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**Weathering the Commercial Storm: Why Everyone  
Should Steer Clear of the Uniform Computer  
Information Transactions Act**

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## **Abstract**

The Author examines the complexities and intricacies of the Uniform Computer Information Transactions Act. The Author utilizes a hypothetical to illustrate the problems with the Act. In Part 2, the Author explains what UCITA is, what the Act covers, and how the Act was drafted. In Part 3, the Author explains the difficulty with categorizing software agreements as licenses. This section addresses the requirements necessary for determining whether a product (software agreement) can be considered a transaction in goods under the Uniform Commercial Code Article 2 and whether software agreements should be considered within that realm. Within that section, the Author also discusses the problem with post-payment disclosure under the Act and explains how UCITA allows for important transactions terms to be hidden from the consumer until after the sale is finalized. In Part 4, the Author discusses and examines UCITA's imaginary warranty provisions. This part discloses the flawed aspects of UCITA's warranty provisions. Under UCITA, express warranties created by the seller, become obsolete when the sale is finalized. Further, the Author discusses how the highly necessary implied warranty of merchantability is reduced to only one element under UCITA. Finally, the Author explains that once a consumer buys software, the product is not warranted to function with the consumer's hardware. In Part 5, the Author discusses the choice of forum provisions. Under UCITA, the licensor chooses the forum of litigation. The problem is compounded by the ability of licensors to chose forums that have adopted UCITA in order to benefit from the Act's one-sided provisions. Part 6 discusses the problem with the preemption of consumer protection laws. If a state adopts UCITA, then both federal and state enacted consumer protection laws are ultimately preempted. The Author gives an example of preemption by utilizing the Magnuson-Moss Warranty Improvement Act. Finally, the Author gives alternative legislation that might allow the legislatures to come together and develop a uniform software license law.

**Keywords:** Uniform Computer Information Transactions Act, Software, Licenses, Software Agreements, Goods, Mass-market Transactions, Contracts, Implied Warranties, Express Warranties, Uniform Commercial Code, Merchantability, Internet, Choice of Forum, Consumer Protection, Magnuson-Moss Warranty Improvement Act, Transactions, Computers.

## **1. Introduction: The Calm before the Storm**

Chris, a Florida resident, uses his personal computer on a daily basis. He downloaded a computer program called *VirusClear* from the Internet site <<http://www.virusclear.com>>. Before Chris downloaded the program, he entered his credit card number electronically. A box with the words 'IMPORTANT INFORMATION' appeared on Chris's computer screen along with an 'I AGREE' box. When these boxes appeared, a hyperlink flashed that allowed Chris to check the latest weather report for 'FREE.' Chris browsed this 'FREE' Internet site for several minutes and then continued the process of downloading *VirusClear's* anti-virus software. Unbeknown to Chris, when he returned to the original Internet site, the 'IMPORTANT INFORMATION' box had disappeared. Chris then clicked the 'I AGREE' box on his computer screen. The software was downloaded on his

computer along with an access contract and directions for the computer program's use. When the anti-virus software was downloaded, Chris realized that the software he downloaded was incompatible with his hardware and was forced to call 1-800-*VirusClear* to attain the correct software. Chris was later billed \$25.00 for the technical service call.

After a week of virus-free computer use, Chris discovered that *VirusClear* inadvertently transferred several viruses onto his computer. Chris's computer crashed and cost him \$200.00 to fix. Upon reading *VirusClear*'s access contract he found the following:

#### Warranty and License Information

These terms shall be governed by and construed in accordance with the laws of the State of Maryland, without giving effect to any principles of choice of law. You agree that any action at law or in equity arising out of or relating to these terms shall be filed only in the state or federal courts located in the State of Maryland and you hereby consent and submit to the personal jurisdiction of such courts for the purposes of litigating any such action.

*VirusClear* gives no warranty against any program defects. No warranties, express or implied, are made with respect to this program, including but not limited to the implied warranties of merchantability and fitness for a particular purpose. You assume the entire risk as to the quality, use and performance of the program and, should the program prove defective, you and not *VirusClear* or its suppliers or an authorized reseller, assume the entire cost of necessary servicing, repair or correction. *VirusClear* does not warrant that the function of this program will be uninterrupted or error-free. You assume the responsibility for the selection of the programs and hardware to achieve your intended results.

## 2. The Aftermath

Under the Uniform Computer Information Transactions Act (UCITA), Chris has virtually no recourse against *VirusClear*. When Chris clicked the 'I AGREE' icon, he accepted the terms of the licensing agreement which did not provide express or implied warranty protection against program defects or computer system integration. Even if Chris could assert a claim against *VirusClear*, his claim would have to be filed in Maryland, a UCITA state, making litigation costly and impracticable. Further, because of UCITA's application, this transaction would be labeled a 'license' and would not be afforded the benefit of consumer warranty protection laws that only encompass 'goods.'

## 3 What Is UCITA?

UCITA applies to information obtained electronically and attempts:

'to conform state contract law governing software and information licensing to a uniform national standard to govern the transactions between licensors and licensees'.

This proposed uniform regulation encompasses the complete range of software

contractual relations: contracts to license or buy software, contracts creating computer programs, contracts for multimedia products, contracts dealing with computer games, and contracts involving online databases which include access contracts.

