

Contracts of Frustration

Addison Mueller†

The average consumer¹ who buys one of today's more complicated products may find that his experience is not as happy as he and his family had anticipated. For due in part to the ever increasing sophistication of such goods, in part to production pressures, in part to price competition, and in part to a lack of enough highly skilled labor to meet the ever-increasing demand, there is a fair chance that his newly delivered color TV, or stereo equipment, or dishwasher, or car won't work.² It probably won't explode, or cut him, or electrocute him—nothing that dramatic. It will just have something wrong with it. The consumer may then discover that getting the difficulty taken care of is a time consuming and maddening experience.³ He may, in short, discover that frustration—not satisfaction—is his lot.

As things stand today, there is precious little beyond persisting and enduring that the average consumer can do about a defective product.⁴ Since in all probability he will have paid for his purchase in advance—either by making a down payment and signing negotiable paper for

† Professor of Law, UCLA Law School. B.A. 1931, University of Wisconsin; LL.B. 1943, Yale Law School. I am indebted to Dennis Hauser, third year law student at UCLA, for his help in the preparation of this article.

1. Sales law lacks a satisfactory definition of the term "consumer." Article 2 of the Uniform Commercial Code [hereinafter cited as UCC] does not attempt a definition. UCC § 9-109 says that goods are "'consumer goods' if they are used or bought for use primarily for personal, family or household purposes." (See also the definition of a "consumer credit sale" in § 2.104 of the proposed Uniform Consumer Credit Code.) As the draftsmen of the UCC admit in § 9-109, Comment 2, cases like that of the physician's car or the farmer's jeep are hard to classify under its definition. Because I want to cover not only such buyers but also such even more troublesome cases as the carpenter's electric saw and the architect's electric pencil sharpener, I have settled for the following statement which will, I believe, adequately convey my intention: By consumer I mean a buyer of a small lot from a retailer.

2. The situation in the automobile industry is neatly summarized by the following statement of Paul F. Lorenz, Ford Motor Company vice-president, in his testimony before the Federal Trade Commission on January 10, 1969: "The roots of today's service problem lie in a rapidly growing vehicle population of enormously increased complexity that has outstripped the resources of the auto-repair industry." *Wall Street Journal*, Jan. 19, 1969, at 4, col. 3. The situation in the appliance industry is no different. See *Wall Street Journal*, Sept. 25, 1968, at 1, col. 1.

3. See generally REPORT OF PRESIDENTIAL TASK FORCE INVESTIGATING APPLIANCE REPAIR AND WARRANTIES (1969).

4. For an excellent and highly readable description of a hypothetical consumer's futile efforts to get something done about a defective product, see Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 397-403 (1966). For an equally readable but tongue-in-cheek description of the same problem, see Buchwald, *There's One Thing that's Absolutely Guaranteed*, L.A. Times, Jan. 14, 1969, § 2, at 9, col. 1.

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the balance,⁵ or by using a bank or other outside-dealer credit card which equally deprives him of defenses to payment of the charge⁶—he does not have the “try and collect” muscle of the increasingly rare individual who buys on open account.⁷ Extralegal institutional sanctions based on the importance of maintaining reputation in well organized markets, so helpful to many businessman buyers, are beyond him because consumer buying power is impressive only in the mass.⁸ Self help (the most tempting of all measures as frustration builds) is a method that society cannot tolerate.⁹ And the law—which is all he has left—is of almost no use whatever. So he sends, or takes, his problem-plagued purchase back to the factory or to the local service center or to the dealer again and again and again until it is finally fixed or until he gives up in disgust.¹⁰

5. The dealer almost invariably “discounts” this paper, *i.e.*, negotiates it to a financing agency and thus keeps his capital available. He also thus cuts off stop-payment pressure from his customer, because the negotiatee will claim as a holder in due course who takes the note free of the purchaser's claims that the goods he purchased are defective. See UCC §§ 3-302 to -305. Such discounting has come under increasing judicial scrutiny, and to the extent that it is not with arm's length financing agencies or is otherwise not in good faith, its normal cut-off effect is denied. *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); Murphy, “Another Assault Upon the Citadel”: *Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales*, 29 OHIO ST. L.J. 667 (1969).

6. Typical of the language carried on bank and similar credit cards is this from the Bank of America's Bank Americard: “Holder agrees . . . (6) to waive and release Bank from all defenses, rights and claims holder may have against any merchant or company honoring the Bank Americard.” As Davenport points out, however: “An unreasonably high percentage of cardholder complaints against a merchant member would be a fact of commercial life which an issuer in its own self-interest could not, and would not, disregard.” *Bank Credit Cards and the Uniform Commercial Code*, 1 VALPARAISO L. REV. 218, 243 (1967). See also Bergsten, *Credit Cards—A Prelude to the Cashless Society*, 8 B.C. IND. & COM. L. REV. 485, 509-516 (1967).

7. Even the buyer on open account may be deterred by concern lest his credit rating suffer if he lets his debt to his dealer show as too long past due on the records of the local credit rating bureaus. It is hard to explain to the colossus that credit bureaus have become why a particular delinquency is justified. The growing use of computers not only to store credit information but to assign credit ratings automatically makes the prospect even more disturbing. See Karst, “The Files”: *Legals Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 359-63, 371-76 (1966).

8. Word gets around in a trade organization if a supplier (or a customer, for that matter) is unreasonably uncooperative. Even without that clout, however, the individual small merchant has some muscle of his own developed through the continuing nature of his relationship with his supplier. A similar close and continuing relationship between customer and dealer still exists to a limited extent in our small towns, where the personal nature of trading encourages dealer-customer cooperation. In our larger cities, however, the picture is now largely one of impersonalization. This is the age of the supermarket on the one hand and of rootless families on the other. Thus, though dealers are interested in maintaining goodwill, it is goodwill in the abstract that concerns them. It is difficult to become too concerned over the loss of a customer who is merely a here-today-and-gone-tomorrow face in the crowd.

9. Perhaps one of the few amusing incidents of self-help was related by columnist Matt Weinstock (L.A. Times, Aug. 5, 1968, § 2, at 6) about what may have been a disgruntled car buyer who apparently used a slingshot to catapult large rocks onto a used car lot. (It was not, however, amusing to the dealer.)

10. The standard warranty usually limits the consumer's remedy to repair or replace-

Perhaps the endurance of substantial frustration is part of the price that today's consumer expects and is willing to pay for his purchase. Perhaps—willing or not—he must grin and bear it for the general economic good. Perhaps the problem is of insufficient importance to justify concern.¹¹ But there is good reason to doubt all of these premises, especially as the problem moves down to the bottom rungs of the economic and social ladder and there joins such merchandising evils as over-pricing, over-selling, loaded financing charges, and misrepresentation.¹² To the extent that existing legal remedies are either unavailable or insufficient, we have an important job of law creating to do.

