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Susan J. Macaulay

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Causes of Action in Computer Litigation: Special Problems for the Small or First Time User

INTRODUCTION

Rapid advances in the field of computer¹ technology during the past two decades have enabled an increasing number of smaller businesses to automate what were once strictly manual operations.² These new users of computer equipment and services typically have no in-house computer personnel and no prior data processing experience or training.³ Therefore, when deciding whether to purchase or lease particular systems, these "uneducated" users must rely upon the specialized product information given to them by the vendors' more experienced representatives.⁴ This element of reliance transforms the computer sale from a transaction between two business persons dealing at

1. A computer may be described as a device or series of devices capable of receiving data (called input), performing arithmetical and other processing functions and producing outgoing data (called output). The physical machinery comprising a computer is known as hardware. The functions that a computer performs are determined by sets of instructions known as programs or, collectively, as software. See generally R. STERN & N. STERN, *PRINCIPLES OF DATA PROCESSING* (2d ed. 1979).

2. The two most significant factors in this trend toward automation are the decreasing cost of acquiring computers and the development of smaller, more sophisticated systems. Benn & Michaels, "Multi-Programming" *Computer Litigation*, 64 CHI. B. REC. 32 (1982); Falk, *The Small Computer Stands Tall*, *NATION'S BUS.*, Apr. 1981, at 75, 78.

3. Thus, there is significant potential that these uneducated users may sign vendors' standard form contracts without knowing enough about computer systems or contracts to protect themselves. See Benn & Michaels, *supra* note 2, at 33.

The provisions contained in these standard form documents are usually general and written so as to protect the vendor, rather than the user. The larger, more experienced buyer who is negotiating a large dollar purchase or lease may be both knowledgeable and powerful enough to force the vendor to include provisions (usually in the form of "Additional Terms and Conditions") to protect his own interests. In some cases, the large buyer may even persuade the vendor to substitute the standard form agreement with one drafted and negotiated by both parties and tailored to the user's specific data processing requirements.

In many cases, however, particularly where the small, first time buyer is concerned, the only parts of the contract tailored to the particular needs of the user are the buyer's name, the list of equipment model and serial numbers, the prices, and the delivery dates. See *infra* notes 72, 87 and accompanying text.

4. Until very recently, however, computer vendors have been accustomed to dealing with larger, more knowledgeable buyers. Furthermore, smaller accounts representing lower commissions are often assigned to the vendor's younger, less experienced account

arm's length to one resembling a consumer sale.⁵

In the majority of these transactions, there are no major problems; the buyer gets a computer system that performs exactly as expected in a timely, cost-effective manner. In many cases, however, the results fall far short of the user's expectations,⁶ and the user sues.⁷

Thus far, traditional causes of action have given the new, small user little relief.⁸ The courts have failed to deal satisfactorily with the recurring problems generated by computer sales.⁹ They have continued to treat the small user as a business person dealing at arm's length, regardless of the inherent disparity in knowledge, expertise, and bargaining power which typically

representatives. This custom creates an ironic situation. In general, the larger the account, the less experienced the sales representative needs to be. The large-scale buyer usually has its own experts to evaluate the vendor's proposals and make recommendations. The smaller, less-experienced user, on the other hand, relies heavily on the vendor's experience to evaluate the business's needs. The new user expects the purchase or lease price he pays to include the cost, and therefore the benefit, of the vendor's superior knowledge and experience. See Benn & Michaels, *supra* note 2, at 33 (describing a typical transaction between the inexperienced buyer and the more knowledgeable computer vendor and the reliance element involved).

5. Cf. *Dunn Appraisal Co. v. Honeywell Information Sys., Inc.*, 687 F.2d 877, 879-80 (6th Cir. 1982) (users, who had little knowledge of computers, were justified in relying upon vendor's statements concerning the suitability and capabilities of its computer); *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 183 (8th Cir. 1971) (inexperienced user was justified in relying upon vendor's expertise in the field of data processing; the inherent inequality of knowledge between the parties therefore supported the user's claim of fraudulent misrepresentation against the vendor). *But cf.* *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919, 923 (E.D. Wis. 1977) (court refused to consider the disparity in knowledge between the user and the vendor a significant factor in evaluating the user's claim of unconscionability concerning a contractual disclaimer of warranties).

6. The user's expectations may or may not be realistic and are often influenced by such factors as lack of knowledge and experience, the mystique of the "black box," a desire to achieve as quickly as possible the increased efficiency and lower costs (real or imagined) automation may provide, no prior bad experiences in automation to induce a more cautious approach, and the promises of overzealous computer salespersons.

See Benn & Michaels, *supra* note 2, at 32-33; Pollack, *When Computers Don't Work*, N.Y. Times, Oct. 23, 1981, § 3 (Business Day), at 1, col. 3.

7. Litigation concerning computers is one of the fastest growing areas of law in the United States judicial system today. It has been estimated that by 1985, computer-related litigation will be exceeded in volume in the United States only by personal injury suits. Johnson, *Explosion in Industry Lawsuits Seen by '85*, COMPUTERWORLD, June 1, 1981, at 16, col. 1.

8. These traditional causes of action include breach of contract, breach of express and implied warranties, and fraud. See *infra* text accompanying notes 69-113, 125-38.

9. See Pollack, *supra* note 6, at 1, cols. 4-5, at 42, cols. 1-2.

exists between the vendor and buyer in these cases.¹⁰ The courts have also failed to take into account the unusually heavy losses a small business experiences when a computer system fails.¹¹

Because small users have been unable to obtain relief under traditional causes of action, plaintiffs have begun to invoke an increasingly wider range of actions.¹² This note presents a survey of those actions. It begins with a brief history of computer-related litigation and the development of the various causes of action available to the aggrieved computer user. It then examines the current state of the law and the particular problems posed for small, first time users. The note concludes with a discussion of future trends in computer litigation and offers an alternative approach to the causes of action currently available to the plaintiff-user.

THE DEVELOPMENT OF COMPUTER-RELATED LITIGATION

The Early Cases

Lawsuits involving computer equipment and software are a relatively new subject of litigation.¹³ Prior to 1972, only five major cases arose involving the acquisition of computer equipment.¹⁴ All were decided by federal courts and litigated under

10. See, e.g., *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919, 923 (E.D. Wis. 1977) (where the court cited plaintiff's status as a business person in refusing to allow a claim of unconscionability against certain provisions of the vendor's standard form contract).

11. See, e.g., *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979) (user claimed that because of the failure of the computer system it had acquired from Honeywell, the company was forced to declare bankruptcy). See also Pollack, *supra* note 6, at 1, col. 3 (describing the potential effects of a computer failure on a small business).

12. These newly employed causes of action include negligent misrepresentation, negligence, computer malpractice, and unfair business practices.

13. Computers are a relatively new aspect of commercial life. The first commercial computer, known as the Univac I, was delivered to the Census Bureau in 1951. Since then, the technology of the digital computer has progressed through three major "generations" of development and has now entered the fourth generation. R. STERN & N. STERN, *supra* note 1, at 21.

The growth of automation in small businesses has been one of the most dramatic aspects of the development and use of commercial computers. For example, in 1981, approximately 80,000 minicomputers, costing more than \$768 million, were sold to small businesses. Estimates are that sales in 1983 will exceed 200,000, costing more than \$1.8 billion. *A Business That Defies Recession*, BUS. WEEK, Oct. 25, 1982, at 30, 31.

14. *Lovable Co. v. Honeywell, Inc.*, 431 F.2d 668 (5th Cir. 1970) (undergarments manufacturer sued the lessor of its computer equipment for damages caused by lessor's failure to provide a system which performed as contractually specified); *Sperry Rand Corp. v.*

the substantive laws of the forum state.¹⁵

In the earliest of these cases, *Sperry Rand Corp. v. Industrial Supply Corp.*,¹⁶ the plaintiff, a distributor of agricultural and industrial equipment, became dissatisfied with the performance of the Univac 60 computer it had acquired from the defendant¹⁷ and brought suit to rescind the contract. Industrial Supply asserted three causes of action in support of its claim against Sperry Rand: breach of express warranty,¹⁸ breach of implied warranty of fitness,¹⁹ and misrepresentation.²⁰ The court upheld the breach of implied warranty claim, dismissing the other

Industrial Supply Corp., 337 F.2d 363 (5th Cir. 1964) (agricultural and industrial equipment distributor sued the vendor of its computer equipment for damages and rescission based on vendor's failure to provide a system which operated as warranted); *Computer Servicecenters, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971); *Honeywell, Inc. v. Lithonia Lighting, Inc.*, 317 F. Supp. 406 (N.D. Ga. 1970) (computer lessor sued a user, a manufacturer of industrial lighting fixtures, for failure to make lease payments, the user counterclaiming breach of contract on the part of the lessor); *Clements Auto Co. v. Service Bureau Corp.*, 298 F. Supp. 115 (D. Minn. 1969), *aff'd in part, rev'd in part*, 444 F.2d 169 (8th Cir. 1971) (auto parts distributor sought reformation or rescission of its computer contract on the basis of vendor's failure to provide a system which performed as represented).

15. Jurisdiction in all five cases was based on diversity of citizenship and amount in controversy in excess of \$10,000. 28 U.S.C. § 1332 (1976 & Supp. I 1977). A federal court having jurisdiction based on diversity of citizenship must apply the substantive law of the forum state, i.e., the law which would be applied by the state court in which the federal court is located. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

16. 337 F.2d 363 (5th Cir. 1964).

