1997

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Recommended Citation
ALI-ABA Course of Study
The Emerged and Emerging New Uniform Commercial Code

December 11-13, 1997
New York, New York

UCC Proposals Concerning Consumer Transactions

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I. Consumer Credit Issues in Revised Article 9

Professor Grant Gilmore once suggested that farmers would like a two section law. Section one would state "It shall be against the law to refuse to lend money to a farmer." Section two would state "It shall be against the law to collect a debt from a farmer." In a similar vein one might state the iron rule of consumer law, namely "No right that has ever been granted to a consumer, however ill considered and unjustified, may thereafter be withdrawn."

Believing that some of the proposals for consumer protection that have been added in Revised Article 9 are not justified and knowing that Article 9 will be in trouble in the legislatures if they are not changed, I propose the following changes to Revised Part 6. What do you think?

A. Consumer creditors do not generally oppose debtors' collecting substantial damages--including punitive damages--where there has been a substantial violation and true injury to the consumer debtor. They oppose liability for punitive damages, either in the form of outright damages under Revised 9-624(c) or in the form of an "absolute bar" to deficiencies under Revised 9-625 where the creditor has made a good faith effort to comply with the law.

Consider first the good faith exception that is currently included in Revised 9-624:

(c) Except as otherwise provided in Section 9-627, in a consumer goods secured transaction, a person that was a debtor at the time a secured party failed to comply with this part has a right to recover from the noncomplying secured party an amount equal to the interest or finance charges plus 10 percent of the principal amount of the obligation, less the sum of any amount by which any consumer obligor's personal liability for a deficiency is eliminated or reduced under Section 9-625 and any amount for which the secured party is liable under subsection (b). This subsection does not apply if the only failure to comply is a failure to send a written notification pursuant to Section 9-614A.

What about the following alternative:
(c) Except as otherwise provided in 9-627, in a consumer goods secured transaction, a debtor may recover an amount equal to interest or finance charges plus 10 percent of the principal amount * * * amount for which a secured party is liable * * * where

(i) the disposition of collateral was made in a way that was not commercially reasonable and the collateral was sold or otherwise transferred to the secured party or to a person related to the secured party;

(ii) the secured party committed a breach of peace under section 9-609 in taking possession of the collateral, or

(iii) the debtor proves that it suffered actual damage as a result of the secured party’s knowing violation of the provisions of this Part.

B. What policy requires the rebuttable presumption rule for all commercial transactions but would allow states to adopt the absolute bar rule for consumer transactions? To bar recovery of any deficiency for any violation of Part 6 of Revised Article 9 is to grant punitive damages whose amount is unrelated to the injury caused. In many cases in which a deficiency is barred, the debtor will have suffered no actual damage. For example, a common basis for denying a deficiency is the failure of the creditor to give appropriate or timely notice to the debtor. In those cases, any deficiency is barred entirely even though the debtor may have been unable to prove that he would have done anything to protect himself if he had received the notice, or indeed that there was any injury to his interest in any event.

C. What about lawyer’s fees? Consider the addition of the following language to 9-627(e):

"Notwithstanding section 9-624 or other provisions of law, the prevailing party in a class action under this article shall not recover attorneys’ fees from the other party."

Revised Article 9 grants any consumer debtor his or her lawyer’s fees from the creditor in any case in which the creditor’s contract calls for lawyers’ fees to a prevailing creditor. What is good for the goose is good for the gander, true? But what about class actions? Might attorney fees in class actions give too large an incentive to plaintiffs’ lawyers to feed off consumer creditors’ innocent errors?
Consider the possibility of a consumer creditor that inadvertently uses a form notice which was technically inaccurate; assume it noticed a "public sale" when a court later determines that the sale (e.g., a dealers' auction) was private.

In all of these cases, the question is whether payment to lawyers and to a particular set of debtors is worthy of the added cost of credit that will ultimately be imposed upon other debtors because the creditors' cost of business rises. What do you think?

