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## Taking the "Byte" out of Warranty Disclaimers, 5 Computer L.J. 531 (1985)

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## TAKING THE "BYTE" OUT OF WARRANTY DISCLAIMERS

Isn't it time that our industry grew up and just resisted purchasing an expensive piece of computer software for which the warranty reads in part:

All . . . computer programs are distributed on an "as is" basis without warranty of any kind. The entire risk as to the quality and performance of such programs is with the purchaser. Should the programs prove defective . . . the purchaser and not the manufacturer . . . assumes the entire cost of all necessary servicing or repair. [The company] shall have no liability or responsibility to a purchaser. . . .

This is not mere legal jargon. It's the embodiment of a business philosophy which seriously harms all of us. It encourages sloppy work and inadequate testing, and it increases the potential for dishonesty. Is it any wonder that so many . . . are turned off by computers?

To software companies I say: Accept responsibility for your products. Get the bugs out *before* you sell them. Don't try to sell a program debugged by your customers as a "revised" or improved product at additional cost.

To software consumers I say: If possible, avoid products for which there is no warranty. Don't buy on faith. Complain loudly to software companies which provide no warranty.<sup>1</sup>

The preceding letter from a distraught consumer reflects the increasing disenchantment retail purchasers experience when buying programs for their home computers. Given the way such programs are marketed, such disenchantment is not surprising. Programs for home computers are commonly sold at retail in "blister packs" (shrink wrapped packages). Visible inside these packages is a sheet of paper that sets forth a number of legal conditions that often disclaim all warranties and potential damages.<sup>2</sup> The paper also states that the opening

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1. Letter from John Navas II to *Byte* Magazine (May 1982, at 16).

2. Atari, one of the most popular of the home computer program manufacturers, includes a provision which states:

Disclaimer of Warranty on ATARI Home Computer Programs: All ATARI Home Computer Programs . . . are distributed on an "as is" basis without warranty of any kind. Any statements concerning the capabilities or utility of the Computer Programs are not to be construed as express or implied warranties. The entire risk as to the quality and performance of such Programs is with the purchaser. Should a Program fail to fulfill the individual requirements of the

of the blister pack constitutes acceptance of all of conditions it sets forth. Thus, if a purchaser chooses to use a program, he does so at his own risk.

The disclaimer of all liability for defects in programs is not surprising. Firms that market software are aware of the potentially enormous damages that could result from the failure of their products.<sup>3</sup> Additionally, the commercial nature of the market in which computers were originally sold, with a more balanced bargaining position between buyers and sellers, fostered the development of such disclaimers. As the products have become more affordable, however, the market has expanded, and computers and programs have become common household purchases.<sup>4</sup> By continuing to attempt to shield themselves from all liability, computer vendors have apparently failed to take note of the legal significance of their movement into the retail consumer market. In this environment, the vendors must comply not only with commercial laws, but also with consumer laws and a strong public policy favoring consumer protection. Therefore, in the consumer context, the courts are more likely to protect the consumer faced with such disparate bargaining power.

This Note will examine the legal actions available to the purchaser of a defective home computer program, in essence focusing upon the extent to which these warranty disclaimers are valid and enforceable. The existing bodies of contract and tort law, to some extent, give courts the power to protect the consumer. This Note will analyze how the courts, through these bodies of law, can offer protection to the consumer, and will conclude by proposing further equitable steps necessary in this expanding market.

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purchaser or prove defective following its purchase, the purchaser (and not the manufacturer, distributor or retailer) assumes the entire cost of all servicing, damages, or liabilities which may result from the use of any such Computer Program.

ATARI shall have no liability or responsibility to the original consumer purchaser or any other person or entity with respect to any claim, loss, liability, or damage caused or alleged to be caused directly or indirectly by Computer Programs sold by ATARI. This disclaimer includes, but is not limited to, any interruption of services, loss of business or anticipatory profits, and/or incidental or consequential damages resulting from the purchase, use, or operation of ATARI Home Computer Programs.

3. See *infra* notes 8 & 9 and accompanying text.

4. See, e.g., Note, *Negligence: Liability for Defective Software*, 33 OKLA. L. REV. 848 (1980) ("The computer has come of age in the land of the consumer."); Comment, *Computer Software and Strict Products Liability*, 20 SAN DIEGO L. REV. 439, 453 (1983) ("[B]oth industry and public opinion now look on computer programs as a commodity to be bought and sold like a cassette tape or hair dryer.").

## I. BACKGROUND

In order to better understand the need for adequate consumer protection in the purchase of computer programs, a brief background on the development of computer hardware and software is necessary.

A computer is designed to accept various types of input, or data, and to manipulate or process that input in accordance with specified instructions in order to produce useful information.<sup>5</sup> Software programs are the instructions that tell the computer component, or hardware, what to do.<sup>6</sup>

Software is an algorithm or formula which is sold to a home user as a pre-packaged program embodied on a physical medium, often a cartridge. As a product of human intellect, software is subject to human errors and limitations. If the program is improperly designed, the computer will not function as intended. Hence, the often-used expression of computer programmers, "garbage in, garbage out," has merit.

One writer has noted that there are four principal points in a program's development when an error can be introduced: "first, when the algorithm is constructed; second, when the algorithm is translated into a higher level language; third, when the source program is translated by the compiler into machine language; and fourth, when the object program actually enters the machine by setting internal switches."<sup>7</sup> Although specific programs can be tested to reveal such errors, "no amount of testing can guarantee that all the bugs in the program have been found."<sup>8</sup> Indeed, computer programs have already caused near catastrophes that would have brought grave societal consequences.<sup>9</sup>

Of course, defects in programs designed for home use would not cause such devastating societal effects. Typically, home computer users purchase programs that will assist them in maintaining personal and business financial records, mailing lists and correspondence, preparing tax returns, regulating the home's heating and air conditioning, and other similar functions. Defects in such programs have less potential for enormous consequential damages.<sup>10</sup> Even though consumers' claims

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5. Zammit, *Contracting for Computer Periodicals*, 56 N.Y. ST. B.J. 214 (1982).

6. *Id.*

7. Gemignani, *Product Liability and Software*, 8 RUTGERS COMPUTER & TECH. L.J. 173, 183 (1981).

8. *Id.* at 185 n.35.

9. *See id.* at 173. The author documents incidents of computer failures causing passenger jets to almost collide, nuclear power plants to close, Skylab to suffer an alarming waste of fuel during its descent, and a false alert of another world war.

10. In home computer contexts, there still is the potential in some cases for damages to be severe. For example, one author suggests a foreseeable hypothetical wherein defect in a program controlling the humidity within the home causes the humidifier to fill the house with excess moisture, thereby damaging it. *See Note, supra* note 4, at 848. *See also*

will generally tend to be smaller in size, they will nonetheless occur, and the purchaser should be adequately protected. Additionally, "the principle of the thing" is often as important to consumers as the actual damages suffered.

## II. EXISTING LAW

The disgruntled consumer has two broad avenues he may pursue in order to obtain remedies after purchasing an unwarranted defective computer program. Contract and tort law both offer the consumer in this situation some degree of protection. This section analyzes each of these avenues.

