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Uniform Commercial Code - Section 2-719(3) - Presumption of Unconscionability on the Part of Tire Manufacturer for Exclusion of Liability for Personal Injuries under Express Warranty against Blowouts Is Not Rebutted by Proof that the Tire Was Not Defective

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along with other areas of civil liability.[90] Whatever the likelihood of such an occurrence, its effectiveness would be suspect, at least in certain areas;[91] for to remain flexible enough to be effective, the language of any codification would have to be broad, and judicial interpretation and inconsistencies would follow. Third, the SEC could codify the area by rewriting the rule. Certainly it has the power to do so,[92] and presumably, as the issuer and enforcer of rule 10b–5, it has the necessary expertise.[93] Finally, the Supreme Court could, in precise terms, articulate the desired rule. Given the lower federal courts' propensity to seize the meager Supreme Court pronouncement available in this area,[94] this approach would most likely be the quickest and least tedious.

As previously noted,[95] an analysis of the class of persons protected by rule 10b–5 demonstrates a need for a "limiting doctrine" which retains the flexibility necessary to adapt to a multitude of factual situations so as not to deny a "proper" plaintiff a cause of action. Since its inception, the *Birnbaum* purchaser-seller rule has been the means chosen to fulfill this need. The decision in *Eason* reflects judicial dissatisfaction with the suitability of *Birnbaum* to the task, and presents a welcomed analysis of the problems involved and a suggested solution.

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UNIFORM COMMERCIAL CODE — SECTION 2–719(3) — PRESUMPTION OF UNCONSCIONABILITY ON THE PART OF TIRE MANUFACTURER FOR EXCLUSION OF LIABILITY FOR PERSONAL INJURIES UNDER EXPRESS WARRANTY AGAINST BLOWOUTS IS NOT REBUTTED BY PROOF THAT THE TIRE WAS NOT DEFECTIVE.

Collins v. Uniroyal, Inc. (N.J. 1974)

Plaintiff brought suit in a New Jersey state court against Uniroyal, Inc. (Uniroyal), to recover damages for the death of her husband, who was killed when the failure of a tire manufactured by defendant caused his

90. The American Law Institute has begun drafting a Federal Securities Code. To date, three tentative drafts have been produced. FEDERAL SECURITIES CODE (Tent. Draft No. 3, 1974); FEDERAL SECURITIES CODE (Tent. Draft No. 2, 1973); FEDERAL SECURITIES CODE (Tent. Draft No. 1, 1972). The relevant section of the Code takes no position on the *Birnbaum* issue; rather, it leaves the matter to judicial discretion. Tent. Draft No. 2, §§ 1402(a)–(c), comment 3, at 79.

91. In discussing the codification of the securities laws, Professor Loss remarked that rule 10b–5 was not yet "ripe" for codification; rather, its development by the judicial system must continue. FEDERAL SECURITIES CODE, Introductory Memorandum at xxxvi–xxxvii (Tent. Draft No. 1, 1972).

92. 3 L. LOSS, SECURITIES REGULATIONS 1469 n.87 (2d ed. 1961).

93. The SEC apparently has made the decision not to rewrite rule 10b–5, choosing instead to persuade the courts, via amicus curiae participation, to eliminate the purchaser–seller requirement from their interpretation of rule 10b–5. *See, e.g.*, Mount Clemens Indus., Inc. v. Bell, 464 F.2d 339, 341 (9th Cir. 1974); Vine v. Beneficial Fin. Co., 374 F.2d 627, 636 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

94. *See* note 51 *supra*.

95. *See* text accompanying notes 55–59 *supra*.

automobile to go out of control.[1] The complainant sought relief on two theories: 1) strict liability in tort;[2] and 2) breach of the express warranty[3] embodied in Uniroyal's "Road Hazard" guarantee,[4] which had expressly

1. Collins v. Uniroyal, Inc., 126 N.J. Super. 401, 404, 315 A.2d 30, 32 (App. Div. 1974) (per curiam). Decedent had purchased the tire from a Uniroyal distributor about five months prior to the accident. *Id.* at 404, 315 A.2d at 32.

2. *Id.* at 404, 315 A.2d at 32. To establish a cause of action in strict liability, it is unnecessary for a plaintiff to prove negligence on the part of the defendant. The clearest definition of strict liability in the products liability context is that contained in RESTATEMENT (SECOND) OF TORTS:

> (1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for *physical harm* thereby caused to the ultimate *user* or *consumer,* or to his *property,* if
>
> (a) the seller is engaged in the business of selling such a product, *and*
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. § 402A (1964) (emphasis supplied). While the *Restatement's* definition imposes liability on the manufacturer only for personal or property damage, New Jersey law extends the manufacturer's liability to include economic loss as well. *See* Santor v. A.&M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), wherein the New Jersey Supreme Court held the manufacturer liable for damages in an amount sufficient to compensate plaintiff for the loss of his bargain when carpeting purchased from defendant proved defective but not unreasonably dangerous.

3. 126 N.J. Super. at 404, 315 A.2d at 32 (1974). In the instant case, the law of express warranty is governed by the 1962 version of the UNIFORM COMMERCIAL CODE [hereinafter cited as the Code or UCC], which was adopted in New Jersey effective January 1, 1963. (The 1962 version of the Code has been adopted by the District of Columbia and all the states but Louisiana.) The text of the UCC is contained in Title 12A of the New Jersey Statutes Annotated. N.J. STAT. ANN. §§ 12A:1-101 *et seq.* (1962). For convenience, references herein are to the 1962 Official Text of the UCC as published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. UCC §§ 1-101 *et seq.* (1962 version). In order to convert these references to the manner in which they appear in the New Jersey Statutes Annotated, the reader should add the prefix "12A" to all of the sections cited.

UCC § 2-313 defines express warranties:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Id.

