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ARTICLE 2 REVISIONS: AN OPPORTUNITY TO PROTECT CONSUMERS AND "MERCHANT/CONSUMERS" THROUGH DEFAULT PROVISIONS

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INTRODUCTION

The National Conference of Commissioners on Uniform State Law (NCCUSL) is in the process of revising Article 2, the Sales Article of the Uniform Commercial Code (U.C.C.). The NCCUSL plans to promulgate the revised version in 1997. Presently, Article 2 governs all transactions in goods, and usually applies to buyers and sellers of goods regardless of their respective levels of experience, sophistication, and bargaining power.

While revising Article 2, the NCCUSL must decide how, and to what extent, Article 2 should include special rules to protect consumer buyers. The current version of Article 2 does not define the term "consumers," although it incorporates the Article 9 definition of "consumer goods." Thus, there seems to be a consensus that an appropriate definition of a "consumer" is "one who purchases goods for personal, family or household purposes."*5

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1. The U.C.C. is a joint project of the NCCUSL and the American Law Institute (ALI).
2. This Article refers to "current Article 2" meaning the 1962 Official Text and Comments, which has been enacted in all states except Louisiana. This Article refers to "the July 1996 Draft" to mean U.C.C. Revised Article 2, from the NCCUSL Annual Meeting Draft dated July 1, 1996. Sections in current Article 2 are referred to by section numbers (e.g., section 2-102); sections in the July 1996 Draft are referred to using the prefix "J96" (e.g., J96 2-102.)
4. Section 9-109 provides: "Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes." U.C.C. § 9-109. A definition of "consumer" may be added as part of the current Article 9 revision process.
5. This is the definition that has now been incorporated into the July 1996
Many commentators and consumer advocates believe that Article 2 should include special rules to protect consumer buyers. On the other hand, a like number of industry representatives argue that Article 2's current approach does not contain such special rules.

The ongoing debate on the extent to which the NCCUSL should incorporate consumer protection provisions into Article 2 is an important one. The debate focuses on the distinction Article 2 should draw between the treatment of consumer buyers and non-consumer buyers. Commentators almost uniformly assume that there is one group composed of consumer buyers who need protection and another group composed of all other buyers, non-consumers, who do not. However, the debaters do not appear to recognize that some buyers do not fit neatly into either group. In fact, there is a third hybrid group of buyers. These buyers are entrepreneurs, sole proprietors and "mom and pop" stores. Buyers in the hybrid group cannot be classified as consumers because they do not buy goods for "personal, family or household purposes." When they sell goods, they are "merchants," as defined in current Article 2 because they are engaged in the business of selling


7. See infra note 245 and accompanying text for letters from industry representatives to the Subcommittee on Consumer Issues.

8. Professors Jean Braucher and Julian B. McDonald both have recognized that buyers actually run on a continuum from the inexperienced consumer to the sophisticated business person, with buyers of all different levels of background and experience in between. They refer to buyers who are not consumers, but who lack the sophistication of experienced business people, as "quasi-consumers." Braucher, supra note 6, at 78; see also Julian B. McDonnell, Definition and Dialogue in Commercial Law, 89 NW. U. L. REV. 623 (1995).

9. In fact, not all buyers even fit neatly into the three categories I describe. I agree with Prof. Braucher that there are not necessarily discrete categories of buyers, but I believe that legal analysis of the rights of buyers nevertheless is enhanced by recognizing at least a third group of buyers, who should not be treated exactly as consumers nor exactly as non-consumers. See Braucher, supra note 6, at 78. Recognizing this third, hybrid, group will assist courts in distinguishing between "consumer cases" and "commercial cases" as precedent.
 Nonetheless, when this hybrid group buys goods, they share many of the characteristics of "typical" consumer buyers. Consumer buyers generally must buy goods on a "take it or leave it" basis. The seller uses its standard form contracts that are often written in somewhat obscure language and are narrowly designed to limit the buyer's rights and the seller's obligations. Similar to consumer buyers, the small merchant buyers generally must purchase goods on a "take it or leave it" basis using the seller's standard form contract. Although these merchants are engaged in business, they are relatively unsophisticated, and when they buy goods they are often in an unequal bargaining position. This Article refers to this hybrid group as "merchant/consumers."

A number of commentators charge that consumer cases distort the meaning of certain provisions of Article 2 and result in inappropriate results in non-consumer commercial cases. However, most cases do not support this charge. Rather, the courts generally can distinguish between consumers and non-consumers. Courts that apply the current Article 2 to consumer transactions rely on the open-ended drafting style of its provisions to formulate rules to protect consumers. The courts do not apply these rules in cases that involve sophisticated business people. When courts cross the line and apply "consumer" rules to "non-consumers," a close reading of the case facts usually shows that the courts recognize a difference in the status of the buyer. Many courts seem to implicitly recognize that, in some circumstances, they should not treat certain merchants as non-consumers at all because when they buy goods, they have all the earmarks of consumers. Accordingly, when courts do identify the characteristics of a "merchant/consumer," they follow the interpretation of rules used in previous consumer cases. On the other hand, when courts determine that a merchant is relatively sophisticated and is able to

10. See infra notes 27-34 and accompanying text for a discussion of "merchant."

11. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-1, at 415 (4th ed. 1995) (asserting that sections 2-316 and 2-719 are among the most unpredictable provisions in the Code and "this unpredictability is attributable to activist courts' sympathy towards consumers."). See also Miller, supra note 6, at 1572 (arguing in favor of adding specific consumer protection provisions to Article 2). Miller stated that "Article 2 would continue to apply rules designed for commercial transactions to consumer transactions, and thus motivate courts to interpret the rules in a way which can only cause questions when the interpretation is applied in commercial cases." Id. (citing Donald F. Clifford, Jr., Non-U.C.C. Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods, 71 N.C.L. REV. 1011, 1015 n.6 (1993)).
bargain on his or her own behalf, the courts interpret and apply the rules as in previous “commercial” cases.

As part of the Article 2 revision process, the drafters are paying significant attention to the question of how to treat consumers under the revised Article 2. Yet, no one is addressing the interests of the “merchant/consumers.” This Article examines how cases construing current Article 2 treat “merchant/consumers,” and it explores how the proposed revised Article 2 will treat them. As an outsider to the Article 2 revision process, I peek over the shoulders of the Drafting Committee\(^{12}\) and examine selected provisions of the July 1996 Draft to see how it treats consumers, and I explore the likely impact of such provisions on “merchant/consumers.”

Part I reviews how current Article 2 treats consumers and buyers which, for the purposes of this Article, are categorized as “merchant/consumers.” It examines the existing legal framework by focusing on four sections of current Article 2 that have generated a large volume of consumer cases: section 2-302\(^{13}\) (unconscionability), section 2-316\(^{14}\) (warranty disclaimers), section 2-202\(^{15}\) (the parol evidence rule), and section 2-719\(^{16}\) (remedy limits).

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12. See infra Part III for a discussion of the membership and activities of the Drafting Committee.


This Part concludes that under current Article 2, courts have the flexibility to interpret and apply the statute similarly to protect both consumers and "merchant/consumers" from "bad bargains." Courts also have the flexibility to give more weight to the bargain of the parties in merchant-to-merchant transactions, because those parties presumably have sufficient expertise and bargaining power to protect themselves when they enter into a contract.

In addition to reviewing the Code sections, Part I analyzes a sampling of representative cases that were decided under current Article 2 to determine whether courts have been able to fashion protection for consumers without distorting legal rules applying to all transactions. For each Code section, Part I analyzes three types of cases: (1) a merchant-to-consumer transaction; (2) a merchant-to-merchant transaction; and (3) a merchant-to-"merchant/consumer" transaction. Each case is examined to determine whether an initial interpretation of a particular code section, developed in a case involving a consumer, subsequently was applied in a case that involved non-consumers or "merchant/consumers."

Part II describes several provisions of the July 1996 Draft. Specifically, it reviews each new section of the July 1996 Draft that bears on the issues of unconscionability, warranty disclaimers, parol evidence, and remedy limitations. In each instance, it discusses how the status of the parties to a particular transaction will affect the interpretation and application of that section. Part II further explores the potential treatment of "merchant/consumers," and in particular, asks whether measures designed to protect consumers will also protect "merchant/consumers."

Part III describes what the July 1996 Draft does not do and makes conclusions and recommendations. The Drafting Committee rejected certain suggestions that would greatly advantage consumer buyers. It largely ignored the consumer protection features of existing federal and state laws and their impact on an Article 2 analysis. The Committee also failed to incorporate certain con-

17. This Article refers the reader to additional cases that follow the same pattern as the cases cited in the text. All of the cases discussed are appellate court cases. Such cases may not accurately reflect the disposition of similar types of disputes, because only a very small number of cases reach the appellate court level. Nevertheless, appellate court cases do give guidance which lawyers use to give advice to their clients.

18. See infra Part II.B for an explanation on how the cases were grouped into these categories.
sumer protection features that exist in other laws that should be incorporated into Article 2 to continue the comprehensive nature of the Uniform Commercial Code. Moreover, it failed to expand consumer protection by including special statutory provisions suggested by many consumer advocates.

By failing to incorporate specific consumer protection measures into Article 2, the Drafting Committee has preserved the "open-ended drafting" approach of current Article 2 which permits courts to extend protection not only to consumers, but also to "merchant/consumers." However, the July 1996 Draft introduces some new key concepts, such as that of a "standard form," and "manifesting assent," that need further modification if they are to protect both consumers and "merchant/consumers."

Based on analysis of specific cases that interpret key provisions of current Article 2, and the July 1996 Draft, this Article concurs with the Drafting Committee's decision to write revised Article 2 in a flexible style. This Article agrees with commentators who argue for additional protective provisions to help consumers. However, this Article argues that Article 2 should extend such special protective features to "merchant/consumers." This Article therefore recommends that the Drafting Committee write buyer protection provisions as "default" provisions of revised Article 2, and permit sophisticated parties to "opt out" of these provisions.

I. CURRENT ARTICLE 2 TREATMENT OF CONSUMERS AND "MERCHANT/CONSUMERS"

A. Current Framework of Article 2

Uniform Commercial Code Article 2 applies to "transactions in goods." A sale is the most common transaction to which it applies, and it applies to all such transactions regardless of the dollar amount involved, the complexity and sophistication of the goods sold and the status of the contracting parties.

Freedom of contract is a guiding principle of the U.C.C.. This means that the contracting parties are free to reach any agreement. This freedom is subject to the requirements that the parties act reasonably and in good faith. Moreover, their

19. Generally, "default" rules are defined as rules that the parties can contract around by prior agreement; they include for example, terms that govern unless the parties contract around them. The "gap-fillers" in Article 2 are examples of "default" rules.
21. The Code does not define "reasonable." Professor David Mellinkoff observed: "[t]he word 'reasonable,' effective in small doses, has been adminis-
agreement must not be unconscionable.\textsuperscript{23} Article 2 contains many specific rules, although most are "default rules" which apply only if the parties do not agree upon some other arrangement.\textsuperscript{24} The parties cannot agree that Article 2 does not apply to their transaction.\textsuperscript{25} Accordingly, Article 2 applies to all sales transactions involving goods.

Given the broad applicability of Article 2 to all transactions involving the sale of goods, combined with a policy of encouraging private agreements within broad parameters of commercial reasonableness, it is not surprising that Article 2 does not contain a large number of specific rules to govern narrow fact patterns. Indeed, few provisions of Article 2 recognize that there may be different considerations involved in transactions where the buyer and seller both are relatively sophisticated business people, and transactions where one of the parties has a much broader range of business experience and understanding than the other.\textsuperscript{26}

\textsuperscript{23} See infra Part II.B for a discussion of unconscionability. See supra note 13 for a list of law review articles that discuss unconscionability.


\textsuperscript{25} Although this rule is not explicitly stated in the Code, it follows from U.C.C. § 1-102(3) which prohibits an agreement that would negate the basic requirements of good faith, reasonableness.

\textsuperscript{26} The PEB Study Group U.C.C. Article 2 Preliminary Report summarized Article 2's current approach as follows:

A second drafting dilemma concerns the extent to which a commercial statute should attempt to deter or alter the conduct of persons engaged in a trade or of parties to the contract for sale. The Article 2 solution is to invoke general standards to reject commercially unreasonable prac-
The exception to this general approach is Article 2's recognition of a special class of people called "merchants." Article 2 defines a merchant as "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." A party who is a merchant is, in certain circumstances, held to higher standards of performance than a less knowledgeable party would be. For example, the standard of "good faith" for a merchant is somewhat higher than the general standard of "good faith" applicable to all parties under Article 2. Furthermore, merchants are expected to have certain knowledge of general business conduct and to act accordingly. Therefore, Article 2 contains special rules that apply only to merchants, such as the special "merchant rules" found in the statute of frauds, the 'tattle of the forms,' contract modification, and risk of loss provisions. In addition, the Code treats special treatment only to consumers in


27. See Ingrid Michelsen Hillinger, The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, The True, The Beautiful in Commercial Law, 73 Geo. L. J. 1141, 1150-51; see also id. at 1178-79 n.231, 234, 244 (listing numerous law review articles and cases all which discuss the merchant class).

Historically, courts and commentators have argued about whether a farmer is a merchant. See, e.g., id. at 1144 n.13. This question often arises in the context of the implied warranty of merchantability because only a merchant gives such a warranty. However, the problem of deciding whether or not a farmer is a merchant for purposes of applying other rules is resolved if it is recognized that many farmers will fit the "merchant/consumer" category.

28. U.C.C. § 2-104 (1989). Note that the U.C.C. uses the masculine gender at all times. Accordingly, that same approach is taken in this Article. Unfortunately, the Drafting Committee has not changed this approach.

