds Collide, 18 STAN. L. REV. 974, 979-80 (1966). Although the definition of this term is quite broad, "defective" does not include mere buyer dissatisfaction or disappointment with a particular consumer product.

56. "First purchaser" was defined to preclude evasion of the warranty requirements of this Act by schemes in which an unscrupulous dealer would make "paper sales" of his products to an employee or agent, then repurchase the product and sell it to a "regular" buyer in the normal course of business. This subsequent buyer, under such a scheme, would not technically be the first purchaser of the product. Comment, Consumer Protection and Warranties of Quality—Proposal for a Statutory Warranty in Sales to Consumers, 34 ALBANY L. REV. 339, 365 (1970).

57. This definition was adapted from that of "household appliance" contained in H.R. 20, 93d Cong., 1st Sess. (1973). At the time this comment was being written, hearings on the bill were being held.
manufactures, produces or assembles a product that will be purchased by a consumer and used as a consumer product.\textsuperscript{58}

1-3.7 Manufacturer's Selling Price—The unit price at which a manufacturer sells a product to a wholesaler, distributor, retailer, or other merchant for resale, or the price at which the manufacturer sells a product directly to a consumer.\textsuperscript{59}

1-3.8 Merchant—A person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.\textsuperscript{60}

1-3.9 Motor Vehicle—Every self-propelled vehicle, in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.\textsuperscript{61}

1-3.10 Products Sold as Seconds—A product sold as a “second” is a product which is not defective except that such “second” may contain defects in materials or workmanship.\textsuperscript{62}

\textsuperscript{58} For purposes of this Act, “manufacturer” does not refer to persons or companies which produce component parts that subsequently will be used by another person or company in the production of a “finished” product. However, even though final assembly of an article that will be sold as a consumer product is not done by the manufacturer—that is, if a product is intended to be sold to a consumer disassembled or if a merchant is required to assemble or add to the product prior to its sale to a consumer—the manufacturer of this “final but disassembled” product must accompany it with a Statutory Warranty. Persons who are not “engaged in the business” of manufacturing goods—such as one who occasionally sells handcrafted articles made as a hobby, or one who sells his personal car to another—do not come within the definition of “manufacturer.”

\textsuperscript{59} This “price” is defined in the Act for two reasons. First, the Statutory Warranty need not be given to articles sold for less than $5.00 by the manufacturer to a merchant for resale as a consumer product, and second, the duration of the warranty period is directly related to the price of the product.

\textsuperscript{60} The definition of “merchant” is taken verbatim from § 2-104(1) of the Uniform Commercial Code. A merchant may be a manufacturer, wholesaler, retailer, or dealer who sells directly to consumers.

\textsuperscript{61} The definition of “motor vehicle” is adapted from ILL. REV. STAT. ch. 95½, §§ 1-146 and 1-217 (1970).

\textsuperscript{62} Many consumers search for items sold as “seconds” in order to obtain a cheaper price for a brand name product. This Act will not prohibit manufacturers from selling “seconds,” but such products must be accompanied by a statutory warranty from the manufacturer. The definition of “defective” in a warranty given with a “second,” however, may be slightly altered by the warrantor. See note 71 and accompanying text infra.
1-3.11 Related Creditor—Any person, partnership, corporation or association which has made or is making loans to consumers to enable payment to be made for consumer products or services and which either participates in or is connected with the consumer sale or lease transaction. Without limiting the scope of the immediately preceding language, the creditor participates in or is connected with the consumer sale or lease transaction under any one of the following circumstances:

1. The creditor is a person related by blood or marriage to the seller or the seller's spouse.
2. The creditor prepared, supplied or furnished the seller with the forms or documents used to evidence or secure the consumer loan.
3. The seller prepared, supplied or furnished the creditor with the forms or documents used to evidence or secure the consumer loan.
4. The creditor is directly or indirectly controlled by, under common control of, or is otherwise affiliated with the seller.
5. The creditor and the seller are engaged in a joint venture or are in cooperation or combination to produce consumer obligations payable either directly or by transfer to the creditor.
6. The creditor, directly or indirectly, pays the seller or lessor any consideration whether or not it is in connection with the particular transaction.
7. The seller guaranteed the consumer loan or otherwise assumed the risk of loss by the creditor upon the loan.
8. The creditor made five or more loans within a one-year period the proceeds of which were used in transactions with the same seller following referral of the consumer to the creditor by the seller.
9. The creditor knew or had reason to know that the loan proceeds would be used in whole or in substantial part to pay the seller for an obligation of the consumer, and the creditor had notice that the seller failed or refused to perform contracts with consumers, or failed to remedy complaints within a reasonable time.63