In order to recover for breach of express warranty under section 2-313, a plaintiff must prove: 1) the existence of an express warranty as defined within the section; 2) nonconformity of the product with the terms of the warranty; 3) injury; and 4) proximate causation of the injury by the breach. *See* notes 16-19 and accompanying text *infra.*

4. Manufacturer Uniroyal gave the following warranty:

> The new U.S. Royal Master tire with wraparound tread and pin stripe (½ inch)

excluded liability for consequential damages[5] and limited liability to repair or replacement of the tire.[6] The trial judge therefore instructed the jury that such limitation was invalid under New Jersey law.[7] The jury returned a verdict favorable to plaintiff on the breach of warranty count, but adverse to plaintiff on the strict liability count.[8] On appeal, defendant argued, *inter alia,* that the instruction was improper, but the Superior Court of New Jersey rejected this contention and affirmed the trial court.[9] The Supreme Court of New Jersey, in a per curiam opinion, affirmed, *holding* that even

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whitewall design is of such quality and reliability that U.S. Rubber Tire Company makes the following Guarantee:

> LIFETIME — Every such U.S. Royal Master tire of our manufacture, bearing our name and serial number, other than "seconds," is guaranteed to be free from defects in workmanship and material for the life of the original tread without limit as to time or mileage.
>
> ROAD HAZARD — In addition, every such U.S. Royal Master tire, when used in normal passenger car service, is guaranteed *during the life of the original tread* against blowouts, cuts, bruises, and similar injury rendering the tire unserviceable. Tires which are punctured or abused, by being run flat, improperly aligned, balanced, or inflated, cut by chains or obstructions on vehicle, damaged by fire, collision or vandalism, or by other means, and "seconds" are not subject to the road hazard provision of this Guarantee.

If our examination shows that such a U.S. Royal Master tire is eligible for adjustment under either the Lifetime or Road Hazard provision of this Guarantee, we will repair it or provide a new U.S. Royal Master tire at a fractional price computed on percentage of wear of original tread depth and then current U.S. suggested exchange price as follows: [There followed a rate chart and several additional paragraphs not relevant here.]

. . . .

This Guarantee does not cover consequential damages, and the liability of the manufacturer is limited to repairing or replacing the tire in accordance with the stipulations contained in this guarantee. No other guarantee or warranty, express or implied, is made.

126 N.J. Super. at 405–06, 315 A.2d at 33 (emphasis by the court).

5. Consequential damages, as defined in the UCC, 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.

UCC § 2–715(2). The damages claimed by plaintiff in the instant case were covered by this section of the Code. 126 N.J. Super. at 406, 315 A.2d at 33.

6. Although recovery of consequential damages is permitted by section 2–714(3) of the UCC, section 2–719 allows the parties to a contract to limit or exclude available remedies, unless it is unconscionable to do so. UCC § 2–719. *See* notes 22–23 and accompanying text *infra.*

7. 126 N.J. Super. at 406, 315 A.2d at 33.

8. *Id.* at 404, 315 A.2d at 32. The trial judge submitted the cause to the jury on both theories of recovery with instructions, in case of a verdict in favor of plaintiff, to state whether the basis of recovery was strict liability, breach of express warranty, or both. *Id.*

9. *Id.* at 406, 315 A.2d at 33. Defendant also alleged error in the judge's instruction that proof of the technical cause of the blowout or of a specific defect was unnecessary to a cause of action for breach of warranty, and in his admitting defendant's advertisement into evidence. Similarly, defendant raised certain questions with respect to the strict liability count. However, the court rejected all the arguments advanced. *Id.* at 404–09, 315 A.2d at 32–35.

where the jury makes a finding of "no defect" in the subject goods,[10] it is "patently unconscionable"[11] under section 2–719(3) of the Uniform Commercial Code (UCC) for a manufacturer to limit his liability for consequential damages from a breach of warranty proximately resulting in the purchaser's death. *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 315 A.2d 16 (1974).

The UCC was drafted with the intent of balancing the needs of both buyer and seller.[12] By virtue of the provisions of its Article 2 on Sales,[13] the seller of goods[14] may create an express warranty,[15] which, if breached, gives the buyer[16] a cause of action in contract.[17] Section 2–714 of the UCC specifically authorizes recovery of damages for breach of warranty[18] and expressly allows recovery of consequential damages, in a proper case, for nonconformity of accepted goods.[19] However, as a means of protecting the seller,[20] contractual limitation of remedy for breach of warranty is per-

10. Collins v. Uniroyal, Inc., 64 N.J. 260, 262, 315 A.2d 16, 17 (1974). The court mentioned the alternative possibility that this adverse finding meant simply that plaintiff had failed to meet her burden of proof rather than that the tire was not defective. *Id.*, 315 A.2d at 18. *See* note 58 and accompanying text *infra*. Mr. Justice Clifford dissented. His opinion was based on the premise that the adverse verdict on the strict liability count meant a jury finding of "no defect." 64 N.J. at 266, 315 A.2d at 20 (Clifford, J., dissenting).

11. For discussion of unconscionability, *see* notes 42–50, 72–78 and accompanying text *infra*.

12. *See* J. WHITE & R. SUMMERS, HANDBOOK ON THE UNIFORM COMMERCIAL CODE § 1 (1972) [hereinafter cited as WHITE & SUMMERS].

13. Article 2 on Sales applies only to "transactions in goods." UCC § 2–102. *See* note 14 *infra*.

14. The Code defines "seller" as "a person who sells or contracts to sell goods," UCC § 2–103(d), and this definition ostensibly covers manufacturers as well as retailers. The Code proceeds to define "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." *Id.* § 2–105(1). In the absence of agreement to the contrary, "identification" of goods already "existing and identified" occurs when the contract for sale is made. *Id.* § 2–501(1)(a). Thus, since Article 2 covers transactions in goods, and tires fall within the definition of "goods" found in section 2–105(1), the UCC is the applicable law for the *Collins* case.

15. Express warranties, like that involved in *Collins*, are provided for by the Code. UCC § 2–313. For the text of this section, *see* note 3 *supra*. The Code also provides for an implied warranty of merchantability, *id.* § 2–314 (*see* note 68 *infra*), and for an implied warranty of fitness for a particular purpose, *id.* § 2–315, both of which provide standards implied by law for the acceptability of goods' quality under circumstances specified in those sections.

16. Analogous to the definition of "seller" is that of "buyer," which means "a person who buys or contracts to buy goods." UCC § 2–103(1)(a).

17. For buyer's remedies provided by the Code, *see generally* UCC §§ 2–711 to 2–717.

18. Section 2–714(1) provides:

> Where the buyer has accepted goods and given notification (subsection (3) of Section 2–607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

UCC § 2–714(1).

19. UCC § 2–714(3). "Incidental" and "consequential" damages, which include personal injuries, are both defined in section 2–715 of the Code. *See* note 6 *supra*.

