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Warranties and Mass Distributed Software

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I. INTRODUCTION

Do users of $500 computer programs require the same protection as users of $100,000 computer programs?

The dramatic advances in computer hardware technology over the past few years have caused equally dramatic changes in the economics of the computer software industry. Data base management software that would have cost a mainframe user $100,000 ten years ago became available to minicomputer users for $25,000 a few years later, and the same basic data base management functions are now available to microcomputer users for under $500.

The vendor of $100,000 mainframe software can afford to provide extensive on-site support to its customers. Minicomputer software vendors can afford to provide corrected and updated copies of $25,000 software to their customers. Microcomputer software vendors can hardly afford to answer the telephone when their customers call to complain about $500 software.

Most mainframe and many minicomputer software acquisition agreements are negotiated between computer professionals. These agreements may have detailed provisions for acceptance testing, and they usually provide for ongoing software maintenance and support after the user’s initial acceptance. Where they are provided for, proper acceptance testing and maintenance services may be workable substitutes for performance warranties.¹

¹ Where the customer has had an adequate opportunity to test the software before deciding to keep it, the software itself may form the "basis of the bargain" between the parties, and the important feature of a performance warranty is not that there are no problems with the product, but that any problems that do occur will be corrected.
In contrast, the advent of the microcomputer software industry with its high volume, low cost distribution has made negotiated acquisition agreements and ongoing software maintenance agreements impractical. Many vendors of mass distributed microcomputer software feel that they cannot afford to warrant their software given the prices they are charging. Most have drafted form software marketing agreements that attempt to provide their software to users on an “AS IS” basis.²

On products that are subject to the Uniform Commercial Code, warranties may be created by contract or they may be imposed by law. They may be based on express statements or commitments made by the vendor, or they may be based on commitments which the law implies in any sale of goods. The strongest type of warranty is one based on an express representation of the vendor that the product will do something. For example: “This computer program will read, store and sort five thousand records into alphabetical order in less than one minute.”

This article explores some of the issues involved when a vendor designs a software warranty or non-warranty policy.³ It makes the assumption that the intellectual property known as a “computer program” or “software” will, at least in some cases, be treated as “goods” under the Uniform Commercial Code and other warranty laws.⁴

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2. An IBM program license agreement, with a 1984 copyright date, covering software distributed for the IBM PC, PC XT, PCjr, or Personal Computer AT “warrants the diskette(s) or cassettes on which the program is furnished, to be free from defects in materials and workmanship under normal use . . . .” This same license agreement provides, however, that “[t]he program is provided ‘as is’ without warranty of any kind, either express or implied . . . .”

Digital Equipment Corporation (DEC) has taken at least two different warranty approaches to its Digital Classified Software. DEC distributes Microsoft Corporation’s Multiplan 86 “AS IS WITHOUT ANY WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED.” At the same time DEC distributes Digital Research Inc.’s CP/M/86/80 operating system indicating that “[t]his software product is warranted to conform to the Software Product Description.”

Most computer software is purely functional, and its performance is central to its value. Yet it is almost an axiom of the computer industry that there is no complex computer program without some level of errors or “bugs.” Some mainframe and mini computer programs are delivered to users with a known error list as part of their documentation. A performance warranty allocates the economic risks of performance problems between the vendor and the customer.


4. U.C.C. § 2-105(1), which provides: “Goods” means all things (including specially
II. THE UNIFORM COMMERCIAL CODE

With minor variations, article two of the U.C.C. is the law of sales in forty-nine out of the fifty United States. U.C.C. section 2-204 (1) on contract formation provides that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” Once an agreement meets the minimum definition of a contract under the U.C.C., the Code will establish the general ground rules and fill in the missing terms.

A knowledgeable vendor of goods under the U.C.C. must deal with its customers in “good faith” and observe reasonable commercial standards of fair dealing. Good faith and fair dealing are diffi-

manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . .” Note all references to the U.C.C. are to the Uniform Commercial Code as enacted in California. CAL. COM. CODE §§ 1101 et seq.