Two factors combine to bring about the modern consumer's lack of effective legal power when he buys a product which is faulty but does not cause physical injury. Both of them stem from the fact that he is a little man in the scheme of things. First, there is an all-pervasive difficulty: our machinery of justice is simply not designed for easy use by the average citizen with a minor claim of any kind. If anything, it is designed to discourage him. He is not apt to know a lawyer and he does not particularly want to know one.¹³ And if he does muster up his courage and finds a lawyer, he will almost surely discover that his small claim is of no interest to that lawyer unless he is prepared to guarantee what to him will seem a preposterous sum.¹⁴

ment of defective parts at the manufacturer's plant or at an approved service station. This limitation on where the consumer must present the defective product can be both time consuming and expensive, since he must bear the costs of packaging and of shipping the defective product to the plant. Often the consumer will not bother to enforce the warranty because of the bother and expense involved. See Comment, *The Card Warranty and Consumer Sales*, 2 VALPARAISO L. REV. 358, 370 (1968).

11. It is not every slight inconvenience that requires redress. Nor do most people look for it. They are, in fact, conditioned to expect a reasonable amount of frustration in the complicated business of living today. See Perry, *Inability Grows to Accomplish Simple Things*, *The National Observer*, June 17, 1968, at 1, col. 1. It is the accelerating addition of substantial doses of helplessness in situations where the individual feels that he is being victimized that is a cause for concern. It is with frustration of this quantity and quality in the sale of goods area that this paper is concerned.

12. See D. CAPLOVITZ, *THE POOR PAY MORE* (1963); P. WALD, *LAW AND POVERTY passim* (1965); Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 402-07 (1968); Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); Note, *Installment Sales, Plight of the Low-Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1 (1966).

13. [I]t seems to me that at bottom of the popular hatred of lawyers is the black cloud in which the lawyers operate. It is a darkness compounded of an unknown language, intricate procedures, esoteric learning, and the trouble that occasions their presence. The layman approaches the lawyer reluctantly: it is strange; it may bite; it usually does.

Mellinkoff, Review, 15 U.C.L.A.L. REV. 1075, 1076 (1968).

14. Bar Association suggested fee schedules generally set a minimum hourly rate of from \$15 to \$20 for consultation, and few urban lawyers charge less. Carter, *Ethics and Economics in Hourly Fees*, 50 A.B.A.J. 951 (1964). Thus if the lawyer follows such advice

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Even in those localities where small claims courts are supposed to be readily available, the use of the law remains a mysterious and a frightening prospect for the average citizen. It is especially frightening for the below-average citizen, for "the poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away."¹⁵

The unavailability of simple process handicaps the little man regardless of the nature of his small claim, and it is handicap enough. But when he claims as a consumer against a seller, he encounters a second difficulty. Unless his claim is based on accidental injury to person or property caused by a defective product and is thus eligible for relief in tort, he claims in contract and must use a deck of doctrine that is stacked against him.

Most of his losing cards are colored "freedom of contract." Contract (says the jurisprudence) is a voluntary association, and the parties are therefore free within broad limits to adopt such terms as they see fit.¹⁶ The reasonably equal bargaining power that is manifestly required to support this basic principle is presumed,¹⁷ as is the fact that parties to a written agreement know, or ought to know, the terms of their agreement.¹⁸ The ultimate consumer faced with a defective appliance or product, is almost sure to find that his seller has taken full advantage of these presumptions. He will discover that the printed contract that he "made" with his dealer contained one or more variously labeled terms and conditions designed by lawyers to give the dealer and everyone above him in the distribution pipeline maximum pro-

as that of the *California Law Office Handbook* to alert the client to the probable cost of his services at the outset, the matter will probably end right there. As the *Handbook* (with its customary leave-no-stone-unturned completeness) says: "Even a wealthy client may not insist on the enforcement of a right of action if a reasonable fee would make the recovery uneconomical." CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA LAW OFFICE HANDBOOK 599 (1962). The presence in many communities of Legal Aid Offices eliminates most of the cost problem for the informed indigent; in this respect, at least, he is better off than the more affluent consumer. *But see Comment, Translating Sympathy For Deceived Consumers Into Effective Programs For Protection*, 114 U. PA. L. REV. 395, 409-10 (1966).

15. Address by Attorney General Robert F. Kennedy on Law Day, University of Chicago, May 1, 1964. *See* P. WALD, *LAW AND POVERTY* ch. 3 (1965).

16. The law will not make a better contract for the parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce a contract as it is written.

Gummere, C.J., in *Kupfersmith v. Delaware Ins. Co.*, 84 N.J.L. 271, 275; 86 A. 399, 401 (1913).

17. Perhaps the neatest, though oblique, expression of this presumption is the "rule" that the law will not question the adequacy of consideration. The presumption is, of course, rebuttable. *See* 1 A. CORBIN, *CONTRACTS* § 127, at 541 (1964).

18. *See* 3 A. CORBIN, *CONTRACTS* § 607, at 656 (1964).

tection against consumer claims. He has, in short, entered into what we have come to call a contract of adhesion. Professor Patterson, who coined the phrase in 1919 in an article discussing life insurance policies, described such a contract as one "drawn up by the insurer, and the insured, who merely 'adheres' to it, has little choice as to its terms."¹⁹ In less elegant but no less accurate language, a contract of adhesion is a contract that sticks the helpless consumer with standard form clauses that he might not have agreed to if he had actually had free choice.

Some of this printed boilerplate is apt to come in an envelope containing assorted other literature that is sealed in the carton or is taped to the chassis of the purchased equipment. In consequence it is seldom seen by the buyer until after delivery. Clearly, then, the buyer might persuasively claim that he cannot be bound by it because he never accepted it as part of his bargain.²⁰ But it would make little practical difference if he not only saw it but read it and even understood it before his purchase. The result of an attempt on his part to reject it would be no purchase; it would be a rare and imaginative dealer indeed (to say nothing of a rare and imaginative customer) who would act in so non-institutional a fashion as to agree to a special warranty arrangement. Even if a dealer were willing to do so, his action would almost surely be held not to have involved the deeper pockets of his supplier or the manufacturer of the product.²¹ And though theoretically the buyer could go elsewhere and buy from a merchant who did not so limit his obligations, he would almost certainly find that all competing goods were similarly limited.²² So to turn the matter on

19. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). See also Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Ehrenzweig, *Adhesion Contracts in the Conflicts of Laws*, 53 COLUM. L. REV. 1072 (1953).