II. Consumer Issues in Revised Article 2.

A. Parol Evidence.

Assume that Seller sells a used car to Buyer for $30,000. The contract provides the Seller will repair "any defect brought to our attention within 90 days after the date of sale." Six months after the sale, the engine seize and Buyer asks the Seller to replace the engine. Citing the 90-day provision Seller refuses. Buyer then sues Seller and proposes to testify that in his discussions with Seller's salesman, Salesman made clear that "any defect" referred to only patent or obvious defects and not to latent defects of the kind involved here. Assume that Seller objects to this testimony on the ground that it violates UCC 2-202. Consider existing 2-202 that reads as follows:

"Terms with respect to which the confirmatory memoranda 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."
Rev. § 2-202 reads:

"Terms on which confirmatory records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of a previous agreement or contemporaneous oral agreement. However, terms in a record may be explained by any relevant evidence and may be supplemented by evidence of:

(1) course of performance, usage of trade, or course of dealing; and

(2) noncontradictory additional terms unless:

(A) The terms if agreed upon by the parties would certainly have been included in the record; or

(B) The court finds that the record was intended as a complete and exclusive statement of the terms of the agreement.

Does this case come out the same way under both renditions?

Under Revised 2-202 Buyer will say he is merely explaining by "any relevant evidence" and will point out that the "noncontradictory" language does not apply to the verb "explain". Compare existing 2-202.


Assume three alternatives.

(1) Buyer buys a used car and signs a form contract that gives a 90-day express warranty but disclaims the warranty of merchantability.

(2) Buyer signs a purchase agreement that includes a purchase money security interest with the Seller for the purchase of an automobile. As part of the Contract, Buyer agrees to pay the debt due even if the automobile is repossessed and resold (in the latter case paying the deficiency).

(3) Buyer signs a lease that has a standard remedy clause which requires the buyer, on breach, to pay the full rental price until a reasonable time after the car is returned to the lessor and thereafter to pay the difference between the amount for which the lessor is able to release the car and the lease rental in her own contract.
Assume in each case that the Buyer claims that the relevant clause is invalid under 2-206 (or in the case of the lease, under the analogous provision in Article 2A). At trial the consumer buyer testifies that she had no knowledge of these terms. In addition the Buyer offers testimony by a psychologist who has done a sampling of several hundred consumers concerning their understanding of the responsibility of a debtor on default, the meaning of a disclaimer of implied warranties, and about the responsibility of a lessee on breach of a lease. In each case the psychologist is prepared to testify that "a reasonable consumer in a transaction of this type would not reasonably expect" this particular term.

What do you think of Seller or Lessor’s arguments?

1. Revised 2-206 does not apply to retail installment sales contracts which, as "security agreements," are covered by Article 9, not by Article 2.

2. The issues in subsection 2-206(a) cannot go to a jury but are to be determined only by the court. (Seller bases this argument on 2-206(b).)

3. Subsection (c) takes disclaimers out of 2-206 and thus that the third claim cannot be made under 2-206.

4. (The claim is made as a class action.) The class cannot be certified because each consumer’s knowledge is relevant.

5. The psychologist’s testimony as an expert cannot be admitted because it is not relevant to or probative of the issues before the court.

Rev. § 2-206: Consumer Contracts; Records.

(a) In a consumer contract, if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, after affording the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract, shall decide whether the contract should be interpreted to exclude the term.
(c) This section shall not operate to exclude an otherwise enforceable term disclaiming or modifying an implied warranty.

C. Revised 2-403. Express Warranty to Immediate Buyer

In the wake of Phen-Fen's failure assume a fad for the purchase of organic (natural) weight-loss pills. Assume that the TV pictures show the usual testimonials and before and after pictures (obese before and scrawny after). Buyer orders pills by phone and when they come, they have more pictures and additional statements about the weight loss of particular users. Ultimately the consumers are disappointed and a plaintiffs' lawyer, representing a class of several thousand buyers of the pills, sues. He sues on two theories. First, he argues that the TV and the documents in the box with the pills were themselves express warranties under 2-403; he particularly emphasizes the term "depiction" that is now in Revised 2-401(5).

Seller responds as follows:

1. Neither the representation on TV nor the pictures that came with the pills "became part of the agreement." The TV advertisement was not part of the agreement because no reasonable person would believe that it was part of the agreement. The flier with the pills was not part of the agreement because the agreement had already been concluded by the order and the payment of money before the flier was delivered.

2. As part of their recovery the buyers asked for consequential damage in the form of payments for dashed hopes, consequent depression, and increased obesity. See Revised §§ 2-805 and 2-806 (allowing recovery of incidental and consequential damages; § 2-408(f)(3) cuts off consequential damages only from remote buyer's lost profits).

What do you think?

Rev. § 2-401(5) "Representation" means a description, demonstration or depiction of the goods, or a sample or model of the goods.

Rev. § 2-403. Express Warranty to Immediate Buyer.