20. The principle of freedom of contract provides some measure of protection for a seller who wishes to avoid or limit his liability. *See* WHITE & SUMMERS, *supra* note 12, § 12–1. The UCC itself adopts this principle of freedom of contract in section 1–102(3). The official comment to this section states: "Subsection (3) states affirmatively at the outset that freedom of contract is a principle of the Code . . . ." UCC

mitted by operation of sections 2–316(4) and 2–719.[21] In particular, section 2–719(3) permits limitation or exclusion of consequential damages unless such action is unconscionable.[22] Furthermore, if the limitation of exclusion authorized by section 2–719(3) is invoked in a case which involves physical injury to the purchaser proximately resulting from consumer goods,[23] the limitation or exclusion is prima facie unconscionable, whereas, if commercial loss is involved, it is not.

Neither the Comment[24] to nor the text of this section gives any guidance as to the manner by which a defendant can overcome the finding of

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§ 1–102, Comment 2. The official comments were not enacted along with the text in New Jersey. Hence, they do not have the force of law, but are helpful in analyzing the meaning of the Code's language.

21. UCC §§ 2–316(4), 2–719. Section 2–719 is as follows:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion 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.

22. *See* note 21 *supra.* Unconscionability is governed by section 2–302 of the Code:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

UCC § 2–302.

The Code itself does not advance a definition of unconscionability, but the official comments indicate that both the substantive nature of contract provisions and the circumstances surrounding the bargaining process are to be considered. *See id.,* Comment 1. *See* notes 72–81 and accompanying text *infra.* The concept of unconscionability is nebulous and has proved troublesome to the courts. For discussions of unconscionability, *see generally* Leff, *Unconscionability and the Code — The Emperor's New Clause,* 115 U. PA. L. REV. 485 (1967); Murray, *Unconscionability: Unconscionability,* 31 U. PITT. L. REV. 1 (1969); Spanogle, *Analyzing Unconscionability Problems,* 117 U. PA. L. REV. 931 (1969); Comment, *Bargaining Power and Unconscionability: A Suggested Approach to UCC Section 2–302,* 114 U. PA. L. REV. 998 (1966).

23. The definition of "consumer goods" is contained in Article 9 of the Code pertaining to Secured Transactions. Goods are termed "consumer goods" if they "are used or bought for use primarily for personal, family or household purposes . . . ." UCC § 9–109(1). The issue of whether consumer goods were involved was never raised by Uniroyal and the court assumed that the tires were employed in a consumer setting, although this was questionable, as decedent and his family were a troop of entertainers who used their automobile as a means of transportation from one job location to another. 64 N.J. at 265 n.3, 315 A.2d at 19 n.3 (Clifford, J., dissenting).

24. The Comment states only that such limitation may not operate in an unconscionable manner and that these terms are merely an allocation of unknown or undeterminable risks." UCC § 2–719, Comment 3.

prima facie unconscionability of limitation or exclusion. Case law is equally deficient in indicating what proof is necessary to overcome the presumption. For example, in *Matthews v. Ford Motor Co.*,[25] plaintiff suffered physical injuries in a collision caused by a *defective* gear-shift selector mechanism in his automobile.[26] The manufacturer had given an express warranty to the dealer covering defects in material and workmanship, unlike the broad warranty in *Collins* which guaranteed that there would be no tire failure from any cause. The warranty included a limitation of remedy to the repair or replacement of defective parts. The court held the manufacturer liable for breach of the express warranty, stating clearly that the defendant had failed to rebut the presumption of unconscionability of the limitation of damages.[27] However, as in other cases, the *Matthews* court gave no indication of how the defendant could have rebutted the presumption.[28] As a result, the *Collins* court had little in the way of prece-

25. 479 F.2d 399 (4th Cir. 1973).
26. *Id.* at 400.
27. *Id.* at 402.
28. Two courts have utilized this presumption to invalidate *disclaimers* of warranty, thus confusing limitation of remedy under section 2-719 with disclaimer under UCC section 2-316.

In Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968), a buyer was killed when a defective axle caused a wheel of his truck to collapse. The court affirmed a judgment against the local Ford dealer in favor of plaintiff's administratrix for breach of the implied warranties of merchantability and fitness. *Id.* at 890, 430 S.W.2d at 783. For a reference to these types of implied warranties, *see* note 15 *supra.* The manufacturer had given the dealer an express warranty covering defects in material and workmanship, which included a limitation of remedy to repair or replacement of defective parts. This warranty from Ford to the dealer, like that extended to the purchaser by Uniroyal in *Collins,* was given in lieu of all other warranties, express or implied, and the court invoked the section 2-719(3) presumption to declare the disclaimer of the implied warranties of fitness and merchantability by Ford unconscionable. 244 Ark. at 889, 430 S.W.2d at 781. Thus, despite the court's reliance upon this section, the holding related to disclaimer of warranty rather than to limitation of remedy. As a result, *Tritt* is an apparently incorrect application of the correct section of the Code. The language of the Code itself makes a clear distinction between disclaimer and limitation of remedy. UCC § 2-316(4) makes reference to UCC § 2-719 in regard to such limitation and the official comment to section 2-316 further emphasizes that these are different concepts. UCC § 2-316, Comment 2. This distinction has also been recognized by many commentators discussing means which courts employ in order to invalidate disclaimers. *See* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases,* 18 STAN. L. REV. 974, 995 (1966); Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties,* 64 MICH. L. REV. 1430, 1457-58 (1966).

Nevertheless, *Ford Motor Co. v. Tritt* does illustrate features common to section 2-719(3) case law: inability of the defendant to overcome the presumption; the court's failure to indicate the means of rebuttal; and the actual determination of defect present in all pertinent cases prior to *Collins.*

In Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969), as in *Tritt,* there was a determination of defect. The manufacturer's express warranty and limitation of remedy was the same as that involved in *Tritt,* and the court conceded that UCC section 2-316 permitted disclaimer of warranty. The court nonetheless upheld plaintiff's motion for dismissal of the affirmative defense of disclaimer and/or limitation of warranty, stating that defendants had not offered any proof to rebut the plaintiff's showing that the exclusion of damages for personal injuries was prima facie unconscionable under section 2-719(3). *Id.* at 242, 298 N.Y.S.2d at 540. Thus, *Walsh,* like *Tritt,* is illustrative of the confusion between disclaimer of warranty and limitation of remedy and is not a proper section 2-719(3)

dent to guide it in determining whether Uniroyal had overcome the prima facie finding of unconscionability. Nevertheless, it is submitted that on the facts of the instant case, the *Collins* court did have valid grounds upon which to hold that the section 2-719(3) presumption had been overcome, and, by failing to do so, effectively made the exclusion of consequential damages in the case of personal injury per se rather than prima facie unconscionable.