Except where software is delivered to a customer by wire or other intangible means of transfer, the delivery of software usually involves the transfer of four elements from the vendor to the customer. Three of them, the magnetic media, the documentation, and the packaging are clearly tangible. The tangible items are generally sold to the end user. The copy of the intangible software itself may be sold, leased, or licensed. Where software is developed under a custom programming contract, a strong argument can be made that the programmer is providing a service. But the service argument is not very persuasive when prepackaged copies of standard software are distributed over the counter at retail computer stores. Even if, in a given case, software is not a “good” as defined by the existing warranty laws, those laws may provide the most useful law for courts to use by analogy when they are faced with the need to allocate the risk of loss in a transaction.

See Holmes, Application of Article Two of the Uniform Commercial Code to Computer System Acquisitions, 9 RUTGERS COMPUTER & TECH. L. J. 1 (1982); Note, Computer Programs as Goods Under the U.C.C., 77 MICH. L. REV. 1149 (1979). Both these articles discuss the variety of forms that computer contracts take and the legal confusion that exists on this issue. However both commentators resolve that, existing judicial confusion notwithstanding, the U.C.C. ought to apply. The Michigan Law Review note concludes that applying “article 2 to all these transactions assures uniform treatment and allows business innovation in an atmosphere of relative legal certainty.” Id. at 1165.

5. The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, § 101, 15 U.S.C. § 2301 (1982), which covers warranties for consumer products, defines “[t]he term ‘consumer product’ [as] any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . . .” California’s Song-Beverly Consumer Warranty Act, CAL. CIV. CODE § 1791 (Deering Supp. 1985), defines consumer goods [as] “any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes.” Many other states have warranty laws that may arguably apply to software. See also, Rice, Computer Products and the Federal Warranty Act, 1 COMPUTER LAW. 13 (1984).

6. U.C.C. § 2-104(1) defines a merchant. “ ‘Merchant’ means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” Section 1203 provides that “[e]very contract or duty within this code imposes an obligation of good faith in its performance or enforcement.” Section 2-103(b) defines good faith. “ ‘Good faith’ in the case
cult concepts to define precisely; however some level of consistency between the vendor's representations and the vendor's actions or intended actions would seem to be required. A vendor's warranties to its customers are closely related to the vendor's representations and must be made, limited or disclaimed in good faith.

There are four basic statutory warranties provided by the U.C.C. They are: (1) a warranty of title and against infringement;7 (2) express warranties made by affirmation, promise, description or sample;8 (3) implied warranties of merchantability;9 and (4) implied warranties of fitness for a particular purpose.10 These warranties probably accompany every computer program delivered to a customer unless some action is taken to limit or eliminate them.

A. Warranties

1. The Warranty of Title: U.C.C. Section 2-312

Section 2-31211 provides that in every contract for the sale of goods a vendor warrants that the title transferred is good and free from liens or encumbrances of which the buyer has no knowledge. This warranty can be modified or excluded only by specific language or circumstances indicating to the buyer that the vendor is not transferring full title. The vendor also warrants the goods are free from any rightful claims of third parties. A buyer who fur-

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7. U.C.C. § 2-312.
8. U.C.C. § 2-313.
11. U.C.C. § 2-312 provides:

(1) Subject to subdivision (2) there is in a contract for sale a warranty by the seller that

(a) The title conveyed shall be good, and its transfer rightful; and

(b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge. [Emphasis added].

(2) A warranty under subdivision (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications. [Emphasis added].
SOFTWARE WARRANTIES

nishes the vendor with specifications, however, cannot hold the vendor liable for claims arising out of the vendor's compliance with the buyer's specifications.