17. *Id.* at 367.

18. Under the Uniform Commercial Code (U.C.C.) § 2-313 (1)(a) (1978), an express warranty may be created by "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."

The sale of computer hardware and software has been held to be a sale of goods and thus subject to the U.C.C. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765, 768 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 604 F.2d 737 (2d Cir. 1979). See Note, *Computer Programs as Goods Under the U.C.C.*, 77 MICH. L. REV. 1149 (1979).

19. At common law, unless otherwise legally imposed, no warranties attached to a contract for the sale of goods except those expressly stated in the contract. Under 1964 Florida law (the forum state's law in Industrial's case), there were two implied warranties: a warranty that the article in question would be fit for the purpose for which it was to be applied and a warranty that the goods would be fit for the ordinary purpose for which such goods were used (i.e., that the goods were merchantable). *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363, 369 (5th Cir. 1964).

The U.C.C. currently recognizes both the implied warranty of fitness for a particular purpose and the implied warranty of merchantability recognized under Florida law. U.C.C. §§ 2-315, 2-314 (1978).

20. It is not clear whether Industrial was claiming negligent or fraudulent misrepresentation, or both. The court stated only that Industrial averred that "false representations were wilfully, recklessly or negligently made by Sperry Rand." 337 F.2d at 365.

causes of action as not supported by the facts.²¹

The court based its decision on three grounds. It found that a breach of implied warranty was established because Sperry Rand knew of the intended use of the equipment, the user was justified in relying upon the seller's judgment in making the purchase, and the equipment was not capable of fulfilling this purpose.²² Although the integration clause²³ contained in the contract²⁴ precluded the court from considering any prior understandings or agreements, the court decided that under Florida law the clause did not preclude the operation of the implied warranty of fitness.²⁵ Sperry Rand was therefore found liable.²⁶

The second case, *Clements Auto Co. v. Service Bureau Corp.*,²⁷ arose five years later under Minnesota law. Clements Auto, an auto parts distributor, sued the defendant vendor due to the inadequate performance of its inventory control system.²⁸ Clements sought reformation of the contract, or in the alternative, rescission of the contract on the grounds of breach of implied warranty, breach of contract, and fraudulent misrepresentation.²⁹

21. When a party seeks rescission of a contract, it asks the court to put the parties where they would have been had the contract never been made. The court awarded Industrial rescission plus damages for Sperry Rand's breach of its implied warranty of fitness, dismissing the other two causes of action as not supported by the facts. In granting the award of rescission, the court decreed that Industrial should return the computer equipment, and, in return, that Sperry Rand should pay to Industrial the original purchase price of the equipment, plus certain incidental charges and expenses. *Id.*

22. *Id.* at 369-70.

23. The term "integration clause" denotes any statement in a writing which asserts that the terms of that writing constitute the complete agreement between the parties. Corbin states that where a valid integration clause is included in a contract, "antecedent understandings and agreements [are] not admissible to vary or contradict [the] writing." 3 A. CORBIN, CONTRACTS § 576 (1960).

24. The integration clause in the written agreement signed by Industrial and Sperry Rand read in relevant part: "The entire Agreement between the parties with respect to the subject matter hereof is contained in this Agreement and no representation, except when made in writing by a duly authorized officer . . . shall be deemed to be part of this Agreement, . . ." 337 F.2d at 370.

25. *Id.*

26. *Id.* at 373.

27. 298 F. Supp. 115 (D. Minn. 1969), *aff'd in part, rev'd in part*, 444 F.2d 169 (8th Cir. 1971).

28. Clements claimed that the system took too long to produce invoices and made numerous errors in the reports it created. *Id.* at 122.

29. The court described the elements of a cause of action in fraud as follows:

1. There must be a representation;
2. That representation must be false;
3. It must have to do with a past or present fact;

The *Clements* court struck down the plaintiff's first two claims. The breach of implied warranty claim was defeated because, unlike the contract signed by the parties in *Industrial Supply*, the *Clements Auto* contract contained a disclaimer of all express and implied warranties.³⁰ The court upheld this disclaimer as a valid exclusion of the implied warranty of fitness of purpose.³¹ The user's breach of contract claim was also dismissed because the plaintiff failed to mitigate damages once the alleged fraud was discovered.³²

The court upheld the misrepresentation claim, however, finding that Service Bureau Corp. had fraudulently misrepresented the manner in which the inventory control system operated.³³ The court observed that since Service Bureau Corp. had held itself out to be an expert in data processing, the user was justified in relying upon Service Bureau's "superior knowledge in that field."³⁴ It was this "inequality of knowledge" between the user and vendor which the court found to be of particular importance and which warranted the award of damages.³⁵

The remaining three pre-1972 cases which followed *Industrial Supply* and *Clements Auto* rested upon claims of breach of contract. In two of the three, the court found no cause of action presented by the facts.³⁶ In the third, the terms of the contract per-

4. That fact must be material;
5. It must be susceptible of knowledge;
6. The representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false;
7. The representer must intend to have the other person induced to act, or justified in acting upon it;
8. The other person must be so induced to act or so justified in acting;
9. That person's action must be in reliance upon the representation;
10. That person must suffer damage;
11. That damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury.

444 F.2d at 175 (quoting *Hanson v. Ford Motor Co.*, 278 F.2d 586, 591 (8th Cir. 1960)).

30. The disclaimer stated that "SBC makes no warranties, expressed or implied, other than the express warranties contained in this agreement." 298 F. Supp. at 139.

Under the U.C.C. § 2-316, exclusions and modifications of express and implied warranties are valid so long as the exclusionary statement is sufficiently conspicuous and, in the case of warranties of merchantability, the word "merchantability" is used in the disclaimer.

31. 298 F. Supp. at 139.

32. 444 F.2d at 186.

33. *Id.* at 183.

34. *Id.*

35. *Id.*

36. *Lovable Co. v. Honeywell, Inc.*, 431 F.2d 668 (5th Cir. 1970) (lessee not entitled to

mitted the user to terminate the unsatisfactory data processing service agreement.³⁷ Of particular significance, however, was the court's statement in one of these cases that, because the plaintiff had prior data processing experience and could rely upon a highly trained staff, the plaintiff knew precisely what the vendor's equipment would do and was thus not at a disadvantage in dealing with the vendor.³⁸

When taken together, the few cases litigated during this period make a significant contribution to the history of computer litigation for two reasons. First, they set forth the traditional causes of action available to users seeking relief against computer vendors. Second, they recognized that regardless of the user's status as a business person, where the user was a small, first time buyer, the relative positions of the parties could not be considered equal.

The Mid-1970's

The number of claims filed by dissatisfied users increased dramatically during the mid-1970's as the use of computers by small businesses became more widespread.³⁹ The majority of the claims filed during this period were based upon the same causes of action asserted by users in the earlier cases. As courts reassessed the bargaining power of the first time user, however, the success rate for users claiming under the earlier theories began to decline.

A number of plaintiffs during this period, as in the earlier period, included breach of contract and breach of express warranty claims in their complaints. These cases were often resolved in user's favor.⁴⁰ In those cases where the user was unsuccessful,

damages for failure of computer to perform certain functions during 12 month lease trial period); *Honeywell, Inc. v. Lithonia Lighting, Inc.*, 317 F. Supp. 406 (N.D. Ga. 1970) (user's counterclaim against vendor not supported by the facts).

37. *Computer Servicecenters, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971).

38. *Honeywell v. Lithonia Lighting, Inc.*, 317 F. Supp. 406, 409. (N.D. Ga. 1970).

39. See *Benn & Michaels*, *supra* note 2, at 32.

40. See, e.g., *Acme Pump Co. v. NCR Corp.*, 32 Conn. Supp. 69, 337 A.2d 672 (1974) (user recovered damages caused by vendor's failure to provide a working computer as warranted); *Burroughs Corp. v. Joseph Uram Jewelers, Inc.*, 305 So. 2d 215 (Fla. 1974) (user recovered damages equal to the difference between the value of the computer as it was actually programmed, and its value as it should have been programmed under the contract); *Atlas Indus., Inc. v. NCR Corp.*, 216 Kan. 213, 531 P.2d 41 (1975) (user recovered

at least one of three elements dictated the loss: 1) the facts simply did not support a finding of breach;⁴¹ 2) the applicable statute of limitations, imposed either by statute or by the terms of the contract itself, barred the plaintiff's claim;⁴² or 3) the user's remedies were limited to those described in the contract even though the court found that the vendor had breached either the contract or its express warranty.⁴³

Users claiming breach of implied warranties of fitness of purpose and merchantability, as originally pleaded in *Industrial Supply*, were only successful when there was either no disclaimer of warranties in the contract⁴⁴ or the vendor's attempts to disclaim the warranty were unsuccessful.⁴⁵ Typical of the courts'

damages for breach of warranties, the disclaimer of which failed to conform to Kansas' commercial code); *Alexander v. Burroughs Corp.*, 350 So. 2d 988 (1977), *aff'd as modified*, 359 So. 2d 607 (La. 1978) (user awarded rescission plus damages for vendor's failure to provide a working accounting system); *Lovely v. Burroughs Corp.*, 165 Mont. 209, 527 P.2d 557 (1974) (user awarded damages for vendor's failure to provide an accounting system which operated as warranted); *Triboro Quilt Mfg. Corp. v. Nixdorf Computer, Inc.*, 54 A.D.2d 678, 387 N.Y.S.2d 854 (1977) (user obtained a rescission of its contract with vendor for vendor's failure to provide required programs); *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325 (E.D. Pa. 1973), *aff'd mem.*, 493 F.2d 1400 (3d Cir. 1974) (because computer was virtually worthless without proper programming, buyer was entitled to damages for vendor's breach of agreement to furnish proper programming).