In *Collins,* the Supreme Court of New Jersey affirmed judgment in favor of plaintiff for breach of express warranty "essentially for the reasons stated in the opinion of the Appellate Division."[29] The lower court had recognized correctly that under section 2-719(3), "limitation of consequential damages for injury to the person in case of consumer goods is *prima facie* unconscionable."[30] However, the Appellate Division determined that there was no evidence in the record to overcome this presumption, without discussing what evidence a defendant would have to adduce to do so. Unlike the Appellate Division, the Supreme Court of New Jersey addressed itself to this question, by way of answering the argument raised in the dissenting opinion that this presumption had been overcome.[31]

Justice Clifford, in dissent, concluded that "where the express warranty goes beyond what is required by the Code and the common law of this state,[32] and where the product is found to be free from defect, the prima facie unconscionability contemplated by the Code has been overcome."[33] He also determined that unconscionability did not otherwise appear.[34] His conclusion that the tire was not defective was based on the contention that the jury's rejection of plaintiff's claim in strict liability in tort indicated that the finder of fact had made a determination that there was "no defect" in the tire,[35] and was buttressed by the fact that neither

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case. However, again like *Tritt,* it demonstrates the features common to section 2-719(3) cases.

29. 64 N.J. at 261, 315 A.2d at 17.

30. 126 N.J. Super. at 406, 315 A.2d at 34 (emphasis by the court).

31. 64 N.J. at 263, 315 A.2d at 18 (Clifford, J., dissenting).

32. By this language, Justice Clifford was referring to the implied warranty of merchantability imposed by UCC § 2-314 (1962). 64 N.J. at 263, 272-73, 315 A.2d at 18, 23-24 (Clifford, J., dissenting). This protection for the consumer was established in the pre-Code case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In *Henningsen,* the Supreme Court of New Jersey determined, *inter alia,* that an implied warranty in favor of an automobile purchaser arose against the manufacturer even if there was no privity between them and that a standard disclaimer clause limiting damages to repair or replacement was void as contrary to public policy. *Id.* at 404, 161 A.2d at 95. The *Henningsen* case has had tremendous influence in the area of products liability and has been widely followed both for its dispensing with privity requirements and for its invalidation of the clause. *See, e.g.,* Lambert, *Justice Francis and Products Liability Law,* 24 RUTGERS L. REV. 426, 429, 434 (1970).

33. 64 N.J. at 268, 315 A.2d at 21 (Clifford, J., dissenting).

34. *Id.* at 270, 275, 315 A.2d at 22, 24 (Clifford, J., dissenting). Justice Clifford applied standards developed in case law interpreting UCC § 2-302, the unconscionability section of the Code, in reaching this conclusion. *See* note 22 *supra* and notes 72-81 and accompanying text *infra.*

35. 64 N.J. at 266, 315 A.2d at 20 (Clifford, J., dissenting). For a discussion of the dissent's reasoning on this last point, *see* notes 60-71 and accompanying text *infra.*

plaintiff's nor defendant's expert witnesses were able to identify or even to suggest a possible defect.[36]

The majority, in rejecting the theory posited by the dissent, relied upon the proposition that this was a warranty for tire failure from *any* cause and therefore "an issue of freedom from defect could not be injected by a defendant into an action for breach of express warranty for any purpose at all."[37] The court initially reasoned that it was improbable that the legislature, being aware of this consideration, intended the presumption created by section 2-719(3) to be negated through a failure to establish existence of a defect in the product.[38] Continuing its analysis on the premise that the existence of a defect was irrelevant in relation to *damages* as well as to liability, the court stated that the plaintiff's joinder of a count in strict liability and the jury's determination on that count should be immaterial, even were such determination to indicate freedom from defect rather than "mere failure of plaintiff to carry her burden of persuasion" on that point.[39]

After rejecting the dissent's basic thesis, the majority proceeded to counter the policy reasons advanced to support it. Justice Clifford emphasized that allowing a limitation of damages in a case such as Uniroyal's where the warranty advanced gave a buyer more than he was entitled to by law would encourage such offers in the future.[40] The majority criticized this position as "not consonant with the commercial and human realities" because of its opinion that a tire manufacturer extends warranties against blowouts in order to increase sales.[41] According to the majority, the nature of defendant's advertising[42] made it more likely that a consumer's

36. 64 N.J. at 266, 315 A.2d at 20 (Clifford, J., dissenting).

37. *Id.* at 262, 315 A.2d at 17.

38. *Id.*

39. *Id.*, 315 A.2d at 17-18. The court stated that "plaintiff should not stand in a worse posture for having joined a claim in strict liability . . . ." *Id.* at 262, 315 A.2d at 18. Thus, the court revealed its favorable inclination toward the injured consumer while casting doubt on the validity of the foundation for the dissent's argument.

40. *Id.* at 272, 315 A.2d at 23 (Clifford, J., dissenting).

41. *Id.* at 262, 315 A.2d at 18.

42. Defendant's advertisements contained statements such as:

> If it only saves your life once, its [sic] a bargain. . . . It could pay off some day. The day you hit a pothole at 70 miles an hour.
>
> The day you sweep around a tricky rain-slicked curve. The day it's 90 degrees in the shade and you have to go 600 miles in a hurry.
>
> The day you pick up a nail and it's three in the morning. You're getting a brute of a carcass that's so strong, you can practically forget about blowouts.

126 N.J. Super. at 408, 315 A.2d at 34-35. At trial, defendant had unsuccessfully objected to the admission of these advertisements into evidence. The Appellate Division approved the trial court's hearing of this evidence, concluding that it helped to explain the scope and intent of the "Road Hazard" warranty and reflected defendant's concept of normal passenger car service. *Id.* at 408, 315 A.2d at 34. The lower court was also of the opinion that because of testimony adduced at trial, the jury could have inferred that decedent relied upon these advertisements when he bought the tires. *Id.* at 408, 315 A.2d at 34.

Although not depicted as actual terms of the express warranty, the manufacturer's advertisements and the expectations which they created in the consumer were salient factors in the supreme court's decision that the presumption of unconscionability had not been overcome. However, it is submitted that a somewhat different methodology should have been employed. The narrow issue under section 2-719(3) should have been considered successfully met by defendant from the fact of the implicit finding of "no defect" by the jury — a party who is totally free from "fault" as

decision to purchase arose from a desire to protect the purchaser and his passengers from personal injury or death in the event of a blowout rather than to assure himself of a price refund in such a case.[43] Consequently, in holding the seller to the realization that this was the motivating factor behind the purchase, the *Collins* court considered the exclusion of consequential damages "patently unconscionable"[44] under section 2–719(3).