(a) If a seller makes a representation or promise relating to the goods to an immediate buyer, the representation or the promise becomes part of the agreement unless a reasonable person in the position of the immediate buyer would not believe that the
representation or promise became part of the agreement or would believe that the representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods. An obligation may be created under this section even though the seller does not use formal words, such as "warranty" or "guarantee."

(b) A representation or a promise that becomes part of the agreement is an express warranty and the seller has an obligation to the immediate buyer that the goods will conform to the representation or, if a sample is involved, that the whole of the goods will conform to the sample, or that the promise will be performed. The obligation is breached if the goods do not conform to any representation at the time when the tender of delivery was completed or if the promise was not performed when due.

(c) A seller's obligation under this section may be created by representations and promises made in a medium for communication to the public, including advertising, if the immediate buyer had knowledge of them at the time of the agreement.

Rev. § 2-408. Extension of Express Warranty to Remote Buyer and Transferee.

(a) In this section, "goods" means new goods and goods that are sold as new goods.

(b) If a seller makes a representation or a promise relating to goods on or in a container, on a label, in a record, or that is packaged with or otherwise accompanies the goods and authorizes another person to deliver the container, label, or record to a remote buyer and it is so delivered, the seller has an obligation to the remote buyer and its transferee, and in the case of a remote consumer buyer, to any member of the family or household of the remote consumer buyer, that the goods will conform to the representation or that the promise will be performed, unless a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that any representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.

(c) If a seller makes a representation or a promise relating to the goods in a medium for communication to the public, including advertising, and
a remote buyer with knowledge of the representation or promise buys or leases the goods from a person the seller has an obligation to the remote buyer and its transferee and, in the case of a remote consumer to buyer, to any member of the family or household of that consumer buyer, that the goods will conform to the representation, or that the promise will be performed, unless a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that the representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.

(d) An obligation may be created under this section even though the seller does not use formal words, such as "warranty" or "guaranty".

(e) An obligation arising under this section is breached when the goods are received by the remote buyer if the goods, at the time they left the seller's control, did not conform to any representation made, or if the promise is not performed when due.

(f) The following rules apply to the remedies for breach of an obligation created under this section:

(1) A seller under subsections (b) and (c) may modify or limit the remedies available to a remote buyer for breach, but a modification or limitation is not effective unless it is communicated to the remote buyer with the representation or promise.

(2) Damages may be proved in any manner that is reasonable. Unless special circumstances show proximate damages of a different amount:

(A) a measure of damages if the goods do not conform to a representation is the value of the goods as represented less the value of the goods as delivered; and

(B) a measure of damages for breach of a promise is the value of the promised performance less the value of any performance made.

(3) A seller in breach under this section is liable for incidental or consequential damages under Sections 2-805 and 2-806 but is not liable for consequential damages for a remote buyer's lost profits.
[(4) A remote consumer buyer that bought the goods on credit and is entitled to damages under subsection (f)(2) may, upon notifying the immediate seller, deduct damages from any part of the price still due.]

(5) An action for breach of an obligation under subsection (e) is timely if commenced within the time provided in Section 2-814.

(g) This section is subject to Section 2-409(b).

How do you resolve the issues?

1. Did these become part of the bargain?

2. Are they within 2-403 or 2-408? (Note that the standards under 2-403 and 2-408 are different. The warranties do not arise under 2-408 if the "remote buyer would not believe the representation". The standard under 2-403 is that the buyer "would not believe that the representation or promise became part of the agreement.")

3. Perhaps these are merely statements of seller's opinion or a commendation of the goods.

4. Does the language in 2-403, "becomes part of the agreement," apply standard contract rules or is it intended to carry forward the "basis of the bargain" rules from the existing Code?

D. Revised 2-406. Disclaimer of Warranties.

1. Used car salesman is a cyber dealer who sells over the internet. As part of every contract for sale he transmits a statement that says: "We make no promises about the quality or usefulness of the car that you are buying. We make an express 90-day warranty that our cars work, but they may not work and they may not be fit for any purpose that you have in mind. By clicking on the adjoining box you agree to this disclaimer."

2. In face-to-face sales, assume that dealer uses comparable language in his sales agreement and the buyer initials it.

Ultimately a debtor purchases the car. When the car fails long after the 90 days, debtor sues for breach of the implied warranty of merchantability. Seller defends on the ground that he disclaimed that warranty and buyer makes the following responses. Which do you think?
a. The disclaimer in the cyber contract is invalid because it was not conspicuous and the clicking on the "agree box" was not a "separate authentication."

b. Because the language deviated from the language now set out in Revised 2-406(e)(2) in certain respects, it was invalid.

c. Neither the language in the cyber contract nor the language in the written contract was "conspicuous."