20. See Note, *The Card Warranty and Consumer Sales*, 2 VALPARAISO L. REV. 358 (1968).

21. Manufacturers' warranties usually state explicitly that a dealer is not authorized to alter or make additional warranties on behalf of the manufacturer. Such limitations should at least be given effect against a claim over by a dealer who is held to such altered or additional obligation by his customer. Whether a consumer should be entitled to claim directly against the manufacturer in such a case depends on whether an agency relationship (express or apparent) can reasonably be spelled out. The problem ties into that arising when a dealer warrants that a product is fit for a use not reasonably encompassed by the nature of the product. In such a case, a remote seller's defense of no privity to a consumer claim based on product failure under the stress of such special use makes some sense.

22. The clause limiting remedy to repair or replacement is now as much a fixture in business literature as those old friends the *force majeure* clause, the offer subject to prior sale and acceptance clause, standard invocations of the parol evidence rule, and "very truly yours." The feeling about them is that they—like so much contractual language—can do no harm and might do some good.

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the buyer's lack of knowledge would simply put dealers to the useless task of saying, "Look at this," before they say, "Sign here." A requirement that full disclosure be made concerning terms that can in fact be accepted or rejected is a meaningful and important element of contract law. But standard disclaimers and limitation of remedy clauses²³ such as make up the bulk of the printed boilerplate in contracts for the sale of consumer goods are not such choice-offering terms. The problem with such clauses is not lack of notice but lack of consumer power to bargain about them. The problem is that they are parts of contracts of adhesion.

The most common liability-limiting clause in the modern consumer's contract of adhesion will be reassuringly labeled "Warranty" or "Guarantee." It will read something like this:

This product is precision built, inspected and tested before leaving our factory. It is guaranteed against defects in materials and workmanship for one year, cord set and plastic container excluded. If found defective it must promptly be returned post-paid to the factory or an authorized service station, *not to the dealer*, and it will be repaired without charge. It is expressly agreed that our total liability is limited to such repair. If used according to instructions, it should give years of satisfactory service.²⁴

This clause comes in a variety of shapes and sizes, but all models are designed to accomplish the same end. The idea is to salvage as much protection as possible from the wreckage of the now discredited "no warranties express or implied" clause, by which yesteryear's lawyers attempted to avoid even the obligation to deliver merchantable goods.²⁵ As an example of skillful legal drafting to that end, the repair and replacement clause is a superb product. For by generously admitting a sole (and minimal) obligation to keep trying until the

23. Broad disclaimers of warranty are frowned upon by the UCC; limitations of remedy, on the other hand, are encouraged. Compare UCC § 2-316 (exclusion or modification of warranties) with §§ 2-718 (liquidation or limitation of damages) and 2-719 (contractual modification or limitation of remedy).

24. Warranty, Rival Blender Model #944. Rival Manufacturing Co., Kansas City, Mo. (1968).

25. UCC § 2-316 makes the present futility of such a catch-all attempt clear without denying a seller the opportunity to negotiate an "as is" sale in a case where such a sale makes commercial sense. As Comment 1 to the Section explains,

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

promised defect-free product is delivered, it continues to deny—either expressly or by necessary implication—all other responsibility. And it does all of this in a virtuous and reassuring tone that is much appreciated by sales managers.

If the language of this “guarantee” to repair or replace means what it says, what a consumer really buys from his dealer is not a properly operating color TV, stereo, dishwasher, or car. He buys a promised opportunity to get one sooner or later if in the meantime he cooperates with the manufacturer-wholesaler-dealer establishment. In effect, he not only has the role of final inspector in the production process, but is also expected to take all risks and bear all expenses involved in making that inspection.

The clause has not, of course, been permitted to provide all of the protection it seems to call for. It is no more effective in insulating a seller from liability for physical injury caused by a dangerously defective product than was the sweeping language of its predecessor, the general disclaimer. The tortious road from *caveat emptor* to *caveat venditor* in such cases is too well marked²⁶ to allow such frivolous strays as permitting a seller whose customer has been electrocuted by a defective power saw to discharge his obligation by tendering a replacement to the executor of the customer's estate. Any lingering doubts which might have remained on this score in some contract-conscious jurisdictions have been laid to rest by the sweeping adoption of the Uniform Commercial Code with its provision in Section 2-719 that a limitation or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable and of no effect.²⁷ So although a repair and replacement clause tucked

26. The literature in the legal periodicals is overwhelming. Some of the more frequently cited articles are Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); James, *Products Liability*, 34 TEXAS L. REV. 44 (1955); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Kessler, *Products Liability*, 76 YALE L.J. 887 (1967); Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262 (1964); Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 W. RES. L. REV. 5 (1965); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

27. UCC § 2-719(3) reads as follows:

Consequential damages may be limited or excluded unless the limitation or ex-

away in the seller's literature may make the consumer serve as the final inspector in the manufacturing process, at least he does not bear the risks of physical injury during the "inspection," no matter what such a clause may say.

The effect of the clause on claims for damages to property is a little less clear, though there is no sensible reason why the same result should not be reached. What question there is stems from the UCC's express exclusion of limitations of commercial damages (blithely left undefined in the Code) from the prima facie unreasonable category of Section 2-719. The nature of commercial damages was apparently clear to the Code's draftsmen, but it is not all that clear to everyone else, especially in view of the fact that only consumers (equally undefined in the Code, but certainly the least commercial of buyers) are eligible for protection to begin with.²⁸

When we leave the area of physical injury to person or to property, we enter a land of consequential damages that defy classification. In contract, there is no wilder territory. The scenery ranges from the hunter who, because of a defective rifle, loses his once-in-a-lifetime shot at a tiger and claims the total cost of his safari²⁹ to the farmer whose crop is substantially lost because of the delivery of harvesting machinery that does not operate as it should.³⁰ Contract has long struggled with consequential damage problems like these in all sorts of breach situations. Theoretically, once the "avoidable consequences" test is met by the complaining buyer, all provable damages caused by the breach should be recoverable.³¹ This, however, is a result for which the merchant-oriented law of contract has never had much stomach, and it has built a battery of devices upon and around the foreseeability requirement of *Hadley v. Baxendale*³²—including those twins "too remote" and "too speculative"³³—to permit maximum judicial flexibility

clusion is unconscionable. 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.

28. See Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 994-96 (1966).

29. *Thomas v. Olin Mathieson Chem. Corp.*, 255 Cal. App. 2d 806, 63 Cal. Rptr. 454 (1967).

