

EXTENDED WARRANTIES, THE GREAT LIE: WHY THE KING HAS NO CLOTHES

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Abstract

This paper examines how states have effectively eviscerated consumer protections in consumer product purchases all while under the guise of allegedly adding more consumer protection. The state and federal governments have sacrificed the consumer in the name of economic profit and economic revival by selling the consumer into economic slavery. Businesses are allowed to prod and encourage the consumer to purchase a diverse range of products through a barrage of advertising. Consumers are told that they can gain an added peace of mind, comfort, and security in the use of these products by purchasing extended warranties and service plans. What they are not told is that the legislature has allowed and encouraged many businesses to sell this added protection without providing the consumer anything of substance. Apparently, it is now legally and commercially acceptable to stand behind your product just as long as that does not mean expending any money. *Caveat emptor* is not dead but alive in a different suit.

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I. INTRODUCTION

Historically, the purchase of goods involved a long, drawn out negotiation between a consumer and a local proprietor of the goods. Selection of products was limited and good customer service was a prerequisite of a good business. Purchasing goods generally involved a face-to-face meeting with people you knew and trusted, whose local reputation was literally on the line. That face-to-face meeting helped instill a corresponding trust between the consumer and the merchant and the merchant's commitment to quality and fulfill the purchaser's trust. "Today with the advent of the internet, people are able to instantaneously form contracts and do so across the globe."¹ However, as the personal connection between proprietor and purchaser has gradually been removed from the sales process, the notions of trust and commitment seem to have become less important.

II. THE HISTORY OF CONSUMER PROTECTION IN EXPRESS WARRANTIES SHOW A TIME GONE BY

It is precisely this lack of face-to-face meeting between the consumer and purchaser that requires the need for consumer product protection. But how does that protection arise? We must first examine the initial contract that brings about the opportunity to purchase the additional extended warranty or the service contract. The Uniform Commercial Code (the "U.C.C." or "Code") governs the initial contract for a sale of goods.² This generally refers to the purchase of an item, referred to as a "good" from your local brick-and-mortar store or from an online purveyor.³

¹ Amelia Rawls, *Contract Formation in an Internet Age*, 10 COLUM. SCI. & TECH. L. REV. 200, 202 (2009) ("[t]echnological innovation has ushered in a new commercial era, with communication between contracting parties occurring in the blink of an eye").

² U.C.C. § 2-102 (2002).

³ U.C.C. § 2-102 (2002) ("[T]his Article applies to transactions in goods. . .").

The term “[g]oods” means all things . . . which are movable at the time of identification to a contract for sale.”⁴ For the most part these contracts are creatures of the U.C.C. and the common-law and/or state statutes modifying them.

The U.C.C. “does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction *nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.”⁵*

While Article 2 of the U.C.C. applies to the initial purchase of goods, it does not apply to the additional purchase of the extended warranty or the extended service contract because these are contracts for service, which do not fall within the U.C.C.’s definition of a good.⁶ Therefore, extended warranty or extended service contracts are governed by common law.

Depending on the state, some states view these warranties as contracts for service that fall outside of the U.C.C., while others view these as contracts of insurance.⁷

In the normal course of purchasing a product, the consumer will come across various types of express warranties. These warranties are governed by various Federal Trade Commission (“FTC”) rules.⁸ They are also creatures of contract and as such are most likely drafted by an attorney. FTC regulations require that the language used be “clear, easy to read, and contain certain specified items of information about its coverage.”⁹ Despite this requirement there is no definition of what is clear and easy to read.¹⁰

⁴ U.C.C. § 2-105(1) (2002).

⁵ U.C.C. § 2-102 (2002) (emphasis added).

⁶ U.C.C. § 2-105(1) (2002).

⁷ *See, e.g.*, MASS. GEN. LAWS ANN. ch. 175, § 149N (West 2011).

⁸ *See, e.g.*, 15 U.S.C. § 2302 (1975).

⁹ FTC PUBLICATION—A BUSINESSPERSON'S GUIDE TO FEDERAL WARRANTY LAW (2015), <https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law>; *see generally* 16 C.F.R. § 701.3 (2015) (setting forth the exact statutory language); *see also* 15 U.S.C. § 2302 (1975).

¹⁰ *See* 16 C.F.R. § 701 (2015).

Federal law requires that a consumer be given an opportunity to review a warranty prior to purchase. Yet, a recent article explaining warranties to the general public would suggest that the average person does not have the requisite understanding of warranty language to appreciate what the warranty is and/or what it might cover either expressly or impliedly.¹¹ Even if a consumer is aware of the right to review the warranty, store policy and accompanying store logistics may make that review by the consumer difficult or near impossible. Retail electronic stores carry thousands of different products. How likely is it that the store would keep, for easy retrieval, all of these individual warranties? What sales floor space are they willing to sacrifice so that the consumer can sit and read this disclosure? The following example from Consumer Reports is illustrative of the consumer's problem:

When Melodie Eisenberg of Decatur, Ga., went to Best Buy for a computer modem and asked to see the warranty, “the salesperson acted like I was some nut job asking for something weird” and refused to open the box, she recalls. Eisenberg says the salesperson had first tried to sell her a service contract, presumably to supplement the unknown benefits of the warranty. When she complained to Best Buy headquarters, she was told that the employee was not allowed to open the package.”¹²

This story highlights the trouble with the status of the current law. Despite the fact that under the FTC regulation the consumer is allowed to view a warranty prior to purchase, store policy, at least as at Best Buy, makes that necessary review impossible.¹³ It is interesting to note that the same regulation requires manufacturers to provide sellers with these warranties.¹⁴

One can only wonder where the many retailers are storing all of those warranties they have been given. Perhaps they are with Tootles’

¹¹ *What You Need to Know About Warranty Laws: You Have More Rights than You Might Think*, CONSUMER REPORTS (May 2013), <http://www.consumerreports.org/cro/magazine/2013/05/the-word-on-warranty-protection/index.htm>.