1-3.12 Sale—A sale consists in the passing of title from the seller to the buyer for a price.64

63. "Related creditor" is defined in the National Consumer Act § 2.407 and in the Revised Proposed Trade Regulation Rule, 38 Fed. Reg. 892 (1973). The definition used herein is adapted from both sources.
64. "Sale," as defined in this Act, stems directly from § 2-106(1) of the UCC.
§ 2-1 STATUTORY WARRANTY

The manufacturer of all consumer products within the scope of this Act shall include the following written warranty with all such products:

New Product Warranty

(Name of Manufacturer)

(Address of Manufacturer)

(Date of Purchase—to be filled in by Seller)

THE MANUFACTURER WARRANTS THAT:

1. This product is not defective. Defective means an article which is not fit for the ordinary purpose for which it is intended to be used or is likely to be used by the consumer, or which does not conform to the promises or affirmations made on the container or label, if any, or which is not in conformity with all state and federal regulations governing the safety and quality of the product (or which contains defects in materials or workmanship).65

2. If the product is defective, the manufacturer will repair or replace it without charge and within a reasonable time following notification by the consumer of the defect to the manufacturer or his appointed agent. If such repair or replacement is inadequate, the buyer may return the defective product to the manufacturer and the manufacturer will refund the sales price to the buyer. Costs of shipping the defective product to be repaired shall be borne by the manufacturer.

3. If the manufacturer refuses to repair, replace or refund the sales price of the defective product within a reasonable time, the purchaser of this product is entitled to take any and all of the following action:
   a. File a complaint with the Federal Trade Commission. That agency shall file a suit on the buyer's behalf if, upon investigation of the complaint, the Federal Trade Commission determines that the product is defective.

---

65. The bracketed phrase may be deleted by the manufacturer if the consumer product is being sold as a “second.” See note 71 and accompanying text infra.
b. If any balance of the purchase price is outstanding at the time and the manufacturer has refused to repair or replace the defective product, the buyer may withhold payments from the holder of his obligation for the balance of the purchase price, if the product was purchased on an installment plan, revolving charge and any other open-end credit account such as a bank credit card, or if the purchase of the consumer product was financed through a related creditor. The buyer will resume payments to the holder of his obligation upon the manufacturer's repair or replacement of the defective product, or upon refund, by the manufacturer, of the purchase price of the consumer product. No additional interest shall accrue during the time the consumer is withholding payments.  

c. Bring an action in any competent court on his own behalf.

d. Pursue any other remedies available under law and equity.

4. This warranty will not apply and the manufacturer will not be required to repair or replace the defective product, nor refund the purchase price, if the buyer fails to comply with any reasonable instructions from the manufacturer regarding the operation and maintenance of this product and the defect is a direct and proximate result of such non-compliance.

5. Operating costs, and ordinary and normal maintenance costs,

66. This paragraph of the Statutory Warranty is one of the most important provisions of the Act. The elimination of waiver of defense clauses, coupled with the fact that the Statutory Warranty may not be disclaimed, will provide the consumer with an effective non-judicial tool which he may use to obtain satisfaction for a defective consumer product. Through this Act, the consumer may assert any defenses he may have not only against a party who has allowed him to purchase a consumer product on credit, but also against a party who comes within the definition of "related creditor." The inclusion of "related creditor" will permit a consumer to assert claims and defenses against creditors who pretend to insulate themselves from consumer sales transactions by claiming that they are only lenders having nothing to do with the seller. See National Consumer Act, § 2.407(f), and the comment following.

67. Clear and explicit instructions on the operation, maintenance and care of a consumer product may and should be prepared and included with the product by the manufacturer. If periodic service is required, as in the case of motor vehicles, the manufacturer may require the consumer to prove such service was obtained by including with the instruction booklet coupons to be stamped or filled in by the servicing party. It is unreasonable to require a manufacturer to accept responsibility for a product which becomes "defective" as a direct result of consumer neglect or misuse. However, if there are no instructions provided, or if the instructions given are unreasonable, the consumer will have no means of knowing the requirements and limitations of the product, and would not be responsible, under such circumstances, for the defects that might occur.
which may be specified in the instruction booklet provided by the manufacturer, shall be borne by the consumer.68

6. The duration of the warranty period is ________ (to be filled in by the Manufacturer in accordance with Section 2-2 of this Act).