See also *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F. Supp. 504 (D. Conn. 1975) (discussing damage awards in breach of warranty cases).

41. *See, e.g.*, *Renfro Hosiery Mills Co. v. NCR Corp.*, 552 F.2d 1061 (4th Cir. 1977) (noting that the jury made no finding as to user's counterclaim for breach of contract); *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1977) (disclaimer effectively excluded all warranties); *F.&M. Schaeffer Corp. v. Electronic Data Sys. Corp.*, 430 F. Supp. 988 (S.D.N.Y. 1977) (user's claim of breach of contract to vendor's replevin action dismissed); *Westfield Chem. Co. v. Burroughs Corp.*, 21 U.C.C. Rep. Serv. (Callaghan) 1293 (Mass. Super. Ct. 1977) (no genuine issues of material fact raised by the user); *NCR Corp. v. Modern Transfer Co.*, 224 Pa. Super. Ct. 138, 302 A.2d. 486 (1973) (user denied damages on breach of contract claim after parol evidence supporting user's claim was excluded).

42. *See, e.g.*, *IBM Corp. v. Catamore Enter.*, 548 F.2d 1065 (1st Cir. 1976) (contract included a limitation on actions for breach of one year, which had expired).

43. *See, e.g.*, *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974) (insurance company barred from recovery of incidental or consequential damages by contract provision expressly limiting damages).

44. *See, e.g.*, *Alexander v. Burroughs Corp.*, 350 So. 2d 988 (1977), *aff'd as modified*, 359 So. 2d 607 (La. 1978) (seller held bound by an implied warranty that the computer it sold plaintiff was free of hidden defects and reasonably fit for intended use); *NCR Corp. v. Adell Indus. Inc.*, 57 Mich. App. 413, 225 N.W. 2d 785 (1975) (continuous malfunction of vendor's accounting machine constituted a breach of an implied warranty of fitness for intended use); *Lovely v. Burroughs Corp.*, 165 Mont. 209, 527 P.2d 577 (1974) (defective operation of vendor's accounting equipment constituted a breach of an implied warranty of fitness for intended use).

45. *See, e.g.*, *Acme Pump Co. v. NCR Corp.*, 32 Conn. Supp. 69, 337 A.2d 672 (1974)

treatment of the user-vendor relationship during this period was the reasoning employed in *Badger Bearing Co. v. Burroughs Corp.*⁴⁶ There, the user asked the court to strike the warranty disclaimer contained in its computer contract as unconscionable and therefore unenforceable. In refusing to do so, the court stated that “[a]lthough the plaintiff was less knowledgeable concerning computers than the defendant, [since he was] a business man he must be deemed to possess some commercial sophistication and familiarity with disclaimers.”⁴⁷

This arm’s length characterization of the relationship between the inexperienced user and the more knowledgeable vendor differed from the approach employed by earlier courts in its failure to consider the parties’ disparate bargaining positions.⁴⁸ As this arm’s length reasoning became more prevalent, vendors began to write disclaimers into their standard form contracts. As a result, the success rate for users claiming breach of implied warranties continued to decline.⁴⁹

Like the plaintiffs in both *Clements Auto* and *Industrial Supply*, a number of users suing computer vendors during this period also included claims of fraudulent misrepresentation. Most of the courts considering such claims found in favor of the vendor.⁵⁰ In one case, for example, the court held that none of the

(vendor’s disclaimer of warranties failed to conform to the U.C.C. requirements of conspicuousness); *Atlas Indus. Inc. v. NCR Corp.*, 216 Kan. 213, 531 P.2d 41 (1975) (vendor’s disclaimer of warranties violated Kansas U.C.C.).

46. 444 F. Supp. 919 (E.D. Wis. 1977).

47. *Id.* at 923.

48. See *supra* notes 22, 35 and accompanying text.

49. See, e.g., *Renfro Hosiery Mills Co. v. NCR Corp.*, 552 F.2d 1061 (4th Cir. 1977); *IBM Corp. v. Catamore Enter., Inc.*, 548 F.2d 1065 (1st Cir. 1976); *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1977); *Westfield Chem. Corp. v. Burroughs Corp.*, 21 U.C.C. Rep. Serv. (Callaghan) 1293 (Mass. Super. Ct. 1977); *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202, 343 N.Y.S.2d 541 (1972) (all contracts contained effective disclaimers of warranties).

50. See, e.g., *Renfro Hosiery Mills Co. v. NCR Corp.*, 552 F.2d 1061 (4th Cir. 1977) (jury made no finding as to user’s counterclaim for fraudulent misrepresentation); *IBM Corp. v. Catamore Enter., Inc.*, 548 F.2d 1065 (1st Cir. 1976) (court expressed no opinion on the merits of user’s claim that it was induced to enter its contract with IBM by fraud); *Closed Circuit Corp. of Am. v. Jerrold Elec. Corp.*, 426 F. Supp. 361 (E.D. Pa. 1977) (user’s claim of fraudulent misrepresentation barred because it merely restated the user’s claim in contract, having no separate basis in tort); *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F. Supp. 504 (D. Conn. 1975) (discusses proper award of damages in the event of a finding of fraudulent misrepresentation); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974) (user’s claim of fraud barred as having no separate basis in tort, being a mere restatement of the plaintiff’s contract claim); *Westfield Chem. Corp. v.*

vendor's misrepresentations had been made intentionally and that any statements as to the system's ability to meet the plaintiff's future data processing needs were merely promises of future performance and not grounds for action.⁵¹ In contrast with earlier decisions, consideration of the vendor's role as an expert in the field or of the plaintiff's relative lack of expertise did not factor into the courts' determinations.

Two previously untried causes of action, negligence⁵² and negligent misrepresentation,⁵³ were introduced to the field of computer litigation during this period. Neither of these causes of action proved successful, however.⁵⁴

The Late 1970's and Early 1980's

The late 1970's and early 1980's brought a further narrowing of the traditional contract and warranty actions available to first time users. Although breach of contract and breach of express

Burroughs Corp., 21 U.C.C. Rep. Serv. (Callaghan) 1293 (Mass. Super. Ct. 1977) (underlying allegation of fraud claim identical with assertions contained in warranty claims and therefore void); *NCR Corp. v. Modern Transfer Co.*, 224 Pa. Super. 138, 302 A.2d 486 (1973) (under Pennsylvania law, the parol evidence rule bars all extracontractual statements from admission into evidence, even where such statements are fraudulent).

It is interesting to note that vendors were far more likely to succeed where the case was litigated in federal court, whereas users were generally more successful in state court settings. *See also infra* note 55.

51. *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919, 925 (E.D. Wis. 1977).

52. The elements of a cause of action in negligence may be stated as follows: 1. A duty or obligation on the part of the actor to conform to a certain standard of conduct; 2. Failure on the actor's part to conform; 3. A causal connection between the actor's conduct and the resulting injury (i.e., proximate cause); and 4. Actual damage, loss, or injury to another. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1976).

Note that in those jurisdictions where comparative negligence has not been adopted, the plaintiff must also show a complete absence of negligence on his own part in order to sustain a cause of action.

53. The RESTATEMENT (SECOND) OF TORTS § 552 (1976) defines an act of negligent misrepresentation as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

54. *See, e.g.*, *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1977) (lessee failed to establish that the representations made by vendor concerning performance of the computer system were false); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974) (user's negligence claim was merely a restatement of the warranty claim and therefore void).

warranty remained fairly successful causes of action,⁵⁵ by the late 1970's, claims of breach of implied warranties (already on

55. See *Dunn Appraisal Co. v. Honeywell Information Sys., Inc.*, 687 F.2d 877 (6th Cir. 1982) (vendor found to have breached its lease agreement by failing to provide a system with all of the capabilities required without the user having to acquire additional equipment); *Chatlos Sys., Inc. v. NCR Corp.*, 635 F.2d 1081 (3d Cir. 1980), *reh'g denied*, 670 F.2d 1304 (3d Cir. 1982) (breach of warranty occurred when vendor failed to provide a computer system in good working order and free of defects, thus entitling user to an award of damages); *Huntington Beach Union High School Dist. v. Continental Information Sys. Corp.*, 621 F.2d 353 (9th Cir. 1980) (vendor held liable for a breach of contract to deliver a quantity of computer hardware to the user); *Convoy Corp. v. Sperry Rand Corp.*, 601 F.2d 385 (9th Cir. 1979), *aff'd as modified*, 672 F.2d 781 (9th Cir. 1982) (lessor of computer equipment was liable to the lessee for damages caused by the installation of a computer system which proved no faster than the old, manual method of performing the same function and which worked only intermittently with many errors); *Garden State Food Distrib., Inc. v. Sperry Rand Corp.*, 512 F. Supp. 975 (D.N.J. 1981) (user entitled to recover damages for breach of warranty where the computer system provided by vendor never operated to meet the user's needs and expectations); *Hi Neighbor Enter., Inc. v. Burroughs Corp.*, 492 F. Supp. 823 (N.D. Fla. 1980) (vendor's motion for summary judgment against user's claim that its computer system never functioned properly and that vendor's support was inadequate, denied); *Lovebright Diamond Co. v. Nixdorf Computer Corp.*, No. 78 Civ. 4585 (HFW) (S.D.N.Y. Oct. 9, 1979) (vendor's motion for summary judgment against user's claim that vendor failed to produce software it had agreed to provide, denied); *Diversified Environments v. Olivetti Corp. of Am.*, 460 F. Supp. 286 (M.D. Pa. 1978) (vendor breached its contract by failing to perform its obligations to train lessee's employees and to make the user's computer system operational); *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055 (1980) (vendor breached its contract with lessee by failing to provide a working computer system and by failing to install all of the agreed software); *Quad County Distrib. Co. v. Burroughs Corp.*, 68 Ill. App. 3d 163, 385 N.E.2d 1108 (1979) (vendor breached its contract with plaintiff by failing to provide programs which worked to the user's specifications); *Southern Hardware Co., Ltd. v. Honeywell Information Sys., Inc.*, 373 So. 2d 738 (La. Ct. App. 1979) (case remanded for further consideration of vendor's contract liability); *Wang Laboratories, Inc. v. Docktor Pet Centers, Inc.*, 422 N.E.2d 805 (Mass. App. Ct. 1981) (lessor suing user for failure to make lease payments permitted only a limited award where computer system failed to perform as promised); *Burrough Corp. v. Chesapeake Petroleum & Supply Co.*, 282 Md. 406, 384 A.2d 734 (1978) (user awarded damages for breach of contract and breach of warranty caused by vendor's failure to provide working software); *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S.2d 888 (1980) (vendor breached its contractual obligations to user by failing to provide a working computer system); *W.R. Weaver Co. v. Burroughs Corp.*, 580 S.W.2d 76 (Tex. Civ. App. 1979) (granting of lessor's motion for summary judgment on its contractual and warranty liability reversed).