### A. CONTRACTS

#### 1. *The Uniform Commercial Code*

a. *Applicability of the Code*: Article 2 of the Uniform Commercial Code (hereinafter "U.C.C.") applies to "transactions in goods"<sup>11</sup> and defines "goods" as "all things . . . which are movable at the time of identification to the contract."<sup>12</sup> This statute has been substantially adopted in every state, except Louisiana, as well as in the District of Columbia and the Virgin Islands.<sup>13</sup> If the contract is for the performance of services, then only the common law of contracts of the individual state would apply.

The question of whether computer programs are goods for the purpose of U.C.C. coverage must be examined. This question is difficult, for by exhibiting characteristics of both concrete property and abstract knowledge, computer programs do not fit easily into either of the contract law's traditional categories of goods or services. A program is in essence intangible intellectual property. These ideas, however, must be given tangible form, and this transformation allows the inference that the "ideas" have been made into "movable" goods.

Few courts have been presented with the question of whether programs should be considered goods for the purpose of U.C.C. coverage. The two leading cases have reached opposite conclusions.

In 1970, in *Computer Service Centers, Inc. v. Beacon Manufacturing Co.*,<sup>14</sup> the United States District Court in South Carolina was first presented with the question. The judge concluded that the contract in

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*Climate Control Malfunction Annihilates Laboratory Mice*, Computerworld, Sept. 8, 1980, at 10, col. 3.

11. U.C.C. § 2-102 (1976).

12. U.C.C. § 2-105(1) (1976).

13. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1, at 1 (2d ed. 1980) (hereinafter cited as WHITE & SUMMERS).

14. 328 F. Supp. 653 (D.S.C. 1970).

question was one for services and thus not covered by the U.C.C.<sup>15</sup> The facts specific to the case, the court's rationale, and the relative novelty of the industry at the time all tend to support the court's conclusion.

Under the contract, Computer Service Centers agreed to furnish data processing services to Beacon. Indeed, the written proposal for the agreement explicitly stated that the contract was for services,<sup>16</sup> and the payment under the contract was said to be for "the analysis, collection, storage, and reporting of certain data" by Computer Service Centers.<sup>17</sup> The court concluded that this contract was for the sale of services provided by Computer Service Centers, "and to claim to the contrary strains the imagination."<sup>18</sup>

In 1978, the United States District Court for the Eastern District of New York was presented with the same question and reached an opposite conclusion in *Triangle Underwriters, Inc. v. Honeywell, Inc.*<sup>19</sup> In that case, the plaintiff corporation had agreed to have the defendant computer system vendor install a system at Triangle's place of business. The system was to include software prepared by the defendant for the plaintiff's business. The court, in concluding that the software was a "good" covered by the U.C.C., stated:

The agreement with Honeywell did not contemplate that it would run a data processing service for Triangle but rather that Honeywell would develop a completed system and deliver it . . . to Triangle to operate. After the installation and training period, Honeywell personnel were to withdraw, and Honeywell's major remaining obligation was to be maintenance. Although the ideas or concepts involved in the custom designed software remained Honeywell's intellectual property, Triangle was purchasing the product of those concepts. That product required efforts to produce, but it was a product nevertheless and . . . is more readily characterized as "goods" than "services."<sup>20</sup>

It appears from these cases that courts will look to specific factual situations to determine whether the agreement was for a continuing service or for an outright purchase of a program.

Applying this analysis in the consumer context, it seems appropriate to conclude that courts would consider pre-packaged programs that have become such popular retail items in the past few years<sup>21</sup> as goods covered by the U.C.C. Such programs are distributed in a method simi-

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15. *Id.* at 655.

16. *Id.*

17. *Id.*

18. *Id.*

19. 457 F. Supp. 765 (E.D.N.Y. 1978).

20. *Id.* at 769.

21. See *Bride, Hardware Vendors See Software as the Difference*, SOFTWARE NEWS, May 3, 1982, at 37; *Bylinsky, The Computer Stores Have Arrived*, FORTUNE, Apr. 24, 1978, at 52; *The Computer Bargain Basement is Here*, MIS WEEK, July 8, 1981, at 4; *What Xerox*

lar to the mass distribution of any product. The objective with such programs is not to design them with individual users in mind, but rather to sell the same programs as off-the-shelf "goods" to as many users as possible. The commentators who have discussed this issue all agree that these pre-packaged programs should undoubtedly be considered "goods" covered by the U.C.C.<sup>22</sup> Some analogize the "hybrid" characteristics of both intellectual and tangible property of these programs to books and records, both of which are covered by the U.C.C.<sup>23</sup> For purposes of this Note, therefore, it will be assumed that computer programs are within the scope of the U.C.C.<sup>24</sup>

b. *Warranty protection offered under the U.C.C.*: A person who is injured, either economically or physically, by a defective product has three possible warranties under the U.C.C. by which he may recover damages: an express warranty, an implied warranty of merchantability, and an implied warranty of fitness for a particular purpose.

If the seller makes a promise or affirmation of fact about goods which becomes part of the basis of the bargain, the seller has made an express warranty that the goods conform to the promise or affirmation.<sup>25</sup> Therefore, in order for the injured party to recover in a cause of action for breach of express warranty, the seller must have taken some express action to create such a warranty. In pre-packaged programs, however, the manufacturer does not purport to make any such warranty. To the contrary, the manufacturer specifically and conspicuously states that the product is being distributed without an express warranty, and, further, that no statements concerning the capabilities of the product should be construed as an express warranty.<sup>26</sup> Thus, the consumer is prevented from claiming breach of an express warranty.

Implied warranties exist regardless of any overt claims that may or may not be made by the seller. The U.C.C. offers two implied warranties as protection for the purchaser of a product. First, if the seller is a merchant with respect to the goods, an implied warranty of merchantability arises, warranting that the goods are fit for the ordi-

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*Sees in Retail Stores*, BUS. WK., Apr. 21, 1980, at 130; *Pac-Man Invasion*, Washington Post, May 23, 1982, at B1, col. 4.

22. See Nycum, *Liability for Malfunction of a Computer Program*, 7 RUTGERS COMPUTER & TECH. L.J. 1, 3 (1979); Note, *Computer Programs as Goods Under the U.C.C.*, 77 MICH. L. REV. 1149, 1155 (1979); Note, *supra* note 4, at 854; Comment, *supra* note 4, at 444.

23. See, e.g., Note, *Computer Programs as Goods Under the U.C.C.*, 77 MICH. L. REV., 1149, 1155, 1165 (1979).

24. The reader interested in a comparison of common law contracts and the U.C.C., and how these differences may affect litigation regarding computer programs, is referred to Nycum, *supra* note 22, where this subject is explored in detail.