Because of UCITA's all encompassing application, the Act applies to virtually every aspect of business and consumer life. Its wide range has not gone unreported. Many sources have criticized UCITA, including the attorney generals of twenty-four states. The attorney generals are concerned about UCITA's impact on consumers because of its reduction of warranty protections, and the Act's preemption of existing state law disclosure standards. However, the major source that has expressed concern is the consumer: the very hand that feeds the American economy. Most consumers are apprehensive because the Act allows offensive contract terms to be hidden until the consumer has paid for the product, allows publishers to market knowingly defective software, and will essentially limit the market for used software.

### **3.1 The Drafting of UCITA**

Several years ago, the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a committee to draft Uniform Commercial Code (UCC) Article 2B dealing with the regulation of licenses. UCC Article 2B, applied to licenses of information and software contracts. Licenses, were defined in 2B-102 as a transaction that:

‘authorizes, prohibits or controls, grants permission to access to or use of information, if the contract expressly conditions, withholds, or limits the scope of the rights granted’.

The goal of Article 2B was to:

‘facilitate electronic commerce and to implement concepts concerning electronic trade.’ (UCC Article 2B § 2B-102 n.4.)

While proposed UCC Article 2B did not advance to a final draft, it was used by NCCUSL as a guideline for UCITA. The first draft of UCC Article 2B was presented before the NCCUSL committee on February 2, 1996 and went through approximately sixteen drafts until the last draft was presented in February, 1999. In April of 1997, however, NCCUSL announced that UCC Article 2B would not be promulgated. The press release stated that the ‘lack of uniformity and lack of clarity of the legal rules’ would make computer transactions under the UCC costly and unpredictable (*Immediate Release, 2000*). While the purpose of UCC Article 2B was to find uniformity, NCCUSL explained that codification under the UCC would not promote harmony in licensing (*Immediate Release, 2000*). However, the press release failed to disclose that the ALI withdrew of UCC Article 2B because it had reservations about the article's substance and technical quality (*Memo, Braucher*). The ALI declined to specifically explain why it withdrew from Article 2B, but a May 1998 annual meeting resolution said it all:

‘[t]he current draft of proposed UCC Article 2B has not reached an acceptable

balance in its provisions concerning assent,’ and felt that the drafters reflected ‘a persistent bias in favor of ... licensors’(*4CITE: Roadblock to Innovation, 2000*).

This withdrawal of support was an unprecedented action, the first of its kind in the 50-year history of the two organizations. NCCUSL chose to offer this new uniform law as a stand alone Act: The Uniform Computer Information Transactions Act (UCITA), and on July 29, 1999, NCCUSL adopted UCITA ‘by an overwhelming vote of 43 to 6’.

This uniform act contains major problems that this Comment will analyze. Why the Act will not benefit Florida’s consumers if adopted by the Florida legislature will be explained. While this Comment utilizes Florida as its main source of analysis, the explanations and comparisons can be applied to every legislature. This Comment begins by addressing the problem of categorizing software as licenses and then compares current Florida law with three major concerns consumer groups have about UCITA: the Act’s provisions regarding warranties and choice of law clauses, and the problems of consumer protection law preemption. This Comment then discusses the current status of UCITA in Virginia and Maryland, and ends with a proposal for an appropriate alternative to UCITA. The hypothetical fact pattern beginning this Comment is given for a more personal understanding of UCITA’s impact on unwary consumers.

#### **4. Categorizing Software as Licenses**

One of the major problems with UCITA is its categorization of software as licenses. This section addresses the requirements necessary for determining whether a product can be considered a transaction in goods under UCC Article 2 and whether licenses should be included within that realm.

Usually the sale of software is a three-party transaction. The licensee generates the product and then sells the license to a merchant. The merchant, careful to abide by the license agreement, makes mass copies of the software and sells the product to consumers. The initial transaction between the licensee and the merchant should not fall under UCC Article 2 and should retain the characteristics of a license. Thus, preserving traditional copyright protections for licensors. However, the final transaction between the merchant and the consumer should maintain the characteristics of a ‘good’ because it involves the sale of a product to the mass market. With this said, it is not an easy task to determine whether an item is a good, and there are many ‘grey areas’. Software is arguably within that grey area. The drafters of UCITA have muddied the waters by creating a third possible category for software, licenses. Before UCITA, this grey area involved distinguishing whether the product was a good or a service.

In most instances the predominant factor test is used to aid in determining whether a product is a good or a service. If a product is more intertwined with a service than with the purchasing of a good, then the item is a service and does not fit the definition of a good under UCC Article 2. Florida utilizes the predominant factor test in contracts involving goods and services. This test determines whether ‘their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of a service, with goods incidentally involved’(*BMC Indus. Inc., 1998*). Some states, including UCITA states,

have adopted the *gravamen* test. This test is essentially the same as the predominant factor test and since most software is not ‘intertwined with a service,’ it would be considered a good under either test. The next step is determining whether software fits the formal definition of a ‘good’ under UCC Article 2.