The majority's basic premise — that the issue of freedom from defect was irrelevant to a cause of action for breach of express warranty — was undoubtedly correct as applied to Uniroyal's "Road Hazard" guarantee.[45] Nevertheless, the court's opinion that the question of defect *vel non* was therefore irrelevant to the question of damages as well as to liability[46] failed to answer the dissent's argument. While the plaintiff's right to recover damages in *Collins* admittedly did not hinge upon the existence of defect in the tire, a determination of "no defect" may have an important bearing on the conscionability of a contractual limitation upon the type and amount of damages recoverable, as the dissent argued.

The UCC employs the concept of "unconscionability" as a safeguard to protect the consumer,[47] while also adopting the concept of freedom of contract.[48] It specifically permits the parties to agree between themselves to limit or modify the amount of damages recoverable.[49] In other words,

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contemplated by personal injury law can hardly be considered guilty of unconscionable conduct in not assuming liability for consequential damages. Plaintiff then could have proceeded to show affirmatively the unconscionable character of defendant's conduct, offering the advertisements as evidence of a creation of expectations. The court would have been free to find that the frustration of such expectations would be unconscionable, and consequently refuse to enforce the limitation of remedy. Alternatively, the court could have found the advertising to have constituted an express warranty, separate from the written "Road Hazard" warranty and hence unaffected by the limitation of damages. Thus, the court could have found for the plaintiff independently of the section 2 — 719(3) presumption.

While the results under either approach would have been identical to those reached by the court, it is submitted that they could nonetheless have been reached by a materially different route comporting with the intended operation of section 2–719(3). Furthermore, either would have allowed a more realistic and convincing assessment of the evidence than did the method employed in *Collins*.

43. 64 N.J. at 263, 315 A.2d at 18.

44. *Id.*

45. Breach of express warranty is dependent upon the terms of the warranty itself. The existence of a defect may constitute a breach of an express warranty. The warranty provision in Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968), provided an example of this type of situation. *See* note 28 *supra*. However, the terms of the "Road Hazard" guarantee under consideration in *Collins* do not mention defect. *See* note 4 *supra*.

46. 64 N.J. at 262, 315 A.2d at 17–18.

47. UCC §§ 2–302; 2–719(3). Courts have found unconscionability under section 2–302 in purely commercial settings. *See, e.g.*, UCC § 2–302, Comment 1. However, they are more readily disposed to make such a determination where a consumer enters into a contract of adhesion with a commercial entity. This disposition reflects a tendency to use the concept where the parties are less likely to have equal bargaining positions. *See* WHITE & SUMMERS, *supra* note 12, §§ 4–2, 4–3. Similarly, UCC section 2–719(3) makes the limitation of consequential damages for personal injury prima facie unconscionable in the case of consumer goods, while it does not do so where the loss is purely commercial.

48. *See* note 20 *supra*. Section 1–102(3) of the Code provides that "the effect of provisions of this Act may be varied by agreement, except as otherwise provided in [UCC] § 1–102(3)."

49. UCC §§ 2–316(4); 2–718; 2–719. *See* notes 21–23 and accompanying text *supra*.

remedy limitation is not synonymous with unconscionability and does not automatically render a contract invalid. Where a manufacturer and a consumer agree to limit the amount of or exclude consequential damages, and personal injury results, the UCC's policing device in section 2–719(3) makes such agreement *prima facie* but not *per se* unconscionable. This favorable attitude toward freedom of contract and the language of section 2–719(3) itself indicate the UCC's intent to allow a defendant in a case such as *Collins* to rebut the presumption of unconscionability.[50] In view of the UCC's scheme, a jury finding of "no defect" in a case such as the instant one should be relevant to the issue of damages.[51] The majority's reasoning to the contrary was inadequate.[52]

The dissent's approach provides a feasible solution to the problem of what showing is necessary in order for a defendant to overcome the presumption. If carefully limited, as the dissent emphasized, to the *Collins*-type situation wherein a defendant manufacturer has given an express warranty covering an aspect of the product which is unrelated to defects *and* this warranty guarantees a purchaser more protection than that implied by law,[53] a jury finding of "no defect" would provide the basis for a simple, clear-cut rule which would carry out the UCC's intent.[54] Furthermore, the dissent's method is particularly efficacious since it is not dependent upon joinder by plaintiff of a count in strict liability.[55] Justice Clifford proposed that, in order to allow the court to make a determination of unconscionability,[56] the trial judge should instruct the jury to

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50. *See* 64 N.J. at 267–68, 315 A.2d at 20–21 (Clifford, J., dissenting).

51. The issue of "no defect" is relevant at least in relationship to the question of the unconscionability of the limitation of consequential damages. *But see* notes 37–39 and accompanying text *supra*.

52. Since the majority's holding arguably has the effect of a determination that limitation of consequential damages in a case such as *Collins* is per se rather than prima facie unconscionable, it creates an anomaly. The court would apparently follow the Code and allow *disclaimer* of all express warranties (*see* UCC § 2–316), while at the same time forbidding limitation of remedy for a warranty *extended*, contrary to the plan outlined by UCC § 2–719. For criticisms of this situation arising under the Code's scheme, *see* R. DUSENBERG & C. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 7.03, at 7–47 n.30 (1969); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap to Article Two*, 73 YALE L.J. 199, 282–83 (1966); Speidel, *The Virginian "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 838 (1965).

53. Under UCC § 2–314, the implied warranty of merchantability, which covers defects in the product, arises by operation of law. In New Jersey, in some instances, this warranty cannot be disclaimed, and so protection for the consumer is provided, to an extent, even if no express warranty is extended by the manufacturer. *See* note 32 and accompanying text *supra*.

54. The dissent's position would allow rebuttal of the prima facie unconscionability of § 2–719(3), while allowing for freedom of contract to the manufacturer. At the same time, the implied warranty of merchantability, in circumstances where it is not subject to disclaimer, would assure that the manufacturer was not protecting himself at the expense of the consumer. *See* notes 32, 53 and accompanying text *supra*.

55. The majority expressed the opinion that plaintiff in the instant case should not be penalized for joining a count in strict liability. *See* note 39 *supra*.

56. As a procedural matter, the determination of unconscionability is a question of law for the court. *See* UCC § 2–302.

return a "special verdict" upon all relevant issues of fact.[57] With these answers, the judge could make his determination without regard to the matter of a defendant's strict liability in tort.