25. U.C.C. § 2-313 (1978).

26. See *supra* note 2 and accompanying text.

nary purposes for which buyers use such goods.<sup>27</sup> The second implied warranty offered by the U.C.C. is the implied warranty of fitness for a particular purpose.<sup>28</sup> This warranty is created if the seller knows the purpose for which the buyer requires the goods and knows that the buyer is relying on the seller to furnish suitable goods for this purpose.

c. *Effect of disclaimers of implied warranties and consequential damages under the U.C.C.:* On their face, implied warranties appear to afford the buyer very basic and broad protection. He is guaranteed that products must be of acceptable quality for normal use as well as for a particular use when purchased under prescribed conditions. The impact of both implied warranties offered by the U.C.C. is severely weakened, however, by the seller's right to make disclaimers. U.C.C. § 2-316 explicitly authorizes disclaimers of implied warranties, but delineates specific requirements and circumstances necessary to create a valid disclaimer. For instance, subsection (2) identifies the general standard required for such disclaimers by providing that a written disclaimer of the merchantability warranty must be conspicuous and include the term "merchantability."<sup>29</sup>

In addition to disclaiming warranties, sellers of pre-packaged computer programs frequently disclaim consequential damages<sup>30</sup> in their contracts.<sup>31</sup> U.C.C. § 2-719(3) allows such disclaimers so long as the limitation or exclusion is not unconscionable. The section specifically addresses the consumer by providing: "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."<sup>32</sup> The official comment to this clause states that terms excluding consequential damages are merely an allocation of unknown or undeterminable risks, and that the seller is free to disclaim warranties under U.C.C. § 2-316.<sup>33</sup>

d. *Unconscionability as a bar to warranty disclaimers and limitations of damages:* Generally, if disclaimers of implied warranties and exclusions of consequential damages are conspicuous and meet the

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27. U.C.C. § 2-314 (1978).

28. U.C.C. § 2-315 (1978).

29. U.C.C. § 2-316(2) (1978).

30. U.C.C. § 2-715(2) (1978) defines consequential damages resulting from the seller's breach to include: "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty."

31. See *supra* note 2 and accompanying text.

32. U.C.C. § 2-719(3) (1978).

33. U.C.C. § 2-719 comment 3 (1978).



U.C.C.'s disclaimer requirements,<sup>34</sup> they will be upheld to shield the seller from liability. While computer program disclaimers typically satisfy these requirements, U.C.C. § 2-302 gives the courts the power to find such clauses unconscionable by providing:

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.<sup>35</sup>

Unconscionability can be either procedural or substantive, or a combination of both.<sup>36</sup> Substantive unconscionability relates to the content of the agreement. Courts examine whether the terms of the contract are one-sided, or deprive a party of an essential element of the bargain.<sup>37</sup> Procedural unconscionability is concerned with the relative bargaining power of the parties.<sup>38</sup>

Although the consumer arena has been the most fertile for the development of the doctrine of unconscionability, it is not easily applied and is often confined to disadvantaged consumers in installment sale contexts.<sup>39</sup> Courts are, however, becoming increasingly more liberal in their application of the doctrine. For example, in a recent case brought in the United States District Court for the Northern District of California, warranty disclaimers and the exclusion of consequential damages were found unconscionable in contracts for the acquisition of computer hardware and software in a commercial context.<sup>40</sup> Judge Schwazer, in issuing a judgment notwithstanding the verdict, remarked:

[T]his is perhaps a classic case of protecting a purchaser who is innocent of an appreciation of the consequences of a deficiency . . . a purchaser who has no experience in computers doesn't have any inkling of . . . how wrong things go . . . so it seems to me if there is ever a reason for holding that these provisions in these contracts should not be enforced because of unconscionability, this is the A-number-one case.<sup>41</sup>

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34. U.C.C. §§ 2-316, 2-719(3) (1978).

35. U.C.C. § 2-302(1) (1978). Although California has not adopted this particular provision, CAL. CIV. CODE § 1670.5 (West 1983) allows the same result.

36. See, e.g., *Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989, 408 N.E.2d 403, 409-10 (1980).

37. *WHITE & SUMMERS*, *supra* note 13, §§ 4-7, at 9-21.

38. *Id.* Courts may base a finding, for example, on gross economic disparity, potential unfair surprise, or deceptive sales practice. *Id.* § 4-3, at 150-55.

39. *Id.* at § 4-2, at 149.

40. *Glovatorium, Inc. v. NCR Corp.*, No. C-79-3393(N.D. Cal. 1981), *aff'd*, 684 F.2d 658 (9th Cir. 1982).

41. *Id.*, slip. op. at 6-7. *But see* *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202, 205, 343 N.Y.S.2d 541, 544 (Sup. Ct. 1972) (the court found "nothing unconscionable as far as the

To summarize, absent a finding of unconscionability, the U.C.C. allows manufacturers to escape liability for defective products by disclaiming implied warranties and excluding consequential damages with regard to their products. Unless state or federal legislation deviates from the U.C.C., it is up to the courts to determine whether such disclaimers are unconscionable and, as such, unenforceable.

## 2. *Federal and State Deviation from the U.C.C.*

Recent federal and state legislation has restricted, and in some cases abolished, traditional warranty defenses provided by the U.C.C. This section will discuss where such deviation occurs and what effect it has on warranty disclaimers.

a. *Federal legislation:* The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("the Act"),<sup>42</sup> enacted in 1975, is the first federal regulation in the field of warranty law. It reflects an attempt by Congress to facilitate private enforcement of warranty rights of consumers by creating a right of action that is more generous than that offered by the U.C.C.<sup>43</sup>

The Act applies to purchasers of "consumer products,"<sup>44</sup> defining that term to mean "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."<sup>45</sup> Since it has already been assumed for purposes of this Note that the shrink-wrapped, pre-written programs are tangible goods,<sup>46</sup> it is further assumed that computer programs will be covered under the Act provided that they are normally used for personal, family or household purposes. Among the products covered by the Act are those products that are used in both personal and commercial settings, such as typewriters.<sup>47</sup> Where the Act is unclear as to whether an item

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agreement between [the] partners" since the clause limiting liability was common to commercial agreements).

42. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1974).

43. See *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979); Miller & Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10 (1980).

44. 15 U.S.C. § 2301(1) (1982).

45. *Id.*

46. See *supra* notes 14-24 and accompanying text. Further, it can be argued from the low purchase price that the consumer is buying a product that is being sold as a "tangible good" rather than a service. The relatively low cost of each program (the average cost ranges from \$20-\$100) is only worth a fraction of the value that the intellectual property is worth to the developer.

47. 16 C.F.R. § 700.1(a) (1984).

is covered, there is a presumption in favor of coverage.<sup>48</sup> It seems clear, therefore, that programs purchased for home computer use would be covered by the Act, even though they can also be used in commercial settings.

The Act expands the number of forums available to the aggrieved consumer by allowing him to bring actions under the Act in both state and federal courts.<sup>49</sup> In order to maintain federal court jurisdiction, however, at least \$50,000 must be in controversy.<sup>50</sup>

The Act was primarily intended to regulate the content and effect of written warranties for consumer products.<sup>51</sup> The Act does not require that consumer products be warranted.<sup>52</sup> Therefore, even though the Act contains provisions limiting the use of disclaimers, most computer program manufacturers are able to circumvent the Act's disclaimer restrictions by refusing to make warranties of any kind.<sup>53</sup>

The Act distinguishes between full and limited warranties, and sets out the minimum requirements of such warranties.<sup>54</sup> If a warrantor offers a full written warranty,<sup>55</sup> then it "may not impose any limitation on the duration of any implied warranty of the product."<sup>56</sup> Moreover, the supplier may not disclaim or modify any implied warranty to a consumer with respect to the product.<sup>57</sup> Therefore, if a manufacturer purports to make a full warranty, it is then prohibited under the terms of the Act from disclaiming implied warranties of any kind.