To be a good under UCC Article 2, an item must be ‘moveable at the time of identification to the contract for sale’. Software is distinguishable from pure thought and is moveable in any of its forms. Every product ever produced was first generated by human thought; but, eventually those thoughts were converted into a tangible product. Software transferred through the internet is a prime example of this type of transaction and transformation.

Software transferred via the internet requires the use of telephone lines and electricity. Electricity arises from the existence of a charge consisting of protons and electrons. These electrons and protons create atoms (*Electricity, 2000*). Atoms are definitely moveable and tangible items (*Electricity, 2000*). Most current internet providers utilize electricity and fiber optics that transmit digitalized messages by light pulses through hair-thin fibers. This type of transformation allows large amounts of information to be transmitted between computers (*Fiber Optics, 2000*). These types of transmissions utilize moveable goods, because courts have found electricity moving through wires and water moving through pipes to be moveable. When Chris copied *VirusClear* onto his computer system, the program became moveable. The way the ‘good’ was received or converted should not alter its essential character. For example, just like a consumer that buys a CD or record can copy the music onto a tape, a software buyer can copy the program onto his computer system making the good moveable.

The drafters of UCITA specifically disclaimed the above arguments and claimed that a disk with computer information or software transferred over the Internet does not become a good simply because the information is contained on a tangible medium. The drafters cite various judicial opinions to validate this argument. The drafters cite *Gilmer v. Buena Vista Home Video, Incorporated.*, which held that an implied warranty with respect to the sale of books does not extend to their content. The *Gilmer* court stated that in:

‘[b]oth [*Cardozo v. True* and *Winter v. G.P. Putnam’s Sons*] [the court] h[e]ld that a book publisher warrants only the tangible, physical properties of a book’.

This interpretation of *Cardozo* is simply incorrect. The *Cardozo* court expressly stated that it ‘makes no statements concerning the liability of an *author* or *publisher*’. The *Cardozo* opinion is limited to merchants who ‘regularly sell books’ and does not apply to publishers or authors as the court in *Gilmer* suggests. It seems that courts are confused and unsure about how to classify the sale of software and unknowingly interchange the terms distributor and author.

The possibility of book sellers being held responsible for the content of every book they sell is absurd and would hinder the free flow of information. Agreeably, booksellers should not shoulder the burden of testing every idea contained in a book to make sure that the author did not embrace a harmful idea. But if a book seller, and possibly a software

seller, 'has reason to warn the public as to the [product's] contents', then it is possible for the implied warranty of merchantability to be extended to include the material communicated. This means that for software, if the software seller did not have reason to warn consumers of potentially defective software that the implied warranty of merchantability would be limited to the physical properties of the disk. With that said, the sale of a book is equivalent to the sale of software because '[m]usic or words are *not* sold separately from albums or books', and nor should the music or words on software. While the drafters of the Act fight to exclude these types of written ideas and thoughts from the definition of computer information, they create ambiguity concerning whether information must be in electronic form or whether the information must be processed by a computer (*Memo*, Braucher).

The definition of computer information includes 'a copy of the information and any documentation or packaging associated with the copy'. The drafters claim that this type of packaging and documentation is a 'mere inciden[t] of the transfer of the information,' but this inclusion allows clearly non-electronic information to be deemed computer information under the Act, and contravenes the Act's policy of uniformity. (*Memo*, Braucher at 7) For example, a diskette containing electronic information and the disk's documentation, which can include non-electronic documentation, are included within this definition. This all-encompassing definition seems to cover written documentation accompanying software, something the drafters fought to exclude. However, after the definition battle has been fought, the sellers and licensees can throw the consumer for a loop by opting in or out of UCITA's provisions.

UCITA allows hardware sellers that also offer software to opt-in the Act if the software provided is a 'material' part of the transaction. If adopted companies like hardware manufacturers could choose to incorporate the Act into their business transactions. The drafters give a prime example of opting-in. A company that provides financial services that are excluded from UCITA 'may enter into an electronic agreement that enables its customer to access the company's database'. This second transaction would be covered in UCITA if the company decided to opt-in. Since the bulk of the transactions encompass computer transactions under UCITA, most businesses and software manufacturing companies can opt-in or out of UCITA's provisions.

Because of a company's ability to opt-in or out of UCITA, many consumers and businesses will be uncertain about UCITA's reach and enforcement. Many software products are sold with and without software. This furthers the uncertainty about UCITA's scope (*Memo*, Braucher at 5). For example, many types of software are accompanied by a book. The software would be considered a license under UCITA, whereas the physical properties and possibly the contents of the book would be considered a good under the UCC and subject to federal and state copyright law. This type of mixed transaction leads to confusion and costly litigation by forcing these mutually exclusive products into different realms. Once the transaction has been narrowed and the scope of UCITA determined, the consumer must then contemplate the extent of the contractual terms.

#### **4.1 Post Payment Disclosure of Important Contractual Terms and Mass-**

## Market Transactions

UCITA validates post payment disclosure of contract terms by software producers and software sellers. All terms, even important terms such as warranties, can be hidden from the consumer until after the deal has been closed. In Florida, significant contractual or license terms are not hidden from consumers.