But see *Iten Leasing Co. v. Burroughs Corp.*, 684 F.2d 573 (8th Cir. 1982) (user failed to establish that the system would not meet its objectives, needs, and requirements, as warranted); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979) (claim of breach of contract barred by statute of limitations); *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776, (E.D. Wis. 1982) (no issue of material fact concerning user's claims of breach of contract and warranties); *Accusystems, Inc. v. Honeywell Information Sys., Inc.*, No. 80 Civ. 5710 (DBB) (S.D.N.Y. Oct. 26, 1982) (oral contract did not satisfy the statute of frauds); *Sun 'n Fun Stores, Inc. v. Burroughs Corp.*, No. 79-2450-MA

the decline) had become almost totally ineffective.⁵⁶

In addition, vendors began to include limitations of the remedies available to the user as part of their standard form computer contracts.⁵⁷ Such limitations were generally upheld against claims of unconscionability.⁵⁸ In *Earman Oil Co., Inc. v. Burroughs Corp.*,⁵⁹ for example, the court once again invoked the arm's length reasoning to strike down the user's claim that a clause in the contract limiting its remedies to repair or replacement of defective equipment was unconscionable.⁶⁰

Claims of misrepresentation became increasingly popular among first time users due to these further limitations to the success of contract and implied warranty actions and remedies.

(D. Mass. Feb. 23, 1982) (facts did not support user's claim of breach of contract or breach of express warranties); *Bruffey Contracting Co. v. Burroughs Corp.*, 522 F. Supp. 769 (D. Md. 1981) (buyer of an office computer could not show that problems were caused by defects in material or workmanship and was therefore barred from recovery under the terms of the contract); *Samuel Black Co. v. Burroughs Corp.*, No. 78-3077-F (D. Mass. Dec. 18, 1981) (no genuine issue of material fact to support either breach of contract or breach of warranty claim); *Applications, Inc. v. Hewlett-Packard Co.*, 501 F. Supp. 129 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1076 (2d Cir. 1982) (user precluded from recovering for breach of warranty by standard warranty disclaimers).

56. The principal reason for the demise of this cause of action was that by the end of the decade most major computer vendors included disclaimers of all implied warranties in their standard form purchase agreements, drafted in such a manner as to conform to virtually every state's Uniform Commercial Code.

See, e.g., *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir., 1980); *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776 (E.D. Wis. 1982); *Samuel Black Co. v. Burroughs Corp.*, No. 78-3077-F (D. Mass. Dec. 18, 1981); *Bruffey Contracting Co. v. Burroughs Corp.*, 522 F. Supp. 769 (D. Md. 1981); *Applications, Inc. v. Hewlett-Packard Co.*, 501 F. Supp. 129 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1076 (2d Cir. 1982); *Hi Neighbor Enter. v. Burroughs Corp.*, 492 F. Supp. 823 (N.D. Fla. 1980); *Masonite Employees Fed. Credit Union v. Burroughs Corp.*, No. H76-146(C) (S.D. Miss. Apr. 3, 1979); *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055 (1980); *W.R. Weaver Co. v. Burroughs Corp.*, 580 S.W.2d 76 (Tex. Civ. App. 1979) (all holding the user's claim of breach of implied warranties ineffective by virtue of the valid disclaimer of all implied warranties included in the governing contract document).

Those courts addressing plaintiffs' challenges of unconscionability tended to follow the arm's length reasoning of the middle 1970's, uniformly striking down such challenges. See, e.g., *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980); *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1979).

57. Such limitations of remedies are permissible under the U.C.C. § 2-719 (1978).

58. See, e.g., *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980); *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776 (E.D. Wis. 1982); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974); *Westfield Chem. Co. v. Burroughs Corp.*, 21 U.C.C. Rep. Serv. (Callaghan) 1293 (Mass. Super. Ct. 1977) (all upholding such a limitation against users' claims of unconscionability).

59. 625 F.2d 1291 (5th Cir. 1980).

60. *Id.* at 1299-1300.

Although vendors still continued to prevail in most tort actions by users,⁶¹ the relative number of suits in which users were able to recover for misrepresentation increased, especially where fraudulent misrepresentation was pleaded.⁶²

As in the mid-1970's, those few plaintiffs attempting to assert negligence as grounds for recovery continued to meet with little success. One reason given by the court in *Office Supply Co. v. Basic/Four Corp.*⁶³ was the unwillingness of the court to extend

61. See, e.g., *Iten Leasing Co., v. Burroughs Corp.*, 684 F.2d 573 (8th Cir. 1982) (with the exception of two pieces of computer hardware, the user failed to establish as false the vendor's representations that the system would meet the user's requirements and objectives); *Management Assistance, Inc. v. Computer Dimensions, Inc.*, 546 F. Supp. 666 (N.D. Ga. 1982) (user's claim of fraud in the inducement not supported by the facts); *Sun 'n Fun Stores, Inc. v. Burroughs Corp.*, No. 79-2450-MA (D. Mass. Feb. 23, 1982) (vendor made no false, fraudulent, or misleading representations of fact upon which the user was induced to rely to his detriment, and was therefore not liable under user's fraud claim); *Chatlos Systems, Inc. v. NCR Corp.*, 479 F. Supp. 738 (D.N.J. 1979), *aff'd in part, rev'd in part and remanded*, 635 F.2d 1081 (3d Cir. 1980) (plaintiff failed to prove that vendor had committed fraud in statements it had made to user); *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055 (1980) (integration clause in the contract held effective to exclude all extrinsic statements, including fraudulent ones); *Burroughs Corp. v. Chesapeake Petroleum & Supply Co., Inc.*, 282 Md. 406, 384 A.2d 734 (1978) (no evidence of fraud presented by the facts).

62. See, e.g., *Dunn Appraisal Co. v. Honeywell Information Sys., Inc.*, 687 F.2d 877 (6th Cir. 1982) (user awarded compensatory and punitive damages and attorney's fees on the basis of vendor's material misrepresentations concerning the system's capabilities and suitability); *Glovatorium, Inc. v. NCR Corp.*, 684 F.2d 658 (9th Cir. 1982) (vendor committed fraud by knowingly selling a defective computer system); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979) (fraud claim by user remanded for further findings); *Accusystems, Inc. v. Honeywell Information Sys., Inc.*, No. 80 Civ. 5710 (DBB) (S.D.N.Y. Oct. 26, 1982) (vendor's motion for summary judgment on fraud and negligent misrepresentation claims denied); *Hi Neighbor Enter. v. Burroughs Corp.*, 492 F. Supp. 823 (N.D. Fla. 1980) (vendor's motion for summary judgment on fraud claim denied); *Samuel Black Co. v. Burroughs Corp.*, No. 78-3077-F (D. Mass. Dec. 18, 1981) (vendor's motion for summary judgment denied on the basis of vendor's representations regarding its own capacity to perform, thus inducing the user to enter into a contract by claiming the present ability to perform certain obligations, which may in some cases rise to the level of fraudulent misrepresentation); *Tyrrel v. Bedford Computer Corp.*, No. 81 Civ. 1530 (RWS) (S.D.N.Y. Dec. 15, 1981) (fraudulent misrepresentation on the part of the vendor may be a valid defense in an action for replevin of computer equipment against the user); *Aplications, Inc. v. Hewlett-Packard Co.*, 501 F. Supp. 129 (S.D.N.Y. 1980) (case remanded for further findings on fraud issue); *Lovebright Diamond Co. v. Nixdorf Computer Corp.*, No. 78 Civ. 4585 (HFW) (S.D.N.Y. Oct. 9, 1979) (vendor committed fraud by representing to the user that it could convert existing software to meet the user's needs, when, in fact, it could not); *Burroughs Corp. v. Hall Affiliates, Inc.*, 423 So. 2d 1348 (Ala. 1982), *reh'g denied*, Dec. 30, 1982 (vendor's misrepresentations held to have been unintentional, thereby limiting the user's recovery in fraud to compensatory, but not punitive, damages).