If a manufacturer makes a limited warranty<sup>58</sup> or any written warranty that is not a full warranty under the Act, then, while the supplier may still not disclaim or modify any implied warranty to a consumer

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48. *Id.*

49. 15 U.S.C. § 2310(d)(1) (1982).

50. 15 U.S.C. § 2310(d)(3) (1982).

51. See *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1190 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981).

52. 15 U.S.C. § 2302(b)(2) (1982).

53. See *supra* note 2 and accompanying text.

54. 15 U.S.C. § 2303(a) (1982). This section provides:

(1) If a written warranty meets the Federal minimum standards for warranty set forth in [section 2304 of this title], then it shall be conspicuously designated a "full (statement of duration) warranty."

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in [section 2304], then it shall be conspicuously designated a "limited warranty."

55. 15 U.S.C. § 2301(6) (1982). In order to label a warranty a "full warranty," the supplier or seller must stand behind the product by agreeing to fix or replace defective parts at no cost and by granting the consumer an option of either a replacement or a full refund where the consumer's product cannot be fixed satisfactorily after a reasonable number of attempts. 15 U.S.C. § 2304(a) (1982).

56. 15 U.S.C. § 2304(a)(2) (1982).

57. 15 U.S.C. § 2308(a) (1982).

58. See *supra* note 54.

with respect to the product, he may limit the duration of the implied warranty to "the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty."<sup>59</sup> The Act further provides that any purported disclaimer or limitation of implied warranties in violation of the statute is ineffective for purposes of federal and state law.<sup>60</sup>

The House Report that accompanied the legislation stated that the purpose of the implied warranty provision was to eliminate the situation where "the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law and leaving little in its stead."<sup>61</sup>

The Act requires disclosure of any legal remedies available to the consumer in the contents of a written warranty.<sup>62</sup> It does permit, however, in both full and limited warranties, exclusions or limitations of consequential damages for breach of any written or implied warranties, so long as such exclusions or limitations appear conspicuously on the face of the warranty.<sup>63</sup> Thus, the Act basically leaves the treatment of consequential damages to state law. The changes introduced by the Act impose obligations in cases where the warrantor fails to conspicuously disclose any exclusion or where the warrantor, subject to the implied warranty obligations under the Act, fails to exclude consequential damages for breach of implied warranties. If properly made, however, exclusions of consequential damages remain valid and enforceable under the Act.

It is apparent that the Act does limit a manufacturer's ability to disclaim implied warranties of both merchantability and fitness for a particular purpose. Such limitations, however, take effect only when written warranties accompany the sale. Since most computer program manufacturers do not purport to offer any written warranties, and in fact specifically negate such warranties with regard to their programs,<sup>64</sup> the Act as it stands has no force or effect with regard to their disclaimers.

The Act preempts the U.C.C. and other state laws by providing that a "disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law."<sup>65</sup>

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59. 15 U.S.C. § 2308(a), (b) (1982).

60. 15 U.S.C. § 2308(c) (1982).

61. H.R. REP. NO. 1107, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7702, 7706.

62. 15 U.S.C. § 2302(a)(9) (1982).

63. 15 U.S.C. §§ 2304(a)(3), 2302(a)(6) (1982).

64. *See supra* note 2 and accompanying text.

65. 15 U.S.C. § 2308(c) (1982).

States can, however, expand their own statutes to further protect the consumer. The Act does not "invalidate or restrict any right or remedy of any consumer under State law."<sup>66</sup>

b. *State legislation*: Eleven states preclude disclaimers and modification of warranties and limit or preclude the exclusion of remedies to a greater extent than does the U.C.C. These states are Alabama, California, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Vermont, Washington, and West Virginia.

In 1966, nine years before the enactment of the Magnuson-Moss Act, Alabama became the first state to respond to the disclaimer problem with legislation. It added provisions to U.C.C. § 2-316<sup>67</sup> and U.C.C. § 2-719<sup>68</sup> prohibiting sellers from limiting or excluding liability for damages for personal injuries resulting from defective consumer goods. Alabama's approach fails, however, to address problems presented by property and other economic losses caused by consumer goods.<sup>69</sup> Alabama's code affects disclaimers of express warranties and implied warranties of merchantability and fitness for a particular purpose.<sup>70</sup>

In 1971, California approached the problem of disclaimer abuse by enacting separate consumer statutes, rather than by amending the U.C.C.<sup>71</sup> California's legislation, known as the "Song-Beverly Consumer Warranty Act,"<sup>72</sup> closely parallels the Magnuson-Moss Act in that it primarily regulates the contents of written warranties. It does not, however, provide consumers with sufficient protection from warranty disclaimers. If the manufacturer or dealer fails to make a written warranty, then implied warranties may be disclaimed so long as the warrantor informs the buyer that the goods are being sold on an "as is" basis in accordance with section 1792.4.<sup>73</sup> If the manufacturer makes a written warranty, then implied warranties may not be disclaimed,<sup>74</sup> but if the duration of the express warranty is limited, implied warranties

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66. 15 U.S.C. § 2311(b)(1) (1982).

67. ALA. CODE § 7-02-316(5) (1977).

68. *Id.* § 7-02-719.

69. *Id.*

70. *Id.* § 7-02-316(5).

71. *See* CAL. CIV. CODE §§ 1790-1794.2 (West 1983).

72. *Id.* § 1790.

73. *Id.* § 1792.3. Section 1792.4 provides that the "as is" disclaimer will be effective to disclaim implied warranties if the writing is clear and conspicuous to the consumer prior to the sale, and contains each of the following statements: (1) the goods are being sold "as is"; (2) the risk as to quality and performance is with the buyer; and (3) should the good prove defective, the buyer assumes all necessary servicing and repair costs. Most computer program disclaimers meet these requirements.

74. *Id.* § 1793.

are limited to the duration of the express warranty.<sup>75</sup>

The Kansas Consumer Protection Act<sup>76</sup> was enacted, in part, "to protect consumers from unbargained for warranty disclaimers."<sup>77</sup> The Kansas Act prohibits disclaimers of implied warranties or limitation of remedies by any party in the chain of distribution.<sup>78</sup> It does, however, allow a seller to limit the implied warranty of merchantability with regard to a specific defect in a product where the consumer was informed of the defect before consummation of the sale contract and the defect became the basis of the bargain. This limitation is not effective, however, if the consumer suffers either personal injury or property damage as a result of the defect.<sup>79</sup>

In 1973, Maine expanded the coverage of its adoption of U.C.C. § 2-316 by adding a specific paragraph to protect the consumer. The statute states that the provisions of § 2-316 regarding disclaimers of implied warranties shall not apply to consumer goods and services, and that any attempt to exclude or modify such implied warranties will be unenforceable in sales of consumer goods.<sup>80</sup>

In 1971, Maryland enacted a provision in its Commercial Law Code that provides that U.C.C. § 2-316 is inapplicable to the sale of consumer goods or services. The section further states that any disclaimers of implied warranties or remedies for breach of warranty are unenforceable in such sales.<sup>81</sup>

Similarly, Massachusetts in 1970 enacted a provision preempting U.C.C. § 2-316 with respect to consumer goods and services. That section provides that no attempt to exclude or modify implied warranties or remedies for their breach will be enforceable.<sup>82</sup>

The Minnesota Consumer Warranties statutes,<sup>83</sup> enacted in 1973, closely parallel the California Song-Beverly Consumer Warranty Act.<sup>84</sup> Both statutes allow disclaimers of implied warranties only if the products are clearly sold "as is" and a conspicuous writing containing specific statutory conditions of notice is present.<sup>85</sup> The Minnesota statute goes further than the California statute, however, by prohibiting limitations on the duration of implied warranties if the seller makes an ex-

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75. *Id.* § 1791.1(c).