29. See U.C.C. § 2-104 cmt. 1.

30. See Official Comment 2 to U.C.C. § 2-104 for a "laundry list" of these exceptions.

31. U.C.C. § 2-201(2).

32. Id. § 2-207(2).

33. Id. § 2-209(2).

34. Id. § 2-509(3). Similarly, § 2-603 imposes special obligations upon merchant buyers regarding care for rightfully rejected goods. Professor Hillinger states that Llewellyn wrote the merchant rules "to insulate his bedrock commercial rules from creeping, non-commercial considerations that might blur or distort the predictability of his commercial rules." Hillinger, supra note 27, at 1174.
sections 2-318, regarding privity in warranty matters,\textsuperscript{35} and 2-719(3), regarding liability for personal injury damages in the case of consumer goods.\textsuperscript{36} Article 2 does not recognize a hybrid group of “merchant/consumers.”

Many commentators describe Article 2 as “neutral” because of this approach.\textsuperscript{37} A superficial review of Article 2 generally supports this conclusion. Except for the limited “merchant” and “consumer” provisions noted above, nothing in the statute suggests that the status of the parties (e.g., consumer, merchant, or “merchant/consumer”) should affect either the legal analysis of a given fact pattern or the outcome. As a practical matter, however, reported appellate level cases suggest that outcomes do vary depending on the status of the parties to the transaction.

Article 2 seems to assume that the parties to a sales contract have the ability and the knowledge necessary to bargain in good faith and arrive at a mutually advantageous transaction. When that assumption is true, as in the case of two sophisticated business people with relatively equal bargaining power, the parties can fashion their own agreement, confident that if judicial assistance is necessary, generally their bargain will be enforced. However, it is increasingly apparent that in this modern age of mass-marketing, sales transactions with consumer buyers are far from this model of a freely bargained contract.\textsuperscript{38} Furthermore, many sales transactions with “merchant/consumers” are equally far from this model. It is this disparity between the notion of freedom of contract and the reality of the marketplace that courts recognize

\textsuperscript{35} For example, Alternative A to U.C.C. § 2-318(a) (1989), states that “[a] seller’s warranty extends to any natural person . . . in the family or household of his buyer . . . if it is reasonable to expect that such person may use, consume or be affected by the goods.”


\textsuperscript{37} See, e.g., Preliminary Report, supra note 26, at 994: Article 2 is neutral when direct issues of regulation are posed. There are no special provisions designed to provide protection to a consumer buyer in transactions with a merchant seller. Rather, § 2-102 simply provides that Articles 2 does not impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

\textit{Id.} But see Egon Guttman, Mediating Industry and Investor Needs in the Redrafting of U.C.C. Article 8, 28 U.C.C. L. J. 3, 4 (1995) (stating that “[Karl Llewellyn and Soia Mentischikoff’s approach] to drafting the U.C.C. was to have the U.C.C. represent the needs of mercantile interests and to leave consumer and investor protection to other legislative and judicial developments.”).

\textsuperscript{38} Preliminary Report, supra note 26, at 1007 (citing D. Rice, Consumer Transactions 12-13 (1975)).
and address in Article 2 decisions.

B. Case Law Interpreting Key Article 2 Provisions

Although all of Article 2's provisions apply to consumer transactions, four provisions are particularly noteworthy for the volume of consumer cases they have generated. Reported cases applying section 2-302 (unconscionability), section 2-316 (warranty disclaimers), section 2-202 (parol evidence) and section 2-719 (remedy limitations, including both the doctrines of failure of essential purpose and consequential damage exclusions) can be classified into three groups based on the status of the contracting parties.

The first group, "merchant-to-consumer" cases, involves a merchant seller and a consumer buyer. Although some consumer buyers may be very sophisticated and able to understand and evaluate their bargains with sellers, most consumers cannot negotiate specific contract terms with the merchant seller. This is because merchants usually present the goods and the contract on a "take it or leave it" basis.

The second group, "merchant-to-merchant" cases, involves two merchants who are relatively equal in bargaining power. A determination that parties are "relatively equal in bargaining power" can be made when: (1) both parties are somewhat sophisticated in business, or rely on the guidance of sophisticated advisors; (2) the parties negotiate the terms of the contract, other than price and quantity; and (3) the price and other terms usually reflect a bargained-for allocation of risk. Although not all "merchant-to-merchant" cases involve formal written contracts, of the three case groups, merchant-to-merchant cases are most likely to involve

39. As discussed previously, Article 2's applicability is subject to any preemptive federal or state consumer protection legislation, such as the Federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301-2312 (1994) and various state "lemon laws."

40. Other sections of Article 2 that are frequently involved in consumer transactions include U.C.C. § 2-313 (express warranties), U.C.C. § 2-607 (notice), and U.C.C. § 2-318 (privity).

41. Time and space constraints forced me to limit my study to these four provisions. However, I believe that cases interpreting many of Article 2's provisions can be similarly categorized. For example, to determine whether a statement is "puffing" or an "affirmation of fact" so as to give rise to an express warranty under § 2-313, courts look at, among other things, the relative knowledge of the buyer and seller. WHITE & SUMMERS, supra note 11, at 9-4.

42. This Article does not address the question of whether highly sophisticated consumers should be held to a higher standard than ordinary consumers such as in K & C, Inc. v. Westinghouse Electric Corp., 263 A.2d 390 (Pa. 1970), discussed infra note 198.
formal written contracts, prepared specifically for the subject transaction.\footnote{43. I do not mean to suggest that even sophisticated merchants always negotiate contracts. However, a sophisticated merchant who chooses to not negotiate terms usually makes an “educated” choice, based on a “cost/benefit” analysis, taking into account the price of the goods, the volume of goods being purchased, and the overall cost of the contract. Similarly, sophisticated merchants will often use “standard form” documents, unless the size or importance of the transaction warrants tailor-made documents.}

The third group, merchant-to-“merchant/consumer” cases, involves two merchants, but one of the merchants involved in the transaction has superior bargaining power. The other merchant shares many of the characteristics that this Article previously attributed to consumers such as lack of education, lack of sophistication and inability to fully understand the transaction. If there is a written contract, it is usually the seller’s standard form containing unbargained-for terms that favor the seller. Applying the above classification scheme, the following analysis of representative cases shows a remarkably consistent pattern of courts construing code sections based on the contracting parties’ status.

1. \textit{Unconscionability Cases}

The Statutory point for an unconscionability analysis is section 2-302. Specifically, section 2-302 provides:

(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.\footnote{44. U.C.C. § 2-302(1).}

Article 2 does not define unconscionability and Official Comment 1 to section 2-302 provides limited guidance. Comment 1 states that “the principle is one of the prevention of oppression and unfair surprise.”\footnote{45. U.C.C. § 2-302, cmt. 1; see also Emlee Equip. Leasing Corp. v. Waterbury Transmission, Inc., 626 A.2d 307, 312 (Conn. Ct. App. 1993) (explaining that the purpose of unconscionability doctrine is to prevent oppression and unfair surprise).} Another oft-repeated definition was originally stated by Justice Skelly Wright while writing for the court in the leading case of \textit{Williams v. Walker-Thomas Furniture Co.}\footnote{46. 350 F.2d 445 (D.C. Cir. 1965).} Justice Wright stated that “[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably
favorable to the other party."  

Most courts analyze unconscionability along the lines that the late Professor Leff originally suggested. Leff said that to find unconscionability, two different aspects of the transaction should be examined: first, "procedural" unconscionability (gross unfairness in the bargaining process); and second, "substantive" unconscionability (unfairness in the actual contract terms). The entire transaction should be treated as unconscionable only if both aspects are unconscionable.

When courts elaborate on the basis for their decisions regarding unconscionability, the cases generally fall into the three categories described previously, and the results can be predicted based on the status of the parties. The following three cases illustrate the application of the doctrine of unconscionability based on the status of the parties.

a. Merchant-to-Consumer

In Jefferson Credit Corp. v. Marcano, the court reviewed an installment sales contract between a car dealer and a consumer buyer. The car dealer assigned the contract to the plaintiff, a duly licensed finance company. The car broke down repeatedly, and despite the seller's assurances, the dealer never fixed the car. Eventually, the buyer stopped making payments on the contract, and the plaintiff repossessed and resold the vehicle. In this action, the plaintiff sued on the contract to recover the unpaid balance due on the contract. In response, the plaintiff raised contract provisions that waived the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The court described the buyer as having "at best, only a sketchy knowledge of English." The contract was the seller's printed standard form written entirely in English. The court also

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47. Id. at 449.
48. Leff, supra note 13, at 487.
49. Id.
50. A review of many unconscionability cases reveals that not all courts are particularly thorough in their unconscionability analyses. These courts fail to clearly identify the factors that support their conclusion that a contract, or clause, is both procedurally and substantively unconscionable. Instead, they simply state in a conclusory fashion that a provision is (or is not) unconscionable.
52. Id. at 391.
53. Id. at 392-93.
54. Id. at 393.
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noted the buyer's lack of bargaining power. Although the written contract contained waiver provisions printed in large black type in the contract, the court held that based on all the facts, the contract was unconscionable from its inception. Due in large part to the language issue, the court concluded that it was doubtful whether any of the contract clauses were within the buyer's grasp or understanding.

b. Merchant-to-Merchant

When both contract parties are merchants who have relatively equal bargaining power, they generally do have freedom of choice, as well as the ability to understand and negotiate contract terms. Accordingly, in such cases courts usually conclude that the challenged contract or clause is not unconscionable. Thus, in

55. Id. at 394.
56. See Kugler v. Romain, 279 A.2d 640 (N.J. 1971). Where the Attorney General of the State of New Jersey brought an action to have a house-to-house contract for the sale of so-called educational books invalidated as to all consumers who executed it, the court explained the application of the doctrine to consumers as follows:

Unconscionability is not defined in section 2-302 of the Uniform Commercial Code... It is an amorphous concept obviously designed to establish a broad business ethic. The framers of the Code naturally expected the courts to interpret it liberally so as to effectuate the public purpose, and to pour content into it on a case-by-case basis. In that way a substantial measure of predictability will be achieved and professional sellers of consumer goods as well as draftsmen of contracts for their declared unacceptable and will avoid them. The intent of the clause is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion. Viewed in that sense, freedom to contract survives, but marketers of consumer goods are brought to an awareness that the restraint of unconscionability is always hovering over their operations and that courts will employ it to balance the interests of the consumer public and those of the sellers.

Id. at 651-52. See also Fischer v. General Elec. Hotpoint, 438 N.Y.S.2d 690, 691 (N.Y. Dist. 1981) (holding that a provision in a contract for the sale of a refrigerator by a large corporation to a consumer was unconscionable). The Fischer court stated that, "[t]he plaintiff was obviously at a substantially poorer bargaining position than the corporate defendant. Further, the defendant should have been aware that the plaintiff did not understand the significance of the provision. Under these circumstances, the court finds the provision unconscionable." Id.

57. This does not mean that these merchants always negotiate contract terms. However, they have the ability to do so and presumably make an informed decision as to whether or not to do so.
Siemens Credit Corp. v. Marvik Colour, Inc., the court refused to strike certain contract clauses including waiver provisions and exclusion of consequential damages that a commercial computer system buyer challenged. Specifically, the court found that the buyer had a meaningful choice in entering into the contract. The court also emphasized that the buyer had actively negotiated the contract. Furthermore, the court stated that there is a presumption of conscionability when a contract is between business people in a commercial setting and upheld the challenged clauses.

59. Id. at 695. The plaintiff was the assignee of a secured equipment sales agreement. Id. at 693.
60. Id. at 695.
61. Id.
62. Id.; see also Bailey Farms, Inc. v. Nor-Am Chem. Co., 27 F.3d 188, 193 (6th Cir. 1994) (holding that a disclaimer of warranties was not unconscionable where buyer had been farming for over seventeen years, had over 1000 acres under cultivation at the time of the transaction, had performed custom farming for others, and had prior experience with pesticides); Potomac Plaza Terraces, Inc. v. QSC Prods., Inc., 868 F. Supp. 346, 353 (D.D.C. 1994) (finding a remedy limitation in contract between housing cooperative and manufacturer and seller of polyurethane coating used in roofing not unconscionable because agreed upon by commercial parties of relatively equal bargaining strength); Jim Dan, Inc. v. O.M. Scott & Sons Co., 785 F. Supp. 1196, 1201 (W.D. Pa. 1992) (finding a remedy limitation is not unconscionable because (1) herbicide buyer was not an inexperienced merchant (he had 15 years experience running a restaurant, miniature golf course and driving range, although he was new to running a full size golf course); (2) he had experience in making contracts, and (3) the seller set forth the disclaimer clearly and did not rely on legalese); Peacock v. Ciba-Geigy Corp., 8 U.C.C. Rep. Serv. 2d 688, 689 (E.D. Ark. 1980) (holding a disclaimer of liability for consequential damages on herbicide bag label is not unconscionable because (1) buyer was free to choose from a number of herbicides on the market; (2) buyer was familiar with the terms of the directions, which contained the disclaimer; (3) disclaimer appeared in bold face type significantly larger than that in the remainder of the directions; and (4) there were no facts from which an inference of oppression or unfair surprise could be drawn); U.S. Roofing, Inc. v. Credit Alliance Corp., 279 Cal. Rptr. 533, 547 (Cal. Ct. App. 1991) (rejecting unconscionability challenge, relying on parties' equal bargaining power); W. L. May Co. v. Philco-Ford Corp., 543 P.2d 283, 286 (Or. 1975). In W.L. May the court noted that:

Unconscionability is a legal doctrine currently undergoing a rapid evolution. Most parties who have successfully asserted it in the past have been consumers and, frequently, have also been poor or otherwise disadvantaged. Courts have generally not been receptive to pleas of unconscionability by one merchant against another except in cases involving damage provisions or warranty disclaimers. In order to prove the unconscionableness of the termination provisions of a contract between merchants, it must be shown that the terms of the agreement bear no reasonable relation to the business risks involved and are so one-sided as to be oppressive.
c. Merchant to “Merchant/Consumer”

A “merchant/consumer” often has no more ability to negotiate and understand a contract than does an ordinary consumer. Accordingly, when a court applies the unconscionability test in a merchant-to-“merchant/consumer” case, the court often finds unconscionability. For instance, in Moscatiello v. Pittsburgh Contractors Equipment Co., the highway contractor purchased a concrete spreader-finisher machine from a paving machine vendor for use in a contract with the Pennsylvania State Department of Transportation. The contractor was not a consumer because the contractor was not buying goods for “personal, family or household purposes.” In fact, if he had been selling the goods, he would probably be a merchant under section 2-104 because, by reason of his occupation, he “had knowledge or skill peculiar to the practices or goods involved in the transaction.” The seller was a merchant because it was “dealing in goods of the kind.”