¹² *Id.*

¹³ 16 C.F.R. § 702.3(a) (2015).

¹⁴ 16 C.F.R. § 702.3(b) (2015).

marbles in Neverland, an aptly named repository for these warranties. It would be nice if this was a fantasy but, unfortunately, this is a harsh reality being borne by the consumers in this country.

III. CONSUMER RIGHTS STRIPPED AWAY AS A RESULT OF AN ONLINE TRANSACTION

Many times assumptions made by the legislature when creating a rule or statute, though initially valid, may lose their validity or even become invalid over time. We will see how an initial purported protection completely misses the mark in today's online world.

A. *The FTC Gives the Consumer a Helping Hand*

Though the FTC regulation appears to require that warranty materials be made available to a purchaser of a good at the time of purchase, the regulation contains an interesting anomaly as it applies to catalogue sales and, by extension, internet-based sales. The regulation does not require a catalogue or mail order house to provide the consumer with a copy of the product's warranty prior to purchase.¹⁵ Instead, it allows the seller to either post a copy of the warranty in the catalogue (a rather cumbersome and unlikely method) or to make it possible for the consumer to request a copy of the warranty by mail whereupon the seller must mail it to the consumer free of charge.¹⁶

This exception might seem unusual given the FTC's initial requirement for brick and mortar stores to make warranty information available to consumers at the time of purchase. This difference in treatment is clarified when we examine the difference between the two purchasing experiences in their historical time frame. This regulation was drafted in 1975, a time when the purchasing experience was quite different than it is today.¹⁷ There was no online market experience.¹⁸

¹⁵ 16 C.F.R. § 702.3(e) (2015).

¹⁶ *Id.*

¹⁷ Legal Information Institute, *16 CFR Part 702 – Pre-Sale Availability of Written Warranty Terms*, CORNELL UNIV. LAW SCH, <https://www.law.cornell.edu/cfr/text/16/part-702>, (last visited Mar. 3, 2015).

¹⁸ iShift Staff, *The History of Online Shopping in Nutshell*, INSTANTSHIFT (Mar. 26, 2010), <http://www.instantshift.com/2010/03/26/the-history-of-online-shopping-in-nutshell>.

In the 1970's, based on certain sections of the regulation, a consumer, who was physically present in a store and ready to make a purchase, would have the ability to review the warranty prior to purchase.¹⁹ The underlying rationale for this was that presumably a consumer had traveled to the store, examined the product, and was intent on making his purchase at that moment. He had committed time and expense in this endeavor. The purchase decision was one that would have been made after reviewing all of the relevant data and warranty terms. Therefore, having the ability to review all the terms of the transaction prior to committing to the purchase was important. Should the warranty terms be unsatisfactory, the purchaser, having all of the facts at hand, could refuse to consummate the transaction and choose to leave or modify his purchase strategy.

The catalogue or mail order purchaser, however, is not under the same time constraints or potential purchasing pressures that befall the brick and mortar purchaser. The catalogue purchaser is contemplating his purchase in the comfort of his home. Other than taking the time to peruse the catalogue he has not committed much in the way of time or resources in making his choice. He most likely does not need the item immediately and can afford to wait for the item to arrive some weeks later. Indeed, it was expected that an item purchased from a catalogue would be mailed out, and the item's receipt would arrive some time later. Contrast this with the purchase of an item needed immediately. If the item were immediately needed, the purchaser would physically go to their local brick and mortar purveyor and purchase the item then and there. This would require having all of the facts needed to make an informed choice a necessity. These timing and purchasing differences were not lost on the FTC. Given the assumed delay in catalogue purchases, it seems logical for the FTC to allow the seller time to mail the warranty to the purchaser. The mail order purchaser was already expecting a delay in obtaining his item so the additional delay for a warranty to arrive seemed to be an acceptable concession for the convenience of not having to leave one's home.

B. *Times Are a Changing*

This difference in treatment by the FTC, which made sense back in 1975 when in-store sales accounted for the lion's share of all sales,

¹⁹ 16 C.F.R. § 702.3(a)-(b) (2015).

may in fact be misplaced in today's economy.²⁰ Today, the scales have turned. Online purchases have increased dramatically. According to the National Retail Federation, ("NRF"), "56 percent [of holiday shoppers] plan to shop online, up from 51.5 percent last year and the most in the survey's 13-year history. Additionally, the average person plans to do 44.4 percent of their shopping online, the most since NRF first asked in 2006".²¹ This purchasing change will have a dramatic effect on the consumer's ability to access warranty information since an online transaction appears to fall within the rubric of a catalogue sale as to a sale made at a brick and mortar store. FTC regulations specify that:

- (i) *Catalog* or mail order *sales* means any offer for sale, or any solicitation for an order for a consumer product with a written warranty, which includes instructions for ordering the product which do not require a personal visit to the seller's establishment.²²

Note that the definition of catalogue or mail order is "any offer for sale . . .for a consumer product . . . which does not require a personal visit to the seller's establishment."²³ This definition fits squarely with the description of an online purchase which, generally, is a consumer purchase where the consumer is not visiting the seller's establishment. The difference between the catalogue sale or mail order sale and the online transaction is that they involve very different communication media and the expectation of service provided has dramatically changed over the last 40 years.