76. KAN. STAT. ANN. §§ 50-623 to -644 (1983).

77. *Id.* § 50-623(c).

78. *Id.* § 50-639.

79. *Id.* § 50-639(c).

80. ME. REV. STAT. ANN. tit. 11, § 2-316(5) (Supp. 1983).

81. MD. COM. LAW CODE ANN. § 2-316.1 (1975 & Supp. 1983).

82. MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1982).

83. MINN. STAT. ANN. § 325G.17-.20 (West Supp. 1981).

84. *See supra* notes 71 & 72 and accompanying text.

85. MINN. STAT. ANN. § 325G.18 (West Supp. 1981).

press warranty arising out of a consumer sale of new goods.<sup>86</sup>

In 1966, the Mississippi legislature repealed U.C.C. § 2-316, but retained U.C.C. § 2-719. The repeal of U.C.C. § 2-316 was intended to render all disclaimers of the implied warranties of merchantability and fitness for a particular purpose unenforceable.<sup>87</sup>

In 1971, Vermont added a paragraph to U.C.C. § 2-316 with results comparable to Maine's statute.<sup>88</sup> The addition provides that U.C.C. § 2-316 disclaimers of implied warranties shall not apply to new or unused consumer goods or services, and any attempts to exclude or modify such warranties will be unenforceable.<sup>89</sup>

In 1974, Washington amended U.C.C. § 2-316 to provide that disclaimers of implied warranties of merchantability and fitness for a particular purpose are ineffective in consumer transactions unless the disclaimer specifically identifies the qualities and characteristics not warranted.<sup>90</sup> Thus, the Washington approach recognizes disclaimers of implied warranties as long as they are specific.

Finally, West Virginia in 1974 enacted a General Consumer Protection Act.<sup>91</sup> Section 46A-6-107 provides that "no merchant shall (1) exclude, modify or otherwise attempt to limit any warranty, express or implied . . . or (2) exclude, modify or attempt to limit any remedy provided by law."<sup>92</sup>

### 3. *Summary of Warranty Protection*

It is apparent from this overview that the U.C.C. affords little protection to consumers in cases where merchants and manufacturers make no express warranties, clearly disclaim all implied warranties, and exclude consequential damages. Since manufacturers of computer programs typically make use of disclaimer provisions,<sup>93</sup> the U.C.C. offers little protection to the software purchaser. Although disclaimers and exclusions can be attacked as unconscionable, it is up to the courts to invoke this doctrine to provide the consumer with compensation.

Federal legislation is also of little help in assisting the consumer in his battle. Even though the Magnuson-Moss Act disallows disclaimers of implied warranties, this prohibition applies only in cases where an express warranty is offered. Computer programs do not purport to offer warranties of any kind.

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86. *Id.* § 325G.19(1).

87. House Bill No. 977 1976 Miss. Laws 517.

88. *See supra* note 80 and accompanying text.

89. VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1984).

90. WASH. REV. CODE ANN. § 62A.2-316 (Supp. 1984).

91. W. VA. CODE §§ 46A-6-101 to -108 (1980).

92. *Id.* § 46A-6-107.

93. *See supra* note 2 and accompanying text.

It appears, therefore, that unless a program purchaser is fortunate enough to live in one of the few states where disclaimers of implied warranties are not allowed regardless of the existence of express warranties,<sup>94</sup> he will have difficulty pursuing a cause of action under a warranty theory unless he can claim that such disclaimers are unconscionable.

Breach of warranty, however, is not the only avenue of relief available to the consumer. The law of torts might also apply when a consumer is damaged by a defective computer program. The following section addresses the current state of these tort remedies.

## B. TORTS

Since the tort law compensates a party for the violation of duties imposed by operation of law rather than those assumed consensually, contractual disclaimers do not bar recovery in tort. The consumer who pursues recovery under tort theories, however, often faces rigid burden of proof requirements regarding the product's defects. Three theories of tortious liability—negligence, strict products liability, and misrepresentation—will be discussed herein, with the analysis focusing primarily on their application to actions involving defective computer programs.

### 1. *Negligence*

Under common law principles of negligence, plaintiffs must successfully prove causation, duty of care, breach of duty and proximate causation in order to prevail. When these requirements are applied to litigation involving computer programs, the novelty and sophistication of the programs present courts with difficult questions regarding adequacy of proof and standards of care. Each of these elements and the problems they may present to courts in the computer program context are discussed below.

a. *Causation*: Initially, the consumer must prove that but for a defect in the program the damage would not have occurred.<sup>95</sup> If the plaintiff fails to meet this "but for" causation requirement, liability will be precluded. This requirement is, in some respects, probably the easiest hurdle the consumer has to overcome. For example, if a program was purchased to regulate the humidity of a home and the program's malfunction damaged the home, the consumer would only need to prove that the failure of the program was the cause of the damage. Although the plaintiff may have to show that the source of the defect was in the

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94. Kansas, Maine, Maryland, Massachusetts, Mississippi, Vermont, and West Virginia all prohibit such disclaimers.

95. See, e.g., *New York Central R.R. v. Grimstad*, 264 F. 334 (2d Cir. 1920).



program rather than in the computer itself, this should not be difficult.<sup>96</sup>

b. *Duty of care*: Once it has been established that the program was the cause of the damage, the plaintiff must then prove that the manufacturer owed a duty of care to the consumer. This is a fairly straightforward requirement that is ordinarily not difficult for the consumer to meet. Common law principles of negligence recognize that a manufacturer owes a duty of care to the consumer.<sup>97</sup> There are, however, different standards of care,<sup>98</sup> and the courts must decide what standard a manufacturer of computer programs should be required to meet. Some commentators have suggested that programmers should be held to a professional standard of care,<sup>99</sup> or to that degree of care exercised by a reasonable member of the profession under similar circumstances.<sup>100</sup> The relatively recent development of the computer industry, however, presents a problem in defining the standard of professional duty that programmers should be required to meet. Programmers are not required to be licensed,<sup>101</sup> and the industry has not established any guidelines or regulations.<sup>102</sup> The continued growth of the industry, however, is likely to lead to customary industry practices, allowing courts to look to industry standards to establish a level of duty commensurate with that of other computer program manufacturers.

c. *Breach of duty*: After it has been established that a manufacturer owes a duty of care to the consumer, the consumer must next prove that the manufacturer breached that duty. This is the most difficult element for the plaintiff to prove. Again, the relative youth of the computer industry prevents courts from adequately relying on trade custom and usage to determine whether a duty has been breached.<sup>103</sup> For example, if a consumer argues that the manufacturer negligently failed to adequately test a program, the courts must then decide how

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96. See Comment, *supra* note 4, at 441 n.6 (“[O]ften the nature of the accident itself will demonstrate the program’s defectiveness.”).