The placement of the referenced license agreement and the accessibility of the license agreement were of primary judicial concern in *Management Computer Controls Incorporated v. Perry Construction, Incorporated*. In *Management*, the plaintiff had access to the license agreement before he signed the contract. The court explained that the contract must contain more than a mere reference to the license agreement before it becomes part of the sales contract. Here, the license agreement was ‘affixed to the outside of the box,’ and contained a warning at the top, which stated that by opening this package the plaintiff accepted the terms of the license agreement. The plaintiff had the opportunity to read the venue clause *before* he opened the software package, and thus the venue clause was enforceable.

In the above hypothetical fact pattern, Chris was given the opportunity to read the contractual terms before he downloaded *VirusClear*'s software, but was distracted from reading these terms with a hyperlink. The opportunity of review as stated in *Management* is lost under UCITA, because the drafters altered the definition of one's ‘opportunity to review’. Opportunity of review under UCITA does not require that the terms be provided to the consumer before he has paid for the product (*Memo, Braucher*). Thus, Chris will be deemed to have had the opportunity to read the contractual terms, even though he did not. This result can be altered by utilizing the doctrine of incorporation by reference which allows the consumer to know that a ‘mysteriously hidden’ agreement exists.

The doctrine of incorporation by reference was entertained in *Kantner v. Boutin*. This doctrine requires that there be an expression in the incorporating document of intention to be bound by the collateral agreement. While *Kantner* did not deal with computer software, the policy reasons behind the decision are applicable. With computer programs, the collateral document is usually a license agreement. This collateral document should be required to be incorporated by reference into the primary software contract provisions and should be provided prior to the customer's assent to the sale of software. With this type of policy, consumers will know that a collateral agreement exists. Software product license agreements contain terms that include what law governs the transaction, what warranties apply, and how the consumer can utilize the software. These terms become extremely important when the consumer buys the software in bulk for a small-time business.

If UCITA is adopted by Florida, this type of pre read approval will not be necessary to enforce software license agreements that contain uncomplimentary terms. By preventing post payment disclosure of contractual terms, the consumer is excluded from comparing the terms of alternate software and from making an educated decision to purchase.

In the above-mentioned hypothetical fact pattern, *VirusClear* indirectly provided Chris



with the opportunity to read the pre contractual terms. It has become customary with over-the-internet software purchases to distract the purchaser with a hyperlink while the consumer is in the process of purchasing software. In the hypothetical, Chris was distracted with a 'FREE weather report'. Once Chris clicked on the hyperlink, the 'IMPORTANT INFORMATION' icon disappeared and did not return when he returned to the original computer screen. This is the type of situation that the attorney generals are concerned about. The use of the 'IMPORTANT INFORMATION' boxed icon in this way has the effect of evading the consumer notification requirement and is validated in UCITA's provisions.

Because UCITA does not mandate that the record or terms of the contract be conspicuous, it is perfectly legal for licensors selling software via the internet to distract consumers, like Chris, with a hyperlink. With UCITA, important contractual terms can also be placed in boilerplate provisions that will be seen only after the consumer buys the software, takes it home, and unwraps the box. For example, if a consumer buys a shrinkwrapped software product from *CompUSA*, the consumer can only purchase the software based upon what the exterior of the software package represents. It is not until the consumer puts the disk into his or her computer that the consumer is given an opportunity to review the software's contractual terms.

Here is how the majority of judicial opinions would treat the same mass-market software transactions. Assuming that most consumers do not read the license agreements that accompany the software on their computers, most judicial opinions refused to uphold the enforcement of shrinkwrap licenses because the consumers have not assented to the terms. However, if the consumer has had an opportunity to read the license prior to acceptance, as in *ProCD Incorporated v. Zeidenberg*, the consumer cannot reject the hardware or software.

In *ProCD*, the defendant bought telephone database software and formed a web service to resell the information. (*ProCD Inc.*) ProCD filed suit seeking an injunction barring the defendant's further dissemination of the information because the license agreement disallowed mass dissemination. (*ProCD Inc.*) Because the defendant had the opportunity to read the license at his leisure and accepted the goods, he accepted the goods and the terms of the contract. (*ProCD Inc.*) However, the court utilized the UCC and emphasized the fact that the buyer had the opportunity to inspect the goods first and could make an effective rejection under UCC section 2-602(1). (*ProCD Inc.*)

Under this analysis consumers have ample opportunity to inspect the goods and make a 'final decision after a detailed review' (*ProCD Inc.*). In the above hypothetical fact pattern, Chris would likely prevail in a *ProCD* analysis, because he did not read the terms of the contract and was duped into the contract without having had the opportunity for a 'detailed review.' However, since UCITA specifies this type of transaction as a license, consumers are not afforded this type of *ProCD* pre-acceptance protection.

Under UCITA, a buyer does not have the right to return software if the buyer has had an opportunity to review the license contract before his or her obligation to pay. This conclusion changes when the consumer has waited a period of time before complaining of

the software's performance.