Historically catalogues were of limited size and the larger the catalogue the more costly it was to post warranty information. To include warranty language for every product would cause the catalogue to be many thousands of pages long depending on the number of items included in the catalogue. Requiring a catalogue seller to include warranty

²⁰ *Catalog and Mail-Order Houses*, REFERENCE FOR BUSINESS, <http://www.referenceforbusiness.com/industries/Retail-Trade/Catalog-Mail-Order-Houses.html> (last visited Mar. 3, 2015).

²¹ Kathy Grannis, *Gift Givers Plan to Splurge on Friends, Family this Holiday Season*, NATIONAL RETAIL FEDERATION (Oct. 16, 2014), <https://nrf.com/media/press-releases/gift-givers-plan-splurge-friends-family-this-holiday-season>.

²² 16 CFR § 702.3(c)(i) (2015) (emphasis added).

²³ *Id.*

language for each product was simply not economically feasible in the 1970's; thus, the FTC's allowed the seller to send the warranty to the consumer by mail. However, this physical limitation is not present with the online purveyor. In answer to the question "How many pages can a web site have?", Google's search engine responded with approximately 520 million pages of data in 0.58 seconds. This suggests that online catalogues are no longer constrained by the limitations of size or weight.

Additionally, the delay in receipt of an item purchased via catalogue is not a factor in online transactions, leaving no remaining justification for not requiring the immediate availability of a warranty to the purchaser. Many online services such as Amazon have free two-day shipping and one-day shipping at a minimal cost, so it is possible for a consumer to order the product from the convenience of their home, and then have the item delivered the very next day.²⁴

Though traditional paper mail order transactions in the current market may be smaller than brick and mortar purchases, online purchasing is now becoming a significant purchasing phenomenon.²⁵ According to the U.S. Census Bureau, "E-commerce shipments approached half of all manufacturing shipments as e-commerce shipments were 49.3 percent of all manufacturing shipments in 2011, up from a revised 47.9 percent in 2010."²⁶

The FTC's justifications for not requiring a seller to make all warranty information available to catalogue purchasers, and now by extension online purchasers is clearly outdated. There is no longer an economic constraint by way of postage, nor is there the expectation on the part of the purchasing public that the online purchase will somehow be slow in delivery. In 2014, Apple ranked first among online retailers with an average delivery time of 2.3 days.²⁷ The comparatively slower pace of life in the 1970's is in stark contrast to today's electronic means

²⁴ *Amazon Prime Shipping Benefits*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201118070> (last visited Mar. 3, 2015).

²⁵ *2011 E-Stats*, U.S. CENSUS BUREAU (May 23, 2013), <http://www.census.gov/econ/estats/2011/2011reportfinal.pdf>.

²⁶ *Id.*

²⁷ Mikey Campbell, *Apple Order Fulfillment Ranks First Among Online Retailers with Average Delivery Time of 2.3 Days in June*, APPLE INSIDER (July 30, 2014), <http://appleinsider.com/articles/14/07/30/apple-order-fulfillment-ranks-first-among-online-retailers-with-average-delivery-time-of-23-days-in-june>.

of communication and purchasing possibilities. Improved technology has given rise to the “Now Generation,” a group who looks for instant gratification and who now purchases not only locally but interstate with great ease.²⁸

So where can we look to find a statutory authority designed to bridge the gap amongst the states and give the consumers of varying states their needed protection? Of Course, the venerable Uniform Commercial Code, isn't that why it was proposed?

IV. CAN THE U.C.C. WARRANTY OF MERCHANTABILITY RESCUE THE CONSUMER?

Given that express warranties are contracts whose creation is controlled by the seller of the good and unlikely to benefit the buyer, buyers are often forced to rely on implied warranties such as the implied warranty of merchantability. Implied warranties are governed by sections 2-314 through 2-316 of the U.C.C.²⁹ Section 2-314 of the U.C.C. deals specifically with the implied warranty of merchantability.³⁰

Section 2-314 requires that the good “pass without objection in the trade . . . and be fit for the ordinary purposes for which such goods are used.”³¹ From that, consumers should expect that an item will perform its intended function in a way that meets its purpose; consumers should be reasonably satisfied with the functioning quality of their recent purchase.

The official comments to section 2-314 of the U.C.C. makes it clear that “[g]oods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade”³² The comments to section 2-314 also suggest that the definition of what is to be considered merchantable was to be very broadly interpreted.³³ The language chosen was done

²⁸ *Now Generation Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/now+generation> (last visited June 20, 2015).

²⁹ U.C.C. §§ 2-314 to -316 (2002).

³⁰ U.C.C. § 2-314 (2002).

³¹ U.C.C. § 2-314(2)(a)-(c) (2002).

³² U.C.C. § 2-314 cmt. 2 (2002).

³³ *Id.*

with an eye towards allowing inclusivity of other potential definitions of the word merchantable.³⁴

So the idea of merchantability reflects the notion that a manufacturer must make a good that is fit for its ordinary use, or stated differently, the good should be such that the average person would not object.³⁵ For most people it is easy to see when the item is not merchantable. It is that place where your new jacket's zipper breaks and you exclaim, "I just bought this jacket how could this happen?"

A. *The Code Giveth and the Code Taketh Away*

Despite this purported protection afforded to the consumer when purchasing from a merchant, the Code allows for the limiting of the warranty of merchantability. Specifically, section 2-316 of the Code gives the merchant the ability to exclude the warranty of merchantability by so stating in a conspicuous manner.³⁶

Thus, on the one hand section 2-314 creates an implied warranty of merchantability: a basic protection as to the level or quality of the product which would be average in the general trade or usage of the product.³⁷ Yet, section 2-316 gives merchants the ability to negate this warranty of merchantability whenever they choose.³⁸ I think we can take as a given that most manufacturers and/or sellers would and, in fact, do delete the implied warranty of merchantability by using the exception created by section 2-316.