97. See, e.g., *Oklahoma Natural Gas Co. v. Young*, 116 F.2d 720 (10th Cir. 1940).

98. See, e.g., *Titus v. Bradford Etc. R.R. Co.*, 136 Pa. 618, 20 A. 517 (1890).

99. Prosser defines “professionals” as “those who undertake any work calling for special skill [who] are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.” W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 161 (4th ed. 1971).

100. See, e.g., *Nycum, supra* note 22, at 9; Jordon, *The Tortious Computer: When Does E.D.P. Become Errant Data Processing?*, 4 *COMPUTER L. SERV.* (Callaghan) § 5-1, Art. 2 (1972).

101. See 5 *COMPUTER L. SERV.* (Callaghan) § 7-3 (1974).

102. See *Gemignani, supra* note 7, at 190.

103. See *Nycum, supra* note 22, at 11.

much testing is required. Since programmers are not required to follow any codes of professional conduct and no industry standards have been established, courts cannot rely on common practices of others in the industry, and consequently have little guidance. Further, the complex nature of, and lack of familiarity with, the industry makes this task even more difficult.

Another problem in proving breach of duty is found in isolating the defect and determining whether this defect was the result of a negligent act. A plaintiff may, for example, be required to isolate the individual error to determine whether or not the mistake was the result of a programmer's negligence.<sup>104</sup> In the consumer context the difficulty of determining the cause of the error will often prevent the consumer from prevailing in a negligence cause of action.

The law offers a possible shortcut for the plaintiff faced with this difficulty, provided that certain requirements are met. The doctrine of *res ipsa loquitur*, which means literally "the act speaks for itself," may be applied in cases where the injury would not normally occur in the absence of negligence. If the doctrine is successfully invoked, the burden of proof shifts to the defendant, who must then rebut the presumption that it has breached its duty of care. Commentators have agreed, however, that it is not likely that this doctrine would be applied by courts to program malfunctions due to the current state of the art of computer technology.<sup>105</sup> This conclusion is based on their reasoning that one cannot yet say with assurance that errors do not occur in the computer industry in the absence of negligence.<sup>106</sup>

d. *Proximate cause*: Under common law principles of negligence, the consumer's injury must result from the program's defect.<sup>107</sup> This causal connection is not in and of itself, however, sufficient to invoke negligence liability.<sup>108</sup> The negligent act must also be the "proximate cause" of the injury.<sup>109</sup>

Although there is no uniform method used to determine whether the proximate cause requirement has been satisfied, a general question often asked by courts is whether the injury was the direct and natural result of the negligent act, and was not affected by intervening circum-

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104. See, e.g., Comment, *supra* note 4, at 441.

105. See, e.g., Gemignani, *supra* note 7, at 191; Jordan, *supra* note 100, at 8; Nycum, *supra* note 22, at 11.

106. See Jordan, *supra* note 100, at 8.

107. See *supra* note 95 and accompanying text.

108. Alabama Power Co. v. Bass, 218 Ala. 586, 119 So. 625 (1928); Lemos v. Madden, 28 Wyo. 1, 200 P. 791 (1921).

109. Kryger v. Panaszy, 123 Conn. 353, 195 A. 795 (1937), Gilman v. Central Vt. Ry. Co., 93 Vt. 340, 107 A. 122 (1919).

stances.<sup>110</sup> Thus, if a defect was only remotely connected with the harm caused, the proximate cause requirement may not be satisfied.

e. *Defenses to a negligence cause of action:* Even if the consumer successfully proves that the manufacturer was negligent in developing the program, the manufacturer has several defenses. Contributory negligence<sup>111</sup> or assumption of risk,<sup>112</sup> for example, might be available, and if successfully proven by the manufacturer, can relieve him of all or part of his liability.

It is apparent from the preceding overview that a negligence cause of action, laden as it is with problems of proof, can present special problems with respect to defective computer programs. Although strict liability alleviates some of the problems present in negligence actions, this avenue also presents the consumer with a difficult route to recovery.

## 2. *Strict Products Liability*

Section 402A of the Restatement (Second) of Torts provides that one who sells any product<sup>113</sup> in a defective condition which is unreasonably dangerous to the user or consumer or to his property shall be subject to liability regardless of the amount of care the seller has exercised.<sup>114</sup> The American Law Institute adopted section 402A in order to free the consumer from the warranty disclaimers provided by the U.C.C. The strict liability doctrine has not developed into the ultimate consumer remedy some of its supporters envisioned, however.<sup>115</sup> The primary problem many consumers encounter with the doctrine is the courts' hesitation to apply it to those cases where plaintiffs have suffered only economic losses. Although some jurisdictions have applied

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110. *Price v. Neyland*, 320 F.2d 674 (D.C. Cir. 1963).

111. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

112. *Id.* § 496A.

113. The term "product" presents a definitional problem similar to that previously addressed in connection with the U.C.C. See *supra* text accompanying notes 11-24. Specifically, the question is whether courts will allow a mass-marketed computer program, which possesses characteristics of both a service and a product, to be considered a "product" in a strict liability cause of action. For two reasons, this Note assumes that they will. First, the policy motivations underlying the enforcement of strict liability indicate that it is appropriate for mass-marketed programs to be considered "products." See Note, *supra* note 4, at 855. Second, both the retail popularity and the tangible characteristics of the program lead one to conclude that such programs are better thought of as "goods." See *supra* notes 21-23 and accompanying text.

114. Section 402A, adopted in 1965, has been enacted either judicially or legislatively by all but six states. See Note, *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the U.C.C. in Cases Involving Economic Loss, Used Goods, and Nondangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347, 1352 nn.39, 40 (1982).

115. See Note, *supra* note 114, at 1347.

strict liability to cases in which the consumer has been harmed only economically,<sup>116</sup> the majority refuse to apply the doctrine unless the plaintiff is physically harmed.<sup>117</sup>

The courts' reluctance to extend the strict liability doctrine can be attributed in part to a general tendency to perceive recovery of economic losses as being contractual by nature, and recovery in tort as being essentially limited to physical injury.<sup>118</sup> Additionally, some commentators believe that the application of strict liability to economic losses would deprive the seller of the opportunity to negotiate the allocation of risks with the buyer.<sup>119</sup>

Damages resulting from defective programs used in home computers will often consist only of economic losses. Consequently, a consumer who purchases such programs will likely, in most jurisdictions, encounter courts unwilling to apply strict liability to allow recovery of such losses. Assuming, however, that the court is willing to allow recovery based on strict liability, the consumer is faced with yet another hurdle. The consumer must prove that the product is defective and that the defect is so dangerous to the consumer that the manufacturer should be held strictly liable for the resulting damages.<sup>120</sup>

Section 402A provides that a manufacturer should be held strictly liable for his product only if it is "in a defective condition unreasonably dangerous to the user or consumer."<sup>121</sup> Thus, the consumer must prove not only that the seller was responsible for the product's defect, but also that the defect caused the product to be unreasonably dangerous.<sup>122</sup> Although most courts follow the requirements of section 402A,<sup>123</sup> some have lightened the plaintiff's burden of proof requirements. California, for example, no longer requires the consumer to prove that the product was unreasonably dangerous, reasoning that such a requirement is ap-

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116. See, e.g., *Moorman Mfg. Co. v. National Tank Co.*, 92 Ill. App. 3d 136, 139-46, 414 N.E.2d 1302, 1306-11 (1980) (damages for loss of profits due to defective storage tank recoverable under strict liability); *City of La Crosse v. Schubert, Schroeder & Assocs., Inc.*, 72 Wis. 2d 38, 44-45, 240 N.W.2d 124, 127-28 (1976) (cost of making repairs on defective roof recoverable under strict liability).