The seller used his standard form contract. On the reverse side of the form were warranty disclaimers and language limiting the buyer’s remedy to return of the purchase price, less wear and tear of the machinery. The court found that the machine was defective and that the seller had breached the implied warranty of merchantability. It then concluded that the seller’s remedy limitation was unconscionable and unenforceable. In making this determination, the court emphasized the buyer’s lack of experience with concrete spreader-finishers, or any heavy equipment, and the fact that the buyer had not dealt with the seller before and was unfamiliar with the seller’s forms. Furthermore, the court contrasted the seller’s superior business knowledge and familiarity with his own form. Finally, the court emphasized the harshness of the clause in question.

Thus, the court was able to distinguish Moscatiello from “merchant-to-merchant” cases such as Siemens. At first glance, like Siemens, Moscatiello seems to involve two business people in a commercial setting. However, three fundamental differences dis-

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Id.; 63. 595 A.2d 1190 (Pa. 1991). 64. Id. at 1191. 65. U.C.C. § 2-104(1). 66. Moscatiello, 595 A.2d at 1191. 67. Id. at 1192. 68. Id. at 1194. 69. Id. at 1194-95. 70. Id. 71. Id. 72. Id. at 1197.
tistinguish Moscatiello from Siemens. First, only the seller was relatively sophisticated in business. Here, the seller had the advantage of using its own form contract, presumably prepared by its legal counsel, while the buyer was unfamiliar with the form and the terms it contained. Second, the record did not reflect extensive negotiation of the contract terms. Third, the challenged terms were unilaterally imposed by the seller, rather than the reflection of a bargained-for allocation of risk. Accordingly this transaction is not a “merchant-to-merchant” transaction. Rather, it is better characterized as a merchant-to- “merchant/consumer” case. 73

Based on other reported cases, common types of terms in sales transactions that are “excised” under this doctrine in merchant-to-consumer cases include warranty disclaimers and remedy limitations. These same terms have been upheld in merchant-to-merchant cases. 74 Thus, courts have demonstrated their understanding that the same clause that may be unconscionable in one transaction may not be unconscionable in another. To date, the factors that courts have relied upon to find procedural unconscionability have included poverty, 75 lack of education, 76 relative bargaining power, 77 age, 78 poor English language skills, 79 business

73. Id. The court characterized the case as a “commercial” case, and commented: “[e]ven in commercial contracts between merchants, courts have recognized that the signer may be theoretically and technically a merchant, but practically a consumer in terms of education, business acumen and experience.” Id. at 1196.

The court also used the doctrine of unconscionability to protect a “merchant/consumer” in John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1570 (Okla. 1986). There it reviewed a lease between John Deere Leasing Co. and an individual farmer. Id. at 1569. The court noted that under the Kansas Consumer Protection Act, a “sole proprietor,” such as a farmer, is treated as a consumer. Id. at 1574. It stated that analytically Blubaugh was “more akin to a consumer than a commercial party.” Id.

Similarly, in a non-Code case, Weaver v. American Oil Co., unconscionability was used to protect a “merchant/consumer.” 276 N.E.2d 144, 148 (Ind. 1972). In Weaver, the court struck a clause in an oil lease exculpating an oil company from liability for its own negligence and requiring the dealer to indemnify the oil company for damages attributable to the oil company’s negligence. Id. Factors cited by the court include the dealer’s lack of education, lack of experience in the oil business, and the fact that the subject clauses were in fine print and were neither called to the dealer’s attention nor explained to him. Id. at 1574.

74. See infra Part I.B.2 and accompanying text for a discussion of warranty disclaimers, and see infra Part I.B.5 for a discussion on remedy limitations.

75. See, e.g., Jones v. Star Credit, 298 N.Y.S.2d 264, 264-65 (N.Y. Sup. Ct. 1969) (discussing a sale of a freezer to a welfare recipient for $900 with $1439 extended credit price, despite a retail value of $300).

76. See, e.g., Weaver, 276 N.E.2d at 144.

acumen, experience of parties, absence of explanation of terms, atmosphere of haste and pressure, and one-sided terms. It is usually a combination of some of these factors rather than one alone that compels a court to reach a finding of procedural unconscionability. It follows that few reported cases have found procedural unconscionability in merchant-to-merchant cases. The majority of successful unconscionability arguments are found in merchant-to-consumer cases. When merchants successfully defend (or attack) enforcement of a contract or clause on the grounds of unconscionability, and when the courts provide sufficient information to ascertain the status of the merchant, more often than not the merchant is best classified as a “merchant/consumer.”

Unconscionability, therefore, has proven to be an effective mechanism for protecting consumers and “merchant/consumers” in transactions that involve harsh contract terms and unfair bargaining. It is the very open-ended nature of the doctrine of unconscionability and the fact that the applicability of the doctrine is not limited to consumer transactions that gives the courts a license to protect contract parties in appropriate situations. The generally accepted need to establish both procedural and substantive unconscionability prevents unconscionability from being interpreted in consumer cases in ways that might lead to erroneous results in non-consumer cases.

As demonstrated above, when courts have

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78. See, e.g., Waters v. Min Ltd., 587 N.E.2d 231, 232 (Mass. 1992) (declaring a contract to an assign annuity unconscionable when signed by a 21-year-old who was unduly influenced by her ex-convict boyfriend who had introduced her to drugs).


80. See, e.g., Weaver, 276 N.E.2d at 145-46.

81. See, e.g., John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1572 (D. Kan. 1986) (asserting that “there was clearly a disparity in sophistication between John Deere Leasing and the defendant, a farmer”).


85. WHITE & SUMMERS, supra note 11, at 135; Westfield Chem. Corp. v. Burroughs Corp., 21 U.C.C. Rep. Serv. 1293, 1296 (Mass. Dist. Ct. 1977) (asserting that “[t]he majority of contracts held unconscionable have been in the area of consumer transactions”).

86. Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 759 (N.Y.D.C. 1966). A relatively small number of merchant-to-consumer cases have even found unconscionability based solely on substantive unconscionability. Frostifresh is a case frequently cited for that proposition. A careful reading of the case, how-
found unconscionability in a non-consumer case, further analysis of the facts reveals that the case is actually a merchant-to-
"merchant/consumer" case. Thus, those who have the ability to contract freely remain free to contract; those who lack the power to protect themselves may, under appropriate circumstances, receive protection from the courts.

2. **Disclaimers of Express Warranties under Section 2-316 and the Parol Evidence Rule (Section 2-202)**

Generally, section 2-316 governs the enforceability of warranty disclaimers. Specifically, section 2-316(1) governs disclaimers of express warranties. It states:

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

In a case where a parol warranty is made before a disclaimer is incorporated into a written contract, the effectiveness of that disclaimer of an express warranty ultimately depends on whether parol evidence of an express warranty is admitted. If the court admits the parol evidence and the evidence proves that the seller

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ever, reveals that the court stressed not only the harshness of the substantive term (a total price of $1,145.88 compared to the seller’s own cost of $348), but also many factors that evidence procedural unconscionability. *Id.* at 758-59. In *Frostifresh*, consumer buyers entered into a written installment sales contract for the purchase of a refrigerator-freezer. *Id.* at 758.

The contract . . . was negotiated orally in Spanish between the consumers and a Spanish-speaking salesman representing the seller. In that conversation, which took place in the buyer’s home, the buyer told the salesman that he had but one week left on his job and he could not afford to buy the appliance. The salesman told the buyers that the appliance would cost them nothing because they would be paid bonuses or commissions of $25.00 each on the numerous sales that would be made to their neighbors and friends. *Id.*

The contract the buyers then signed was written entirely in English, which was neither translated nor explained to the buyers. *Id.* In addition to noting that the price was “shocking,” the court noted that the buyers were “handicapped by a lack of knowledge, both as to the commercial situation and the nature and terms of the contract which was submitted in a language foreign to them.” *Id.* at 759. The author has not found a reported merchant-to-merchant case that struck a contract or contract clause on the grounds of substantive unconscionability alone.

87. The only exception to this general rule is that disclaimers of the warranty of title are governed by § 2-312. U.C.C. § 2-312 (1989).

88. U.C.C. § 2-316(1).
made an express warranty, any written disclaimer is inoperative. If the court does not admit the parol evidence, the disclaimer may be effective. Accordingly, the analysis of whether or not a parol express warranty has been effectively disclaimed ultimately turns on the application of section 2-202, the parol evidence rule.89

Section 2-202 provides that "terms ... which are ... set forth in a writing intended by the parties as a final expression of their agreement... may not be contradicted by evidence of any prior agreement." More often than not, courts admit parol evidence of an express warranty if the transaction falls into the merchant-to-consumer category.91 In consumer transactions, especially those where the contract was the seller's standard form contract with merger clauses, courts are often receptive to the argument that both parties did not intend the writing to be the final expression of their agreement. Consequently, courts hold that the agreement is not integrated and admit the parol evidence.92 In contrast, courts usually uphold a carefully negotiated and drafted merger clause in a contract between two sophisticated merchants as probative of the intent of both parties that the writing represents the complete statement of their agreement and exclude parol evidence of an alleged express warranty.93 When courts admit parol evidence of an express warranty in a transaction that is not a consumer transaction, it is likely that the case is best categorized as a merchant-to-"merchant/consumer" case.94 The following three cases illustrate this pattern.

a. Merchant-to-Consumer

In *Carpetland, U.S.A. v. Payne,*95 a consumer carpet buyer alleged that the seller made an oral express warranty.96 The written contract contained a disclaimer of express warranties.97 The court

89. See generally Broude, supra note 15 (discussing the parol evidence rule).
90. U.C.C. § 2-202 (emphasis added).
92. Id.
93. See infra notes 100-06 and accompanying text for a discussion on merger clauses in merchant-to-merchant transactions.
94. See infra notes 107-15 and accompanying text for a discussion on the admission of parol evidence of an express warranty.
96. Id. at 310.
97. The disclaimer stated:

EXCEPT FOR DESCRIPTION ON REVERSE SIDE HEREOF, BUYER ACKNOWLEDGES THAT NO EXPRESS OR IMPLIED WARRANTIES
held that the very existence of a prior oral express warranty indicated that the writing was not intended to be the final expression of the parties. It therefore admitted the parol evidence. In so ruling, the court cited the pro-consumer orientation of Official Comment One to section 2-316 which states that section 2-316 “seeks to protect a buyer from the unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty.”

b. Merchant-to-Merchant

In Wayman v. Amoco Oil Co., retail oil dealers disputed certain prices charged by Amoco under several license agreements. The dealers attempted to introduce parol evidence of an offset agreement they claimed Amoco had made with them. Each of the Amoco contracts contained carefully drawn integration clauses. Amoco contended, based in part on the integration clauses, that the written agreements were the parties’ “final expressions” of their agreements with respect to pricing and argued that the court should exclude evidence of any alleged agreement regarding offsets. The court agreed and stated that “[i]ntegration clauses are generally held to be valid and effective” especially when “two commercial parties are involved.”

The court treated the transaction as one that involved business people in a commercial setting. Although Amoco was a large, sophisticated oil company and the dealers were relatively unso-

(IDENTIFYING WARRANTIES OF MERCHANTABILITY OR FITNESS) HAVE BEEN MADE BY SELLER AND SELLER HEREBY DISCLAIMS ALL SUCH WARRANTIES. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE HEREOF.

*Id.* at 309.

98. *Id.* at 307.

99. *Id.* at 307; U.C.C. § 2-316 cmt. 1.


101. *Id.* Some of those clauses read as follows:

This Dealer Supply Agreement cancels and supersedes all prior written and unwritten agreements and understandings between the parties pertaining to the matters covered in this Agreement. No obligations, agreements or understandings shall be implied from any of the terms and provisions of this Agreement, all obligations, agreements and understandings with respect to the subject matter hereof being expressly set forth herein. This Dealer Supply Agreement cancels and supersedes all prior agreements and understandings between the parties hereto pertaining to the matters covered herein, and there are no other agreements, written or oral, between the parties pertaining to the subject matter hereof.

*Id.* at 1337.

102. *Id.* at 1339-40.

103. *Id.* at 1341.
phisticated individuals, the court did not view the dealers as need of Amoco's protection. The court noted that the dealers were represented by counsel and had an opportunity to read the contracts, or have their lawyers read the contracts. The court held that the integration clauses evinced the parties' intent that all of their agreements were contained in the written contracts, and refused to admit the parol evidence.

c. Merchant-to-Merchant/Consumer

*Session v. Chartrand Equipment Co.* involved two farmers who purchased a used tractor from an equipment company. They experienced problems with the tractor engine. The farmers sued and claimed that the seller had made an oral express warranty that the tractor engine would operate for 1000 hours. The seller denied the claim and argued that the court should not admit the buyers' parol evidence of an alleged oral express warranty. The seller reasoned that such evidence contradicted language printed on the bill of sale disclaiming express warranties. The bill of sale also served as a receipt for payment of the purchase price. The court noted that because agreements were made that were not reflected in the bill of sale, the disclaimer language would

104. *Id.*
105. *Id.* The court rejected the dealers' arguments that they lacked equal bargaining power, and emphasized the fact that they were represented by knowledgeable attorneys. Apparently, the dealers were unable to demonstrate enough of the "consumer characteristics" discussed above that might have convinced the court to treat them as "merchant/consumers." At any rate, the court's opinion does not reflect that the dealers shared sufficient "consumer characteristics" to warrant protective treatment. *Id.*
106. Accord Betaco, Inc. v. Cessna Aircraft Co., 32 F.3d 1126, 1128 (7th Cir. 1994) (reversing summary judgment that would have admitted parol evidence, and remanding for trial court to take testimony regarding intent of parties; court noted that the contract was between two "seemingly sophisticated parties entering into a commercial agreement"); Middletown Concrete Prods., Inc. v. Black Clawson Co., 802 F. Supp. 1135, 1143-44 (S.D. Del. 1992) ($2 million contract for pipe making equipment; courts said the buyers were sophisticated, and had negotiated for several months, and excluded parol evidence); Hoover Universal, Inc. v. Brockway Imco., Inc., 809 F.2d 1039, 1043 (4th Cir. 1987) (excluding parol evidence, noting that a lengthy Asset Purchase Agreement had been negotiated by in-house counsel and contained a merger clause).
108. *Id.* at 378.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Session,* 479 N.E.2d at 378.
have no effect on an alleged express oral warranty.\textsuperscript{114} Other courts have noted that the business sophistication of the buyer and the parties' relative bargaining power are some of the factors to be examined in determining whether a writing is "the final expression" of the parties' agreement.\textsuperscript{115}

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114. Id. at 382. See also Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., 874 F.2d 653, 660 (9th Cir. 1989) (finding triable issue of fact regarding parties' intent to have agreement be final existed when, despite merger clause, buyer claimed oral warranties were made and there were numerous attempts at repair that would conform to such alleged warranties). See infra notes 132-41 and accompanying text for a detailed discussion of the case.