63. 538 F. Supp. 776 (E.D. Wis. 1982).

a cause of action in tort to compensate for economic losses alone.⁶⁴ Others simply found no basis for the claim in the facts of the case.⁶⁵ Similarly, attempts by users to recover damages under claims of strict liability,⁶⁶ professional malpractice,⁶⁷ and unfair business practices⁶⁸ were also unsuccessful during this period.

CURRENT STATE OF THE LAW

As the foregoing discussion illustrates, dissatisfied users of computer equipment and software have invoked a relatively wide range of legal theories in their attempts to obtain relief from unsatisfactory agreements with computer vendors. Currently, users pursuing claims rely on both the traditional contract and warranty actions, and on the increasingly successful tort actions. All of these causes of action present particular problems for the new or first time user.

Contract Actions

In most current cases, the first time user includes some form of breach of contract or breach of warranty claim in an action against a vendor. The greatest problems facing the inexperienced user relying on a contract action are posed by statutes of limitation, limitations on the remedies a buyer or lessee may seek, and integration clauses. These problems are further compounded where the user has signed the typically vendor-oriented standard form contract containing a disclaimer of warranties and offering little protection for the user's interests in the transaction.

64. *Id.* at 791.

65. *See, e.g.*, *Burroughs Corp. v. Chesapeake Petroleum & Supply Co.*, 282 Md. 406, 384 A.2d 734 (1978) (vendor did not commit negligence in delivering user's computer system late nor in failing to provide working software).

See also *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979) (user barred from pursuing negligence claim by statute of limitations). *But see* *Accusystems, Inc. v. Honeywell Information Sys., Inc.*, No. 80 Civ. 5710 (DBB) (S.D.N.Y. Oct. 26, 1982) (case remanded for further findings on the applicability of a negligence cause of action to the facts).

66. *See, e.g.*, *Chatlos Sys., Inc. v. NCR Corp.*, 635 F.2d 1081 (3d Cir. 1980); *W.R. Weaver Co. v. Burroughs Corp.*, 580 S.W.2d 76 (Tex. Civ. App. 1979) (both cases dismissing without discussion the user's strict liability claim).

67. *See* *Chatlos Sys., Inc. v. NCR Corp.*, 635 F.2d 1081 (3d Cir. 1980). *See also infra* notes 142-46 and accompanying text.

68. *See* *Sun 'n Fun Stores, Inc. v. Burroughs Corp.*, No. 79-2450-MA (D. Mass. Feb. 23, 1982) (vendor did not engage in any conduct which could have been construed as unfair

Statutes of Limitation

Under the Uniform Commercial Code (U.C.C.) § 2-725(1), any action for breach of contract must be commenced within four years from the time the cause of action accrues.⁶⁹ This limitation has been extended to breach of warranty actions as well.⁷⁰ In many cases, however, the contract terms impose a shorter time limit during which actions on the contract may be brought. This is permitted under section § 2-725(1).⁷¹ Major vendors, including IBM and Burroughs, presumably relying on this provision, have included two-year limitations in their standard form contracts.⁷²

The problem most often arising in litigation involving these provisions is determining when the cause of action actually accrues. Vendors will typically argue that the statute tolls upon execution of the contract, or, more commonly, upon installation of the computer equipment or software.⁷³ The user, on the other hand, will argue that the statute begins to run when the vendor stops trying to resolve the user's problem or refuses to make further changes to the system.⁷⁴ On occasion, the user has

or deceptive practices or acts); *Samuel Black Co. v. Burroughs Corp.*, No. 78-3077-F (D. Mass. Dec. 18, 1981) (case remanded for further findings of fact).

69. Note that while the sale of computer software and hardware has been held to be a sale of goods and therefore subject to the U.C.C., *see supra* note 18, the sale of data processing services, such as those provided by service bureaus, has not. *Computer Servicecenters, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653 (D.S.C. 1970).

While courts often apply U.C.C. principles in resolving disputes involving lease agreements, a contract for the lease of computer equipment or software does not normally fall within the U.C.C. *See* U.C.C. § 2-102 & comment (1978). *See also* *O.J. & C. Co. v. General Hosp. Leasing, Inc.*, 578 S.W.2d 877 (1979) (user's lease of a Nixdorf computer did not constitute a sale within the meaning of the U.C.C.).

70. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 743 (2d Cir. 1979).

71. U.C.C. § 2-725(1) (1978) states that "By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."

See generally Note, *The Effect of the Statute of Limitations on a Computer Vendor's Liability in a Failed Computer Installation: Triangle Underwriters, Inc. v. Honeywell, Inc.*, 26 ST. LOUIS U.L.J. 181 (1981).

72. *IBM Corp., Agreement for Lease or Rental of IBM Machines* (available from IBM Corp., Armonk, N.Y. 10504); *Burroughs Corp., Business Machines Group, Agreement for Equipment Sale*, #1914116 (June 1982).

73. *See, e.g.*, *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 741 (2d Cir. 1979); *Atlas Indus., Inc. v. NCR Corp.*, 216 Kan. 213, 221, 531 P.2d 41, 47 (1975); *W.R. Weaver Co. v. Burroughs Corp.*, 580 S.W.2d 76, 80 (Tex. Civ. App. 1979).

74. *See, e.g.*, *Alexander v. Burroughs Corp.*, 350 So. 2d 988, 991 (La. Ct. App. 1977). *See also* *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S. 2d 888 (1980) (breach occurred when vendor admitted that it couldn't solve the user's problem with its computer system).

claimed that the statute begins to run when the user first discovers the problem.⁷⁵

A prime example of the problems that limitations of this type may cause is illustrated by the plaintiff's difficulties in *IBM Corp. v. Catamore Enterprises*.⁷⁶ In this case, the vendor spent an extended period of time, in excess of one year, attempting to correct the problems Catamore appeared to be having with its system.⁷⁷ When Catamore finally refused to continue making lease payments on equipment, IBM sued.⁷⁸ In its counterclaim for damages, Catamore claimed breach of contract against the vendor, along with several other causes of action.⁷⁹ The court found that the cause of action had accrued at the time of installation. Because more than a year had elapsed since the system had been delivered and installed, and since the contract between the parties limited causes of action to one year, the contract portion of Catamore's claim was dismissed.⁸⁰

The *Catamore* holding appears to be the current state of the law in several jurisdictions.⁸¹ In most cases, the contractually imposed limitation on actions of two years following installation allows the user sufficient time in which to discover any breach and file suit against the vendor if the problem cannot be remedied.

In some cases, however, this formulation can work a harsh result on the uneducated user. For example, a vendor often will install computer software in phases, so that the user may begin to make use of the hardware and whatever software is finished without having to wait until all of the software is installed.⁸² Where the vendor delivers the final phase of the software a great deal of time after the original hardware installation, the user, having relied on the vendor's expertise, may not discover that the computer cannot handle the additional programs' requirements until the statute of limitations is about to, or

75. See, e.g., *Closed Circuit Corp. of Am. v. Jerrold Elec. Corp.*, 426 F. Supp. 361, 365 (E.D. Pa. 1977).

76. 548 F.2d 1065 (1st Cir. 1976).

77. *Id.* at 1067.

78. *Id.*

79. *Id.*

80. *Id.* at 1076.

81. See *supra* note 73 and accompanying text. But see *supra* notes 74-75 and accompanying text.

82. This is not an uncommon technique for installing computer systems in the small business environment. See *Benn & Michaels, supra* note 2, at 33.

already has, run.⁸³ The user may thus be left with little or no time in which to determine the optimum cause of action and, if necessary, to file suit. This limitation period may be further reduced by the vendor's attempts to remedy the situation.⁸⁴

One alternative to the *Catamore* approach would be to toll the statute when the vendor completes every aspect of the system installation, including software. A second would be to toll the statute when the vendor ceases or refuses to make further efforts to remedy the user's problems. A third alternative would be to extend the tort concept of tolling the statute when the user knows or should have known that an injury has occurred to contract actions as well.⁸⁵ Each of these alternatives would give the user a chance to use the completed system in a live environment for a reasonable period of time,⁸⁶ without having to file a premature lawsuit and without losing his right to sue for having exercised patience. The vendor also would have a reasonable opportunity to correct the user's problems without fear of an impending lawsuit.

Limitations of Remedies

A second problem often posed in computer contract litigation for first time users concerns contractually imposed limitations on the remedies available to the buyer in the event of a lawsuit against the vendor.⁸⁷ By contractually limiting the user's reme-

83. Where, for example, the computer lacks sufficient memory (the area of the computer used to store program instructions or data), storage capacity (the area of the computer exclusive of memory used to store data), or processor speed (the rate at which the computer performs calculations and other functions), the defect may be in the original configuration of the hardware, not in the additional programs.

84. Because a program is nothing more than a series of instructions, *see supra* note 1, a programmer can sometimes make a program run more quickly or take up less space in the computer's memory by rewriting or reorganizing the instructions (sometimes referred to as the "code") in a more efficient manner.

85. This standard is similar to the one employed in *Closed Circuit Corp. of Am. v. Jerrold Elec. Corp.*, 426 F. Supp. 361, 365 (E.D. Pa. 1977). *See supra* note 75 and accompanying text.