One might wonder why the creators of the U.C.C., back in 1952, decided to include section 2-314 at all given its ability to be mitigated by section 2-316. The comments to 2-316 provide this explanation:

³⁴ *Id.* ("Subsection (2) does not purport to exhaust the meaning of 'merchantable' nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is 'must be at least such as . . . ,' and the intention is to leave open other possible attributes of merchantability.").

³⁵ *Id.*

³⁶ U.C.C. § 2-316 (2002) ("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").

³⁷ U.C.C. § 2-314 (2002).

³⁸ U.C.C. § 2-316 (2002).

It [2-316] seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.³⁹

These comments suggest that the writers of this section were in fact attempting to protect the buyer from something which is unexpected and unbargained for. Given that most consumers are never given the opportunity to negotiate the warranty for their product, how is it then that this contract of adhesion is bargained for at all? How many of us when purchasing an item online or at a brick and mortar store have the opportunity to negotiate the included warranty? How many of us even see the warranty prior to purchase, given that it is usually placed inside a sealed box with the item we just purchased?

These rhetorical questions lead to the inevitable conclusion that, in reality, the average consumer has not negotiated the warranty contract with the manufacturer, and is generally not informed that his remedy is limited to those conditions stated on the express warranty which is typically located inside the box of the item he has just purchased. Therefore, the commenter's statement that section 2-316, "seeks to protect a buyer from unexpected and unbargained language of disclaimer" has no practical effect given that the disclaimer, though conspicuously displayed as required by section 2-316, is inside a sealed box and cannot be viewed until the consumer has brought the item home!⁴⁰

B. *How Can They Understand That Which They Have Never Heard?*

The comments also allude to a desire to prevent the buyer from being surprised by "an unexpected . . . disclaimer" of the warranty of merchantability.⁴¹ Is it reasonable to assume that the average consumer would even know what a warranty of merchantability was if he saw it? In

³⁹ U.C.C. § 2-316 cmt. 1 (2002) (emphasis added).

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.*

1952 when the U.C.C. was created, “the median educational attainment of 25- to 29-years-olds rose to 12 years.”⁴² “By 1960, 42 percent of males, 25 years old and over, still had completed no more than the eighth grade, but 40 percent had completed high school and 10 percent had completed 4 years of college.”⁴³ Therefore, when section 2-316 of the U.C.C. was created, to presumably protect the consumer from unexpected deletion of the implied warranty of merchantability, 88 percent of the American public had a high school education at best.⁴⁴ How many high school graduates in 1952 would have been exposed to the concept of an implied warranty much less have knowledge of the implied warranty of merchantability? It would seem that the Code’s creators falsely assumed that the American public were all legal scholars.

Now advance forward to today, sixty plus years from the Code’s creation. How does the average citizen compare to the average purchaser presupposed by the creators of the Code? According to the United States Census Bureau, “5 percent of the public have less than an 8th grade education, 7.3 percent of the public have an educational level between 9th and 11th grade, and 30.3 percent of the public have graduated high school.”⁴⁵ Therefore, roughly 42 percent of the American public has at best a high school education or less.⁴⁶ If we look at the benchmarks for higher education, 26.3 percent of the public have attained an associate’s degree or have taken some college courses with 19.8 of the public having graduated college.⁴⁷ These government statistics demonstrate that 68.3 percent of the American public, that would be two-thirds of the American public, has not achieved an education higher than an associate’s degree and less than half of the public has not even earned a high school diploma.⁴⁸ Thus, the folly of the Code’s creators is evidenced by comment 1 of section 2-316 which provides an impossible justification for stripping away consumer

⁴² *120 Years of Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/naal/lit_history.asp (last visited Mar. 5, 2015).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Educational Attainment in the United States: 2012*, U.S. CENUS BUREAU, <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (last visited Mar. 5, 2015).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

protections outlined in section 2-314.

I think that we can all agree that unless we are lawyers, legal educators, or lovers of the U.C.C. most members of society are neither aware of their rights under the implied warranty of merchantability, nor are they aware of what its disclaimer might mean to them. This statement is not meant to be a criticism of the educational level of the citizenry in the United States but, rather, an acknowledgement of the failure of the writers of the Code to adequately protect the public as to the implied warranty of merchantability. There are at least two possibilities for this error. The writers either overestimated what the public knew or could reasonably be expected to know pertaining to warranties, both express and implied, or knowingly chose to side with businesses as opposed to consumers in an effort to have the Code uniformly adopted throughout the country. I hope that it was the former.

Despite their zealous optimism of the public's knowledge of warranties, the reality of the public's perception of a well-made product, i.e. one that is merchantable, seems to be much like the Supreme Court's idea of pornography, "I know it when I see it."⁴⁹ The dictionary defines merchantability as "a product of a high enough quality to make it fit for sale. To be merchantable an article for sale must be usable for the purpose it is made."⁵⁰ The concept that it be usable for the purpose it was made is inherent in the purchase of all items by consumers. None of us would pay for an item not fit for its intended purpose. In fact many of us have very definite opinions about what products are made "well" and which products are "junk". The public's expectation that the product will perform as intended is demonstrated by the average consumer's reaction to a product that fails prematurely. How many of us have purchased a shirt or a blouse only to have a button fall off prematurely within the first month and then exclaim, "How could this happen? This is brand new!" The heartfelt indignation, the frustration, the feeling of betrayal all underscore the point that consumers believe that products should be fit for sale and last for a reasonable period of time. All of these notions are very much in keeping with the implied warranty of merchantability. The average consumer may not know the

⁴⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

⁵⁰ *Merchantability Definition*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/merchantability> (last visited Mar. 5, 2015).

term merchantability, per se, but he does know it when he sees it.