30. *Steele v. J.I. Case Co.*, 197 Kan. 554, 419 P.2d 902 (1966).

31. The rule that damages that could have been avoided by reasonable action by the non-breaching party are not recoverable (the avoidable consequences rule), is built into the system by considering such losses as "caused" by the non-breaching party's conduct and not by the breach.

32. 9 Exch. 341 (1854).

33. "Too remote" is the contract equivalent of tort's "proximate cause" principle, and its application is equally unpredictable. An interesting illustration of its use is found in *Newsome v. Western Union Telegraph Co.*, 153 N.C. 153, 69 S.E. 10 (1910).

in handling such claims.³⁴ But this very flexibility has made their shelter too leaky for sellers to rely upon without more.³⁵

It is here that the "repair and replacement only" clause comes into its own.³⁶ Its use does not guarantee a weatherproof shelter, because under Section 2-719 any limitation of remedy can, under proper circumstances, be shown to be unconscionable³⁷ or to have failed of its essential purpose³⁸ and thus to be inoperative. But it certainly helps. Without doubt it could save a judge the struggle of fitting the foreseeability and too speculative—too remote doctrines to such a case as that of the father of the bride who discovers that defective film has caused all of the pictures taken at the wedding to be blanks. The little legend on the box of film to the effect that the sole liability of the

"Too speculative" is frequently used with "too remote" as if the whole were one word. When used in this sense, *i.e.*, as describing a loss not caused by the breach, there can be no quarrel with it beyond redundancy. It has another use in contract law, however: to characterize a damage claim that, though admittedly caused by the breach, cannot be determined with sufficient monetary exactness to satisfy the court. It is usually invoked where a buyer claims for lost profits because of a nondelivery. The degree of certainty of loss required is steadily being relaxed, but the rule still can operate harshly to cut off all but nominal damages in cases where, for example, the buyer is starting a new and unusual business and cannot open as planned because of a nondelivery. See C. McCORMICK, DAMAGES 519-726 (1935); 5 A. CORBIN, CONTRACTS §§ 1022-23 (1964).

34. The ultimate in flexibility is provided by the addition to the foreseeability rule of the so-called "tacit agreement to assume the risk" requirement. This rule originated in England shortly after *Hadley v. Baxendale* was decided, and it has subsequently been used when convenient by some American courts. It requires not only that a party have notice that a particular loss will follow a breach on his part, but also that the assumption of such risk by him be within the contemplation of the parties, *i.e.*, that he be deemed to have assumed the position of insurer against such loss as part of his total obligation. The possibilities for manipulation of this concept are infinite. As Professor McCormick states in his excellent discussion of this whole topic in his treatise on damages:

It adds the fiction of a tacit promise to the original fiction of "contemplation," and seldom is there anything in the situation more definite and mandatory than the judge's sense of justice to tell him to find the presence or absence of this silent promise to assume the risk. The recurrent cropping up of the idea in the opinions of the courts indicates that some of the judges have found the conception useful in giving expression to this sense of the justice of the situation.
C. McCORMICK, DAMAGES §§ 141, 580 (1935).

The draftsmen of the UCC expressly repudiated the above rule in § 2-715, Comment 2 in the following terms: "The 'tacit agreement' test for the recovery of consequential damages is rejected."

35. In *Steele v. J.I. Case Co.*, for example, the plaintiff-farmer was unable to harvest his wheat crop before rain substantially destroyed it because a combine he had recently purchased would not work. In effect, the court held that the loss of the crop from heavy rain if the combine proved inoperable was not unforeseeable. 197 Kan. 554, 419 P.2d 902 (1966).

36. The framers of the UCC explicitly recommend its use for purposes of avoiding consequential damages in Section 2-715, Comment 3 with this language: "Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy."

37. UCC § 2-719(3).

38. UCC § 2-719(2). "Failed of its essential purpose" was not a happy choice of language by the draftsmen. A limitation whose purpose is to cut off consequential damages does not fail of that purpose when it does just that. One must look to Comment 1 of the Section to understand that what was apparently meant is ". . . operates to deprive either party of the substantial value of the bargain."

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manufacturer is replacement with a new film would provide a convenient out for the judge who was unsympathetic to the father's claim.³⁹

But what of strict liability in tort? Does it provide a potential basis for recovery of consumers' damages like these? As in the case of contract, tort logically should be available for such consequential damages if available for direct injuries to person or property. Such treatment would eliminate contract's *Hadley v. Baxendale* tests along with limitation of remedy clauses, replacing them with such narrower escape routes from off-beat claims as proximate cause, assumption of risk, buyer's negligence, and lack of measurable loss.⁴⁰ The prospect of this shift frightens the wits out of sellers. It has also caused further questioning of the economic wisdom of risk-spreading over the total market.⁴¹ Only the opening skirmish of the judicial battle over whether or not so to extend strict liability has been fought.⁴² It promises to be a long and bloody war, with the forces of sellers now well entrenched behind the express language of Section 2-719. Their position is indeed a strong one, for to extend strict liability to all types of consumer losses would seem to nullify the distinction expressly drawn in Section 2-719(3) between "injury to the person" and "commercial" loss.⁴³ Only by straining to interpret the phrase "injury to the person" to mean not personal injury but any injury suffered by a person who qualifies as a consumer (as opposed to any injury suffered by a businessman) can the distinction be accommodated. Judicial nose-thumbing at legislative intent on this scale is not easily come by. Nor does the extension of strict liability here have the same appeal, either emotional or practical, that it does in physical damage cases. The three major reasons for using tort to win compensation for injuries to person and property caused by a defective product have been (1) to take

39. If there is such a case, I have not been able to find it. This perhaps bears testimony to the deterrent effect of the legend on the box. Cf. *Coppola v. Kraushaar*, 102 App. Div. 306, 92 N.Y.S. 436 (1905). The limitation need not, on the other hand, prevent a sympathetic court from finding in favor of a disappointed picture taker who suffered sizeable commercial damage. *Willard Van Dyke Pr. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 239 N.Y.S.2d 337, 189 N.E.2d 693 (1964).

40. See Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267 (1968); *Dippel v. Sciano*, 37 Wis. 2d 443, 460-62, 155 N.W.2d 55, 63-64 (1967).

41. See Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Products Cases*, 18 STAN. L. REV. 974, 1004-12 (1966); Note, *Economic Loss in Product Liability Jurisprudence*, 66 COLUM. L. REV. 917, 954-58 (1966).

42. The concurrence and dissent of Peters, J., in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965) provides a map of the battle.