In *Hill v. Gateway 2000*, the court utilized the same analysis as in *ProCD* of determining whether the defendant had an opportunity to review the contractual terms. However, in *Hill* the consumer had thirty days to return the computer (*Hill*). The consumer waited more than thirty days to complain of the computer's inadequate components and performance and precluded the defendant from returning the computer (*Hill*). This type of transaction differs from one under UCITA, because the plaintiff had the opportunity to read the contractual terms before the acceptance was finalized (*Hill*). While the consumer may not have been aware of the problems prior to the expiration of thirty days, the consumer had ample time to read the contractual terms and to consider the arbitration or venue clause if litigation would become necessary. Where as under UCITA, the consumer's acceptance is finalized at the time of purchase.

In conclusion, the secondary transaction of sellers selling software to consumers should be considered the sale of a good. Consumers are afforded more protections if computer programs or software is characterized as a good, because they are given more certainty as to the type of transaction they are entering into and important contractual terms will not be hidden until after their purchase and acceptance.

## **5. UCITA's Imaginary Warranty Provisions**

### **5.1. Certain Express Warranties are Eliminated**

Florida's consumers are afforded the same express warranty protections as UCC Article 2 provides. Express warranties by a seller are created by any 'affirmation of fact or promise' that 'becomes part of the basis of the bargain,' or any description and any sample or model that 'becomes part of the basis of the bargain'. While the basis of the bargain element remains in Florida, it provides the lesser of the two evils by incorporating the natural tendency of purchasers to rely on a promise of affirmation, description, sample or model.

Because the term 'basis' has no understood legal meaning, its interpretation has lead to confusion. Several theories have been developed to explain what 'basis of the bargain' means. In *Royal Typewriter Company v. Xerographic Supplies Company*, the court explained that the basis of the bargain meant that the statement must be 'inextricably intertwined with the initial determination' to determine whether the language constituted an express warranty. In *Royal*, the consumer lacked prior experience with the goods and thus the affirmations made prior to their purchase formed the basis of his purchase. The existence of an express warranty is negated only if a buyer has knowledge or did not rely on the seller's affirmations.

White and Summers have also developed a test of actual reliance based on Section 12 of the Uniform Sales Act of 1960. Another theory, predicated by Professor Nordstrom, utilized public policy by holding the seller liable under an express warranty even if the buyer did not rely on the warranty's language. While these theories give substance to the

meaning of 'basis of the bargain,' there is a downside to using this term with regard to advertising.

With either theory, the UCC still protects sellers from being caught in express warranties brought about by advertisements. One does not usually 'regard an advertisement as being made 'during a bargain,' and therefore no statement in an advertisement would normally qualify' as creating an express warranty. Further, statements made by the seller, whether by a commission paid sales person or by a well-informed expert, to the buyer after the transactions are normally not legally binding. However, there can be exceptions. For example, if the buyer has read the advertisement before his purchase and the information given in the advertisement became the basis of his bargain, the express warranty provisions of the UCC would be fulfilled because the advertisement induced the buyer to purchase the advertised product.

Proponents of UCITA claimed that the Act expands current case law on UCC Article 2 by including certain advertisements within the scope of Section 402 as an express warranty. However, the advertisement:

'must be known by the licensee, and must influence and in fact become part of the basis of the bargain under which the licensee acquired the computer information'.

Without the licensee's actual knowledge of the advertisement, an express warranty does not exist. This means that consumers relying on the reputation of a licensor, will not be provided the benefit of an express warranty. For example, a consumer relying on the robust reputation of *Microsoft* will not be provided any type of express warranty unless the consumer was actually aware of a specific warranty and that warranty in fact became the reason the consumer purchased that software.

Imagine that Chris, in the above-mentioned hypothetical fact pattern, had relied on *VirusClear's* reputation to purchase the anti-virus software. Chris's reliance on this secondary source would not be enough to produce an express warranty. Even if Chris had relied on the express words of a retail seller, he would have to prove that those expressed words became 'in fact' the 'basis' of his purchase.

The drafters claimed that express commitments are part of the basis of the bargain as applied under the same standard of UCC Article 2, and that licensees are benefitted by the explicit indication of an express warranty created by advertising. But, the drafters of the Act fail to address the legal significance of the Act's required language to create an express warranty. An express warranty can only arise if the licensee has actual knowledge of the advertisement, otherwise the express warranty will not exist. As stated above, this knowledge is unlikely.

While the basis of the bargain remains the essential turning point in providing express warranties, UCITA would corrupt the test further by requiring that the licensee 'in fact' be influenced by the licensor. UCITA's proponents claimed that the Act would bring uniformity to the companies that publish or sell software. However, the Act will actually

put a damper on consumer rights. UCITA gives the appearance of providing consumers with express warranty protection, but in turn requires that the consumer know of these specific affirmations. (*Memo*, Braucher) Because most computer transactions are based on reputation created by advertising, consumers will not receive the benefit of UCITA's warranty provisions.

## **5.2 Warranty of Merchantability is Rendered Useless**

An implied warranty of merchantability is an important warranty and should not be discarded without in-depth consideration. Implied warranties of merchantability can be compared to strict tort liability and products liability, because no affirmative steps need to be taken by the consumer or product seller. The only elements necessary are the requirement that the contract be for the sale of a good and that the seller be a merchant.