The days of *caveat emptor*⁵¹ have slowly waned in other areas of the law.⁵² Both Federal and State laws now require sellers of real property to disclose lead paint issues, and other hazardous substance issues to prospective purchasers.⁵³

Some states, have statutes which prohibit sellers from engaging in unfair and deceptive trade practices.⁵⁴ Massachusetts, for example, has enacted a statute that grants the public another possible avenue for consumer redress for a defective product, conflict-of-laws issues aside.⁵⁵ The statute also incorporates a broad definition of what constitutes “trade” giving the consumer further latitude.⁵⁶ Massachusetts enacted this law in 1967 in an effort to give the private individual the power to bring an action against a seller or manufacturer who engaged in such unfair and deceptive trade practice.⁵⁷ This was a remedy not available to the consumer at the time under the FTC regulations.⁵⁸

The use of the word “unfair” in the Massachusetts statute seems to underscore the State’s desire to address a more common understanding of the problem⁵⁹. It is not speaking legalistically about merchantability or about other more specific and complicated legal

⁵¹ Alan M. Weinberger, *Let the Buyer Be Well-Informed? – Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 388 fn. 5 (1996).

⁵² *Id.* at 388-89.

⁵³ Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856 (2006); *see, e.g.*, R.I. GEN. LAWS ANN. § 23-24.6-16 (West 2002).

⁵⁴ MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1967) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”).

⁵⁵ *Id.*

⁵⁶ MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 1967) (“[t]rade’ and ‘commerce’ shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security . . . and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth”).

⁵⁷ RE04RC12: M.G.L. c. 93A, *Consumer Protection & Business Regulation*, MASS.GOV, <http://www.mass.gov/ocabr/licensee/dpl-boards/re/ceu/continuing-education-subject-matter-curricula/re04rc12.html> (last visited Mar. 5, 2015).

⁵⁸ *Id.*

⁵⁹ *See* MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1967).

theories, but rather attempts to address the simpler theory of fairness. This demonstrates society's desire to move away from the maxim, 'Let the buyer beware' to one of embracing an obligation on those engaged in trade to be fair. And it is this concept which viscerally I think we can all relate to, unfortunately is difficult to define in a practical way. Again many of us know fairness when we see it, but find it difficult to define in the abstract.

Merriam-Webster's dictionary defines unfair as "1. marked by injustice, partiality, or deception. 2. Not equitable in business dealings."

Thus, it appears that the public generally knows, subjectively, when something is unfair, but is most likely unaware of the actual legal effect of the various types of warranties that exist, as well the impact of these warranties on their specific transaction.

V. THE STATES GIVE THE DROWNING CONSUMER A RAFT WITH A HOLE IN IT

It is important to review how various state statutes handle service contracts and extended warranty contracts due to the degree of variation of protection afforded the consumer in these states. Given the rise of online purchases the likelihood is that a consumer will not be purchasing their products locally such that when they are buying the service contract or extended warranty they may find themselves at the mercy of state law very different from their own. I have chosen the states below based on their degree of geographic diversity to provide a broad picture of how the consumer is treated and to also highlight the fact that the consumer may be treated very differently depending on where in the country they make their purchase.

A. *Not To Worry, Aren't All Service Contracts the Same?*

Alaska for example defines a service contract as "(1)... a service contract or agreement for separate or additional consideration, for a specified duration to (A) maintain, service or repair tangible personal property."⁶⁰ Yet this language specifically excludes "portable electronic insurance as defined in AS 21.36.515", which covers a myriad of small electronic devices.⁶¹

⁶⁰ ALASKA STAT. ANN. § 21.03.021 (West 2014).

⁶¹ ALASKA STAT. ANN. § 21.36.515 (West 2014) (portable electronic insurance means

Their definition seems to blur the lines between what one might consider a traditional warranty or an implied warranty. Though they classify maintenance, service, and repair work pursuant to a contract to be a service contract, what then would be an extended warranty? Is not the idea of a warranty one where the broken item can be serviced or repaired? No mention is made in the Alaska statute of when the contract must be provided or what it must contain.

Arkansas differentiates a motor vehicle service contract from any other type of service contract, allowing the purchaser of a motor vehicle service contract to cancel the contract within thirty days of purchase provided that no claim is made.⁶² The retailer may also charge a cancellation fee of not more than fifty dollars.⁶³ Despite this seemingly inspiring beginning towards protecting consumers, the statute takes a dramatic turn rather rapidly when it comes to other service contracts, presumably where online transactions will sit.

In the non-automotive online service contract, the retailer is only required “to provide the consumer with a receipt for their purchase of the contract and then must provide a copy of the service contract to the service contract holder within a reasonable period of time from the date of purchase.”⁶⁴ The wording of the statute allows the retailer to sell a service contract to the consumer with the consumer never having even seen the contract until after he purchases it. The only protection being that the consumer would have a receipt indicating that he purchased the contract, yet would have no idea, other than what was told to him by the sales clerk what the contract encompasses. Apparently these service contracts are treated much like a pot luck dinner. You pay your fee to attend and then receive whatever happens to be there.

Given that a service contract is not a good, its contract formation would be governed under the common law. One might ask how contract formation is even achieved if the consumer never sees the contract he has allegedly purchased until after the transaction is consummated. Can

“insurance offered, issued for delivery, delivered, or renewed by a vendor engaged in the business of selling, leasing, or servicing portable electronic devices to cover the loss, theft, mechanical failure, malfunction, damage, repair, or replacement of a small electronic device, including a cell phone, laptop computer, GPS device, radio, portable music player, or associated accessory”).