43. UCC § 2-719(3):

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.

the easy way to avoid the privity problem and thus make the deep pocket of the manufacturer directly available to pay the substantial damages generally involved in claims of this type,⁴⁴ (2) to avoid the requirement of prompt notice of defect as a condition precedent to a recognizable claim⁴⁵—a notice frequently not thought of by legally unsophisticated consumers, especially in the emotion-laden period following an accident—and (3) to cancel the effect of contractual disclaimer and limitation of remedy clauses.

Those needs are not pressing in the area of consequential damages loosely labeled "commercial" or "economic." A direct dealer-consumer relationship is primarily involved, and here there is privity aplenty. Rarely are the damages earth-shaking in amount, so the easily available dealer is almost invariably the prime target. And where the deep pocket must be reached, either because the dealer is a fly-by-night operator or is insolvent, such devices as the handy third party beneficiary doctrine still have a lot of mileage left in them.⁴⁶ Nor is proper notice of defect within a reasonable time after the buyer either knows or ought to know about the defect an important problem when a dealer is the defendant.⁴⁷ It is seldom indeed that the outraged buyer fails to give not only prompt but also loud and persistent notice of his complaint to the seller.⁴⁸

Another factor reducing the pressure on courts to impose strict liability in the area of economic loss is that most such damages of any consequence flow from persistent product failure despite a seller's attempts to repair, and such cases do not require tort treatment to beat the repair or replacement only clause. A contractual limitation of liability to repair the defective product does not mean that a consumer must put up forever with a dealer's or a service center's futile efforts. The limitation of remedy carries in it the promise to repair, and reading "within a reasonable time" into such a promise is standard judicial engineering. Once the dealer has made a certain number

44. See Comment, *Manufacturer's Responsibility for Defective Products: Continuing Controversy Over the Law to be Applied*, 54 CALIF. L. REV. 1681, 1712 (1966).

45. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 60-62, 27 Cal. Rptr. 697, 699-700, 377 P.2d 897, 899-900 (1963).

46. For numerous ways of satisfying the privity requirement, see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 152-55 (1958).

47. See Prosser, *Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1130 (1960).

48. This is not true of many consumers in the ghetto. See D. CAPLOVITZ, *THE POOR PAY MORE* 169-71 (1963); Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?* 5 DUKE L.J. 831, 845-48 (1968). The difficulty here, however, would not be significantly reduced by elimination of the notice requirement. It goes much deeper.

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of unsuccessful attempts at cure, therefore, the promise to repair has been breached, the protection is gone, and the dealer is liable in contract for all the consequences of the breach⁴⁹—limited again, of course, by *Hadley v. Baxendale* and its relatives.⁵⁰

Only one difficult problem remains if tort liability is denied in this area of economic loss: the problem of damages caused by the initial failure of a product. Here the dealer or the manufacturer has had no chance to repair or replace, so he can scarcely be held accountable for the loss because of breach of a warranty to repair. What then about the father of the bride with his lost pictures, or the hunter with his wasted safari, or the farmer with his lost crop? Even here the Uniform Commercial Code reduces the need for tort liability by providing ways to protect the consumer in cases where giving effect to the limitation's full force would result in inequity or hardship. All that Section 2-719(3) says about commercial damages is that the application of a limitation of remedy clause to them is not prima facie unconscionable. The limitation can also be found to have failed of its essential purpose in accordance with Section 2-719(2).⁵¹ And there is always the catch-all unconscionability clause of Section 2-302 available in all states but California and North Carolina.⁵²

In sum, the pressures on a court to go the tort route of strict liability for all consequential damages are not great and the difficulties involved in so doing are substantial. Indeed, it can be said that the need to protect consumers is too slight here to make the fight worth the effort. But there is a larger need; the need for a complete reversal of emphasis in this entire area of the law—a reversal that will make it clear once and for all that the fiction of consumer "agreement" to take risks of loss in routine deals has been abandoned. The use of tort theories or of judicial interpretation of Section 2-719 are clumsy and confusing ways to accomplish this, as recent opinions have demonstrated.⁵³ The clean way to do it would be to amend Section 2-719 so as to make *all* limitations of remedies prima facie unconscionable in all consumer purchases of standard goods.⁵⁴ This would recognize

49. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 13-14, 403 P.2d 145, 148, 45 Cal. Rptr. 17, 20, 403 P.2d 145, 148 (1965).

50. See pp. 583-84 & notes 35 & 36 *supra*.

51. See notes 39 & 40 *supra*.

52. BENDER'S UNIFORM COMMERCIAL CODE REPORTER-DIGEST at 1-77 (1967).

53. See generally Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 W. RES. L. REV. 5 (1965).

54. This is the philosophy of Justice Peters of the California Supreme Court as expressed in his forceful dissent in *Seely*:

the fact that consumer deals for such goods are seldom commercial transactions in the classic sense of fully negotiated bargains—that they are contracts of adhesion and deserve special treatment as such. At the same time it would preserve the more flexible contract damages rule of *Hadley v. Baxendale* for judicial use.⁵⁵ But the prospect of such Code amendment in the teeth of seller and manufacturer opposition is scarcely bright. We can expect, then, that the battle will continue to be fought in the courts, that the dust and smoke of the contest will grossly distort the issues, and that consumer victories will only slowly and painfully be won.

So much for the dramatic consequential damage cases. In spite of their importance to the development of the law, their number is infinitesimal compared to those simple “it just won’t work” situations that plague the modern consumer. These are the cases where the loss is to time and to patience more than to person or to pocketbook. All that the frustrated buyer usually wants is “out.” Here the repair or replacement limitation has its basic bite: it denies the consumer buyer the power to terminate the sale and get his money back upon his initial discovery of a defect rendering the product unmerchantable. Thus, if a buyer will not permit a deliveryman to leave a defective product in his home and promptly cancels the order, he nonetheless remains bound to his contract.⁵⁶ And, of course, if the defect is not discovered (because not discoverable) until after the appliance has been put to use, the same result follows, although in the absence of the repair or replace limitation the UCC denies the seller such advantages. Section 2-608 permits the buyer to notify his seller, tender return, and proceed to terminate as if there had been a proper rejection when the product was first tendered, if the defect substantially impairs its value to him.⁵⁷

If this were all that the repair or replacement clause amounted to, it would hardly be worth quarreling about. It would accomplish little more than to underscore the fact that the law now looks with disfavor

The majority recognize that the rules governing warranties were developed to meet the needs of “commercial transactions.” If this is so, then why not look to the *transaction* and see if it was a “commercial” transaction rather than a sale to an ordinary consumer at the end of the marketing chain.

This approach, of course, poses the difficult problem of defining a consumer, as the Justice recognizes; his solution is that this be done on a case-by-case basis. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 26-28, 45 Cal. Rptr. 17, 28-30, 403 P.2d 145, 156-58 (1965). See note 1 *supra*.