117. See, e.g., *Beauchamp v. Wilson*, 21 Ariz. App. 14, 17-18, 515 P.2d 41, 44-45 (1973) (buyer of defective diesel truck could not recover economic losses under strict liability theory); *Henderson v. General Motors Corp.* 152 Ga. App. 63, 64, 262 S.E.2d 238, 239-40 (1979) (buyer of car could not recover economic loss under strict liability theory).

118. See Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123, 142 (1974).

119. See, e.g., Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 318, 327 (1973).

120. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

121. *Id.*

122. *Id.*, comment i.

123. See, e.g., *Byrns v. Riddell, Inc.* 113 Ariz. 264, 266, 550 P.2d 1065, 1067-68 (1976) (en banc); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1362-63 (Okla. 1974).

propriate in a negligence action, but not in a products liability suit.<sup>124</sup>

Although purchasers of defective programs may experience difficulty meeting the damage and proof requirements for strict liability, the policy considerations that spawned the concept of strict liability—loss spreading, victim compensation and accident cost reduction<sup>125</sup>—do provide the consumer with a compelling argument that strict liability should be applied to suppliers of computer programs. It can be argued that computer companies are better able than consumers to spread the loss of damages, either by buying insurance<sup>126</sup> or by adjusting prices. Computer companies may also be in a better financial position to compensate individual consumers for their losses. Perhaps the most compelling argument, however, is that strict liability will provide the industry with incentives to improve future products. If the industry knows that it will be strictly liable for its defective products, it will allow time for proper testing which will reduce the likelihood of potential defects in programs in the future.

A consumer filing a strict liability action would also have to overcome various defenses. Two defenses that are recognized in strict liability cases are product misuse<sup>127</sup> and assumption of risk.<sup>128</sup> In addition, courts have precluded the application of strict liability if the danger posed was unavoidable due to the current state of the art at the time of manufacture.<sup>129</sup>

### 3. *Tortious Misrepresentation*

The two preceding sections discussed tort theories based upon errors in the design or manufacture of the product in question. Another possible theory may be available to the consumer if a misrepresentation concerning the attributes or capabilities of the product is made. U.C.C. § 2-721 specifically recognizes the possibility of recovery for misrepresentation apart from any recovery for breach of warranty.<sup>130</sup> At least

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124. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (en banc). Although some other jurisdictions have followed California's lead, most have rejected this reasoning and continue to require plaintiffs to prove that products are unreasonably dangerous.

125. *See Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

126. *See Freed, Products Liability in the Computer Age*, 12 FORUM 461, 477 (1977).

127. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965) provides: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not liable."

128. *See Moran v. Raymond Corp.*, 484 F.2d 1008, 1014 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974).

129. *See Bruce v. Martin-Marietta Corp.* 544 F.2d 442, 447 (10th Cir. 1976).

130. U.C.C. § 2-721 (1977) provides: "Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither re-

three varieties of tortious misrepresentation have been recognized by the courts. They are intentional fraud, negligent misrepresentation, and innocent misrepresentation.

a. *Intentional fraud*: Intentional fraud requires a showing that the vendor made an intentionally false statement of material fact reasonably relied upon by the vendee to his detriment.<sup>131</sup> Mere "puffing" or predictions as to future performance, however, are not actionable.<sup>132</sup> Moreover, if the contract explicitly states a fact completely contrary to the claimed misrepresentations, the plaintiff will be prevented from demonstrating the necessary element of reliance.<sup>133</sup>

b. *Negligent and innocent misrepresentation*: Some jurisdictions have recognized two additional causes of action for tortious misrepresentation, negligent and innocent misrepresentation. Most courts, however, are persuaded by the argument that such unintentional misrepresentations are not actionable in transactions where a warranty has been disclaimed, since the recognition of such actions would defeat the purpose of the contractual disclaimer. In *Call v. Computer Data General Corp.*,<sup>134</sup> for example, where a negligent misrepresentation claim was made, the judge stated:

The court is of the opinion that this cause of action cannot stand. To allow it to remain and to sanction its validity would in essence render the provision of Section 2-316 of the Commercial Code insofar as they permit a disclaimer of warranties a nullity. . . . [I]t is unlikely that parties could ever effectively agree to a disclaimer of warranties pursuant to Section 2-316 if such a pleading was allowed.<sup>135</sup>

c. *Misrepresentation theories as applied to computer vendors*: Notwithstanding the specific recognition of misrepresentation causes of action provided by U.C.C. § 2-721, courts have been reluctant to allow disappointed computer users to circumvent contractual terms by resorting to such theories.<sup>136</sup> Moreover, in the consumer context, there is lit-

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scission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."

131. See *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39, 46 (D.S.C. 1974).

132. See *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919, 925 (E.D. Wis. 1977), *aff'd mem.*, 588 F.2d 838 (7th Cir. 1978).

133. *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 179 (8th Cir. 1971).

134. No. 409415 (Cal. Sup. Ct., Santa Clara Co., March 11, 1980).

135. *Id.* But see *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169 (8th Cir. 1971).

136. See, e.g., *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974); *Westfield Chem. Corp. v. Burroughs Corp.*, 6 Computer L. Serv. Rep. (Callaghan) 438, 21 U.C.C. Rep. Serv. (Callaghan) 1293 (Mass. Super. Ct. 1977).

the likelihood of misrepresentations being made since bargaining and negotiating for such products is not the normal method of practice.

### III. CRITIQUE OF THE EXISTING LAW

#### A. INADEQUACY OF CURRENT LEGAL PROTECTION FOR THE PURCHASE OF HOME COMPUTER PROGRAMS

Although the U.C.C. offers broad protections from both economic and physical injury to the consumer who purchases a defective product by imposing implied warranties on the seller<sup>137</sup> and providing statutory remedies for the buyer,<sup>138</sup> the impact of these warranties and remedies is severely weakened by the seller's right to disclaim them. Since the U.C.C. allows the seller to disclaim implied warranties and exclude consequential damages<sup>139</sup> for products, the seller who complies with the statutory requirements for such disclaimers may be effectively relieved of all warranty liability.

By hiring attorneys adept at disclaimer draftmanship, the sellers of computer programs are able to avoid all warranty liability. Since the seller clearly brings to the consumer's attention the fact that the program is being sold "as is," these disclaimers are not considered to be misleading. Nonetheless, the consumer is forced to accept the terms of these contractual provisions if he chooses to buy the program. If the program eventually proves defective, and the consumer chooses to litigate under a contract theory, the consumer must argue that the contract was unconscionable.<sup>140</sup> Since the terms of such contracts are permitted by statute in most states, however, it is difficult for the consumer to prevail in such actions.