Florida law provides for six elements of merchantability with regard to goods. These elements include a warranty that the product 'pass without objection in the trade,' 'in the case of fungible goods, are of fair average quality within the description,' that the goods are 'fit for the ordinary purposes for which such goods are used,' the goods 'run, within the variations permitted by the agreement,' the goods 'are adequately contained, packaged, and labeled as the agreement may require; and conform to the promise or affirmations of fact made on the container or label'.

UCITA also provides for an implied warranty of merchantability, but requires only that the computer program be fit for the ordinary purposes of the end user, i.e; the consumer. In commentary, the drafters further reduce the warranty of merchantability by explaining that merchantability does not require a perfect program and that the 'presence of certain defects may be consistent with merchantability'. While this commentary is only persuasive authority, it reflects the drafter's intent and many courts will look to the commentary for explanation and clarification. Understandably, software programs are not perfect and are constantly updated to reflect technology; however, this type of lackadaisical view provides a scapegoat for licensors by ensuring that licensors can take their time updating products and alerting consumers of botched software. This position lowers the standard of disk quality and encourages a rush to market without adequate testing. Meanwhile, consumers, like Chris, will be forced to pay out of pocket expenses for computer repairs due to knowingly distributed defective software. By allowing the licensors to skimp on warranty of merchantability, UCITA's consumers are sure to receive inferior but fixable products.

It is widely accepted and codified in the UCC and other uniform acts that the industry sets the standards of trade merchantability. For example, if UCITA is allowed to set low standards for licensors, then consumers are not protected against non-merchantable software products because under the industry's trade standard the software is alleged to be 'merchantable.' Licensors will be able to manufacture and distribute software that is defective, because the trade standard does not want to achieve quality products. For example, in *Borrell-Bigby Electric Company v. United Nations Incorporated*, the court recognized that a telephone alarm to a local fire station satisfied 'minimum military requirements,' and thus the lack of a certain computer program did not breach the implied

warranty of merchantability because the trade standard had been met. Similarly, under UCITA, if the trade standard allows computer programs to be disseminated with known defects, the trade standard for software licensors will reflect this lower computer industry standard. Along with lowering industry standards, UCITA further protects licensors at the expense of consumers by providing multiple ways to disclaim product warranties.

UCITA also allows licensors to disclaim or modify the warranty of merchantability by mentioning the term merchantability of quality or 'words of similar import'. In the above hypothetical fact pattern, *VirusClear* disclaimed the warranty of merchantability by stating that no warranties are given including but not limited to the implied warranties of merchantability. Most consumers are unaware of the different types of warranties. In contrast, under the UCC, merchantability is disclaimed if the terms of disclaimer are conspicuously written. The only other way to disclaim merchantability under UCITA is to make a disclaimer utilizing the terms 'as is' or 'with all faults' or other words that makes it known that there is no implied warranty. While UCITA does mandate that the words 'reasonably achieve the purpose of clearly indicating that the warranty is not given,' the Act does not mandate that these terms be of 'common understanding' to the buyer.

Again, under Florida law, consumers are afforded more warranty protections than UCITA is willing to provide. In the above-mentioned hypothetical fact pattern, assume that Chris bought the software from a merchant at *CompUSA*, instead of over the Internet. Even if Chris bought the program from a merchant, he still would not be afforded a 'flawless' product. The drafters attempt to compare this section of merchantability with the UCC by utilizing the term 'fair average'. While computer software may be a type of 'fungible' good, the drafters explained that this concept was utilized because of the inherent and natural error rate and because of the incapability of small providers being able to produce defect-free programs. Chris bought the software to prevent viruses from capturing his computer, and instead received viruses. Surely this type of program defect is not within the 'middle belt of quality'.

Once again, UCITA fails to protect consumers. Licensors are allowed to shirk responsibility by being held to a lesser industry standard than other sellers.

### **5.3 Revocation and Rescission: No Warranty of Software and Hardware Functioning Together**

Since revocation of acceptance occurs after acceptance, the buyer must understandably meet additional conditions to revoke acceptance of a product. Under Florida law a consumer can revoke acceptance if:

'a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it: without discovery of such nonconformity if his acceptance was reasonably induced either by difficulty of discovery before acceptance or by the seller's assurances'.

However, under UCITA, revocation is not allowed if after the purchase the software and

hardware do not function together.

In Florida, consumers can rescind their sales contract if the software does not perform satisfactorily with the hardware. In *Winterbotham v. Computer Corporations Incorporated*, the court recognized that hardware is useless without software, and vis-a-versa. Although the computer and software were bought as a package and the plaintiffs expressed that their primary purpose of buying this package was to automate their records, UCITA would disallow this type of consumer recourse, because the definition of return includes only returning the information and not the hardware. Thus, if the consumer buys a computer with software, and the seller opts into UCITA, the consumer could return only the software but not the computer because the return applies only to the computer 'information' (*Memo, Braucher*). The *Winterbotham* rescission and return policy would be lost, and consumers would be stuck with hardware they do not want or need.

When buying software from computer stores, such as *CompUSA*, or through the internet, consumers most likely do not inquire about what software is compatible with their hardware. Computer programs usually proclaim on their package which systems their products work with, but under UCITA that assertion is not enough to produce an implied warranty that the software will in fact work with the consumer's hardware, because these sellers, such as *CompUSA*, can disclaim the functioning of the software with the hardware.