55. See pp. 583-84 & notes 35 & 36 *supra*.

56. *Wilson v. Scampoli*, 228 A.2d 848 (D.C. Ct. App. 1967), noted in 52 MINN. L. REV. 937 (1968).

57. UCC § 2-608 (revocation of acceptance in whole or in part).

on buyers who are quick to use an initial defective delivery as an excuse to get out of a deal that has turned out to be economically undesirable. That disfavor is writ large in Section 2-508, which not only gives a seller the opportunity to “cure” an early defective delivery by substituting a conforming tender up until the time delivery is finally due,⁵⁸ but also allows a further reasonable time (*i.e.*, a time beyond the delivery date) in instances where the rejection is of goods which the seller had “reasonable grounds to believe would be acceptable with or without a money allowance.”⁵⁹ Since final delivery date is usually a flexible term in consumer deals and most troublesome defects in consumer goods are hidden in the carton or in the product itself, it would seem that the Code’s cure provisions are neatly applicable to the average dealer-consumer transaction.

But the repair or replacement clause, as sellers like to read it, bites much deeper. It calls for depriving the buyer of power to terminate for as long as a seller continues to insist on exercising his option to make attempts to repair. And normally a seller will so insist when goods of substantial value are involved, not only as an alternative to cancellation but as an alternative to replacement as well. To understand this insistence one must look to the set-up of the modern distribution system. For while desire to retain the sale and its profit explains a dealer’s reluctance to permit a cancellation, it cannot explain his unwillingness to replace. The answer lies in the fact that wholesalers and manufacturers upstream from the dealer have also protected themselves contractually from taking a faulty but repairable item back. Therefore, the dealer who replaces is left with a piece of merchandise on his hands that he has difficulty in selling at full price because consumers are quick to suspect a product that does not have a “factory fresh” appearance. Backed into a corner by his supplier’s refusal to replace instead of to repair, small wonder that a dealer is equally stubborn in his treatment of a consumer.

Modern courts, as we have seen, have not let the clause give a seller the power to make never-ending efforts to repair.⁶⁰ At some point in a series of futile attempts, the promise to repair is deemed to have been broken, the contract is materially breached, and the buyer acquires the power to terminate, with all remedies—including rescission—open to him. This is a significant restriction on the seller’s

58. UCC § 2-508(1).

59. UCC § 2-508(2).

60. *See, e.g.,* Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966). *See also* p. 587 *supra*.

power to limit his liability by contract. But it still allows far more opportunity for cure than do the provisions of UCC Section 2-508. Since that Section was designed merely to weaken the perfect tender rule, not to destroy it,⁶¹ it is hard to read even its Subsection 2 as giving sellers more than a limited opportunity to replace promptly or to make an effective repair—a far cry from the multiple (although less than perpetual) repair opportunity allowed by courts under the repair or replacement clause as a normal application of the freedom of contract principle.⁶² So again we return to the fact that in consumer-dealer contracts, standard contract philosophy is inappropriate. To say that consumers in truth “bargain” for this sort of deal is to flout reality.

But even if all the foregoing were magically corrected by a happy combination of legislative and judicial action, it would not be enough. The consumer would still face the basic problem of the little man and the law—the problem of how to use our legal machinery as an effective sword. Here he meets obstacles that are not created by the use of contractual devices but are inherent in a law of sales designed neither to encourage little claims nor to protect the contract expectations of non-merchants.

The law of sales was developed to meet the needs of those with a substantial economic stake in the effective operation of agreement as a commercial tool.⁶³ What was called for was the maintenance of a nice balance between not showing too much tenderness toward a contract breaker on the one hand, and not exposing contracting parties to the risk of too much loss on the other. The result for buyers is a system that in all but the most unusual cases not only refuses to recognize any form of relief other than money awarded as a substitute for an expected performance, but also measures the amount of such substitute in terms of the value of the contract goods in the market on or about the date of breach.⁶⁴ Losses beyond this can be collected only if they both (1) could not have been avoided by prompt purchase of

61. UCC § 2-601 states the perfect tender rule as the baseline doctrine introducing buyers' rights upon breach. See also § 2-508, Comment 2. For an excellent discussion of cure under the Code, see Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 209-16 (1963).

62. See, e.g., *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967).

63. See E. FARNSWORTH & J. HONNOLD, *CASES ON COMMERCIAL LAW* 3-6 (2d ed. 1968).

64. Whether the date of breach in the case of an anticipatory repudiation is the date of repudiation or the date on which delivery should have been made is one of the fascinating problems left unsolved (if not aggravated) by the UCC. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 263-67 (1963).

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a substitute in the market⁶⁵ (a rare case) and (2) could have been foreseen at the time the contract was made either because such loss would be normal or because express notice of the possibility of such loss was given by the buyer and accepted by the seller as his liability.⁶⁶ In other words, the loss (if any) suffered by the innocent buyer when his seller does not deliver is presumed to be a loss caused by a market change; only in the exceptional case will it be greater than that. And if a defective product is delivered and the buyer complains but either neglects to reject it properly⁶⁷ or elects to keep it,⁶⁸ he is in effect deemed to have bought it at its fair value, determined as a percentage of the contract price rather than of the prevailing market price. Again, in theory at least, the price bargain is protected. Thus contract in the sales area is basically an arrangement by which the buyer automatically takes an inventory position in the contract goods at the contract price immediately upon reaching agreement, and the law protects that position by requiring a non-performing seller to pay the buyer any increase in the market cost of those goods. In the typical case, that's all: no punitive damages,⁶⁹ no attorney's fees,⁷⁰ no consequential damages beyond the cost of effecting a substitute purchase,⁷¹ and definitely no court supervised order to perform.⁷²

The sanctions of this system are patently weak. Thus the highly permissive overtones in Holmes's famous statement that a party to a contract has the option to perform or to breach and pay damages have practical as well as theoretical significance.⁷³ In fact, in the case of a seller's wrongful refusal to deliver generally available goods in a rising market, the arithmetic of the standard damage formula is likely to require him to pay little more in damages than he has already

65. This is the obvious application of the avoidable consequences rule to the buyer who does not get his expected goods. UCC § 2-712 talks about this application in terms of "cover," and provides safeguards for the buyer who makes good faith attempts to comply.