Congress has recognized the consumer's disadvantage resulting from the U.C.C. disclaimer provisions and has enacted the Magnuson-Moss Act to restrict the seller's use of implied warranty disclaimers.<sup>141</sup> The Act takes effect, however, only after the manufacturer has voluntarily made an express warranty.<sup>142</sup> As a result, sellers of computer programs are able to circumvent further restrictions on their use of such disclaimers by simply refusing to make warranties of any kind. Ironically, the Act has had the effect of further discouraging the use of warranties by manufacturers, rather than broadening the consumer's protections.

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137. See *supra* notes 27 & 28 and accompanying text.

138. See *supra* notes 30-33 and accompanying text.

139. See *supra* notes 29-33 and accompanying text.

140. See *supra* notes 34-41 and accompanying text.

141. See *supra* notes 54-61 and accompanying text.

142. See *supra* note 64 and accompanying text.

Consumer warranty legislation in California<sup>143</sup> and Minnesota<sup>144</sup> has, to a great extent, paralleled the Magnuson-Moss Act. In those states, sellers are able to circumvent the protective efforts of the legislation simply by failing to make any express warranties and clearly indicating that the products are being sold "as is." Alabama<sup>145</sup> has gone somewhat further than California and Minnesota by refusing to allow sellers to exclude liability for damages for personal injury resulting from consumer goods. This legislation has had only minimal effect on warranty actions resulting from defective home computer programs, however, since most of these buyers suffer only economic or property damages.

The only states that have by legislation chosen not to recognize the disclaimers of warranty typically included in computer program contracts are Kansas,<sup>146</sup> Maine,<sup>147</sup> Maryland,<sup>148</sup> Massachusetts,<sup>149</sup> Mississippi,<sup>150</sup> Vermont<sup>151</sup> and West Virginia.<sup>152</sup> These states generally accomplish this by amending U.C.C. § 2-316 to prohibit any disclaimers of implied warranties or remedies for breach of warranty in the sale of consumer products. Mississippi has gone the furthest by disallowing such disclaimers in both consumer and commercial contexts.

The purchaser of a home computer program is able to avoid the effect of warranty disclaimers by relying on tort theories, but this may be an equally difficult route to recovery. Often, the cost and effort of such litigation will outweigh the damages suffered.

In negligence actions, strict burden of proof requirements present consumers with a considerable hurdle to overcome.<sup>153</sup> Although strict liability to some extent relieves the consumer of these requirements, that doctrine is generally only applied to non-economic losses<sup>154</sup> and inherently dangerous products,<sup>155</sup> and therefore does not provide a cause of action for defective computer programs in most jurisdictions. Tortious misrepresentation also fails to provide a viable cause of action on account of the courts' reluctance to recognize such actions in the computer program context and the likelihood that such misrepresentations

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143. See *supra* notes 71-75 and accompanying text.

144. See *supra* notes 83-86 and accompanying text.

145. See *supra* notes 67-70 and accompanying text.

146. See *supra* notes 76-79 and accompanying text.

147. See *supra* note 80 and accompanying text.

148. See *supra* note 81 and accompanying text.

149. See *supra* note 82 and accompanying text.

150. See *supra* note 87 and accompanying text.

151. See *supra* notes 88 & 89 and accompanying text.

152. See *supra* notes 91 & 92 and accompanying text.

153. See *supra* notes 95-112 and accompanying text.

154. See *supra* notes 116-119 and accompanying text.

155. See *supra* notes 120-124 and accompanying text.



would not be made in the context of consumer purchases of off-the-shelf goods.<sup>156</sup>

In sum, the difficulty of proving harm caused by a defective computer program, the fact that most defective programs will not cause the consumer exorbitant damages, and the likelihood that most consumers will be initially deterred from litigating in the face of blatant contractual disclaimers all indicate that, in most cases, sellers will be able to successfully avoid liability for damages resulting from their defective programs.

#### B. FURTHER STEPS NECESSARY TO PROTECT THE CONSUMER

The law as it now stands allows the seller in most states, absent a successful tort or unconscionability claim by the buyer, to effectively shift the risk of defective products to the consumer. As a result, purchasers of consumer programs are not provided with any assurances or guarantees of quality and safety for the products they purchase. This can be troublesome for consumers, since they often rely on the capabilities of computer programs to protect their homes from burglaries and fires, control the humidity in their homes, and carry out important computations for investment, business and tax purposes.

In business settings, purchasers of computer programs often have the opportunity to negotiate the allocation of risks. Furthermore, programs are often tailored to meet the specific needs of business purchasers. Consumers, however, are forced to accept the terms of contracts as set forth by the supplier for their programs. Since the program manufacturer produces and duplicates a single program to be used by many computer owners, it is in a better position than the consumer to bear the burden of anticipating and controlling the risks with respect to the performance of the product. The seller is also in a better position financially to bear the burden of injury costs caused by defective programs. The seller can distribute these costs by purchasing insurance and, if necessary, by increasing the price of its programs. Shifting the burden of liability to the seller would also have the effect of enhancing the quality of programs by encouraging adequate testing by the seller before marketing. In the consumer context, therefore, it is more equitable and efficient for the burden of liability for defective programs to be borne by the seller.

#### IV. PROPOSAL

Although several states have been successful in enacting legislation to prohibit the sale of "as is" consumer products, this protection is

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156. See *supra* notes 130-136 and accompanying text.

piecemeal. In order to effectively shift the burden of bearing the risk of defective products to the seller, uniform legislative action is required. Congress must recognize that the Magnuson-Moss Act has failed to adequately protect the consumer who purchases home computer programs, and that this failure directly contravenes strong public policy favoring consumer protection and manufacturer responsibility. Consumer warranty legislation that would prevent the seller from making disclaimers of implied warranties would go far in furthering the goal of adequate consumer protection.

In light of the foregoing, Congress should amend the Magnuson-Moss Act to prohibit consumer software manufacturers from disclaiming implied warranties and remedies, including consequential damages, regardless of whether a full or limited express warranty has been made under the terms of the Act. Such an amendment would require sellers to provide consumers with adequate protection by providing buyers of computer programs with assurance that the goods are suitable for their intended purposes. If the products fail to adequately perform their intended function, the seller rather than the buyer would be responsible for resulting damages.

#### CONCLUSION

Consumers must be provided with minimal guarantees for the quality and safety of the programs they purchase for their computers. The state of the art of the industry is no longer an excuse that manufacturers should be able to hide behind to escape liability for defective products. Computers are no longer experimental pieces of equipment, but rather are products sold as everyday appliances relied upon by the consumer to perform routine tasks. The expansion of the market resulting from the increasing popularity of such items enables sellers to bear the burden of adequately testing such programs to ensure their quality.

Although several states have recognized the need to protect the consumer by prohibiting sellers of consumer products from disclaiming implied warranties, a uniform nationwide legislation that protects the consumer will ensure that the market will function more equitably and efficiently for all concerned.

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