Software and hardware that do not work together are permitted without warranties under UCITA. While UCITA creates an implied warranty that software and hardware work together if they are sold together, this implied warranty is created only if the licensor has reason to know that the licensee is relying on the licensor's skill or judgment in selecting the component items (*Memo, Braucher*). However, the seller can prevent this implied warranty by disclaimer under UCITA. To make matters worse, once the consumer finds out that the software she purchased does not work on her hardware, the software is not usually refundable if the package is opened. This leaves the consumer with only two remedies, an exchange or store credit.

Under our hypothetical fact pattern, Chris has no recourse if *VirusClear* does not work properly with his computer and will be out of pocket \$25.00 for technical product support along with \$200.00 for repairs. Because Chris bought his software through the internet, the agreement did not require a licensor to select a computer or other software applications to run on his computer. Thus, internet transactions will hardly ever provide consumers with computer and software integration assurance.

## **6. UCITA's Choice of Forum Provisions**

Choice of forum clauses allow parties to an agreement to choose a state or country where future litigation would take place. These types of clauses are necessary to determine the appropriate jurisdiction in Internet transactions and in other settings. However, UCITA allows licensors to choose the law of a state or country that has no relevance to the transaction involved.

UCITA allows the parties of the transaction to choose an 'exclusive judicial forum unless the choice is unreasonable and unjust'. The agreed choice of forum is unenforceable if no valid commercial purpose exists and there is severe and unfair impact on the other party. This broad provision allows companies to choose states that have enacted UCITA to forgo the business expense and risk of litigating in other non-UCITA states. After October 1, 2000, many software publishers will utilize a Maryland or Virginia forum in order to receive the benefits of UCITA's provisions. (*Memo*, Braucher) Iowa has implemented a 'bomb shelter' provision in the Uniform Electronic Transactions Act, which 'denies application of another state's law pursuant to a choice of law clause if UCITA is the chosen law'. This means that in Iowa, the choice of forum provision in the above hypothetical fact pattern would be voidable because the choice of forum is a state, i.e; Maryland, that has adopted UCITA. Thus, the agreement would be interpreted pursuant to Iowa's laws if that person is a resident or has a principle place of business in Iowa. The Supreme Court of the United States has also addressed the issue of forum selection clauses.

The Supreme Court laid out a three-prong test in determining whether forum clauses are enforceable: requiring that the forum not be chosen as a result of 'unequal bargaining power'; that the enforcement of the clause not contravene strong public policy; or that the purpose of the forum's selection is not to transfer a dispute in order to inconvenience the other party. In *Bremen* the court took into consideration the special expertise of the parties to the agreement and noted that the agreement was an 'arm's length negotiation by experienced and sophisticated businessmen' (*Bremen* at 1912). While the drafters explain in commentary that the Act adopts the approach taken in *Bremen*, however the drafters state that just because the bargaining power was unequal does not mean that the forum clause is invalid. This contravenes *Bremen* because one of the three prongs of the test requires that the agreement not be negotiated by unequal bargaining power. Further, the Act invalidates only unreasonable and unjust forum selection clauses, but the drafters state that a forum selection clause would have to have no commercial purpose or have 'severe and unfair impact' on a party to be invalidated (*Memo*, Braucher at 11). Most licensors and software sellers can easily establish a commercial purpose to back up contractual forum clauses. And, most forum clauses will not be deemed to have a severe or unfair impact on customers because of the inequality in costs. Thus, in reality, the *Bremen* decision is watered down to protect licensors at the cost of the consumer.

Since UCITA has been passed in Maryland and Virginia, it is logical and most likely that software producers will attempt to utilize these two states in contractual forum clauses to receive the benefits of UCITA's provisions. This can be overcome by passing bomb-shelter legislation, as explained above, which refuses to recognize another state's law if UCITA is the chosen law. While UCITA explains that contract terms that select an exclusive forum are subject to the laws of unconscionability, it also states that just because the forum clause adversely affects a party does not mean the clause will be struck down. Most consumers will have no recourse unless the software is extremely expensive or a class action suit is brought, because of the extended travel and expenses.

In the above-mentioned hypothetical fact pattern, Chris must proceed in a Maryland court to receive any type of recourse. Since Chris lives in Florida, it is unlikely that he will

expend his resources in travel and litigation to be awarded a \$200.00 judgment. The licensor will be off the hook and the consumer will be stuck with the bill.

## **6.1 Preemption of Consumer Protection Laws**

While UCITA preserves state and federal consumer protection laws, most state and federal consumer protection statutes do not utilize the term 'license' in their statutory language and thus Section 105(c) is misleading. This section states that:

‘except as otherwise provided in subsection (d), if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer protection statute [or rule] governs’.