115. For a lengthy study of the admissibility of parol evidence based on the status of the parties, see Robert Childres & Stephen J. Spitz, \textit{Status in the Law of Contracts}, 47 N.Y.U.L. REV. 1 (1972). Professors Childres and Spitz suggest that contracts cases can be classified into three groups: (1) "Formal contracts," (cases involving formal written contracts, usually tailor made for a specific transaction and the result of sophisticated bargaining and negotiations; (2) "Informal contracts," (cases where the contracts may not be written at all. The contracts may arise through course of dealing, or, the contracts might arise through the exchange of standard forms); and (3) Contracts involving an abuse of the bargaining process. (Contracts between merchants and consumers predominate in this category. However, merchant-to-"merchant/consumer" transactions may also fall into this category.) Id. at 4. To test their classification of cases, Childres and Spitz analyzed 206 reported cases interpreting § 2-202, and found that they could accurately predict the court's parol evidence ruling by using their classification scheme. Id. at 12.

Their analysis supports my conclusions that (1) express warranty disclaimers in a writing generally will be upheld in merchant-to-merchant transactions, particularly if "formal" contracts are used (since formal contracts usually contain some type of merger clause); (2) such disclaimers generally will not be upheld in merchant-to-consumer cases, which will most often fall into the abuse of bargaining power category described by Childres and Spitz, and (3) merchant-to-"merchant/consumer" cases may fall into either the "informal contract" or the "abuse of bargaining power" categories, and the enforceability of the warranty disclaimer will depend on which category is applicable.
3. Disclaimers of Implied Warranties under Section 2-316(2) and the “Conspicuousness” Requirement

Section 2-316(2) governs the disclaimer of implied warranties. The specific requirements for an effective disclaimer of the implied warranty of merchantability are (1) the disclaimer must actually use the word “merchantability,” and (2) if the disclaimer is in writing, it must be conspicuous. Section 2-316(2)'s specific requirements for an effective disclaimer of the implied warranty of fitness for a particular purpose are (1) the disclaimer must be in writing, and (2) the disclaimer must be conspicuous. The first requirement for each disclaimer is relatively straightforward. What is “conspicuous,” however, is less clear. In defining “conspicuous” section 1-201(10) states that “[a] term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.” Whether a term or clause is “conspicuous” or not is for the court to decide.

116. Section 2-316(3) identifies additional ways to effectively disclaim implied warranties. These include (a) use of the words “as-is” or other language which in common understanding calls the buyer's attention to the exclusion of warranties; (b) an inspection that would have revealed a defect; and (c) through course of dealing or course of performance or usage of trade. U.C.C. § 2-316(3). A disclaimer that fails to comply with either § 2-316(2) or § 2-316(3)'s requirements generally will be found to be ineffective, regardless of the buyer's status. There has been some suggestion that “as-is” language should not be effective against consumers, who would not necessarily understand its meaning. NATIONAL CONSUMER LAW CENTER, SALES OF GOODS AND SERVICES 264 (2d ed. 1989 & Supp.).

117. U.C.C. § 2-316(2).

118. When a disclaimer of either the implied warranty of merchantability or the implied warranty of fitness for a particular purpose does not comply with the first specific requirement (e.g., a mention of “merchantability” for the implied warranty of merchantability or the requirement of a writing for the implied warranty of fitness for a particular purpose), courts almost uniformly strike the disclaimer, regardless of the status of the parties. See, e.g., Davis Indus. Sales, Inc. v. Workman Const. Co., 856 S.W.2d 355, 362 (Mo. Ct. App. 1993) (holding that the language “SOLD AS USED EQUIPMENT. NO WARRANTIES OR LIABILITIES EXPRESS OR IMPLIED” was ineffective to disclaim the implied warranty of merchantability because it failed to comply with § 2-316(2)'s requirement that any disclaimer of the implied warranty of merchantability must mention the word “merchantability”).

119. U.C.C. § 1-201(10).

120. Id. For a lengthy discussion of the “conspicuousness” requirement, see Debra Goetz et al., Special Project: Article Two Warranties in Commercial Transactions: An Update, 72 CORNELL L. REV. 1159, 1271 (1987). In this article, the authors describe different tests of conspicuousness, and conclude that courts commonly use the test they term “the modified objective test.” Id. The authors describe the “modified objective test” of conspicuousness, which test focuses on the phrase “reasonable person against whom it is to operate”
pattern of giving protection to consumers and “merchant/consumers,” but not to merchants, again emerges when courts interpret the “conspicuous” requirement.

a. Merchant-to-Consumer

In *Hartman v. Jensen's, Inc.*, the Supreme Court of South Carolina upheld a trial court's finding that a mobile home manufacturer's disclaimer of the implied warranty of merchantability was ineffective. In *Hartman*, the manufacturer had placed a technically complying disclaimer of the implied warranty of merchantability in its contract under the bold heading “Terms of Warranty.” When the consumer buyer sued for breach of the implied warranty of merchantability, the seller's and the manufacturer's defense was based on the contractual disclaimer. The court ruled that the disclaimer was ineffective because the placement of the disclaimer created an ambiguity that was likely to fail to alert the consumer that the exclusion of a warranty was intended.

b. Merchant-to-Merchant

Contrary to the above case, the federal district court upheld the same type of disclaimer in a merchant-to-merchant case. In

found in § 1-201(10). *Id.* at 1272. This test allows courts to concentrate on the writing, on the parties' respective experience and size, negotiations, etc. *Id.* The authors state "the modified objective test [enables] courts to distinguish between commercial and consumer buyers without compromising the drafters' goal of avoiding inquiry into the parties' negotiations. *Id.* Since courts would probably expect the reasonable consumer to notice only objectively conspicuous language, this approach would continue to promote disclaimer visibility." *Id.*

121. 289 S.E.2d 648 (S.C. 1982).
122. *Id.* at 649.
123. *Id.* at 648.
124. *Id.*
125. *Id.* Although the court did not specifically use the word “conspicuous,” in its discussion, its emphasis on whether the placement of the disclaimer would “alert” the consumer to its presence, shows that the court was applying a test of conspicuousness. *Id.* Accord *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 268 A.2d 345, 350 (N.J. 1970) (stating that an “as-is” disclaimer under heading “Warranty” was not conspicuous because it would not call the buyer's attention to it); *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 437 S.W.2d 459, 463 (Ark. 1969) (disclaimer delivered after contract made).

I do not mean to suggest, however, that a disclaimer of implied warranties will never be deemed to be "conspicuous." See, e.g., *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 344-345 (Ky. Ct. App. 1970). Because the disclaimer of implied warranties was printed in larger, darker print than the remainder of the instrument, the court enforced it although the disclaiming language was on the reverse side of the contract. *Id.*

126. See generally *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F.
Myrtle Beach Pipeline Corp. v. Emerson Electric Co.,\textsuperscript{127} the contract between Myrtle Beach (the buyer) and Emerson (the seller) contained an express warranty as well as a disclaimer of the implied warranty of merchantability.\textsuperscript{128} The disclaimer was in the same paragraph as the express warranty under the heading “Grant of Warranty.” The buyer relied on Hartman to argue that the location of the disclaimer was not conspicuous because it failed to apprise the buyer of its content. The court forcefully rejected that argument and emphasized the difference in the status of the buyers in the two cases.\textsuperscript{129} In so doing, the court asserted that “[h]ere, no consumer was involved; rather, the context of this transaction is a commercial negotiation between two sophisticated corporate entities.”\textsuperscript{130} Furthermore, the court stressed that it must “consider the status of the parties to the transaction in its calculus for determining what constitutes conspicuous language.”\textsuperscript{131}

127. Id.
128. Id. at 1065.
129. Id. at 1040.
130. Id.

The court enforced a clause disclaiming implied warranties, with little reference to location, size, or color of print. The contract had been in negotiations for two years, culminating in a $12 million price. Id. at 441. The court described the agreement as a “commercial agreement, painstakingly negotiated between industrial giants” and stated, “[i]t strains credulity to suggest that plaintiffs had no notice or were unaware of the exclusion of implied warranties in the . . . contract.” Id. at 451.

In Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance, the court held that a disclaimer of implied warranties was invalid, even though the disclaimer fell under the heading “Warranties.” 365 N.E.2d 1285, 1290 (Ill. App. Ct. 1977). The court concluded that the disclaimer was effective because it was printed in large type and the contract was only two pages in length. Id. In Avenell v. Westinghouse Elec. Corp., the court upheld the trial court’s determination that a disclaimer was conspicuous because, among other reasons, the “person against whom the limiting language is to operate is a prominent, sophisticated entity.” 324 N.E.2d 583, 586-87 (Ohio Ct. App. 1974).
c. Merchant to “Merchant/Consumer”

In *Sierra Diesel Injection Services, Inc. v. Burroughs Corp.* the nineteen year old daughter-in-law employed as a bookkeeper in the family owned and operated business went to buy a posting machine to speed up invoicing and accounting functions. However, the seller told her to buy a computer instead. She and her father-in-law (the owner/operator of the company) attended a sales demonstration of the computer at the seller's offices. They decided to buy the computer. The seller wrote up the sale on the seller's standard form contract containing a warranty disclaimer on the reverse side of the form. The court noted that the owner had only a high school education, he lacked knowledge about computers, and although he had a general knowledge of warranties, he did not understand the word “merchantability.” The court further noted that when he read the contract he basically checked to see that the price and the description of the goods were correct. When he did glance at the back of the contract, he remarked that he was checking to see that “[he was] not actually signing away the deed to [his] home or something of [that] nature.” Taking all of the foregoing into account, the court ruled that the disclaimer was not conspicuous. Notably, the court cited factors such as education, business acumen, and bargaining power—the same factors that are relied upon in merchant-to-consumer cases—to support its decision.

The foregoing discussion shows that courts use the status of the parties as a significant factor when they apply section 2-316 to disclaimers of implied warranties. Specifically, courts do seem to apply the “conspicuousness” requirement differently based on the status of the parties. As these cases suggest, the courts use the
flexible standard of "conspicuousness" to protect consumers and "merchant/consumers" from unbargained-for warranty disclaimers. A technically complying disclaimer clause in a contract that was freely bargained for and negotiated between equal-bargaining power merchants might be "conspicuous." However, the same clause, buried in "boilerplate" and not called to the attention of the buyer, might be stricken when the buyer is either a consumer or a "merchant/consumer."

4. Disclaimer of Implied Warranties and Unconscionability

Some courts and commentators have wondered whether section 2-302 should apply to evaluate the efficacy of a warranty disclaimer that complies with section 2-316(2). Again, the cases reflect a pattern of different results depending on the status of the buyer.

a. Merchant-to-Consumer

In Jefferson Credit v. Marcono,

the court ruled that warranty disclaimers were unconscionable despite the fact that waivers of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose were printed in large black type in the contract. The other factors, particularly the facts that the consumer did not speak English well and that the contract was written in English, gave the court grounds under 2-302 to excise that which was apparently otherwise effective under the standards of section 2-316(2).

b. Merchant-to-Merchant

In contrast, when the buyers are non-consumers, most courts state that compliance with section 2-316 alone is sufficient. For example, in Ohio Savings Bank v. H. L. Vokew Co.,

the "buyer" of a seventy-five ton rooftop air conditioning unit sued the manufac-

sophisticated entities.

Id. 143. See Michael J. Phillips, Unconscionability and Article 2 Implied Warranty Disclaimers, 62 CHI-KENT L. REV. 199, 224 (1985) (noting that most courts hold that section 2-302 can be used to invalidate a disclaimer satisfying section 2-316); WHITE & SUMMERS, supra note 11, at 454 (stating that "[o]ne of us believes that these courts misread the intention of the drafters and that the drafters never intended section 2-302 to be an overlay of the disclaimer provision of 2-316."). See also discussion in Special Project, supra note 120, at 1293.


145. Id.

146. Id. at 393.

turer and installer of the unit for, among other things, breach of the implied warranty of merchantability. The manufacturer's defense was that the written contract (of which Ohio Savings Bank was deemed to be a third party beneficiary) contained a disclaimer of the implied warranty of merchantability. After concluding that all of the parties were merchants, the court held that the disclaimer "fully complied with" section 2-316 and that unconscionability was not available to aid the buyer. The court stated that "[t]he parties to this contract are merchants, and this court is reluctant to apply unconscionability principles in a commercial setting to warranty disclaimers."

c. Merchant to "Merchant/Consumer"

Courts have also applied section 2-302 to warranty disclaimers in merchant-to-"merchant/consumer" cases. For instance, in A & M Produce Co. v. FMC Corp., the buyer, A & M Produce Co., a solely-owned farming company, entered into a sales contract with FMC for the purchase of certain weight-sizing equipment to be used in farming tomatoes. The buyer's sole owner had no experience farming tomatoes. The contract contained an implied warranty disclaimer that apparently satisfied the requirements of section 2-316(2). The California court described the parties as "an enormous diversified corporation" and "a relatively small but experienced farming company." It stated that "courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms... and that even large... business entities may have relatively little bargaining power." Accordingly, the court struck the disclaimer on grounds of unconscionability.