86. By including the delimiter "should have known," the reasonableness factor will usually be taken into account.

87. Burroughs Corp.'s standard form contract, *supra* note 72, provides that:

Customer's sole and exclusive remedy in the event of defect is expressly limited to the correction of the defect by adjustment, repair or replacement, at Burroughs [sic] election and sole expense, except that there shall be no obligation to replace or repair items which by their nature are expendable.

Under a section entitled "Limitation of Liability," the contract further states, in bold-face

dies to the repair or replacement of defective equipment, or, in some cases, to actual damages, the plaintiff is barred from seeking reformation, rescission, or indirect, special, consequential, or punitive damages. Limitations or modifications of remedies such as these are permitted under U.C.C. § 2-719(1)(a).⁸⁸ For the most part, these limitations have been allowed to stand. Users have, however, challenged such limitations on two different grounds: that the limitations defeat the essential purpose of the remedies available to the buyer,⁸⁹ and that such limitations are unconscionable.

In *Chatlos Systems, Inc. v. NCR Corp.*,⁹⁰ Chatlos claimed the provision limiting its remedies to repair or replacement was void for failing in its essential purpose of providing reasonable relief to the injured user.⁹¹ Chatlos asked the court to declare the provision inoperative.⁹² The court found that after one and one-half years of trying to correct the user's problem, NCR had still failed to produce a system which functioned as warranted. The court held that this time delay had "operated to deprive the purchaser of the substantial value of the bargain" and that the correction remedy was ineffective and therefore void.⁹³

type, that "In no event shall Burroughs be liable for loss of profits, indirect, special, or consequential damages arising out of any breach of the agreement or obligations under the agreement."

IBM's standard form contract, *supra* note 72, contains essentially the same provisions as Burroughs Corp.'s contract, except that IBM permits the customer to recover actual damages, limited to the "greater of \$100,000 or twelve Monthly Lease charges or Monthly Rental Charges for the specific machines that caused the damages or that are the subject matter of or are directly related to the cause of action."

88. U.C.C. § 2-719(1)(a) (1978) states that:

(T)he 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.

89. U.C.C. § 2-719(2) (1978) qualifies the vendor's right to limit remedies "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose."

See *supra* notes 56-58 and accompanying text; see generally Note, *U.C.C. § 2-719 As Applied to Computer Contracts—Unconscionable Exclusions of Remedy?: Chatlos Systems, Inc. v. National Cash Register Corp.*, 14 CONN. L. REV. 71 (1981).

90. 479 F. Supp. 738 (D.N.J. 1979), *aff'd in part, rev'd in part and remanded*, 635 F.2d 1081 (3d Cir. 1980), *reh'g denied*, 670 F.2d 1304 (3d Cir. 1982).

91. 635 F.2d at 1085-86.

92. *Id.*

93. *Id.* Note that the court in *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055, 1059 (1980), reached a similar conclusion regarding an almost identical limitation of remedies.

In contrast, the court in *Garden State Food Distributors, Inc. v. Sperry Rand Corp.*,⁹⁴ upheld the limitation in a lease agreement restricting the user's remedies to repair, replacement, or recovery of prior lease payments against a similar challenge.⁹⁵ The court based its decision on the fact that, unlike *Chatlos*, this user had a remedy in the recovery of the lease payments, which was the equivalent of a rescission. The court held that recovery of the payments provided an adequate remedy in the event that repair or replacement did not.⁹⁶ In addition, the court stated that such a limitation of remedies under the U.C.C. was not void for having failed in its essential purpose where the defects in the system were not latent, but were discoverable on reasonable inspection.⁹⁷ The court therefore upheld the provision.

Based on the limited amount of precedent in this area of computer litigation, it is likely that a contract limiting the user's remedies to repair or replacement would not withstand a user's challenge that it failed in its essential purpose under § 2-719(2). On the other hand, a contract permitting the repair or replacement of defective equipment plus actual damages, similar to that in *Garden State*, would probably be upheld.

A number of users have also attempted to circumvent contractually imposed limitations which exclude consequential, indirect, or special damages by claiming that such limitations were unconscionable and therefore void.⁹⁸ Most courts have not been sympathetic to this argument and have upheld such limitations as a normal part of business dealings conducted at arm's length.⁹⁹ These courts point out that the purchase of a computer is like any other business transaction carried out by two presumably knowledgeable business persons.¹⁰⁰

The difficulty with this approach is that the inexperienced user, although a business person, is not in a position to bargain away knowledgeably any of his remedies. He is likely to know a great deal less about computers in general, and computer con-

94. 512 F. Supp. 975 (D.N.J. 1981) (litigated the same year by a lower court in the same circuit).

95. *Id.* at 978.

96. *Id.*

97. *Id.*

98. *See supra* notes 58-60, 87-89 and accompanying text.

99. *Id.*

100. *See, e.g.,* Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776, 789 (E.D. Wis. 1982).

tracts in particular, than the vendor and must rely heavily on the vendor's expertise throughout the transaction. By agreeing to limit his remedies, he agrees to bear the risk of loss without fully knowing what that risk might be.

One alternative approach in those cases where such limitations either are found to have left the user without a viable remedy or have been held unconscionable would be to award the user all reasonably foreseeable damages. This remedy would prove especially appropriate where limiting the award to actual damages would result in extreme hardship to the innocent first time buyer. The potential magnitude of the consequential and other damages a failed computer system may inflict on a small business is too high a risk to force a small business to take. This risk is an unreasonable one because the user may not realize the extent of that risk due to his own lack of data processing experience.

Integration Clauses

The third problem area in computer contract litigation facing the new or first time user involves the integration clauses now included in virtually every major vendor's standard form contract.¹⁰¹ The problem most often arises in breach of contract or warranty claims when the buyer seeks to admit oral statements, or statements made in other, presumably non-contractual documents, such as correspondence, vendor publications, or prior agreements or understandings.¹⁰²

As in other areas of the law,¹⁰³ courts have been understandably reluctant to admit extrinsic evidence which adds to or modifies the terms of an otherwise valid agreement. This reluctance exists even though hardship may result to an inexperienced user relying on an overzealous salesperson's promise of performance and productivity. In *Investors Premium Corp. v. Burroughs Corp.*,¹⁰⁴ for example, the user signed a purchase

101. See *supra* note 23.

102. See, e.g., *Burroughs Corp. v. Weston Int'l Corp.*, 577 F.2d 137 (4th Cir. 1978) (user sought to introduce a letter written by vendor's representative in addition to the terms of the contract); *Burroughs Corp. v. Chesapeake Petroleum & Supply Co.*, 282 Md. 406, 384 A.2d 734 (1978) (user attempted to introduce prior oral representations by vendor's agents and statements contained in vendor's sales literature).

103. See *supra* note 23.

104. 389 F. Supp. 39 (D.S.C. 1974).

agreement containing the standard integration clause excluding all "understandings, agreements, representations or warranties . . . not specified herein. . . ." ¹⁰⁵ When the user tried to introduce evidence of a Burroughs employee's statement that the system "had sufficient capacity and capability to handle plaintiff's then present business needs and to double that capacity without adding additional personnel," the court held the statement inadmissible. ¹⁰⁶ The court based its holding on the fact that the integration clause conformed to the U.C.C. requirements of form ¹⁰⁷ and on its finding of law that the terms of a written contract cannot be varied by parol evidence. ¹⁰⁸

Like those plaintiffs challenging contractually imposed limitations of remedies, users who have claimed that these evidentiary limitations are unconscionable have met with little success in having them excluded or held inoperative. ¹⁰⁹ This fact may account for the recent increase in claims of misrepresentation against computer vendors, especially by users having signed standard form contracts. The availability of misrepresentation as an alternative cause of action may help in mitigating the effects of these integration clauses on users who have relied to their detriment on extracontractual representations made by a vendor's account representative.

Standard Form Contracts and Disclaimers of Warranties

An issue which is unique to claims of breach of warranty involves the disclaimers of all warranties, express and implied, currently included in most vendors' standard form contracts. ¹¹⁰ Such exclusions of warranties are permissible under the U.C.C. ¹¹¹ and are not unconscionable under the current state of the law. ¹¹² The net result is that few, if any, current computer hardware or software contracts contain any operable implied warranties. In addition, in most cases the only express warranties are those

105. *Id.* at 45.

106. *Id.* at 43-44.

107. *Id.* at 44-45.

108. *Id.*

109. *See, e.g.,* Investors Premium Corp. v. Burroughs Corp., 389 F. Supp. 39, 45 (D.S.C. 1974); Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776, 786 (E.D. Wis. 1982).

110. *See supra* note 30.

111. *Id.*

112. *See supra* note 46 and accompanying text.

specifically denoted as such in the terms of the contract. These are usually limited to such tangential issues as assurances against patent infringement and copyright law.¹¹³

While the effects of a warranty disclaimer may not, in and of themselves, seem particularly unfair to the initiated user, the combination of a warranty disclaimer and a limitation of liability, when included in a standard form contract, can be particularly damaging to a user seeking relief under a breach of contract or warranty theory. It is not difficult to imagine a situation where the user acquires a working, but useless, computer system. Where, for example, the governing document is a user's standard form contract and the only description of what the user is acquiring is the hardware model and serial number, the user may be left with a system that functions properly, but in no way fits the user's time, storage or processing requirements.¹¹⁴ Since the disclaimer of warranties excludes the operation of the implied warranties of merchantability and fitness of purpose, the user can neither claim that the system is not fit for the ordinary purpose for which such system is used, nor claim that the system does not perform the function for which it was acquired. If the contract also includes an integration clause, the user is further precluded from admitting parol evidence in support of his claim of breach. Even if the plaintiff is able to convince a judge or jury that some sort of breach has occurred, a limitation of remedies precluding everything but repair or replacement gives the user nothing more than he already has: a working, but useless, computer system.