66. UCC § 2-715, Comment 3.

67. UCC §§ 2-602(1), 2-605, 2-606(1)(b).

68. UCC §§ 2-601(b), (c), 2-606(1)(a)(2), 2-609(3).

69. RESTATEMENT OF CONTRACTS § 342 (1932).

70. See 1 J. BONBRIGHT, VALUATION OF PROPERTY 279-80 (1937).

71. UCC §§ 2-712, 2-715.

72. UCC § 2-716(1) & Comment 2.

73. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

gained by keeping the goods.⁷⁴ In addition, the high and unrecoverable costs of legal services and litigation discourage use of legal process to obtain redress in cases where the claim is not substantial. But merchants are generally content with the system for a variety of reasons: (1) in their dealings with their peers, the lack of sanctions cuts both ways; (2) by grouping small claims, as in the collection of delinquent accounts, a sufficiently large problem in gross is created to justify the costs of legal proceedings; (3) the system encourages settlement, and the process of negotiating settlement is one businessmen understand and are comfortable with; and (4) the powerful extralegal sanctions available in the continuing buyer-seller relationships that are typical of most commercial contexts offer sufficient additional protection.

The significant point is that these compensating considerations do not apply to the consumer's little one-at-a-time commercial dealings. Hence the law's failure to provide adequate relief for small claims that do not sensibly fit the contract-market formula is apt to mean total denial of relief for the consumer when he is faced with a defective product and a foot-dragging dealer. To him, contract protection against increased market price is of only theoretical interest. His color TV, his stereo, his dishwasher, his car are almost invariably bought within narrow price ranges to begin with, delivery is usually close to contract date, and no market fluctuates less wildly. When a consumer buys, he buys to satisfy a very personal need, not to take a market position in the item purchased. What he wants when that need is not satisfied because the product delivered is defective is its prompt replacement or, failing that, prompt refund of his purchase price. When he gets neither, to tell him that he need not worry because if he follows proper legal procedures, and if his claim is just, he may eventually be awarded judgment for a sum that will include coverage of any loss he has suffered due to an increase in market over contract price is to reassure him (if this can be called reassurance) on the one point about which he is almost never concerned.

Under these circumstances, dealer concern over the prospect of customer litigation is understandably small. The worst that can happen, practically speaking, is that the dealer may have to refund the buyer's full price, with interest. The possibility of an award of signifi-

74. Incidental damages such as "charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach" which are recoverable under UCC § 2-715 are commonly not a significant item in the case of non-delivery of goods readily available in the market.

cant consequential damages for such a claim as lost use is remote in the present state of the law.⁷⁵ Thus even if he should be stripped of the protection of the "repair only" clause, the dealer is not apt to be frightened into abandonment of his repair only position by threat of a law suit, especially when he knows that the threat will rarely be carried out once the threatening customer discovers the cost and inconvenience involved in pressing the claim.

Consumer dissatisfaction with this state of affairs has been steadily mounting. It adds to such other dissatisfactions as those stemming from harsh credit terms, unreasonable and not fairly disclosed financing costs, misleading advertising, and lack of understandable labeling.⁷⁶ That the voice of this complaint is being ever more clearly raised and ever more attentively listened to is evidenced by recent movement toward statutes calling for full disclosure of "true" financing costs⁷⁷ and providing escape hatches for victims of fast talking door-to-door salesmen.⁷⁸ But the aim of most of this activity has been to help buyers avoid the grasp of over-reaching sellers. It has given the consumer a variety of shields but not a single sword.⁷⁹ Hence he still cannot fight effectively for the full benefit of his bargain in a routine deal that has gone sour.

Provision of the sword would require two related pieces of legal construction. The first involves an imaginative restructuring of the substantive law in the area of consumer sales. This restructuring must be built upon a full recognition that few consumer deals are fully negotiated bargains and hence that much standard contract doctrine is not applicable. Consumers must be given a doctrinal position strong enough to enable them to overcome the contractual defenses carefully erected by sellers at all levels against consumer claims. Beyond that, a simple, prompt, and direct remedy in the nature of a decree of specific performance to replace a judgment for money damages in those cases where the problem is simply a defective product and a dealer who does

75. See pp. 583-84 *supra*.

76. The daily papers are full of evidence of consumer outcry and demand. See, e.g., Berton, *Shoppers Around the World Step Up Pressure to Uncover, Eliminate Fraudulent Practices*, Wall Street Journal, July 12, 1968, at 28, col. 1; Shafer, *A Break for Buyers*, Wall Street Journal, Nov. 12, 1968, at 1, col. 6.

77. See Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285 (1966).

78. See Sher, *The "Cooling-Off" Period in Door to Door Sales*, 15 U.C.L.A.L. REV. 717 (1968).

79. Notable exceptions are the two bills, titled the Federal Household Appliance Warranty Act (S. 2728, 90th Cong., 1st Sess.) and Federal Motor Vehicle Safety Act (S. 2727, 90th Cong., 1st Sess.) introduced by Senators Hayden and Magnuson, each of which provides for arbitration procedures designed to simplify the pressing of consumer claims.

not want to replace or refund. Only such a remedy will truly protect a consumer's expectation that he will receive a usable product without undue delay when he buys one.

All of this might be most easily accomplished by the establishment of a new area of law with a new name—torttract, perhaps⁸⁰—to handle consumer transactions. Such an approach could bypass altogether those doctrinal and administrative impediments that up to now have made accommodation of legal theory to the practical need so difficult. It could, for example, deprive sellers of the power to disclaim or limit responsibility for the delivery of merchantable standard goods without worries about whether the liability is in tort or in contract. It could afford sellers the protection of a reasonable opportunity to cure without worries about the residue of the perfect tender requirements of contract. It could provide damage formulae that would compensate consumers for serious consequential damages without worries about *Hadley v. Baxendale*, while protecting sellers at the same time against far-fetched and unreasonable damage claims. And it could make remedies akin to specific performance available for the simple "it just won't work" cases without struggling with historical restrictions on such relief based on the division between law and equity. It could, in brief, permit consideration of the practical problem of consumer frustration in terms of present realities rather than fictions desperately maintained. However it is done, it needs doing.

Hand in hand with such doctrinal construction must go considerable administrative engineering. For to provide remedies for minor claims that can be obtained only at expense and trouble out of all proportion to the amount involved and the position of the consumer is not to provide such remedies at all. Here the solution seems to lie in the direction already indicated by the philosophy behind small claims courts. The fact that such courts have in too many instances fallen short of the mark⁸¹ does not invalidate their potential if they are properly organized, staffed, and operated. What is needed here is provision of enough such courts to make one reasonably accessible to every citizen, with hours geared to the free time of consumers rather than to the convenience of judges, and with proceedings dignified and

80. The argument against employing the alternative combination should be obvious.

81. While many states did set up small claims courts in response to such pleas, there has been a growing dissatisfaction with their operation, since many credit firms are presently using them as a form of collection agency for their claims. Carlin & Howard, *supra* note 12, at 421-23; Comment, *Small Claims Courts as Collection Agencies*, 4 STAN. L. REV. 237 (1952). See generally Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

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serious without being technical or stuffy. Whether such tribunals be labeled consumer courts or arbitration hearings is unimportant. What is important is that they be available, speedy, inexpensive, and fair.