The foregoing cases suggest that, in merchant-to-consumer cases, courts are applying unconscionability principles to excise disclaimers that appear to comply with section 2-316. Moreover, where courts appear to be extending that approach to non-consumer cases, the facts reveal that the cases actually involve

148. Id.
149. Id. at 1334.
150. 15 Cal. App. 3d 473 (Cal. Ct. App. 1962). California has not enacted section 2-302, but in its place has enacted substantially the same language as Civil Code § 1670.5.
151. Id. at 489.
152. Id.
153. Id. at 492; accord Martin v. Joseph Harris Co., 767 F.2d 296, 298-302 (6th Cir. 1985) (finding that a disclaimer which apparently complied with section 2-316 was unconscionable where the seller was a large national producer and the distributor of seed and the buyers were small independent farmers).
“merchant/consumers.” The interpretation derived in consumer cases is not distorting results in subsequent merchant-to-merchant cases.

5. Remedy Limitations under U.C.C. 2-719

a. Failure of essential purpose

It is common for sellers of goods to attempt to limit their liability through contract provisions that limit the buyer’s remedy if the seller breaches. Section 2-719 specifically validates a negotiated agreement that limits the buyer’s remedy to, for example, repair and replacement of defective parts.154 To protect the buyer, Article 2 currently provides that, unless the parties have agreed that the contractual remedy is to be exclusive, a buyer has recourse to all of the remedies otherwise available under the U.C.C..155 Since the adoption of the U.C.C., most sophisticated sellers have learned to write contracts that stipulate that a specific remedy is agreed to be exclusive. However, contract language is not always dispositive of the issue. An important aspect of analyzing a remedy limitation is to determine whether the parties intended the contractual remedy to be exclusive. When the contract used is the seller’s standard form contract and the buyer lacks sophistication, expertise, experience, and bargaining leverage, it may be difficult for the seller to persuade a court that the buyer knowingly agreed to the remedy limitation as its exclusive remedy. In consumer cases, courts usually give the buyer the benefit of the doubt as to whether the parties intended the express remedies to be exclusive.156

Even if the parties agree that a remedy is to be the exclusive remedy, the limitation may not be enforced if the exclusive remedy limitation “fails of its essential purpose.”157 Some critics charge

154. Section 2-719(1)(a) provides, in pertinent part: “the agreement may provide for remedies in addition to or in substitution for those provided in this Article. . . as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.” U.C.C. § 2-719(1)(a) (1989).
155. Id. section 2-719(1)(b) provides: “resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.” U.C.C. § 2-719(1)(b).
156. Special Project, supra note 120, at 1301; see, e.g., Williams v. Hyatt Chrysler-Plymouth, Inc., 269 S.E.2d 184, 187-88 (Nev. 1980). In Williams, the contract stated “this limited warranty is the sole warranty made by Chrysler.” Id. at 189. The court held that there was no language in the warranty expressly stating that the remedy was exclusive. Id.
157. Section 2-719(2) provides: “where circumstances cause an exclusive or
that merchant-to-consumer cases that apply the doctrine of "failure of essential purpose" have led to particularly bad results in cases that involve non-consumers. The cases do not support this criticism. Instead, they illustrate the now familiar pattern of different results in merchant-to-consumer, merchant-to-merchant, and merchant-to-"merchant/consumer" transactions.

i. Merchant-to-Consumer

It is not surprising that the majority of cases in which the court finds that a remedy has failed of its essential purpose are merchant-to-consumer cases. For example, in Murray v. Holiday Rambler, Inc., two consumers purchased a motor-home. The sales contract provided that in the event that there were problems with the motor-home, the buyers' sole remedy would be the repair or replacement of defective parts. After taking delivery of the motor-home, the buyers experienced problems with the brakes. The buyers brought the motor-home back to the seller nine or ten times; however, the brakes continued to be defective. After more problems with the brakes, the buyers attempted to revoke acceptance. The seller defended, based on the remedy limitation. The Supreme Court of Wisconsin upheld the buyers' right of revocation and concluded that the limited remedy of replacement or repair had failed of its essential purpose.

limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." U.C.C. § 2-719(2) (1989).

158. Preliminary Report, supra note 26, at 1002. "[C]onsumer cases have played an important role in the development of Article 2 case law involving warranties and remedies for breach of warranties. Perhaps most prominent of these is that dealing with failure of essential purpose." Id.

159. 265 N.W.2d 513 (Wis. 1978).

160. Id. at 518-19.

161. Id. at 522-23.

162. Id.

163. Id. at 524.

164. Id. at 516-23. In another merchant-to-consumer case, Giarratano v. Midas Muffler, 630 N.Y.S.2d 656 (N.Y. City Ct. 1995), the court reviewed a contract clause in a Midas brake warranty that purported to limit the buyer's remedies. The court found that, in essence, the buyer would be required to have Midas do additional work for a fee, in order to receive the "free" warranty coverage. Id. at 660-61. The court decided that the exclusive remedy failed of its essential purpose. Id. In particular, the court reasoned:

[B]uyer] purchased the Midas Warranty Certificate for a specific purpose, i.e., to have the brake pads on her vehicle replaced and installed without cost should the pads become worn. Requiring [the buyer] to spend substantial sums to make repairs to her entire brake system as Midas deems appropriate and necessary is to deprive [her] of the substantial benefit of the new parts which she purchased. As such the Warranty Certificate as interpreted by Midas fails of its essential purpose.
ii. Merchant-to-Merchant

In contrast to the merchant-to-consumer cases, in many of the merchant-to-merchant cases the courts have determined that contracts containing provisions limiting a buyer's remedy do not fail of essential purpose unless the seller makes no effort to fulfill its obligations by refusing to repair or replace defective parts. For example, in *Transport Corp. of America, Inc. v. IBM Corp.*, the buyer of a computer system sued the seller and the manufacturer to recover its business interruption losses. The buyer was a national trucking company; the seller was a major computer manufacturer. The contract limited the seller's liability to the repair or replacement of defective parts. The record showed that the seller attempted to diagnose and repair the computer system at the buyer's request, but instead, delayed the work at the buyer's request. In the meantime, the computer system crashed, and the buyer alleged substantial damages. The court held that under the contract the buyer's remedy was limited to repair or replacement of the faulty component. In reaching this result, the court rejected the buyer's argument that the repair or replace remedy failed of its essential purpose because there was a latent defect in the computer. In addition, the court noted that the buyer failed to cite a single system failure that was not fully repaired within one day. Furthermore, the court stated that failure of essential purpose does not occur "so long as repairs are made each time a defect arises." Here, the computer failure occurred just two days after an error code was revealed and one day before the manufacturer was scheduled to perform diagnostic service.

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165. 30 F.3d 953 (8th Cir. 1994).
166. Id. at 955.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id. at 960.
172. Id. at 959-60.
173. Id. at 959.
174. Id.
175. Id.; see also *O'Neill v. United States*, 50 F.3d 677, 680-87 (9th Cir. 1994). In *O'Neill*, landowners and water users within a water district moved to enforce a water service contract between the U.S. and the water district. A specific contract provision relieved the government from liability for water shortages. The court noted that the contract remedy, i.e., reduction in price paid for water delivered, was still available and ruled that the remedy limitation had not failed of its essential purpose. Id. It also ruled that the limitation was not unconscionable, citing the equal bargaining posture of the con-
iii. Merchant-to-"Merchant/Consumer"

In Massey Ferguson Inc. v. Laird, the farmer/buyer of a combine sued the seller and manufacturer for breach of warranty. The seller and manufacturer defended on the grounds that the contract limited the buyer's remedy to repair and replacement of defective parts. The court held that the repair or replace remedy failed because the seller was unable to repair the machine after numerous attempts. The court acknowledged that the seller and the manufacturer attempted to repair the combine numerous times at their expense and that they were willing to keep trying. However, the court noted that the combine was never repaired to the buyer's reasonable satisfaction. The court held that the seller does not have an unlimited period of time to repair and/or replace parts under a warranty.

The foregoing discussion illustrates that courts have not developed a "pro-consumer" rule on the meaning of "failure of essential purpose" under section 2-719. Rather, the cases to date suggest that, with respect to a "repair and replace" limitation of remedy, courts are somewhat less patient with sellers in merchant-to-consumer cases than in merchant-to-merchant cases. In consumer cases, courts may determine that a limited remedy has "failed of its essential purpose" when the seller is ready, willing, and able to keep trying to repair or replace the defective product.


176. 432 So. 2d 1259 (Ala. 1983).
177. Id. at 1260.
178. Id. at 1260-61.
179. Id. at 1264.
180. Id.
181. Id.
182. Id. Failure of essential purpose was also addressed in the merchant-to-"merchant/consumer" case of Severn v. Sperry Corp., 538 N.W.2d 50, 53-55 (Mich. Ct. App. 1995). In that case, the operator of a dairy farm brought an action for breach of warranty against the manufacturer of a cattle feed grinder. Id. at 52. The contract limited the buyer's remedy in the event of breach to the seller's repair of defects or, at the seller's option, replacing any parts that in the seller's judgment were defective. Id. at 53. The facts showed that the grinder was not working properly from the date of delivery. Id. Notwithstanding the buyer's complaints, the seller made only one attempt to repair the grinder, and that attempt was unsuccessful. Id. The seller took no further action. Id. Based on these facts, the court concluded there was sufficient evidence of failure of essential purpose. Id. at 55.
but the consumer has had enough. Conversely, in merchant-to-merchant cases, courts are more inclined to give the seller a longer time to effect needed repairs, provided that the seller is acting in good faith. If, however, the seller simply refuses to make repair efforts, the status of the buyer is no longer the issue. The issue then becomes whether the seller has failed to perform its contractual obligations, and if so, courts consistently find that the remedy has failed of its essential purpose. Accordingly, the "failure of essential purpose" doctrine is working and the courts have not misapplied the doctrine developed in consumer cases to merchant-to-merchant cases.

b. Consequential Damages Exclusions - Unconscionability Analysis

In addition to limiting remedies, as discussed above, sellers commonly try to negate any liability for consequential damages. Under section 2-719(3), such a liability exclusion is valid unless unconscionable." Exclusion of liability for consequential damages in the case of personal injuries relating to consumer goods is prima facie unconscionable.184

Attacks on exclusions of liability for consequential damages, other than personal injuries that relate to consumer goods, are often successful in merchant-to-consumer cases. For example, in Fischer v. General Electric Hotpoint,185 the consumer buyer of a refrigerator sued the seller to recover damages for food that spoiled because a refrigerator malfunctioned during the warranty period.186 The seller agreed to make repairs; however, relying on a contractual provision that excluded liability for consequential damages, the seller refused to compensate the buyer for the spoiled food.187 The court held that the exclusion was unconscionable due to the fact that the buyer was in a substantially lower bargaining position than the corporate seller.188 The court concluded that the seller should have been aware that the buyer did not understand the significance of the provision.189

i. Merchant-to-Merchant

In contrast to merchant-to-consumer cases, attacks on exclu-
sions of liability for consequential damages on grounds of unconscionability rarely succeed in merchant-to-merchant cases. In Citizens Insurance Co. of America v. Proctor & Schwartz, Inc., the buyer's insurance carrier sued the manufacturer for damages resulting when a peanut roaster and conveyer cleaner caught fire.191 The manufacturer denied liability for consequential damages based on the following contract language:

EXCLUSION OF DAMAGES: THE COMPANY SHALL NOT BE LIABLE FOR PROXIMATE INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES, INCLUDING BUT NOT LIMITED TO ERECTING EXPENSES AND DAMAGES FOR LOSS OF PROFITS OR PRODUCTION OR INJURY TO PERSON OR PROPERTY.192

The court rejected the insurance company's argument that the subject clause was unconscionable.193 In so ruling, the court noted that unconscionability is a question of law to be determined based on the facts and circumstances extant when the parties were making the contract, not as of the time of suit.194 It also noted that unconscionability is rarely found to exist in a commercial setting. A key piece of evidence that the court relied upon was the fact that the president/owner of the buyer signed the 15-page sales agreement immediately beneath the following language: "The undersigned affirms that he has read and understands all the terms and conditions of this Proposal-Contract including Paragraph 2 entitled 'WARRANTIES AND LIABILITY OF COMPANY' and has executed this Proposal-Contract intending to be legally bound by the terms thereof."196

The court emphasized that the buyer's president/owner did not state or imply that his ability to understand was handicapped by illiteracy or lack of education, intelligence or business acumen and experience.197 In light of the foregoing, the court upheld the consequential damage exclusion.198 Notably, the court's analysis

191. Id. at 136.
192. Id. at 142.
193. Id. at 145.
194. Id. at 143.
197. Id.
198. In merchant-to-merchant cases, courts are generally hesitant to strike down, as unconscionable, clauses excluding damages in cases involving commercial entities. See, e.g., Damin Aviation Corp. v. Sikorsky Aircraft, 705 F.
and conclusion in this case is directly in line with the other merchant-to-merchant unconscionability cases discussed earlier in this article.\textsuperscript{199}

ii. Merchant to “Merchant/Consumer”

As with unconscionability cases in general, courts often grant relief to “merchant/consumers.” For example, in \textit{Johnson v. Mobil Oil Corp.},\textsuperscript{200} the buyer-service station operator (“merchant/consumer”) sued Mobil Oil to recover losses, which included consequential damages, suffered when fire destroyed the service station he operated under Mobil’s retail dealer contract.\textsuperscript{201} Mobil Oil defended against the claim for consequential damages by relying on a clause in the retail dealer contract that excluded such liability.\textsuperscript{202} Johnson attacked the clause on the grounds of unconscionability.\textsuperscript{203} In making its determination, the court first charac-

\footnotesize{Notes:


\textsuperscript{201} Id. at 265-66.

\textsuperscript{202} Id. at 266.