Despite the appealing simplicity of the "no defect" approach, it does present difficulties. One problem is whether an adverse finding on the strict liability count actually indicates a jury determination of "no defect." The majority suggested that the jury verdict could also indicate that plaintiff failed to meet her burden of proof.[58] However, this argument is rebutted by Justice Clifford's observation that due to the jury's verdict that the express warranty had been breached,[59] and the obvious unreasonably dangerous character of the product,[60] all of the elements of a cause of action in strict liability were present — except for a defect. As a result, the jury's denial of recovery on the strict liability count must have been based upon a finding that no defect existed. Furthermore, although the possibility of alternative interpretations of the jury decision exists, this objection has validity only in the instant case. It would not affect determinations made independent of a strict liability claim using the practical approach outlined by the dissent.[61] In this respect, the "no defect" premise presents minor difficulties.

However, whether a showing of "no defect" is appropriate evidence to overcome the section 2-719(3) presumption raises a more serious issue. In enunciating this theory, the dissenter countered the majority's contention regarding legislative intent[62] by stating that his colleagues' conclusion did not follow "either in logic or in law" from the irrelevance of the existence of defect to breach of the Uniroyal express warranty.[63] As support for this thesis, the dissent argued that the legislature intended "something" to negate this presumption, and that in consideration of the lack of precedent on this point, it was "not unreasonable nor inequitable nor contrary to the likely legislative intent" to adopt this approach.[64] Both the majority and the dissent were less than authoritative in their respective discussions of this point since their statements about legislative intent were entirely

57. 64 N.J. at 274, 315 A.2d at 24 (Clifford, J., dissenting). The "special verdict" is a procedural device whereby the jury specifically indicates its determination of particular issues of fact.

58. *Id.* at 262, 315 A.2d at 18.

59. Since proximate cause and damages, two elements of a cause of action in strict liability, are also elements of a cause of action for breach of an express warranty, the jury verdict on the warranty claim indicated that these elements were present. *Id.* at 266 n.4, 315 A.2d at 20 n.4 (Clifford, J., dissenting).

60. With respect to the dangerousness of the product, Justice Clifford stated that

> [I]t is theoretically possible that the jury found the product to be defective but not unreasonably dangerous and based their verdict on the absence of that element. But as a practical matter it strikes me that such an analysis of the jury's verdict is totally unrealistic on the facts of this case. There appears to be no way that a defective tire which proximately causes a vehicular accident could not be unreasonably dangerous.

Id. (Clifford, J., dissenting).

61. *See* notes 56–57 and accompanying text *supra.*

62. *See* note 38 and accompanying text *supra.*

63. 64 N.J. at 267, 315 A.2d at 20 (Clifford, J., dissenting).

64. *Id.* at 268, 315 A.2d at 21 (Clifford, J., dissenting).

conclusory, and made without any citation to legislative history. The only authority cited by the dissent were cases in which the products involved were determined to be defective.[65] Justice Clifford emphasized the existence of defect in these cases, thus implying support for his contention that freedom from defect was determinative on the unconscionability issue.[66]

Unfortunately, the cited cases did not directly provide a connection between existence of defect and unconscionability. In two of the cases,[67] it was *necessary* to prove existence of a defect in order to recover damages because the manufacturer warranted only against defects,[68] unlike Uniroyal which warranted against tire failure "from any cause."[69] Therefore, without proof of a defect in those cases, there would have been no issue of the unconscionability of limiting damages since the plaintiffs would not have been entitled to recover. In addition, the third case cited by Justice Clifford, *Ford Motor Co. v. Reid,*[70] was inapposite because it involved no personal injury and therefore no presumption of unconscionability, regardless of the existence of any defect. Thus, it appears that there is no direct support in the case law for the dissent's approach. However, as the opinion points out, neither is there case law with which this rule would conflict.[71] Furthermore, these cases could lend themselves to an alternative interpretation that rebuttal is *possible* only where there is no defect in the product. Consequently, the "no defect" principle should not be overlooked as a viable solution to the question of what showing is necessary to negate the prima facie unconscionability of section 2–719(3), at least as limited

65. *See* notes 90–95 and accompanying text *infra.*

66. 64 N.J. at 268, 315 A.2d at 21 (Clifford, J., dissenting).

67. Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968); Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969). For a brief discussion of both of these cases, *see* note 28 *supra.*

68. In Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968), the plaintiff brought an action for breach of the implied warranty of merchantability, while in Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969), the plaintiff brought an action for breach of the implied warranty of merchantability and an express warranty against defects. *See* note 28 *supra.*

The implied warranty of merchantability arises under UCC § 2–314 which, by defining merchantable goods, implies that unmerchantable goods are defective goods. According to section 2–314,

> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and . . .
> (c) are fit for the ordinary purposes for which such goods are used; and . . .
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.

UCC § 2–314(2). The official comment to this section makes clear that this definition of merchantability is not all-inclusive. UCC § 2–314, Comment 6. In a strict liability setting, "defective product" has been defined in a manner analogous to the definition given in section 2–314. For example, a defective product has been defined as one which "fails to match the average quality of like products," or deviates from the norm, or is dangerous beyond the contemplation of the ordinary user. Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363, 367, 370 (1965). Similarly, such a product has been defined as one which could have been made safe through installation of a feasible safety device. Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972). *See* 4 SETON HALL L. REV. 397 (1972).

69. For the terms of Uniroyal warranty, *see* note 4 *supra.*

70. 250 Ark. 176, 465 S.W.2d 80 (1971).

71. 64 N.J. at 268, 315 A.2d at 21 (Clifford, J., dissenting).

to the *Collins* type situation. Indeed, this rule comports with the implication which arises from the phrase "prima facie," that rebuttal is possible. Still, in spite of the appealing simplicity of the dissent's approach, it may be subject to the challenge that it is not truly consistent with the concept of unconscionability.

Unconscionability, as considered under section 2–302, the principal UCC provision on this subject, relates both to the bargaining process[72] and to the terms of the contract itself.[73] From the case law interpreting section 2–302 it appears that elements of both procedural and substantive inequities must appear in order for a court[74] to make a determination that unconscionability is present.[75] In *Williams v. Walker-Thomas Furniture Co.*,[76] one of the earliest cases mentioning section 2–302, the court cited the section[77] in remanding for findings on the issue of unconscionability. The *Walker-Thomas* court stated:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.[78]

Since *Walker-Thomas,* most courts have applied this standard, requiring some measure of lack of meaningful choice (procedural unconscionability) plus one-sided contract terms (substantive unconscionability) in order to make a positive determination.[79] However, it is at least arguable that in

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72. Unconscionability in the bargaining process, or "procedural unconscionability," relate to the balance of power between the parties to a contract. *See* Leff, *supra* note 22, at 489–508; Spanogle, *supra* note 22, at 944.