⁶² ARK. CODE ANN. § 4-90-507 (West 2012).

⁶³ *Id.*

⁶⁴ ARK. CODE ANN. § 4-114-104 (West 2009) (emphasis added).

there be a meeting of the minds when only one party knows of the term of the contract?

California, has an extremely comprehensive statute which does not separate out motor vehicle service contracts.⁶⁵ Their Consumer Protection Statute in Section 1794 as a whole also initially grants what appears to be a broad based protection for the consumer.⁶⁶

It requires presentation of the contract or a brochure which specifically describes the terms, conditions, and exclusions of the contract prior to purchase,⁶⁷ contrary to Arkansas' statute. Then, it sets out, that within the service contract the language used must, "fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of that contract."⁶⁸ Though the statute does not identify the definition of "simple and readily understood language"⁶⁹ it does suggest by the verbiage chosen that the language to be used must be other than what one might traditionally see in a contract, *i.e.*, legalese. Despite its positive disclosure requirements such as, "fees, charges, and other costs that the buyer must pay to obtain service,"⁷⁰ and "the method of giving notice to the service contract seller of the need for service"⁷¹ the statute makes little demands on the Seller of the service contract as to what services must be provided. In fact, though the statute seemingly attempts to mandate a minimal level of service it nullifies that requirement later on in the statute.⁷²

The net result here is that that the California statute, while mandating many disclosures in simple language, in reality does little to mandate what protections must be offered in the service contract.⁷³ And though the statute does allow the service contract to supplement the

⁶⁵ CAL. CIV. CODE § 1794.41 (West 2011).

⁶⁶ CAL. CIV. CODE § 1794.4 (West 2008).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ CAL. CIV. CODE § 1794.4(5)(I) (West 2008).

⁷¹ CAL. CIV. CODE § 1794.4(5)(E) (West 2008).

⁷² *Id.* ("[e]xcept as otherwise expressly provided in the service contract . . .").

⁷³ CAL. CIV. CODE § 1794.4 (West 2008).

warranty, (whose content is controlled by the Seller),⁷⁴ their own U.C.C. 2-316 allows for the removal of the implied warranty of merchantability.⁷⁵ Additionally, California has adopted U.C.C. article 2-317, which provides that express warranties take priority over inconsistent implied warranties.⁷⁶

Thus, though the statute has many interesting elements, the ultimate benefit offered to the consumer is still in the control of the Seller. Therefore, the implied warranty of merchantability will in all likelihood be disclaimed, and the express warranty will be narrowed so as to only benefit the Seller. The major difference exhibited by California's treatment being that the consumer will at least know of the poor deal he is getting himself into.

Connecticut approaches the issue in an interesting fashion in that their descriptions of a service contract and that of a warranty or extended warranty seem to overlap.

Under the Connecticut tax code, contracts for repairing or maintaining tangible property fall into three classifications. Those where the item is to be maintained, known as a maintenance contract, those where the contract is to repair an item which is in need of repair at the time of contract formation, a repair contract, and those where the repair is to be provided in the future, known as a warranty or guaranty contract.⁷⁷ “*Warranty or Guaranty contracts* are contracts that provide for repair service only in the event of a future malfunctioning of an item of tangible personal property.”⁷⁸

They also define extended warranty contracts thusly elsewhere in the Connecticut code:

⁷⁴ CAL. CIV. CODE § 1794.4(a) (West 2008) (“[n]othing in this chapter shall be construed to prevent the sale of a service contract to the buyer in addition to, or in lieu of, an express warranty . . .”).

⁷⁵ CAL. COM. CODE § 2316(3)(a) (West 2014) (“[u]nless 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.”).

⁷⁶ WEST’S ANN. CAL. COM. CODE § 2317 (West 2015).

⁷⁷ State of Conn. Dep’t of Revenue Services, *Policy Statement 94(2)*, CT.GOV, <http://www.ct.gov/drs/cwp/view.asp?A=1511&Q=267264> (last visited Mar. 5, 2015).

⁷⁸ *Id.*

“1) Extended warranty” means a contract or agreement to either perform or provide indemnification for the repair, replacement or maintenance of a product because of operational or structural failure of such product due to a defect in materials, skill or workmanship or normal wear and tear given for consideration over and above the lease or purchase price of a product.⁷⁹

Connecticut has very similar extended warranty disclosure requirements to California.⁸⁰ Yet again, as with California, exactly what the warranty or extended warranty covers is left up to the Seller. Though the statute seems to offer extensive consumer protection in the form of disclosure, it follows the same path as California, form over substance. If what is disclosed is inadequate coverage and is done so in a manner which is cumbersome to read then what protection is the extended warranty providing?

Connecticut’s U.C.C. Article 2-314 follows the standard U.C.C. language of allowing there to be an implied warranty of merchantability,⁸¹ but then allows that to be excluded via U.C.C. 2-316, which allows for the removal of these warranties by the use of the words “as is” and by conspicuously noting that the warranty of merchantability is being excluded.⁸² They have also adopted U.C.C. 2-317 which makes express warranties displace inconsistent implied warranties of merchantability.⁸³ As with prior states the benefit or protection to the consumer is narrowed to the Seller’s advantage by Connecticut’s U.C.C. Section 2-317.

B. *The Creators of the Code Justify their Failure*

A brief look at the comments associated with the creation of 2-317 is illuminating on how the drafters viewed U.C.C. 2-317.

⁷⁹ CONN. GEN. STAT. ANN. § 42-260 (West 2014).

⁸⁰ *Id.*

⁸¹ CONN. GEN. STAT. ANN. § 42a-2-314 (West 2014); *see also* U.C.C. § 2-314 (2002).