## **6.2 The Magnuson-Moss Warranty Improvement Act**

By specifying software transactions as licenses, UCITA takes software transactions out of the scope of the Magnuson-Moss provisions of the Federal Trade Commission Improvement Act. While this Act does not supplant the UCC, it does provide added warranty assurances to consumers of consumer products. The Magnuson-Moss Warranty Improvement Act covers tangible personal property distributed in commerce and used for ‘personal, family, or household purposes’. This includes any tangible personal property used for consumer purposes ‘intended to be attached to or installed in any real property’. Under the Magnuson-Moss Warranty Act, the contents of warranties must be ‘fully and conspicuously disclose[d] in simple and readily understood language’. However, these warranty protections do not apply to licenses and apply only to consumer products or goods. Thus, under a UCITA state, the consumer will not benefit from Magnuson-Moss, and will be left to assert the limited warranty protections of provided for in UCITA. Further, because the Magnuson-Moss Act incorporates the implied warranties under state law, if UCITA is the state law, all other warranty protections are lost. Even if the Magnuson-Moss Act was amended to covered licenses, the above-mentioned problems with implied warranties will follow.

If Chris, wanted to bring an action under any of the above-mentioned consumer protection laws, he would not be afforded any relief. Simply, his claim does not fall within the confines of these laws, because the products are not ‘goods’ but licenses.

Most consumer protection statutes ‘treat mass-market software transactions as sales of goods’. Courts usually decide whether a contract for software is one of goods or services, and then follow UCC Article 2 if the software fits within the definition of a good. Although software packages vary depending on the consumer’s needs, most likely the transaction will be determined as a contract for the sale of a good. Since UCITA does not include the sale of goods, and only includes licenses, consumer protection under the UCC and other various consumer protection laws, such as the Magnuson-Moss Warranty Act, that only apply to the sale of goods are rendered useless. If Florida adopts UCITA, Section 105(c) will mislead consumers into believing that their software transaction falls within these consumer protection statutes, when in reality it does not.



## **7. The Current Status of UCITA in the States**

UCITA has been passed in only two states, Maryland and Virginia. Maryland's version of UCITA is currently in force as of October 1, 2000. Many state legislatures believe that by passing UCITA they will attract high technological companies. However, regulation is seldom a determining factor for high-technological companies to relocate. In fact, some states are already suggesting opposition to this controversial legislation.

Twenty-four state attorney generals have also expressed their concerns about UCITA to Gene Lebrun, the president of the NCCUSL, and asked the committee to table the project until their concerns were addressed. The major concerns that the state legislatures have regard the preemption of existing state consumer law disclosure standards. The attorney generals requested that NCCUSL not introduce the statute to their legislatures and believe that the current draft 'puts forward legal rules that thwart the common sense expectations of buyers and sellers in the real world'. The purposes of commercial laws are 'to facilitate commerce by reducing uncertainty and increasing confidence in commercial transactions'. However, UCITA does not facilitate commerce because it makes consumers more apprehensive of software that is being sold. The attorney generals even formulate a 'cautionary tale,' similar to the above-mentioned fact pattern, that would become common place under UCITA.

Other states have tabled the Act or have required that the Act undergo an interim study before further legislative consideration.

## **8. Alternative Legislation**

Using UCC Article 2B and UCC Article 2 as constructs, states can come together to form a uniform software license law. Section 2-314 provides a usable model for the implied warranty of merchantability. A warranty that the license is merchantable should include that the product pass without objection in the trade, be fit for the ordinary purposes for which such goods are used, are adequately contained, packaged or labeled as the agreement may require, and conform to the promise or affirmations of fact made on the container or label if any. This implied warranty will only apply if the person making the sale is a 'merchant'.

Further, consumers should be able to go into a computer store and purchase merchantable software. Under UCITA, the software only needs to be fit for the ordinary purposes for which it is being used, and promotes 'bad software'. UCITA allows software publishers to promulgate software that contains glitches and defects without giving the consumer adequate recourse. In the above hypothetical fact pattern, under UCITA, Chris would have no recourse for the \$200.00 he spent on fixing his computer. Automobile manufacturers are not allowed this leeway, and nor should licensors. Essentially software publishers are allowed to sell software 'as is', as 'used cars are often sold, meaning there is no warranty that it works right!'.

Also, software and hardware should be guaranteed to work together. After all, what good

is the software if you can not use it with your hardware. Consumers should be able to rely on packaging and merchant communication. Consumers should also have an implied warranty that the purchased software work as specified with certain hardware.

Certain express warranties should also be restored. Understanding that the flawed 'basis of the bargain' will remain if software is considered a good under UCC Article 2, the UCC provides the lesser of the two evils. Finally, to prevent preemption of consumer protection laws, the term licenses should be equivalent to the term goods. This will prevent software products from falling outside the circle of consumer protection.

## **9. Conclusion**

Florida's legislature should steer clear of UCITA. Although, computer transactions/licenses are in need of a new law to reflect the technological transformation, UCITA provides a premature answer at the expense of America's consumers. This premature legislation will cause consumer strife and ultimately hinder e-commerce. UCITA is beneficial only to a relatively small number of software producers and rings a bell of destruction for millions of businesses and consumers who purchase computer software or subscribe to Internet services. This Act fails to provide consumers with adequate warranty protections, causes confusion in choice of law clauses, and precludes protection from existing state and federal consumer laws. Instead of adopting UCITA, Florida should maintain its current law and keep software under UCC Article 2. While the answers to all of the consumer's needs do not lie in Article 2, the construct and policies behind the article could be applied to the computer realm.