73. Unconscionability in the terms of the contract, or "substantive unconscionability" exists when the terms themselves are harsh or oppressive. According to the official comment to section 2–302:

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948)) and not of disturbance of allocation of risks because of superior bargaining power.

UCC § 2–302, Comment 1. *See* Leff, *supra* note 22, at 509–28; Spanogle, *supra* note 22, at 944.

74. UCC § 2–302(1). For the text of this section, *see* note 22 *supra.*

75. *See* WHITE & SUMMERS, *supra* note 12, at § 4–7; Spanogle, *supra* note 22, at 943, 950.

76. 350 F.2d 445 (D.C. Cir. 1965).

77. Although the court cited section 2–302, it had not been enacted in the District of Columbia at the time of the decision. *Walker-Thomas* presented a situation wherein a welfare mother signed a complex cross-collateral agreement, which, in effect, provided Walker-Thomas, a large furniture store, with a security interest in all purchased items until the total balance of all these items was paid. Plaintiff defaulted after paying nearly the total amount, and Walker-Thomas replevied the collateral. *Id.* at 447.

78. *Id.* at 449.

79. *See* Leff, *supra* note 22 at 539–41; Spanogle, *supra* note 22, at 954–69. Procedural unconscionability has seemingly been defined to include aspects of consumer ignorance — which a court assumed to be present — along with disreputable conduct by the seller, such as including oppressive terms not noticed by or comprehensible to the consumer buyer. *See, e.g.,* Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969) (Spanish-speaking plaintiff unable to read contract written in English). Although nearly all the cases finding procedural unconscionability have involved plaintiffs disadvantaged in terms of knowledge or wealth, courts have not limited unconscionability discussions to these classes of consumers. As illus-

two cases, *American Home Improvement, Inc. v. MacIver*,[80] and *Toker v. Westerman*,[81] substantive unconscionability alone was sufficient.

If the weight of the affirmative showing necessary for a plaintiff to establish unconscionability under section 2–302 were also required of a defendant to rebut the presumption of unconscionability created under section 2–719(3), the dissent's position could be supported, provided unconscionability may be found where there is only substantive unconscionability, *i.e.*, oppressive terms. Clearly, where used to avoid liability resulting from the effects of a defective product, the contractual limitation of remedy falls within the category of substantive unconscionability.[82] However, where an express warranty covers aspects *other* than defect,[83] the character of the product — that is, whether defective or non-defective — could be determinative in assessing the unfairness of such limitation. Thus, the dissent's position does have merit, at least in the limited situation presented by *Collins*. Moreover, even if both procedural and substantive unconscionability must be present, the dissenting thesis could still be viable if one further element were added, *viz.*, the requirement that the court must also find the clause in question to be conspicuous and understandable on the face of the contract.[84] While this would establish procedural conscionability, it might unduly complicate the test. Objection might be raised that it is a fiction that consumers, whether middle-class or disadvantaged, actually read the contract. Furthermore, this could introduce a variable which would lead to different results depending upon the classification of the plaintiff.[85]

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trated by the New Jersey Supreme Court's pre-Code decision in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), even a middle-class consumer may have no bargaining power in relation to a large organization or an industry possessing monopolistic tendencies. *See generally* WHITE & SUMMERS, *supra* note 12, at § 4–3.

Courts have found substantive unconscionability in cases falling within two main categories: 1) those involving excessive price and 2) those involving creditor manipulation of his own or the debtor's remedial rights, as in *Collins*. *See, e.g.*, American Home Imp., Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (excessive price); Denkin v. Sterner, 10 Pa. D.&C.2d 203 (C.P. 1956) (liquidated damage clause unconscionable).

80. 105 N.H. 435, 201 A.2d 886 (1964). In *MacIver*, as an alternative holding, the court declared the contract unconscionable because of excessive price. The buyer-defendants were apparently middle-class homeowners. *Id.* at 439, 201 A.2d at 889.

81. 113 N.J. Super. 452, 274 A.2d 78 (Dist. Ct. 1970). The court determined that the contract for sale of an appliance purchased from a door-to-door salesman was unconscionable because of excessive price. *Id.* at 454, 274 A.2d at 80. There was apparently no procedural unconscionability, unless the door-to-door aspect of the sale can be viewed as creating a more pressured environment for the transaction.

82. *See* note 79 *supra*.

83. If the product is defective, any such limitation of remedy by a manufacturer could be considered substantively unconscionable because of the greater probability that injury will occur. *See* note 79 *supra*.

84. *See* UCC § 1–201(10) for the definition of "conspicuous." However, a requirement that limitation of remedy must be conspicuous would, to a certain extent, confuse limitation of remedy with disclaimer of an implied warranty of merchantability or of fitness for particular purpose under UCC § 2–316(2). *See* note 28 *supra*.

85. Different standards might be applied depending upon the intelligence or wealth of the plaintiff, thus defeating the omni-inclusiveness of the "no defect" rule standing alone. *See* note 79 *supra*.

Although the dissent's test for rebuttal may be practical only if substantive unconscionability may be considered, it is more valid theoretically than the majority's. The majority reached a decision apparently based upon a policy decision to protect the consumer, rather than upon the seemingly clear intent of the UCC to the contrary.[86] As a result, the *Collins* court has effectively foreclosed what would have appeared to have been the only reasonably available means of rebuttal, thus arguably having rewritten section 2–719(3) to read "per se" rather than "prima facie." In light of this interpretation, it is submitted that, even were the dissent's rule for rebuttal not acceptable, other courts should avoid doing such violence to the letter and spirit of the Code. They must, at a minimum, realistically review the available evidence and judge the conduct of the manufacturer in the light thereof. The Code, by constructing a prima facie standard, clearly anticipated that there would be circumstances wherein the manufacturer's conduct might be judged to be fair *when viewed with the evidence.* Although this is a more complex approach than the dissent's, it would more conform to the scheme of the UCC.[87] This mode of analysis obviously would not be as favorable as the dissent's to a manufacturer who has given an express warranty beyond that implied by law. Under the "no defect" principle of rebuttal, once lack of defect was shown, the burden of proof would shift, requiring the plaintiff to affirmatively establish unconscionability. Absent the "no defect" method, the burden would remain with the defendant, and it therefore would be more difficult for him to prevail. Obviously, the majority in *Collins* has chosen to go beyond the generous limits of the Code in protecting the consumer by leaving a burden of proof upon the defendant manufacturer which is impossible to meet. Even if the court's questionable legal analysis is accepted, the question of the economic wisdom of this policy with relationship to the tire industry in particular, and to commercial dealings in general, remains.