⁸² CONN. GEN. STAT. ANN. § 42a-2-316 (West 2014).

⁸³ CONN. GEN. STAT. ANN. § 42a-2-317 (West 2014); *see also* U.C.C. § 2-317 (2002).

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3. The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor **which probably claimed the attention of the parties in the first instance.** (emphasis added) These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.⁸⁴

The commentators to the Code suggest that reliance on the express warranty and the allowance of the disclaimer of the implied warranty is somehow acceptable for the consumer because, the express warranty and its subsequent disclaimer, “probably claimed the attention of the parties,”⁸⁵ and one would presume was a negotiated part of the contract. This supposition flies in the face of the fact that a large part of the population have, at best, a high school education, and relies upon the absurd notion that they would know about the implied warranty of merchantability.⁸⁶ Additionally, how can a warranty be negotiated if it is a pre-printed form contained inside of a box? Lastly Connecticut does not disclose when the warranty or extended warranty need be given to the consumer.

We have now looked at states from the upper most part of our country, from the West coast, from the Midwest and from the East coast, it would seem appropriate to look at a State which is our Southernmost State.

In **Hawaii**, service agreements are differentiated from warranties both express and implied and maintenance agreements. These latter three agreements are excluded from Haw. Rev Stat. 481X-1⁸⁷ The Statute does make excellent distinction between a service contract, a warranty, and a maintenance contract.⁸⁸

⁸⁴ U.C.C. § 2-317 cmt. 3 (2002) (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Educational Attainment in the United States: 2012*, U.S. CENUS BUREAU, <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (last visited Mar. 5, 2015).

⁸⁷ HAW. REV. STAT. § 481X-1 (West 2000).

⁸⁸ HAW. REV. STAT. § 481X-2 (West 2000).

The “Provider”⁸⁹ of the service contract comply with the State’s requirements for selling service contracts, which include having either a suitable amount of reserves to cover those outstanding contracts or some type of insurance policy to cover same or other requirements as set forth by the State.⁹⁰ This statute is similar to California’s requirement that the provider give the purchaser a receipt for the contract and also provide the purchaser with the availability of a basic copy of the contract.⁹¹ The actual contract need not be provided at the time of sale but must be sent to the purchaser within a reasonable period of time.⁹²

Yet again, as with the other states we discussed, Hawaii has adopted sections 2-314 and 2-316 of the U.C.C.,⁹³ which allows for the creation of both express and implied warranties, but also allows for their removal via section 2-316 of the U.C.C.⁹⁴ The net result here is the same sad story with the consumer left to the vagaries of the service contract that he purchases but receives after the transaction.⁹⁵ Though the statute does necessitate that the contract be written in clear and understandable language, it does not define what that means.⁹⁶

After the purchase of the service contract is made, the actual contract arrives at the purchaser’s home, presumably in an understandable format, and now the consumer is allowed to cancel the contract within 30 days and receive a refund, if he is not satisfied with the terms of the contract.⁹⁷ Yet, given that most purchasers are not lawyers, legal scholars, or commentators to the U.C.C., what is the likelihood that the purchaser will exercise that option?

⁸⁹ *Id.*

⁹⁰ HAW. REV. STAT. § 481X-4 (West 2000).

⁹¹ *Id.*; see also CAL. CIV. CODE § 1794.4 (West 2008).

⁹² HAW. REV. STAT. § 481X-6 (West 2000).

⁹³ HAW. REV. STAT. § 490:2-314-16 (West 2014); see also U.C.C. § 2-314 (2002); U.C.C. § 2-316 (2002).

⁹⁴ HAW. REV. STAT. § 490:2-314-16 (West 2014).

⁹⁵ *Id.*

⁹⁶ HAW. REV. STAT. § 481X-6 (West 2000) (“[s]ervice contracts shall be written in clear, understandable language, and shall be printed or typed in a typeface and format that is easy to read”).

⁹⁷ HAW. REV. STAT. § 481X-7 (West 2000).

I suggest that given the purchaser’s unfamiliarity with contract language, the likelihood of a purchaser reading the contract in its entirety and comprehending its contents is slim. If the purchaser does read and understand the contract, cancelling it involves taking additional affirmative action on the purchaser’s part; one must notify the provider of his or her displeasure with the contract then return the product to the provider.⁹⁸ This would require the purchaser to mail the contract back to the provider along with a letter of explanation. In today’s digital society how many of us will go through that process? The U.S. Postal Service indicates that since 2008, the total U.S. volume of mail has dropped by 21%.⁹⁹ So, again, the purchaser is potentially denied the implied warranty of merchantability, left to the contractual savvy of the provider in the creation of their express warranty, and also to the left subject to the provider’s terms as set forth in its their service contract which will arrive for inspection by the consumer after the purchase is made.¹⁰⁰

VI. A PROPOSED FEDERAL RULE

In furtherance of re-establishing the balance between the consumers and those they interact with, I propose that the following language be enacted, as adapted from the proposed languages above, as a Federal Statute or FTC Rule in lieu of the existing laws governing warranties:

Proposed Federal Statute or FTC Regulation.

The following rule shall apply to any contract or agreement for which the consumer pays a separately stated consideration over and above the initial purchase price of the good, for the repair, replacement, or maintenance of the product or good for operational or structural failure due either to a defect in materials or artisanship, or due to normal wear and tear for repair or service to the product. This rule is intended to cover all contracts or agreements which heretofore may have been referred to as service contracts, extended service

⁹⁸ *Id.*

⁹⁹ John Bacon & Donna Leinwand Leger, *Postal Service to End Saturday Letter Delivery*, USA TODAY (Feb. 6, 2013, 11:26 pm), <http://www.usatoday.com/story/news/nation/2013/02/06/us-postal-service-delivery-mail-saturdays/1895277/>.