§ 2-2 DURATION OF WARRANTY

The Statutory Warranty shall be effective for the following time periods:

1. At least one year for household appliances with a manufacturer's selling price of less than $100.

2. At least five years for household appliances with a manufacturer's selling price of more than $100.

3. At least three years or 36,000 miles for motor vehicles.69

4. At least one year for all other consumer products which are not household appliances or motor vehicles with a manufacturer's selling price of less than $100.

5. At least five years for all other consumer products which are not household appliances or motor vehicles with a manufacturer's selling price of more than $100.

§ 2-3 SELLER MAY PROVIDE WARRANTY70

Any seller may assume the duties, responsibilities and liabilities imposed upon the manufacturer by this Act so long as:

1. The seller provides to each purchaser of consumer products the full Statutory Warranty.

68. This section of the warranty is directed principally, but not solely, toward costs incurred in owning and operating a motor vehicle. It should be pointed out by the manufacturer to the consumer that "operating costs, and ordinary and normal maintenance costs" include such items as gasoline, oil, ordinary tune-ups, spark plugs, points, and other ordinary service parts and service charges.

69. Since most automobiles are financed over a three-year period, it is reasonable to allow warranty protection at least for that span of time. The 36,000 mileage figure was chosen because major automobile manufacturers generally use a ratio of 12,000 miles per year in their warranties. Comment, Consumer Protection and Warranties of Quality—Proposal for a Statutory Warranty in Sales to Consumers, 34 ALBANY L. REV. 339, 367 (1970).

70. Since many merchants want consumers to identify the seller, rather than the actual manufacturer, as the source of the consumer product, this Act will not preclude that practice. By agreement, the seller and manufacturer may provide that the required Statutory Warranty will be extended to the consumer by the seller himself. Underlying this provision, however, is the assumption that the manufacturer is acting in good faith and is not coercing the seller to accept liabilities imposed by the Statutory Warranty.
2. The warranty provided by the seller shall be identical to that re-
quired of the manufacturer by this Act, except the seller shall delete the
word "manufacturer" and substitute the word "seller" in the body of the
Statutory Warranty.

3. All provisions of this Act shall become applicable against the seller
instead of against the manufacturer.

4. The seller makes no disclaimers or modifications of the Statutory
Warranty.

§ 2-4 Warranty to be applied to products sold as seconds

1. The written Statutory Warranty provided for in this Act shall ac-
company consumer products sold as "seconds," except that the words "or
which contains defects in materials or workmanship" may be deleted
by the manufacturer from the definition of the term "defective" used in
Paragraph 1 of the Statutory Warranty.

2. A product to be sold as a "second" shall be clearly and conspicu-
ously labeled "second."

§ 2-5 Application of Statutory Warranty

The warranty required by this Act shall become effective at the time the
first purchaser who is a consumer purchases consumer products. If the
minimum duration of the warranty period has not expired at the time the
first purchaser, as a consumer, sells the item to a subsequent purchaser
who is a consumer, the warranty shall extend to such subsequent pur-
chaser if that subsequent purchaser can show the first purchaser reason-
ably complied with the manufacturer's instructions for the operation and
maintenance of the product. The warranty to the subsequent purchaser
shall not be extended beyond its stated duration period, which period
began to run at the time of purchase by the first purchaser. 

71. As long as a product is conspicuously labeled "second," the manufacturer
may delete the bracketed phrase in paragraph one of the Statutory Warranty.
The consumer is thereby allowed warranty recovery for a product that stops func-
tioning as it should, but that consumer may not complain about surface scratches,
pulled threads, or other faults which affect the appearance of the item.