In such a system, administering such law, the consumer would bear the burden of convincing the tribunal that the sale was not "as is" (a mere formality where new merchandise is involved), that the defect is "in" the product and not the result of his mishandling or unreasonable expectations or extended use, and that he has given the dealer a fair opportunity to repair. The establishment of these facts (or failure to do so) could be accomplished in the course of simple questioning of both parties by a skilled fact finder. Once the facts were found, the law and the remedy would be easy to apply: either dismissal of the claim or an order to the dealer to refund.⁸² As simple as that. No damages, no costs, no penalties; in short, nothing in the process to discourage consumers from bringing legitimate complaints to the tribunal, but nothing in it either to encourage them to try to pick up a few extra dollars by bringing unreasonable or trumped-up claims. And claims against parties other than the seller directly involved should not be permitted. Where damage is large enough to make a claim against a remote seller advisable, the regular courts and full process are available, as well as lawyers aplenty to handle the case on a contingent fee basis.

82. To order replacement instead of—or as an alternative to—refund is possible but unrealistic and probably undesirable. If a consumer-dealer dispute has to be settled by legal process, relations between the parties will almost certainly have deteriorated to the point where further dealings should not be required and probably should not even be encouraged. An order to refund or to dismiss the claim, then, is proposed as the only ends to the process.

Admittedly an order to refund (as compared to a judgment for the refund sum) flies in the teeth of tradition. But, for several reasons, it would nonetheless seem to be the appropriate remedy. (1) A money judgment for the refund sum puts the burden of following a technical procedure of collection on those generally ill-equipped to bear it. It would thus tend to defeat the very purpose for which the entire process is proposed: the provision of a simple, inexpensive, speedy system for those now unable to cope with "the law." (2) The traditional attitude toward the use of specific performance in all cases where only the payment of money is required (money is not unique, so the remedy at law is clearly adequate) has little beyond tradition to support it. In cases where the money judgment is not a practical or realistic device, the remedy at law is *not* adequate, and it is time that we accepted that simple truth. Most dealer-customer disputes based on defective merchandise are such cases. (3) Concern that provision of court power to order payment could result in major injustice to dealers is largely emotional. The dealer who is ordered to pay can always appeal, though he should not be encouraged to do so. If the order to refund is proper, there is no reason why he should not be required to pay if he can. If he cannot pay, his showing of that fact when ordered to appear before the tribunal on a non-compliance complaint obviously should save him from penalty. In that case, of course, the consumer will get little or nothing—precisely what he would get if he had won a judgment against a judgment-proof defendant. If the dealer cannot show any acceptable reason for not paying as initially ordered, it is hard to work up much sympathy for him when the tribunal cracks down.

It would seem that such a solution to the routine consumer complaint problem would have the further virtue of placing slight additional burden on our distribution system. At first glance, without the benefit of a full-scale study of this aspect of the problem,⁸³ it is hard to see why substituting replacement for the repair operation which manufacturers now regularly either supply or reimburse their dealers for should significantly increase cost. In the typical case, a proper factory overhaul of a defective item should permit its return to normal distribution channels as "factory fresh."⁸⁴ This is certainly distinguishable from the situation where a dealer buys merchandise whose life or performance have been affected by prior use and palms it off as "new." Reputable manufacturers and reputable dealers can be trusted not to abuse such a process; dishonest merchants would not be furthered in their dishonesty by it. And once dealers know that replacement or price refund is the rule in the case of truly defective merchandise, the pressure they can and will exert upon their suppliers should be enough to cause them, in turn, to cooperate with dealers on returned goods. Direct involvement of remote suppliers in the legal process should not be necessary to bring about such a change, for here the environment is one of continuing relationships and significant volume and thus competition can be expected to handle the matter.

The lack of consumer power in cases involving no great monetary damage appears trivial in the individual case—too trivial to justify embarking on so ambitious a program to supply it. In the mass, however, it takes on larger dimensions. For our society is becoming increasingly urbanized, our population increasingly rootless, our small neighborhood dealers replaced by supermarkets, and our communica-

83. Economists and lawyers should be devoting more time to working together in the construction of efficient social machinery of this kind. See *The Law and Economics of Public Policy: a Plea to the Scholars*, address by Professor George Stigler, University of Michigan, Feb. 29, 1968.

84. Acceptance of such a practice will require a substantial modification of present Federal Trade Commission enforcement policy. The FTC now sweepingly prohibits, in ringing and righteous tones, the marketing of "used" merchandise without disclosure of such prior use. It bases this position on its feeling that a buyer's knowledge of the fact of prior use is relevant to his decision as to whether or not to purchase an item, even though the item has been refurbished to a condition as good as new. It can be conceded that the purchasing public should not be misled into buying as new merchandise whose life has been shortened by prior use. The matter turns on the definition of "new," as the Commission tacitly admits when it states that "this policy applies only to merchandise that has been used and not to merchandise that has merely been inspected but not used." A policy designed to condition the sale of merchandise whose life or satisfactory performance are impaired by previous use on disclosure of such fact is sound and sensible. The extension of this policy to merchandise that is truly refurbished to a condition as good (if not better) than new merely to protect a buyer's unreasonable prejudice is a position that deserves careful re-examination. FTC Enforcement Policy, 34 Fed. Reg. 176 (1969).

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tion fouled by racial and ideological intolerances. As a result, the close personal relationship between dealer and customer that for so long characterized most retail trade and encouraged the amicable settlement of disputes has all but disappeared in large segments of the economy.⁸⁵ With its passing, the law's long-standing indifference to the consumer's interest in sales transactions can no longer be tolerated. The frustrated small buyer must have some place to turn for help, and in a well-ordered society that place should be provided by legal institutions.⁸⁶ If we fail to meet this need, the little man—the black, the poor, the middle-class consumer—will have more reason than ever to doubt that the law is for him too. There is already more of that feeling in circulation than any society can comfortably afford.

85. See Scott, *Small Causes and Poor Litigants*, 9 A.B.A.J. 457 (1923).

86. See Pound, *Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 311, 315-21 (1913); Havighurst, *The Courts in a Democracy*, 42 ILLINOIS L. REV. 567, 572-73 (1947).