¹⁰⁰ *See generally* HAW. REV STAT. § 481X-4 (West 2000).

contracts, warranty contracts or extended warranty contracts. For the purposes of this rule these contracts shall be hereinafter called Extended Service Contracts. Providers of said contracts shall be called Extended Service Contract Providers (hereinafter “ESCP”).

The consumer shall be provided with either the full extended service contract as a whole prior to the opportunity to purchase same, or in the alternative, a brochure which specifically describes the terms, conditions, and exclusions of the contract, and the provisions of this section relating to contract delivery, cancellation, and refund, shall be delivered to the buyer at or before the time of purchase of the contract. Both of these must be in clear, simple and understandable language but in no event shall either be written using language written above a high school grade level. The use of legalese is specifically prohibited. Failure of the ESCP to comport with these terms shall entitle a consumer to treble damages as well as attorney’s fees in the event of suit brought for violation of these terms.

Additionally, the Service Contract and brochure that accompanies any purchased good shall contain the following:

- (1) A clear description and identification of the product;
- (2) The date when the extended service contract commences and its duration;
- (3) A description of the limits on transfer or assignment of the extended service contract if the enforceability of an extended service contract is limited to the original buyer or is limited to persons other than every consumer owner of the covered product during the term of the extended service contract;
- (4) A statement of the obligation of the extended service contract provider including statements of:
 - (A) Any services, parts, components, defects, malfunctions, conditions, repairs or remedies that are excluded from the scope of the extended service contract;

- (B) Any limits on the obligations of the ESCP;
- (C) Any additional services which the ESCP will supply;
- (D) Whether the buyer has the responsibility of any other obligations and, if so, the nature and frequency of such obligations, and the consequences of any noncompliance;

No extended service contract may limit its repair service obligation under the contract, by way of exclusion or otherwise to a level below that which would make the product reasonably operational again after failure.

(5) A step-by-step explanation of the procedure which the buyer shall follow in order to obtain performance of any obligation under the extended service contract including:

- (A) The full legal and business name of the ESCP;
- (B) The mailing address of the ESCP;
- (C) The persons or class of persons that are authorized to perform service;
- (D) The name or title and address of any agent, employee or department of the ESCP that is responsible for the performance of any obligations;
- (E) The method of giving notice to the ESCP of the need for service;
- (F) Whether in-home service is provided or, if not, whether the costs of transporting the product for service or repairs will be paid by the ESCP. All service contracts shall provide for the ability to have in home service or repair, or in lieu of in home service repair may provide the consumer with free shipping to and from the repair facility. The cost of this additional coverage shall not exceed 10% of the contract's purchase price;

- (G) If the product must be transported to the ESCP, either the place where the product may be delivered for service or repairs or a toll-free telephone number which the buyer may call to have the item picked up for repair;
- (H) All other steps which the buyer must take to obtain service; and
- (I) All fees, charges and other costs that the buyer must pay to obtain service, beyond those whose costs by this rule are to be borne by the ESCP;
- (6) A description of the services the ESCP will supply under the service contract, said level of service shall not be below that which would normally constitute merchantability as this term is defined in the Uniform Commercial Code; and
- (7) A statement of a right to cancel the contract within thirty days of purchase if the buyer has made no claim under the terms of the service contract, or if the buyer returns the product or the product is sold, lost, stolen or destroyed.
- (8) An extended warranty or service contract shall not be issued, sold or offered for sale unless the ESCP is insured under an extended warranty reimbursement insurance policy issued by an insurer authorized to do business in this state, for the approximated costs of repair or replacement of all goods covered under outstanding service contracts. This insurance policy shall cover all outstanding Extended Service Contracts.
- (9) The extended warranty reimbursement insurance policy shall cover the obligations under the extended warranty sold by the ESCP during the period of time that such provider's insurance policy is in force. Should the ESCP's insurance policy described herein lapse or be cancelled all buyers who would normally be covered under said policy for service contracts which they have purchased must be immediately notified.

Nothing contained in this rule shall limit the States the ability to regulate insurance policies or express warranties.

VII. CONCLUSION

What is needed is a uniform Federal statute or Federal Trade Commission rule that provides parity between the manufacturers, providers, and the consumers. In days gone by, an aggrieved consumer would simply return their defective or problematic product to his local retailer to get satisfaction. The fact today is that most retailers are no longer local and the buying behavior of the consumer has now become national, if not global. One can see that the initial concept behind the implied warranty of merchantability was the basic understanding that a product needed to be fit for its ordinary purpose, and it needed to do what was reasonably expected. It is counter-intuitive that we should require manufacturers to make a product that meets ordinary expectations, but then at the same time allow for the states to remove that obligation. Further, it does not follow that if we allow a manufacturer to make a product below normal expectation that we should then also allow them to sell a service contract to the consumer to repair the sub-standard product which leaves all bargaining for the extended contract in the hands of the manufacturer or retailer.

Consumers deserve products that meet normal expectations. If a consumer desires to purchase a service contract to extend the potential life of his purchase beyond what is reasonable, the consumer should be allowed to receive value for his purchase. How does one evaluate that value? First, he should be allowed to inspect the contract he is purchasing in its entirety, not merely a synopsis. Second, the language used should be of a type that an average person of high school level intelligence can understand. Third, the terms of the service contract should have real value, not perceived value. It is not a value to pay \$200.00 for a service contract to repair a flat screen television if one must ship the television to the manufacturer for service, where shipping is paid for by the consumer. There is a reason we moved away from *caveat emptor*, let us not lose sight of why that was done.