72. The Statutory Warranty may run with the consumer goods and be extended
to subsequent purchasers who buy directly from the first purchaser consumer.
Reasonable compliance by the first purchaser with the operating and maintenance
instructions, for purposes of this section of the statute, may be shown by the first
purchaser's affidavit given by him to the subsequent purchaser, or by the completion
of any accompanying service manual that was required to be filled in or marked at
the time of service of the product. When the first purchaser consumer sells the
product to a merchant, however, the warranty does not continue in operation.
§ 2-6 LOCATION OF THE STATUTORY WARRANTY

The manufacturer shall cause the Statutory Warranty provided for in this Act to be printed in a conspicuous manner on a document, card or booklet which shall be included in or attached to the package in which the consumer product is contained, if any, or attached to the consumer product itself, or delivered by the seller to the consumer at the time of sale of the consumer product.

§ 2-7 MANUFACTURER MAY APPOINT MERCHANT AS AGENT

The manufacturer may appoint a merchant as the agent of the manufacturer to repair or replace a defective consumer product. If such appointment is made by the manufacturer, the merchant performing as the agent shall be reimbursed by the manufacturer for the cost of replacing the consumer product, or for the costs of performing the necessary repair, including the costs of parts and labor.

§ 2-8 MANUFACTURER SHALL REIMBURSE COSTS OF REPAIR

If emergency or necessity on the part of a consumer requires the immediate repair or replacement of a defective consumer product, and such immediate repair or replacement is secured by the consumer at his own expense, the manufacturer shall reimburse the consumer for the costs incurred by such repair or replacement.73

SECTION III

§ 3-1 CONSUMER REMEDIES

Remedies under this Act are enumerated in the Statutory Warranty (Section 2-1). However, such enumerated remedies do not preclude the right of a consumer to seek any other remedies available to him in law or equity.

§ 3-2 MANUFACTURER'S RIGHT OF ACTION

If a consumer product becomes damaged or defective after it leaves the control of the manufacturer, and such damage or defect subjects the

A manufacturer should not be held responsible under the Statutory Warranty for a product sold as used or reconditioned by a merchant.

73. Frequently, products such as automobiles, washing machines, stoves, etc., are used daily by the consumer. Any delay in repairing such product—even a "reasonable" delay as allowed in this statute—could impose great inconvenience and hardship upon the consumer. Therefore, this provision of the Act entitles him to make arrangements for repair as quickly as possible and receive reimbursement for the costs from the manufacturer.
manufacturer to liability to a consumer under the terms of this Act, the manufacturer shall have a right of action against the merchant, shipper, or other person whose actions proximately caused the damage or defect.

§ 3-3 SANCTIONS FOR NON-COMPLIANCE

If the manufacturer of a consumer product under the scope of this Act fails to accompany such product with a Statutory Warranty, the Federal Trade Commission shall proceed against the manufacturer in a court of competent jurisdiction to enjoin the placing of the non-warranted consumer products in the stream of commerce.

§ 3-4 MANUFACTURER’S DEFENSES

If the buyer of a consumer product fails to reasonably comply with the instructions for normal operation and maintenance of the consumer product, if such instructions are provided by the manufacturer, the non-complying consumer shall have no right of action against the manufacturer under this Act arising from defects which are the direct and proximate result of such non-compliance.

1. The burden of showing consumer non-compliance shall be borne by the manufacturer.

2. Non-compliance with instructions for normal operation and maintenance of the consumer product shall cut off the right of action by the consumer only under the warranty provided in this Act. Such non-compliance shall not be considered assumption of risk or contributory negligence on the part of the consumer, and shall not negate the consumer’s right to bring other actions against the manufacturer.

§ 3-5 ATTORNEY’S FEES AND COSTS

1. In suits brought by individual consumers as plaintiffs, a court may, in its discretion, award reasonable attorney’s fees and costs to a consumer bringing an action under this Act.

2. In suits brought as class actions, a court may award reasonable attorney’s fees and costs to the class of consumer plaintiffs bringing an action under this Act if judgment is awarded in favor of the consumer class.

§ 3-6 AGGREGATION OF CLAIMS IN CLASS ACTIONS

Consumers bringing a class action under this Act in courts of the United States may aggregate their claims in order to attain the amount in con-
troversy exceeding $10,000, exclusive of interest or costs, as required under 28 U.S.C. §§ 1331 and 1332.

§ 3-7 LIMITATIONS

Any action under this Act must be brought in any court of competent jurisdiction within one year from the date of the occurrence of the violation of the provisions of this Act.

§ 3-8 SEVERABILITY

If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.74

Shane H. Anderson
Wendy U. Larsen

74. This section is taken verbatim from § 1-108 of the Uniform Commercial Code.