\textsuperscript{203} Id.
alyzed the transaction as a "commercial" one, but cited several cases between oil companies and service station operators where unconscionability had been used successfully as a defense by operators. Next, the court analyzed the transaction and found that many of the same factors, which were identified above in Part II’s unconscionability discussion, to indicate procedural unconscionability. Johnson was 39 years old. He was an eighth grade-school drop out. He worked on farms, in factories and painted signs. However, Johnson was practically illiterate. Based on these factors, the court found that Johnson assumed the Mobil dealership without being made aware that the contract contained a clause that excluded the recovery of consequential damages. Accordingly, the court concluded that the clause should not be enforced on grounds of unconscionability.

The foregoing cases show that, as was true of the application of unconscionability under section 2-302 in general, the status of the buyer is an important factor courts use to determine whether to enforce the contract or clause. Many courts, when upholding contractual limitations of liability, emphasize the legal expertise of the parties and/or their awareness of the burdens assumed.

204. Id. Here, the Johnson court relied on Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 440 (W. Va. 1976). In Ashland Oil, the court determined that a ten-day cancellation clause in the dealer agreement, available only to the company, was unconscionable on its face. Id. The court also relied on Shell Oil Co. v. Marinello, 307 A.2d 598 (N.J. 1973). In Shell Oil, the court held that a provision in a dealer agreement giving Shell absolute right to terminate on ten days notice was void as against public policy. Id. at 603.


206. Id.

207. Id.

208. Id.

209. Id. at 269.

210. Id.

204. See, e.g., Cryogenic Equip., Inc. v. Southern Nitrogen, Inc., 490 F.2d 696, 699 (8th Cir. 1974). In Cryogenic Equipment, the court stated that the contract was the result of lengthy and detailed negotiations between representatives of both parties. Id. at 697. The court concluded: "[c]learly, in view of the expertise of the negotiators of this agreement (SNI's Wynne being a highly respected and knowledgeable commercial lawyer of some 18 years' standing . . .) and the complete absence of any evidence of a disparity of bargaining power the limitation of remedy was not unconscionable." Id. at 699. See also Wyatt Indus., Inc. v. Publicker Indus., Inc., 420 F.2d 454, 457 (5th Cir. 1969) (holding that "[t]he parties are bound by their own agreement, and it certainly cannot be claimed here that Publicker entered the agreement without full knowledge and appreciation of all material facts pertaining to the condition and prior Unsuccessful testing of the vessel.".).
c. Consequential Damages when a Limited Remedy Fails of its Essential Purpose

The enforceability of consequential damages exclusions is often an issue in cases that involve a "failure of essential purpose" issue. In such cases, before reaching the unconscionability issue under section 2-719(3), courts address the issue of whether, if a limited remedy fails of its essential purpose, a separate contract clause that prohibits recovery of consequential damages is nonetheless enforceable. Section 2-719(2) provides that when a limited remedy fails of its essential purpose, the aggrieved party may have recourse to all other remedies available under the Code. Specifically, the Code expressly permits an aggrieved buyer to recover consequential damages. Therefore, some courts and commentators have concluded that, if a limited remedy fails of its essential purpose, the U.C.C. permits the aggrieved buyer to recover consequential damages and thus, any exclusion of liability for consequential damages is overcome automatically. A contrary argument relies on rules of statutory construction and emphasizes the fact that section 2-719(3) specifically addresses how to analyze the validity of a consequential damage exclusion. If such exclusions are automatically invalidated under section 2-719(2), then section 2-719(3) would be unnecessary. The conclusions of the courts on the relationship between section 2-719(2) and section 2-719(3) vary widely based on the status of the parties.

i. Merchant-to-Consumer

In cases that involve consumers, most courts have taken the position that a separate exclusion of liability for consequential damages fails if a limited remedy fails of its essential purpose. For example, in Murray v. Holiday Rambler Inc., after the court determined that the limited remedy failed of its essential purpose, it permitted the buyer to recover consequential damages notwithstanding a contract clause that prohibited such recovery. The court held that "although an express warranty excludes conse-

213. Id. § 2-715(2).
214. A helpful detailed discussion of these two lines of analysis is found in Aquascene, Inc. v. Noritsu American Corp., 831 F. Supp. 602, 603-04 (M.D. Tenn. 1993).
215. NATIONAL CONSUMER LAW CENTER, supra note 116, at 46.
216. 265 N.W.2d 513 (Wis. 1978).
217. Id. at 526.
sequent damages, when the exclusive contractual remedy fails, the buyer may recover consequential damages under [section 2-715] as though the limitation had never existed.\textsuperscript{218}

ii. Merchant-to-Merchant

Separate exclusions of liability for consequential damages are more likely to survive the failure of essential purpose of a limited remedy if the contract parties are non-consumers. For example, in \textit{Transport Corp. of America, Inc. v. I.B.M. Corp.},\textsuperscript{219} a merchant-to-merchant case,\textsuperscript{220} the court stated that the U.C.C. encourages negotiated agreements in commercial transactions, including warranties and limitations. It cited a previous case with approval: "[i]t is at the time of contract formation that experienced parties define the product, identify the risks, and negotiate a price of the goods that reflects the relative benefits and risks to each."\textsuperscript{221} An exclusion of consequential damages set forth in advance in a commercial agreement between experienced business parties represents a bargained-for allocation of risk that is conscionable as a matter of law.\textsuperscript{222}

In \textit{Schurtz v. BMW of North America Inc.},\textsuperscript{222} the court explicitly used the status of the parties to reconcile the split in the two lines of authority.\textsuperscript{224} The court accomplished this by taking into ac-

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 525-26.
\item \textsuperscript{219} 30 F.3d 953 (8th Cir. 1994).
\item \textsuperscript{220} \textit{Id.} at 955. TCA was a Minnesota corporation that operated a national trucking business, and IBM was a Delaware corporation that manufactured and sold computers. \textit{Id.}
\item \textsuperscript{221} \textit{Id.} at 960 (citing Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990)).
\item \textsuperscript{222} \textit{Id.; see also Aquascene Inc. v. Noritsu Am. Corp.,} 631 F. Supp. 602 (M.D. Tenn. 1993). In \textit{Aquascene}, the Federal District Court for the Middle District of Tennessee upheld a separate consequential damages exclusion even though the limited remedy of repairing or replacing defective parts was deemed to have failed. \textit{Id.} at 603-04. In so ruling, the court emphasized the fact that the bargaining between the parties was fair and relatively equal, both parties were sophisticated and intelligent, and the damages exclusion clause was not unreasonable. \textit{See generally} \textsc{Roy R. Anderson, Damages Under the Uniform Commercial Code} (1988) (Chapter 12 "Contractual Limitations on Remedies"); \textsc{Howard Foss, When to Apply the Doctrine of Failure of Essential Purpose to an Exclusion of Consequential Damages: An Objective Approach,} 25 \textsc{Duq. L. Rev.} 551 (1987); \textsc{Henry Mather, Consequential Damages When Exclusive Repair Remedies Fail: U.C.C. 2-719,} 38 \textsc{S.C.L. Rev.} 673 (1987).
\item \textsuperscript{223} 814 P.2d 1108 (Utah 1991).
\item \textsuperscript{224} \textit{Id.} at 1113-14. \textit{See supra} note 214 and accompanying text for a discussion of the two lines of authority regarding whether consequential damages are recoverable after a limited remedy fails of its essential purpose where the
\end{itemize}
count the status of the parties and outlining the policy considera-
tions that underlie the decisions in the various cases.\textsuperscript{225} The 
\textit{Schurtz} decision supports the position that such clauses should be 
read differently in consumer and commercial transactions.

Where the buyer is a consumer, there is disparity in bargain-
ing power, and contractual limitations are contained in preprinted 
form documents rather than in a contract that is explicitly negoti-
ated between the parties. Courts have held uniformly that if the 
limited warranty fails of its essential purpose, the consumer 
should be permitted to seek incidental and consequential damages. 
Where the parties are essentially commercial, there is no disparity 
in bargaining power and the contract and the limitations on inci-
dental and consequential damages are negotiated. Most courts do 
not automatically void damage limitations when the limitation of 
remedies fails of its essential purpose.\textsuperscript{226}

The foregoing cases again reveal that there is a pattern of 
cases based on the status of the parties. Many courts seem to 
permit consumers to recover consequential damages after finding 
that a limited remedy failed of its essential purpose. However, 
when the parties are both merchants, the courts increasingly seem 
to uphold a separate consequential damage exclusion.\textsuperscript{227} The court 
may also award consequential damages if a merchant shares con-
sumer characteristics to such an extent that it appears to be a 
"merchant/consumer." Again, most cases do not support the view 
of those who argue that rule interpretations in consumer cases dis-
tort subsequent commercial cases.\textsuperscript{228}

The foregoing review of cases that interpret sections 2-202, 2-

case contains a clause prohibiting consequential damages.
\textsuperscript{225} \textit{Schurtz}, 814 P.2d at 1113.
\textsuperscript{226} \textit{Id.} at 1113-14.
\textsuperscript{227} \textit{NATIONAL CONSUMER LAW CENTER}, \textit{supra} note 116, at 466-68.
\textsuperscript{228} Although there are arguments on both sides of this issue, it seems the 
stronger argument favors negating any consequential damage exclusion after 
it is determined that a remedy limitation has failed of its essential purpose, 
unless it can be shown that the parties clearly understood and agreed that 
there were to be no circumstances under which recovery of consequential 
damages would be permitted. For example, if two sophisticated parties nego-
tiate and allocate the risk of a defective product and make their intent ex-
tremely clear: for example, "even if the repair and replace remedy is later 
deemed to have failed of its essential purpose, the parties agree that buyer 
shall have no right to recover consequential damages," their wishes should be 
upheld. However, there is a question whether the common language "in no 
event," or "under no circumstances" shall seller be liable for consequential 
damages, contained in a printed non-negotiated contract, is truly understood 
by the buyer to mean that if the remedy limitation fails (i.e., essentially the 
buyer does not get the benefit of the bargain), it will not be able to recover 
consequential damages.
302, 2-316 and 2-719 demonstrates the important role of the buyer's status in the decision making of the courts. Although the courts do not explicitly recognize the category of merchant-to-"merchant/consumer" cases, they have implicitly acknowledged the similarity of "merchant/consumers" to consumers and have extended some of the same protection that is extended to consumers in merchant-to-consumer cases under these doctrines. The more factors that are used in an unconscionability analysis that are present in a given merchant-to-"merchant/consumer" case, the more likely the court is to give some relief to the "merchant/consumer." The fewer factors that are present, the more likely the court will treat the case as a merchant-to-merchant case, and the more likely it is that the court will uphold the bargain of the parties. This approach to interpretation does not mean that the courts are misapplying doctrine. It means that courts that acknowledge the U.C.C.'s premise of "freedom of contract" should be tempered by a recognition that there may not be a true bargain in transactions that involve consumers or "merchant/consumers." In such cases, the doctrine of unconscionability, the concept of conspicuousness, and the concept of failure of essential purpose, all offer opportunities to relieve a weaker party from a bad bargain.

II. JULY 1996 DRAFT

A. Brief History of U.C.C. and Revision Process

The U.C.C. prescribes legal standards that attempt to explain and guide commercial business practices. With relatively few variations, almost every state in the United States enacted the 1962 Official Text.\textsuperscript{229} U.C.C. Article 2 has passed the test of time. The current Article 2 revision project is the first major re-examination and rewriting of Article 2 since it was promulgated.

The consumer movement began more than twenty years after Article 2 was written.\textsuperscript{230} As a result, the current Article 2 has very few specific consumer protection provisions. Since Article 2 was promulgated, the federal government and the individual states have enacted a hodgepodge of consumer protection legislation that pre-empts the provisions of Article 2 to the extent that such legislation is more protective of consumers. This hodgepodge has sub-

\textsuperscript{230} "Although broad based social movements are difficult to date, the consumer movement seems to have begun around the mid-1960's." Edward Rubin, Efficiency, Equity and the Proposed Revision of Articles 3 and 4, 42 ALA. L. REV. 551, 556 n.28 (1991).
stantially eroded the "uniformity" in commercial law as it affects consumers on a national basis.\textsuperscript{231}

The Article 2 revision process began in 1987 when the Permanent Editorial Board (PEB), the American Law Institute (ALI) and the NCCUSL approved a study to consider whether Article 2 should be revised and, if so, to report on what revisions should be considered.\textsuperscript{232} The move to revise Article 2 grew in response to several factors. First, unlike other articles of the U.C.C., Article 2 was substantially unchanged from the 1962 Official Text. Second, there was a perceived need to address drastic changes in technology.\textsuperscript{233} Third, a careful study of Article 2 began as part of the process of creating U.C.C. Article 2A, a new article governing leases.\textsuperscript{234} The Drafters modeled Article 2A after the current Article 2 and copied many of its provisions; however, Article 2A goes farther than current Article 2 in the direction of consumer protection by incorporating several specific consumer protection provisions.\textsuperscript{235}

A nine-member Article 2 Study Group ("Study Group") was appointed in 1988. The Study Group's three year project was "to identify major problems of practical importance in Article 2 and to recommend revisions."\textsuperscript{236} It published its preliminary report on March 1, 1990,\textsuperscript{237} and an Executive Summary on March 5, 1991.\textsuperscript{238} The Study Group recommended extensive revisions to Article 2.

\textsuperscript{231} Some states have very specific protective consumer legislation; others have almost no such legislation. Such lack of uniformity makes it necessary for national and international sellers to alter their sales forms if not their sales practices for use in different states. See NATIONAL CONSUMER LAW CENTER, supra note 116 for a discussion of state consumer legislation.

\textsuperscript{232} PEB Study Group: UNIFORM COMMERCIAL CODE, ARTICLE 2, EXECUTIVE SUMMARY, reprinted in 46 BUS. LAW. 1869, 1869 (1991) [hereinafter EXECUTIVE SUMMARY].

\textsuperscript{233} See Guttman, supra note 37, at 10. "The driving forces behind the movement to amend the U.C.C. are technology and efficiency; both are valuable assets for sophisticated participants in market transactions . . . . As a result, amendments are driven by the needs of industry. They reflect the needs of 'merchants,' rather than those of the customer/consumer." Id.