It is in the face of these obstacles that claims of the uncon-

113. The only warranties contained in Burroughs' standard form contract, *supra* note 72, are that:

- (i) no applicable statute, regulation or ordinance of the United States or of any State has been violated in the manufacture and sale of the equipment;
- (ii) Burroughs has title to the equipment and the right to sell it; and
- (iii) equipment purchased under this agreement may be either newly manufactured, or assembled by Burroughs from new and/or serviceable used parts (equivalent to new in performance) or equipment which has been previously installed; and
- (iv) the equipment delivered under this agreement shall be free of defects in material and workmanship under normal use and service maintenance for a period of ninety (90) days from date of invoice on B20 and SR100 products; and one (1) year from date of invoice on all other products, provided the equipment has received the normal required maintenance service.

114. See *supra* note 83 and accompanying text.

scionability of warranty disclaimers arise in computer contract litigation. As previously noted, most of the courts have dismissed these claims as not supported by the facts based on the parties' positions as business persons dealing at arm's length.¹¹⁵

Tort Actions

Claims sounding in tort have become both more common and more successful and are currently the major focus of many first time users' claims for relief. There are a number of reasons why a user might choose to include causes of action sounding in tort in addition to, or instead of, claims based on contract law.

In some jurisdictions, for example, the statute of limitations for causes of action in tort, or for certain specific torts, may be longer than those in contract.¹¹⁶ This factor can be an important consideration where the vendor has spent an extended period of time installing the computer system or has attempted to correct the user's problem before the user files suit.¹¹⁷

In addition, contractual limitations on damages or remedies, such as are normally included in standard vendor contracts, may not apply to claims sounding in tort, thus improving users' chances for recovery.¹¹⁸ Evidentiary limitations imposed by integration clauses similarly are inapplicable to tort actions, since they are ineffective in excluding fraudulent statements.¹¹⁹ Therefore, while such clauses may defeat contract actions, they do not affect claims of fraudulent misrepresentation.¹²⁰ Finally,

115. See *supra* notes 46-48 and accompanying text.

116. See, e.g., *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 743, 746 (2d Cir. 1979) (New York's statute of limitations for fraudulent misrepresentation was six years, but only four years for contracts for the sale of goods).

117. See *supra* notes 76-80 and accompanying text.

118. See, e.g., *Chatlos Sys., Inc. v. NCR Corp.*, 479 F. Supp. 738, 749 (D.N.J. 1979) (court stated that in the absence of exceptional circumstances, the concept of punitive damages should not be permitted in litigation involving breach of a commercial contract, whereas such damages would be available under causes of action in tort); *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F. Supp. 504, 511 (D. Conn. 1975) (user permitted to recover in tort those consequential damages excluded on the contract claim as consequential).

119. See, e.g., *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 747 (2d Cir. 1979) (statements of fraud made extraneous to the contract held admissible).

120. *But see Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055 (1980) (integration clause in the contract held to exclude all extrinsic statements, including fraudulent ones); *NCR Corp. v. Modern Transfer Co.*, 224 Pa. Super. 138, 302 A.2d 486 (1973) (under Pennsylvania law, the parol evidence rule bars all extracontractual statements from admission into evidence, including fraudulent ones).

disclaimers of warranties, while narrowing users' chances for recovery in contract, do not affect plaintiffs' potential for recovery in tort.¹²¹

On the other hand, causes of action in tort have not proven nearly as successful in computer litigation as those sounding in contract.¹²² Courts frequently are sensitive to the fact that a user may be filing an inappropriate tort claim to avoid the inherent problems of suing on the contract. One court, for example, held that, while it was possible that a breach of contract might also give rise to an action in tort, the claims must have independent bases of liability.¹²³ In dismissing the user's tort claim, the court stated that the existence of certain tort elements, such as wantonness, could not in and of itself convert the contract action into a valid tort claim.¹²⁴

Misrepresentation

As contract limitations continue to constrain users' remedies under contract and warranty claims, users have begun to rely more frequently on claims of fraudulent and negligent misrepresentation.¹²⁵ In those cases where vendors have successfully defended against such claims, the most common reasons given for their successes were that the claims were not supported by the facts,¹²⁶ or that the misrepresentation claims were simply a restatement of the contract claim and not supportable as separate claims in tort.¹²⁷

In those few cases where users have prevailed on misrepresentation claims, the courts' reasoning, where articulated,¹²⁸ has

121. See, e.g., *Clements Auto Co. v. Service Bureau Corp.*, 298 F. Supp. 115, 139 (D. Minn. 1969), *aff'd in part, rev'd in part*, 444 F.2d 169 (8th Cir. 1971) (disclaimer of warranties did not exclude statements of fraud).

122. The exception to this statement is, of course, breach of implied warranty claims, which are no longer successful at all.

123. *Closed Circuit Corp. of Am. v. Jerrold Elec. Corp.*, 426 F. Supp. 361 (E.D. Pa. 1977).

124. *Id.* at 364. See also *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39, 42 (D.S.C. 1974) (user's claim of fraud barred as having no separate basis in tort, being a mere restatement of the plaintiff's contract claim); *Westfield Chem. Corp. v. Burroughs Corp.*, 21 U.C.C. Rep. Serv. (Callaghan) 1293, 1295 (Mass. Super. Ct. 1977) (underlying allegation of fraud claim identical with assertions contained in warranty claims and therefore void).

125. See *supra* notes 61-62 and accompanying text.

126. See *supra* notes 51, 61.

127. *Id.*

128. One difficulty in predicting the future success of users claiming under this cause

shown much promise for future plaintiff-users. In *Dunn Appraisal Co. v. Honeywell Information Systems, Inc.*,¹²⁹ for example, the court held the vendor liable for fraudulent misrepresentations it had made concerning the capabilities, cost and suitability of the accounting system it had leased to the user.¹³⁰ In awarding not only compensatory damages, but punitive damages and attorney's fees as well,¹³¹ the court noted that the vendor's computer equipment did not have the capabilities represented by the vendor without the user acquiring substantial additional accessories.¹³² The user, who had "little knowledge of computers,"¹³³ had thus been fraudulently induced to enter into the contract on the basis of his reliance on the vendor's "material misrepresentations."¹³⁴ The vendor was therefore held liable.¹³⁵

In another recent case, *Glovatorium, Inc. v. NCR Corp.*,¹³⁶ the court found that the defendant's representatives had sold the user an NCR computer system "with the knowledge that it was not designed to perform the functions for which it was sold," thereby committing an actionable fraud.¹³⁷ In affirming the jury's award of more than \$2.2 million in compensatory and punitive damages, the court also noted evidence of fraudulent practices both in the sale and the installation of the computer system.¹³⁸

Because of the relatively small amount of definitive case law in this area, it is difficult to generalize as to the potential success of users choosing to sue on a theory of misrepresentation. Since misrepresentation claims are successful in some cases, however, it seems advisable for a user to include a claim of misrepresentation in the pleadings where warranted by the facts. This may be the only chance of recovery the user has where the standard integration clause and warranty disclaimers are included in the contract and the source of disagreement is a statement or com-

of action has been the lack of definitive holdings in this area. See *supra* note 62.

129. 687 F.2d 877 (6th Cir. 1982).

130. *Id.* at 880.

131. *Id.* at 881.

132. *Id.* at 880.

133. *Id.* at 879.

134. *Id.* at 880.

135. *Id.*

136. 684 F.2d 658 (9th Cir. 1982).

137. *Id.* at 661.

138. *Id.* at 661-63.

munication by a vendor's representative made outside of the terms of the contract.

Negligence

Claims of negligence have proven ineffective in the few cases where they have been asserted. The primary reason noted in several cases was that the court or jury found no evidence to support the claim.¹³⁹ In one case, the court dismissed the claim on the grounds that the laws of the forum state did not permit recovery in tort for economic losses alone.¹⁴⁰ In another case, the court held that the claim was barred by the statute of limitations.¹⁴¹

One variant of the negligence approach which has not proven successful thus far, but which may have potential for success in future litigation, is the claim of "computer malpractice" first espoused in *Chatlos Systems, Inc. v. NCR Corp.*¹⁴² In *Chatlos*, the dissatisfied user attempted to analogize the heightened standard of care applied to medical and other professionals to the computer vendor against whom it was seeking damages. The court dismissed this claim in a footnote, explaining that "[s]imply because an activity is technically complex and important to the business community does not mean that greater potential liability must attach. In the absence of sound precedential authority the court . . . decline[d] the invitation to create a new tort."¹⁴³

Although the court's decision that a malpractice action was inappropriate was correct, the reasoning the court employed in reaching this decision was faulty. While it is true that there is no precedent for holding a computer vendor liable for having committed "computer malpractice," there is ample precedent for a finding of malpractice against a professional who has failed to exercise reasonable care in the performance of his duties.¹⁴⁴

139. *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919, 924 (E.D. Wis. 1977); *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055, 1058 (1980); *Burroughs Corp. v. Chesapeake Petroleum*, 282 Md. 406, 384 A.2d 734, 735 (1978).

140. *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776, 791 (E.D. Wis. 1982).

141. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 746 (2d Cir. 1979).