If it be assumed that sellers will continue to offer express warranties, as the majority believes they will,[88] the effect of the *Collins* decision is to impose upon the producer an additional cost of doing business.[89] Manufacturers understandably will shift as much of this cost increase as possible

86. *See* notes 20–21 and accompanying text *supra.* The majority's decision is not surprising, however. The considerations reflected by the opinion in *Collins* parallel the trend which has extended manufacturers' strict liability in tort. *See* text accompanying note 94 *infra.* Also, at least one similar decision regarding liability of manufacturers for breach of express warranty has been made in a pre-Code setting. In Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971), the Supreme Court of North Carolina refused to enforce a contractual limitation of damages clause in a contract between a seed-seller and a farmer where purely economic loss was involved, because it determined that the clause was against the public policy of the state.

87. *See* notes 72–75 and accompanying text *supra.*

88. *See* 64 N.J. at 262, 315 A.2d at 18. *See* note 41 and accompanying text *supra.*

89. In order to maintain the economic viability of their organizations, New Jersey businessmen may be forced to provide for protection from what is at least arguably a new form of liability imposed by the *Collins* court. Insulation from this liability may be accomplished through self-insurance, whereby a business entity establishes a fund from which claims can be paid, or through the procurement of an additional insurance policy. In either event, there will be a cost increase to the producer.

to the consumer in the form of higher prices.[90] The wisdom of the court's effectively creating higher prices is particularly dubious where a non-defective product is involved.[91] No longer is the buyer the one able to decide whether his utility is maximized by paying for protection against injury resulting from a non-defective product.[92] This choice has been virtually foreclosed by the New Jersey Supreme Court's new form of social insurance.[93]

Since the *Collins* decision in effect imposes strict liability upon the defendant who uses this type of warranty, it is apparently founded, as is the theory of strict liability, on the premise that the manufacturer is more capable of bearing the economic loss involved, since he can spread the cost of the loss over a greater number of people.[94] However, since continued extension of this warranty to the consumer means an increased price for a product which the consumer must, for practical purposes, continue to buy,[95] this type of decision may actually be harmful to the consumer in the long run. This is especially true since usually the consumer also must pay for both life and health insurance to cover the type of injury sus-

90. To preserve their existing profit margins, manufacturers will strive to impose the full cost of insuring against liability for personal injury involving non-defective products. How successful this effort will be, *i.e.*, what percentage of the new cost the seller will be able to shift to the consumer, depends upon the elasticity of demand for particular products. Elasticity varies between products within the same class, as well as between different product classes. For an explanation of the concept of demand elasticity and the ability of the seller to shift cost increases to the buyer, thereby preserving his profits, *see generally* G. STIGLER, THE THEORY OF PRICE (3d ed. 1966).

91. The courts have imposed strict liability in tort on a seller who delivers a defective product. *See, e.g.*, Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). *Greenman* was the first case wherein a court applied Section 402A of the RESTATEMENT (SECOND) OF TORTS. *See* note 2 *supra*.

As a policy matter, it is felt that the high probability of personal injury arising from the operational failure of a defective product is a sufficient reason to impose the role of an insurer upon the seller. Since the seller is profiting as the producer of a product which is likely to cause harm, it is fair that he bear the cost of any loss attributable to his inadequate workmanship. Absent this causal relationship, however, as in the case of the sale of a non-defective product, it is much less clear that the consuming public will be benefited. *See* note 92 *infra*.

92. Due to the decision in *Collins*, if the buyer is to acquire the product at all, he *must* pay his proportionate share of his seller's insurance cost. Given the alternative, many consumers may have preferred to spend their incomes in other, more satisfying manners. *See* G. STIGLER, *supra* note 90, ch. 4.

93. The decision to promulgate a per se rule with regard to UCC § 2-719(3) has the effect of indemnifying those buyers who are injured by the extraction of a higher commodity price from those who continue to purchase.

94. *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). The use of a large entity to spread the loss suffered by an unfortunate few is an appealing concept. It is appropriate where injury is caused by the manufacturer of a defective product. However, where the product involved is not defective, the imposition of liability solely for the purpose of spreading loss raises serious questions regarding the optimal allocation of society's scarce resources. For a discussion of the most efficient means by which to allocate resources, *see* G. STIGLER, *supra* note 90, ch. 4.

95. Tires in particular are a rather inelastic commodity, due in part to the lack of an adequate substitute. The more inelastic a product, the easier it is to force consumers to suffer a price increase. *See* note 90 *supra*. Of course, whether there will be a cost increase depends upon the validity of the majority's assumption that tire manufacturers will continue to offer a warranty. A manufacturer has the alternative of eliminating the warranty, thereby removing the risk of damage claims arising from the failure of non-defective tires.

tained in the instant case.[96] Consequently, the court ultimately may have injured the consumer by increasing his burden.[97] In any event, consumer-plaintiffs already have available a remedy in strict liability in tort, and the trend is toward extending manufacturers' liability under this theory;[98] a decision contrary to that in *Collins* would not necessarily prevent these economic consequences from later arising within a different legal framework.

In summary, then, *Collins v. Uniroyal, Inc.* seemingly did violence to both the letter and the spirit of the UCC by transforming a presumed-to-be-rebuttable standard into one in practice insurmountable; it portends the withdrawal of a measure of added value from sales by manufacturers who now must fear going beyond the confines of legally imposed warranties; and it potentially imposes upon the consumer, whose buying power is steadily being eroded, a further burden not necessarily justified and clearly not invited. In other words, *Collins* represents questionable law, and, it is submitted, should not be followed by other courts seeking sound precedent in a difficult area.

Katherine A. Bomba

96. Injury involving non-defective products is merely one of many contingencies against which health and life insurance seek to protect. For this reason it is doubtful that New Jersey policyholders will now discontinue their coverage. But it is clear that they will be paying higher commodity prices as a result of *Collins*.

97. For discussion of the economic impact of various solutions to products liability problems, *see generally* Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Cowan, *Some Policy Bases of Product Liability*, 17 STAN. L. REV. 1077 (1965); Keeton, *Products Liability — Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 (1970).

98. *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).