\textsuperscript{235} See U.C.C. § 2A-103 cmt. e. Comment (e) identifies the "subset of rules that applies only to consumer leases" as: sections 2A-106 [choice of law], 2A-108(2) [appropriate relief for unconscionable leases], 2A-108 (4) [award of attorneys' fees for unconscionable leases], 2A-109(2) [burden of proof of good faith is on party who exercised the power], 2A-221 [casualty to identified goods], 2A-309 [fixtures], 2A-406 [excused performance], 2A-407 [irrevocable promises], 2A-504(3)(b) [liquidated damages], and 2A-516(3)(b) [statute of limitations]. Id.

\textsuperscript{236} EXECUTIVE SUMMARY, supra note 232, at 1870-71.

\textsuperscript{237} Preliminary Report, supra note 26, at 984.

\textsuperscript{238} EXECUTIVE SUMMARY, supra note 232.
Next, the NCCUSL appointed a Drafting Committee to write revised Article 2. The Drafting Committee held its first meeting in December 1991.

A series of drafts of Article 2 have been written. The Drafting Committee circulates each draft for comments and makes additional revisions to the draft, based on the comments. In addition to the members of the Drafting Committee, generally fifty or more observers attend Article 2 Drafting Committee meetings. During the meetings, the observers who are present are permitted to speak. After discussions of issues, observers are asked to vote by a show of hands to give the Drafting Committee a sense of the room.

Based in part on the Article 2A experience, the issue of how to address consumer concerns was raised early in the Article 2 revision process. In response to previous criticisms of the drafting process, consumer representatives were involved early in the revision process of Article 2. As a result, the Drafting Committee paid more attention to consumer concerns and to the issue of how to address these concerns in Article 2. In 1994, the Drafting Committee formed a special Subcommittee on Consumer Issues in Article 2 ("Subcommittee") to "help the sponsoring organizations (NCCUSL and ALI) engage in a period of reflection on [consumer] issues and try to focus thought on the manner in which U.C.C. Article 2 should deal with the modern consumer." The Subcommittee received input from wide circles of interested parties and pre-
sented its final report, "Thoughts on the Treatment of Consumer Issues in Revised U.C.C. Article 2" at the NCCUSL meeting in San Antonio in July, 1996.\textsuperscript{246} The report's major theme is the need to focus on the "enactability" of any proposed revision of Article 2.\textsuperscript{247} Specifically, the Subcommittee recommended that revised Article 2 should not contain lengthy specific consumer protection provisions, but should reflect some consideration of consumer concerns.

**B. July 1996 Draft of Revised Article 2**

The July 1996 Draft made several important strides towards addressing major problems that confront consumers. As is the case with the current version of Article 2, there are few provisions in the July 1996 Draft that apply exclusively to consumers.\textsuperscript{248} There is still no explicit acknowledgment of the existence of a hybrid group of buyers, e.g., the "merchant/consumers." However, there are more specific consumer provisions in the July 1996 Draft than in the current Article 2. In addition, as in the current Article 2, there are a significant number of sections that are particularly noteworthy for those interested in consumer and "merchant/consumer" protection.

The following Sections examine the provisions that bear directly on the issues of unconscionability, warranty disclaimers,

\begin{itemize}
\item[246.] \textit{Id.}
\item[247.] Since the Uniform Commercial Code ultimately must be enacted as law on a state-by-state basis, if the proposed revision of Article 2 is not perceived as a "good law" in all states, it will not be adopted, and the "uniformity" of the Uniform Commercial Code will be further eroded.
\item[248.] The Subcommittee Report identified the following as provisions under consideration that refer specifically to consumers and establish a special rule for them:
\begin{enumerate}
\item Definitions. Consumer (§ 2-102(10)); Consumer contract (§ 2-102(11)); Consumer goods (§ 2-102(12)).
\item Transactions subject to other laws (§ 2-104). Consumer protection laws.
\item Standard Form Records (§ 2-206). Consumer not bound by terms not reasonably expected by consumer to be included.
\item No oral modification rule (§ 2-210(b)). Does not apply to standard form consumer contract.
\item Disclaimer of implied warranties (§ 2-316). Exclusion must be in a record; seller has burden of proof that buyer expressly agreed to them.
\item Limitation of remedies (§ 2-709(b)(2)). Consumer buyer given greater protection where limited remedy fails its essential purpose. Two other provisions, regarding special rules for limitation and liquidation of damages in consumer contracts, noted by the Subcommittee Report were deleted in the July 1996 Draft.
\end{enumerate}
\textit{Subcommittee Report, supra note 245.}
and remedy limitations. This examination gives the reader an insight into how the provisions of the July 1996 Draft might affect consumers and "merchant/consumers."

1. Unconscionability

Several sections of the July 1996 Draft will impact on future unconscionability cases. First, the July 1996 Draft retains the concept of "unconscionability," but explicitly adds the statement that something may be unconscionable if it was "induced by unconscionable conduct." This change means that a contract induced by unconscionable conduct may be deemed unconscionable regardless of the fairness of its terms. The new unconscionability provision expands on existing Article 2 case law by explicitly adding the notion that either procedural unconscionability or substantive unconscionability alone may suffice to invalidate a contract or a clause. This change reflects the approach the NCCUSL adopted in Article 2A with respect to leases. Unlike the Article

249. Other provisions that will impact consumer protection include: (1) broadening the scope of Article 2 to encompass service contracts when they are directly linked to the seller's warranty performance; (2) provisions that may make most communications to the public by advertising express warranties; and (3) the extension of warranties of title and other warranties to remote buyers.

250. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE REVISED ARTICLE 2: SALES (NCCUSL ANNUAL MEETING DRAFT JULY 1, 1996) [hereinafter, PROPOSED OFFICIAL DRAFT], § 2-105. Unconscionable Contract or Clause. § 2-105 of the July 1996 Draft provides:

(a) If a court finds as a matter of law that a contract or any clause thereof was unconscionable at the time it was made or was induced by unconscionable conduct [emphasis added], the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or so limit the application of any unconscionable clause as to avoid an unconscionable result.

(b) Before making a finding of unconscionability under subsection (a), the court, on motion of a party or its own motion, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the contract or clause thereof or of the conduct [emphasis added].

Id.

251. U.C.C. § 2A-108(2) states:

With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct, or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

The Official Comments to § 2A-108 state, in part:

Subsection 2 recognizes that a consumer lease or a clause in a consumer
2A approach, however, the July 1996 Draft continues to define unconscionability without limiting its applicability to consumers.

Second, the July 1996 Draft introduces new key definitions of "standard form," \textit{assent}, \textit{standard form}, "assent," \textit{assent}, and related concepts. These definitions will help courts analyze procedural unconscionability by giving courts the tools they need to distinguish between carefully bargained-for contract clauses among sophisticated business people and contract clauses signed by consumers or "merchant/consumers" without choice and without true understanding. The July 1996 Draft's new provision regarding "standard form records" also seems likely to provide a new and more meaningful context for evaluating both consumer and "merchant/consumer" transactions. Commentators have noted for

lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable.

\textit{Id.}

\textbf{252. PROPOSED OFFICIAL DRAFT, supra note 250, §§ 2-102(37)-(38).}

§ 2-102(37): "Standard form" means a record prepared by one party in advance for general and repeated use that substantially contains standard terms and was used in the transaction without negotiation of, or changes in, the substantial majority of the standard terms. Negotiation of price, quantity, time of delivery or method of payment does not preclude a record from being a standard form.

§ 2-102(38): "Standard terms" means terms prepared in advance for general and repeated use by one party and used without negotiation with the other party.

\textit{Id.}

\textbf{253. Id. §§ 2-102(28)-(30).}

§ 2-102(28): A party "manifests assent" to a record if, after having an opportunity to review the terms of the record, the party engages in conduct that under the circumstances constitutes acceptance of the terms of the record and the party had an opportunity to decline to engage in the conduct.

§ 2-102(30): A party has an "opportunity to review" a record if the record is made available in a manner designed to call the terms to the attention the party before assent to the record or is provided in such a manner that the terms will be conspicuous in the normal course of initial use or preparation to use the goods.

\textit{Id.}

\textbf{254. Id. § 2-206 Standard Form Records states:}

(a) If all of the terms of a contract are contained in a record which is a standard form or contains standard terms and the party who did not prepare the record manifests assent to it by a signature or other conduct, that party adopts all terms contained in record as part of the contract except those terms that are unconscionable.

(b) A term in a record which is a standard form or which contains stan-
some time that the concept of "assent" is a fiction in transactions that involve no true negotiation over contract terms and use "standard forms" prepared by the party who has greater bargaining power in a transaction. Standard forms are particularly common in consumer transactions. Not only do sellers use standard forms, but entire trades and industries have developed their own standard forms that are commonly used. Generally, consumers and "merchant/consumers" do not have a meaningful opportunity to read, understand, or negotiate terms in a seller's standard form. By including definitions of "standard form records" and "standard terms," the July 1996 Draft encourages courts to distinguish between transactions that do and do not use standard forms. This distinction is particularly important in connection with the parol evidence rule, warranty disclaimers, and remedy limitations because it will assist courts that have already been making efforts in those areas to determine whether buyers are agreeing to terms. However, the proposed definition of "standard form records," with its special rules for consumers, may limit courts in their efforts to extend protection to "merchant/consumers."

Because section 2-206(b) states a special rule for consumers, a court might conclude that the drafters intended a term in a standard terms to which a consumer has manifested assent by a signature or other conduct is not part of the contract if the consumer could not reasonably have expected it unless the consumer expressly agrees to the term. In determining whether a term is part of the contract, the court shall consider the content, language and presentation of the standard form or standard term.

c. A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form.

Id.


[I]nstead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

Id. See Alexander M. Meiklejohn, Castles in the Air: Blanket Assent and the Revision of Article 2, 51 WASH. & LEE L. REV. 599, 603-05 (1994), for a criticism of Llewellyn's notion of "blanket assent" and proposed § 2-204.


257. PROPOSED OFFICIAL DRAFT, supra note 250, § 2-206(b).
standard form to which a non-consumer, including a "merchant/consumer," has manifested assent is automatically part of the contract. A better approach would be to amend July 1996 2-206(b) to substitute the words "a party" for the words "a consumer." This approach could extend protection to "merchant/consumers."

The July 1996 Draft attempts to clearly define how assent is manifested. The first requirement of manifesting assent is that the terms in question are either designed to call the party's attention to the terms, or provided in such a manner that such terms will be conspicuous.258 Because most consumer transactions do not involve paperwork until all of the essential terms of the agreement are reached, and because most consumers sign what is put before them, these new provisions require a merchant seller to make a special effort to obtain the consumer's assent. If a merchant seller fails to make this special effort, the seller risks a determination that the terms will not be deemed part of the contract at all. Of course, the approach of adding a need to prove "assent" does not address all of the factors that add up to procedural unconscionability, such as an absence of choice and an uneven bargaining posture.

The foregoing review of the prospective treatment of unconscionability under the July 1996 Draft suggests that unconscionability will continue to be a powerful sword and shield for consumers.259 As discussed above, cases to date indicate that courts are able to use unconscionability as a mechanism for protecting consumers and "merchant/consumers" in large part because of the open-ended drafting style. More specific rules that regulate conduct might be appropriate in a more extensive consumer protection measure.260 However, the past thirty-plus years of judicial experience with the flexible concept of unconscionability do not indicate a need for major changes within the U.C.C.

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258. *Id.* § 2-102(28). The Committee Notes to the March 1996 Draft of 2-206 state: "If assent is manifested after an opportunity to review, concerns over unfair surprise are resolved and that party adopts the standard terms of the form or record unless they are otherwise unconscionable under [M96] 2-105." *National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code Revised Article 2: Sales (Working Draft March 1, 1996)* [hereinafter WORKING DRAFT].

259. In adopting the foregoing language, the Drafting Committee apparently rejected the position, held by some consumer advocates, that unconscionability is an effective consumer protection rule, because only specific rules produce voluntary compliance.

2. Disclaimers of Express Warranties

The adequacy of disclaimers of parol express warranties remains tied to the parol evidence rule under the July 1996 Draft. J96 2-316(a) states: "words or conduct creating an express warranty and words or conduct negating such warranty must be construed as consistent with one another, but if they cannot be, subject to the parol evidence rule, the disclaimer is inoperative." Thus, the validity of disclaimers of parol express warranties, now governed by J96 2-316(1), is ultimately still dependent on the parol evidence rule. The parol evidence rule has undergone several changes during the drafting process. Earlier drafts were more favorable to consumers. Given the major differences in application...
of the parol evidence rule to consumers and non-consumers, it seems that this revision provides a good opportunity for the NCCUSL to make major strides towards clarity, uniformity, and consumer and "merchant/consumer" protection by prohibiting the disclaimer of express warranties except in merchant-to-merchant transactions. The cardinal rule that the easiest way to disclaim an express warranty is not to make one would force sellers of goods to control their sales practices. Under current law, courts sometimes become bogged down when trying to determine whether particular statements are "puffing" or "affirmations of fact." The reasonable expectations of a buyer would be vindicated if all statements made by the seller were treated as express warranties, and the buyer did not have to wade through standard form contracts full of merger clauses and warranty disclaimers to understand that no warranty was actually made. Similarly, in a true commercial setting, a seller and a buyer could negotiate their agreement regarding express warranties and include a merger clause in their agreement that would be enforceable.

3. Disclaimers of Implied Warranties

J96 2-316 distinguishes between disclaimers of implied warranties for consumer buyers and non-consumer buyers. It provides that, to be effective, disclaimers of implied warranties in a consumer contract must be in a record. Further, such disclaimers are inoperative unless the seller establishes by clear and affirmative evidence that the buyer expressly agreed to them.