142. 479 F. Supp. 738, 741 (D.N.J. 1979), *aff'd in part, rev'd in part and remanded*, 635 F.2d 1081 (3d Cir. 1980), *reh'g denied*, 670 F.2d 1304 (3d Cir. 1982).

143. 479 F. Supp. at 741 n.1.

144. Malpractice standards have been applied to such professionals as attorneys, architects, accountants, and even insurance company representatives. *Holdridge v.*

An analogy may be drawn, for example, between architects, who are subject to malpractice actions, and computer professionals, who currently are not. In performing their respective jobs, both must possess a great deal of knowledge or skill not normally possessed by the person or business commissioning the work. Both are responsible for designing a system or framework which will support a viable end product and adequately meet the buyer's needs.¹⁴⁵ Both may subject the buyer to substantial financial loss from which the buyer may not recover should the job be performed improperly. The buyers in both instances may be either businesses or individuals.

The major difference between the two, which is the reason the court's decision in *Chatlos* was correct, is that an architect is subject to a uniform standard of certification whereas the computer programmer is not. Until a uniform standard for computer professionals is developed, it will remain difficult at best to state accurately what the "reasonable computer professional" would do under a given circumstance.¹⁴⁶

Another aspect of the "computer malpractice" cause of action was relied on by the plaintiff in *Triangle Underwriters, Inc. v. Honeywell, Inc.*¹⁴⁷ In an attempt to avoid the applicable statutes of limitation in its jurisdiction, the user sought to apply a theory of continuous treatment¹⁴⁸ in determining when the cause of action had accrued to Honeywell's repeated attempts to correct the difficulties the user was having with its new computer system.¹⁴⁹ The court held that under New York law, the continuous treatment theory applied only to medical professionals and, further, that in this case there was no "professional relationship" on which to base an extension of the doctrine.¹⁵⁰ The user was thus barred by the applicable statutes of limitation in eight

Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1096 (N.D.N.Y. 1977).

145. The architect's product is, of course, a building, while the computer professional constructs a fully integrated computer system.

146. A standard of care is a prerequisite for any sort of malpractice standard. W. PROSSER, LAW OF TORTS 150 (1971). See *infra* notes 163-64 and accompanying text.

147. 604 F.2d 737 (2d Cir. 1979).

148. The continuous treatment theory, as it is normally applied to the medical profession, holds that in a suit for negligence against a physician or other medical professional, the statute of limitations begins to run "at the end of continuous treatment . . . and not at the last date of malpractice." 604 F.2d at 744 (quoting *Borgia v. City of New York*, 12 N.Y.2d 151, 157, 237 N.Y.S.2d 319, 322, 187 N.E.2d 777, 779 (1962)).

149. *Id.*

150. *Id.*

of the nine causes of action included in its complaint.¹⁵¹

The problems the user has in making a timely claim in tort against the computer vendor are very similar to those he experiences in contract.¹⁵² The purpose of the continuous treatment theory as it is applied to the medical profession is to avoid having the patient interrupt the course of treatment in order to file a claim against the medical professional.¹⁵³ Applying this doctrine to the computer professional would permit the user to continue negotiating with the vendor to obtain a resolution of the problem without having to file suit. Only when all attempts have failed should the user be required to seek help from the judicial system. By holding that the cause of action accrues at the end of the treatment rather than the beginning,¹⁵⁴ the courts would discourage the filing of premature lawsuits and generally provide a more realistic approach to litigating tort claims against computer vendors. This approach would work particularly well when integrated with a computer professional malpractice standard.

FUTURE TRENDS IN COMPUTER LITIGATION

In the past, vendors have enjoyed a great degree of success in litigation involving their standard form computer contracts. It is therefore unlikely that these standard form contracts will undergo significant changes within the near future.¹⁵⁵ Given these facts, the best approach for the computer user seeking recovery in the future will be to avoid contract litigation in all but the most blatant cases and to proceed under one of the more recently tried tort theories of fraudulent misrepresentation, negligent misrepresentation, or negligence.

The most popular tort action under which first time users are now beginning to proceed is fraudulent misrepresentation.¹⁵⁶ Given the recent successes of several users claiming under this

151. *Id.* at 737.

152. *See supra* text accompanying notes 69-86.

153. 604 F.2d at 745.

154. *See supra* notes 76-80 and accompanying text.

155. Many of the problems experienced by the new, first time user may begin to disappear within the next ten to fifteen years as the number of personal computers in homes and schools work to alleviate much of the computer illiteracy plaguing both large and small businesses today. *See generally* *Machine of the Year*, TIME, Jan. 3, 1983, at 15; "Computer Kids" Master "Basic Skill," N.Y. Times, Apr. 22, 1982, § 3 (Business Day), at 1, col. 3.

156. *See supra* notes 61-62 and accompanying text.

theory,¹⁵⁷ filing an action based on fraudulent misrepresentation may well be the best approach for many users proceeding against vendors within the near future. The difficulty in employing this approach, however, is that the user must establish that the vendor intentionally misrepresented his product's capabilities to the user.¹⁵⁸ Hence, claims of fraudulent misrepresentation may require a level of proof too stringent for the user to meet, particularly where the user has not carefully documented the events leading up to the suit as they happened.

An alternative approach in these cases would be to proceed under theories of negligent misrepresentation¹⁵⁹ and negligence.¹⁶⁰ Although there is little precedent in computer litigation for suits under these causes of action, both approaches hold much potential for increased success by users in future litigation. In many cases where the first time computer user is unhappy with the system he has acquired, the problem is not that the vendor has intentionally deceived him about what the system is or can do.¹⁶¹ Instead the user's expectations are not met because the vendor's sales representative failed to make him understand what he was getting, or failed to fully comprehend the user's needs before proposing the hardware and software configuration. The vendor did not intentionally injure the plaintiff, but did so by careless actions or statements. An action under a negligence or negligent misrepresentation theory is clearly the most appropriate cause of action under these circumstances, particularly where any action on the contract or the warranties has been foreclosed.

The negligence approach, however, presents the difficult issue of what duty of care the computer professional owes an inexperienced user. As previously noted, because of the lack of success of the traditional "reasonable man standard," users have attempted to establish a heightened "computer malpractice" standard of care by which the conduct of computer professionals

157. See *supra* notes 128-37 and accompanying text.

158. See *supra* note 29.

159. See *supra* note 52.

160. See *supra* note 53.

161. *But see* *Glovatorium, Inc. v. NCR Corp.*, 384 F.2d 186 (9th Cir. 1982) (user awarded more than \$2.2 million for vendor's fraudulent misrepresentations concerning its computer equipment and systems, including such acts as replacing the user's disc drive with an older model and switching the serial numbers in order to disguise the replacement drive).

could be measured.¹⁶²

While a cause of action in computer malpractice may hold some long-range potential for obtaining relief for the injured user and for simplifying computer litigation, the probability that this heightened duty of care will be adopted within the immediate future is small.¹⁶³ Even if a uniform standard were developed, there would likely remain a widespread lack of uniformity of standards within the industry, because the current demand for data processing professionals in the United States is so high that the marketplace could not afford to begin hiring only certified data processors.¹⁶⁴ In addition to this lack of standards, there are several subissues which must be resolved before such a level of care could be imposed on the computer industry. These subissues include the potential need for differing standards for computer vendors, software houses, consulting firms and service bureaus, the scope of the computer professional's liability, the extent to which the user's degree of experience, knowledge or reliance will affect the computer professional's duty of care, and the means by which such standards could be kept current with an industry as large, complex and subject to change as is the computer industry.

By relying on actions under fraudulent and negligent misrepresentation,¹⁶⁵ on the other hand, the user may make use of causes of action which are available now and which have begun to show some signs of promise for plaintiff-users. Furthermore, because these causes of action require a showing that the plaintiff relied on the defendant's faulty representation,¹⁶⁶ they encourage a more realistic treatment of the reliance element implicit in the relationship between inexperienced users and sophisticated vendors. In order to fairly assess the injured user's claims, courts must employ standards which recognize the character of

162. See *supra* notes 142-45 and accompanying text.

163. But see Note, *supra* note 71, at 200.

164. See Patterson, *Who Will Keep the Computers Running?*, *INDUS. WEEK*, Nov. 2, 1981, at 46-51.

165. The user may also achieve some degree of success under the traditional "reasonable man" standard negligence action or by pleading a combination of negligence and malpractice standards. See, e.g., *Accusystems, Inc. v. Honeywell Information Sys., Inc.*, No. 80 Civ. 5710 (DBB) (S.D.N.Y. Oct. 26, 1982) (case remanded for a determination as to whether negligence and/or malpractice causes of action were available under the facts of the case).

166. See *supra* notes 52, 53.

this relationship.¹⁶⁷

CONCLUSION

Courts have generally failed to take into account the relative positions of the parties in transactions between computer vendors and inexperienced users. Because courts have frequently ignored the significance of this relationship in their treatment of aggrieved users' claims, the causes of action traditionally available to dissatisfied users have thus far provided little relief. More realistic approaches to established causes of action which take into account the user-vendor relationship and new causes of action recognizing the positions of the parties must be considered by both attorneys and judges involved in computer litigation if first time users are to be afforded the opportunity for appropriate relief within the judicial system.

SUSAN J. MACAULAY

167. For other possible solutions to the problems besetting the dissatisfied computer user, see Benn & Michaels, *supra* note 2, at 38-40, 43-44; Note, *Unconscionability and the Fundamental Breach Doctrine in Computer Contracts*, 57 NOTRE DAME LAW. 547 (1982).