Rev. § 2-102(7) "Conspicuous" means so displayed or presented that a reasonable person against whom it operates ought to have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the message by an individual.

Rev. § 2-406(e) Except in a sale by auction under Section 2-313, language in a consumer contract is sufficient to disclaim or modify an implied warranty only if:

(1) At the time of contracting, a seller in good faith passes through to a buyer an express warranty obligation created by another seller under Section 2-408(b) that is reasonable in scope, duration and remedies and there is conspicuous language in a record stating, for example, "You are receiving an express warranty obligation from the [manufacturer] instead of any implied warranty of merchantability or fitness from us;" or

(2) Conspicuous language in a record which language the consumer has separately authenticated states: "Unless we say otherwise in the contract, we make no promises about the quality or usefulness of what you are buying. They may not work. They may not be fit for any specific purpose that you may have in mind."

E. Perfect tender rules.

Assume two alternative cases. Seller delivers a new car to buyer for $55,000. Buyer had ordered a car with a less expensive radio—one without a CD in the trunk. The delivered car has a CD in the trunk and, hearing buyer's complaint, seller agrees to give the more expensive car to buyer at the price agreed for the one with the less
Buyer, having found that he can buy a similar car for $43,000 in an adjoining city, wishes to reject. Buyer claims a right to do that under Revised 2-703.


(a) Subject to Sections 2-603(b), 2-710, 2-809, and 2-810, if the goods or the tender of delivery fail in any respect to conform to the contract, a buyer may:

1. reject the whole;
2. accept the whole; or
3. accept any commercial units and reject the rest.

(b) A rejection under subsection (a) is not effective unless the buyer notifies the seller within a reasonable time after [tender of delivery] (the nonconformity was or should have been discovered).

Seller claims that there is no such right and that in any case the seller has cured.

Rev. § 2-709. Cure.

(a) If a buyer effectively and rightfully rejects goods or a tender of delivery under Section 2-703 or justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance has not expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure any breach of contract by making a conforming tender of delivery within the agreed time and by compensating the buyer for all of the buyer’s reasonable and necessary expenses caused by the nonconforming tender and subsequent cure.

(b) If a buyer effectively and rightfully rejects goods or a tender of delivery under Section 2-703 or justifiably revokes acceptance under Section 2-708(a)(2) and the agreed time for performance has expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure the breach of contract by making a tender of conforming goods and by compensating the buyer for all of the buyer’s reasonable and necessary expenses caused by the nonconforming tender and subsequent cure, if the cure is [appropriate and] timely under the circumstances and
the buyer has no reasonable grounds to refuse the cure.

What do you think?

Alternatively assume that Buyer has ordered a $200,000 Ferrari to be delivered on November 10, 1997. After the car was ordered but before it was delivered, manufacturer announces it will no longer make models of this kind. Accordingly the automobile, one of the last of its breed, doubles in value. Buyer appears with his $200,000 cashier’s check to pick up the car on November 11 but Seller refuses to deliver it to him. Seller asserts that he has a right to cancel under Revised 2-808(a) on the ground that even immaterial breaches allow him--like the buyer--to cancel. Compare Revised 2-701(b) with Revised 2-703(a) and Revised 2-710(c). What do you think? Do we now have a completely parallel set of rules for the Buyer and Seller? Is the perfect tender rule worth preserving?

Rev. § 2-808(a). An aggrieved party may cancel a contract if there is a breach under Section 2-701, or in the case of an installment contract, a breach of the whole contract under Section 2-710(c), unless there is a waiver of the breach under Section 2-702 or a right to cure the breach under Section 2-709.

Rev. § 2-701(b). A breach of contract occurs in the following circumstances, among others:

(1) A seller is in breach if it fails to deliver or to perform an obligation, makes a nonconforming tender of performance, or repudiates the contract.

(2) A buyer is in breach if it wrongfully rejects a tender of delivery, wrongfully revokes acceptance, repudiates the contract, or fails to make a required payment or to perform an obligation.

Rev. 2-710(c). If a nonconformity with respect to one or more installments in an installment contract is a substantial impairment of the value of the whole contract, there is a breach of the whole contract and the aggrieved party may cancel the contract. However, the power to cancel the contract for breach is waived, or a canceled contract is reinstated, if the aggrieved party accepts a nonconforming installment without seasonably giving notice of cancellation, brings an action with respect to only past installments, or demands performance as to future installments.