This approach seems to be a compromise between the views of

agreed to" the clause. A motion to approve the draft as presented was approved by the Commissioners present but rejected by a vote of all persons present. The conclusion of those adhering to the present draft was that revised 2-202(b) gives the court sufficient flexibility to sort out cases where there is unfair surprise or no real assent, whether the issue involved using a merger clause as (1) a substitute for an inoperative disclaimer of express warranties, see § 2-316(a), or (2) a device to exclude other terms agreed in the negotiating process. See § 2-302. Lingering dissatisfaction with this outcome will be moderated by new section 2-206, dealing with standard form contracts and terms.

Id. § 2-202.


265. This is similar to the approach being taken in M96 2-313(b), defining express warranties.

266. Specifically, J96 2-316(b)(1) eliminates the effectiveness of terms such as "as is" and "with all faults" to disclaim implied warranties in consumer transactions. PROPOSED OFFICIAL DRAFT, supra note 250, § 2-316(b)(1).

267. Id. at § 2-316(e).

268. Id. Committee Notes to the July 1996 Draft apparently states that this provision is still subject to further discussion.
consumer advocates, who argue that there should be no permissible disclaimer of the implied warranty of merchantability,\textsuperscript{269} and industry advocates, who argue that they must have the ability to price goods at a reasonable level that requires a limitation on their ultimate liability. Industry representatives continue to express concern that J96 2-316(e) introduces an apparently new standard of proof that may be impossible for sellers to meet because it requires the seller to “establish by clear and convincing evidence that the buyer expressly agreed.”

A better approach to the issue of warranty disclaimers is to preclude any disclaimer of any implied warranty except where sophisticated parties with relatively equal bargaining power specifically agree to the disclaimer. This approach would accomplish the dual goal of consumer protection and, if properly written, “merchant/consumer” protection and protection of the parties’ bargain when they truly have the capacity to bargain. Indeed, as renowned commercial law scholar John E. Murray, Jr., stated:

The Revised Article 2 could strike a major blow in favor of consumers by precluding any disclaimer of any implied warranty or any limitation on its duration with respect to a consumer buyer . . . . A revised Article 2 need not develop a comprehensive consumer protection maze. This change, alone, would do more for consumer protection than all extant efforts to assure the consumer that the goods she purchases are genuinely merchantable.\textsuperscript{270}

The implied warranty of merchantability simply means that a product will work. It is reasonable for a buyer to expect that the product he or she buys will work. Therefore, it is reasonable to require products to carry with them an implied warranty that they will work unless there is a good reason for the buyer to understand that the product probably will not work. Such a “good reason” might exist in the proverbial sale of suspicious goods in the men’s room.\textsuperscript{271} Another “good reason” would be where two sophisticated parties knowingly bargain with respect to responsibility for the performance of the goods and allocate the risk of non-performance. This allocation may be reflected in the price, the payment terms, or other features of the negotiated bargain. One theory that ex-

\textsuperscript{269} See supra note 6 for a list of commentators on this subject.


\textsuperscript{271} “[Ted Traveler] walked into the men’s room of the bus depot and bought an expensive watch . . . . Are there any implies warranties in this sale?” \textsc{Douglas J. Whaley, Problems and Materials on the Sale and Lease of Goods} 92 (2d ed. 1990). Are there any implied warranties in this sale? \textit{See} § 2-315(3)(c).
plains the operation of "default" rules suggests that default rules work well because parties who do not like a default rule are forced to call the rule to the attention of the other party and to negotiate a different rule for their contract.\textsuperscript{272} In the case of disclaimers, however, the practice of having the implied warranty of merchantability as the "default" rule and permitting disclaimers has not had the anticipated result in consumer and "merchant/consumer" cases due to the lack of their bargaining power and the inability of those buyers to negotiate changes. On the other hand, if "no disclaimer allowed" is the "default" position, subject only to the contrary agreement of sophisticated parties, a better compromise is reached. Another way to accomplish the same goal would be to amend J96 2-316, deleting the reference to "consumers" and replacing it with the word "parties" while retaining the seller's high burden of proof regarding assent.

4. Remedy Limitations

J96 2-709, which replaces current 2-719 on contractual limitations of remedies, provides:

[I]f, because of a breach of contract or other circumstances, an exclusive, agreed remedy fails substantially to achieve the purpose of the parties, the following rules apply:

1. In a contract other than a consumer contract, the aggrieved party may, to the extent of the failure, resort to remedies provided in this [article] but is bound by any other agreed remedy that is not dependent upon the failed remedy.

2. In a consumer contract, an aggrieved party may revoke acceptance and, to the extent of the failure, have other remedies permitted in section 2-723.\textsuperscript{273}

J96 2-709 is a total rewrite of section 2-719. Like section 2-719, J96 2-709 validates agreements that modify or limit remedies. The statement in the Official Comment to 2-719, that a minimum adequate remedy must be available, has been moved into the text of J96 2-709(2).\textsuperscript{274} Furthermore, J96 2-709 makes it clear that after an exclusive remedy fails, a consumer buyer may revoke acceptance,\textsuperscript{275} thereby leading to a refund of the price or replacement of

\textsuperscript{272} Ayres & Gertner, \textit{supra} note 24, at 91.
\textsuperscript{273} \textit{PROPOSED OFFICIAL DRAFT}, \textit{supra} note 250, § 2-709.
\textsuperscript{274} \textit{Id.} § 2-709(2) provides: "An agreed remedy under paragraph (1) may not operate to deprive the aggrieved party of a minimum adequate remedy under the circumstances." \textit{Id.}
\textsuperscript{275} Language from an earlier draft would have guaranteed a consumer
the goods. Many, if not most, consumers already think that they have a right to a refund when goods are defective. This remedy should be rewritten as a new "default" provision that would apply to all buyers, unless there are specific negotiations to negate it.

Finally, J96 2-709 specifically resolves the question of whether consequential damage exclusions survive if a limited remedy fails of its essential purpose. It states that separate exclusions will survive unless in consumer contracts. By adopting this approach, the Drafting Committee appears to be following the trend in current case law. However, by expressly limiting the applicability of this rule to consumer contracts, "merchant/consumers" are not protected. Of course, "merchant/consumers" will still be able to argue against a consequential damages exclusion on the grounds of unconscionability.

### III. RECOMMENDATIONS

In 1994, Fred H. Miller, Executive Director of the NCCUSL, suggested the following "principled approach" to an Article 2 revision with a reasonable chance for success:

1. retain both special consumer rules and rules that treat merchants differently;
2. retain or add sufficient protection so that traditional Code principles of freedom of contract and assumptions like ability to bargain over terms do not result in undue disadvantage or abuse to consumers;
3. add any provisions on which a broad consensus has arisen since the Code was first adopted and which would otherwise conflict with provisions of the code;
4. defer to and suggest development of other law outside the Code to provide additional protection to designated classes of persons or transactions.

Professor Miller's approach continues to provide helpful guidelines for the Drafting Committee in its work. However, his guidelines fail to address the large segment of the business popu-
lation who may technically be "merchants" under current Article 2's definitions, but who are, as a practical matter, as unsophisticated and in need of protection as consumers when they are buying goods. This omission can be corrected if revised Article 2 draws a distinction between consumers and "merchant/consumers," and merchants. The best way to accomplish this is to rely on "default" provisions which can be negated only by sophisticated parties.

When Article 2 was originally written, the drafters paid little attention to consumer protection issues. Since that time, however, the consumer protection movement has grown and matured. It is now time to incorporate consumer protection issues into Article 2. More importantly, revised Article 2 must incorporate the changed realities of the marketplace which have moved away from the type of transaction assumed by Article 2 with contracts between two equal bargaining parties. If Article 2 is to remain a comprehensive code, it must permit courts to address the differences between merchant-to-consumer, merchant-to-merchant and merchant-to-"merchant/consumer" transactions. It must be flexible enough to give courts the tools needed to deal with buyers all along the spectrum, from poorly educated unsophisticated individuals to megacorporations represented by silk stocking law firms.

In revising Article 2, the Drafting Committee invited perspectives and comments from both industry and consumer group representatives. However, throughout the revision process, it appears that the "merchant/consumer" has lacked vocal advocates. The revision represented by the July 1996 Draft does incorporate some consumer protection measures, but in doing so it diminishes protection for "merchant/consumers."

Moreover, the July 1996 Draft does not include several important changes that are recommended by almost all consumer advocates and that could equally benefit "merchant/consumers." These changes include: (1) prohibiting the disclaimer of the implied warranty of merchantability in consumer transactions;280 (2) adding a statutory provision for the recovery of attorneys' fees;281 (3) eliminating the parol evidence rule;282 and (4) adding minimum remedy requirements.283 Industry representatives may still oppose these recommendations, but the Drafting Committee would do well to

280. *See, e.g.*, Murray, [*supra* note 270, at 1491.]
281. *See, e.g.*, Rosmarin, [*supra* note 6, at 1612-13.]
282. See letters from consumer advocates to the Subcommittee on Consumer Issues. *See* Subcommittee Report, [*supra* note 245 (copies on file with the author).]
283. *See, e.g.*, Rosmarin, [*supra* note 6, at 1613.]
consider further modifications to the Article 2 revision to incorporate the suggested changes. Case law decided under current Article 2 demonstrates that courts are capable of identifying and enforcing contracts that are the product of negotiations between relative equals. Furthermore, the law has long respected contracts that truly represent the “bargain of the parties.” Similarly, case law demonstrates that courts can distinguish such contracts from contracts that did not result from a meaningful bargaining process. Revised Article 2 should incorporate this distinction.

The best approach to incorporating these recommendations is to change Article 2’s “default” provisions to protect weaker parties and permit sophisticated business people to “opt out” of the “default” provisions. Specifically, this Article recommends that the following provisions be added to Article 2’s “default” provisions: (1) prohibit the disclaimer of implied warranties except in a truly negotiated contract between sophisticated business people; (2) permit the prevailing party to recover attorneys’ fees, unless such recovery is expressly excluded through negotiations; (3) allow for the admission of all parol evidence, unless the parties negotiate and agree upon a merger clause and exclude subsequent admission of parol evidence; and (4) provide for the remedy of return and refund of the purchase price, unless that remedy is specifically excluded through negotiations between the parties.

The argument that these recommended provisions will inhibit enactability of Article 2 is a questionable one. Article 2A has been passed in forty-eight states, and it includes attorneys’ fees provisions, as well as a more comprehensive definition of unconscionability. In addition, under Magnuson-Moss, limitations already exist on disclaimers of the implied warranty of merchantability. Attorney’s fees are already recoverable in an action under the Magnuson-Moss Act. Moreover, such an action can always include a cause of action for breach of any warranty that arises under the U.C.C., such as the implied warranty of merchantability. Several states have already abolished disclaimers of the implied warranty of merchantability, with no apparent ill effect. Finally, courts presently construe Article 2 in a manner that protects consumers and “merchant/consumers.”

A major goal of the U.C.C. is to arrive at a uniform body of

284. Article 2A has also passed in the District of Columbia. Uniform Commercial Code Reporting Service, Table of State Enactments of 1987 at xiii. (Article 2A) (1996 supp.)
286. Id. § 110(d)(1)-(2).
commercial law. The recommended changes regarding attorneys' fees recovery and disclaimers of the implied warranty of merchantability will enhance, rather than diminish, uniformity. They will also further the U.C.C.'s goal of being a comprehensive statute. Moreover, these recommended changes are not as major as they may first appear. Rather, they reflect and incorporate existing federal and state law as well as the current trend in case law. They allow freedom of contract to those capable of exercising it while protecting those to whom freedom of contract is a fiction.

This Article's analysis of the current Article 2 case law and the U.C.C.'s underlying purposes and policies suggests that Article 2's open-ended drafting style is largely responsible for cases that protect consumers and "merchant/consumers" from unfair bargains. Current Article 2 should be modified to enhance the comprehensive nature of the U.C.C. by incorporating rules that are already a matter of federal and state consumer protection law. Modifications should also clarify rules that developed through judicial decisions, but without sacrificing the benefits of its open texture.

The Report of the Subcommittee on Consumer Issues suggests the best approach to revising Article 2. It states: "revised Article 2 should occupy a middle ground that reflects its history, its interpretation in the courts, and its role as the law that sets forth fundamental principles for all sales of goods transactions, both commercial and consumer alike." 288

A successful revision is one that enhances the effectiveness of Article 2 in meeting the needs of the affected persons. The "middle ground" approach of recognizing the similarities between consumers and "merchant/consumers" and distinguishing them from merchants, strikes the best balance between the diverse interest groups affected by Article 2. The recommended approach of making buyer protection Article 2's "default" position is preferable to the general approach of building in special protection for consumers. 289 Depending on what definition of "consumer" is ultimately adopted, enactment of special consumer provisions could work to

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289. In a recent commentary on consumer protection provisions in the revised Article 2, Jean Braucher suggests that in fact there are relatively few heavily negotiated transactions that involve two equal-bargaining strength merchants who are represented by counsel. Braucher, supra note 6, at 78. She notes that transactions may be placed on a continuum from small business deals that involve an unrepresented consumer, to large transactions that involve two sophisticated parties, both represented by counsel. Id. She suggests that the proposed provisions to protect "consumers" might be better as background rules for all transactions. Id.
the detriment of the "merchant/consumer" because the statute might prevent courts from extending protection to "merchant/consumers." As the foregoing case analysis reveals, the U.C.C.'s current approach gives courts flexibility to grant relief to "merchant/consumers" in the appropriate situations. Writing in special protection for consumers gives rise to the argument that if the legislature intended such protection to be extended to "merchant/consumers," it would have done so, and because it did not, there should be no protection. Drafting the Revised Article 2 to explicitly recognize "merchant/consumers" would ignore the continuum of buyers and would threaten the U.C.C.'s ability to continue to grow and change to reflect commercial realities. Therefore, the revision of Article 2 should retain the flexibility and open-ended style of drafting that has resulted in current Article 2's near-universal acceptance and adoption.

The revision of Article 2 presents a golden opportunity for the U.C.C. to continue to fulfill Karl Llewellyn's ideals of reflecting and shaping commercial law practices. The cherished ideal of "freedom of contract" can be preserved for those who have the ability to enjoy and exercise it, but the recommended default provisions can protect those who do not.