Section 2-312 is quite clear that any merchant vendor warrants that the products it is marketing do not infringe the rights of any third party. This warranty exists by operation of law. It is not disclaimed by general warranty disclaimer language. If a vendor wants to exclude the warranty against infringement, the vendor must draw the absence of a warranty of title directly to the attention of its customer. This could be done with language such as "XYZ Co. expressly disclaims the warranty against infringement and only transfers such rights as XYZ Co. may have under its license from ABC Co."12

The significance of the warranty against infringement is that it gives each customer a right of action against the vendor if the vendor markets an infringing product.13 This right would be in addition to any action that may be taken by the owner of the infringed rights. The warranty of title and against infringement should be of particular concern to anyone who markets any computer code that he did not write. Original Equipment Manufacturers ("OEMs"),14 Distributors and Dealers who market software products under license from others have no control over the content of the software they sublicense to their customers.15 Such vendors of third party

12. What constitutes effective disclaimer of warranty of title is the most litigated issue under U.C.C. § 2-312. Courts unanimously agree that subsection (2) which provides for modification or exclusion of warranty of title should be strictly construed. Thus, it is crucial that the disclaimer be specific and express. See Sunseri v. RKO Stanley Warner Theatres, Inc., 374 A.2d 1342 (Pa. Super. Ct. 1977) (disclaimer merely claiming to transfer only that interest the seller has, is insufficient as a disclaimer of warranty of title). See also McDonald's Chevrolet, Inc. v. Johnson, 376 N.E.2d 106 (Ind. Ct. App. 1978); Marvin v. Connelly, 252 S.E.2d 562 (S.C. 1979); Lawson v. Turner, 404 So.2d 424 (Fla. Dist. Ct. App. 1981); Rockdale Cable T.V. Co. v. Spadora, 97 Ill. App. 3d 754, 423 N.E.2d 555 (1981).

13. Since the primary purpose of U.C.C. § 2-312 is to protect the buyer from legal claims concerning the purchased goods, any reasonable third party claim, whether successful or not, constitutes a breach of the seller's warranty of title. See U.C.C. REP. SERV. (MB) § 2-312; Jefferson v. Jones, 286 Md. 544, 408 A.2d 1036 (1979); Trial v. McCoy, 553 S.W.2d 199 (Tex. 1977). Furthermore, a buyer will not be denied his remedy for breach simply because he has not been prevented from using the goods. Under this section "eviction" is not a necessary condition to the buyer's remedy. U.C.C. REP. SERV. (MB) § 2-312, Official Comment 4.

14. An "Original Equipment Manufacturer" is a general term for an entity that manufacturers, purchases, or assembles a product for resale. OEMs purchase some or all of the needed components for their products. A computer manufacturer would be an OEM customer for another entity that licenses a computer operating system.

15. Even software authors need to be concerned about the warranty of title. Unless a computer program is written directly in machine code, it has probably been assembled, compiled or interpreted. The code provided by the runtime library of a compiler may constitute the bulk of the object code version of a compiled computer program. Does the software
software should particularly be concerned if their software is provided by a supplier that has not contracted to indemnify the vendor from all losses that the vendor may suffer as a result of claims that the products provided are infringing. The practical value of any indemnity agreement depends on the financial strength and reliability of the party giving the indemnity.

2. The Express Warranty: U.C.C. Section 2-313

Section 2-313 provides that the vendor creates an express warranty by any affirmation of fact, description of the goods, sample or model which is part of the basis of the bargain. Section 2-313 further provides that an express warranty will be created despite a lack of formal words such as “guarantee” or “warranty,” or the fact that the vendor has no intention to create a warranty. However, a mere statement of the value of the goods or an expression of opinion by the vendor as to the goods is insufficient to create a warranty.

It is quite clear that a warranty is not necessarily the words within a filigree bordered document labeled as a warranty. A warranty is “[a]ny affirmation of fact . . . which relates to the goods and becomes part of the basis of the bargain.”

16. U.C.C. § 2-313 provides:

(1) Express warranties by the seller are created as follows:
   (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
   (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
   (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty. [Emphasis added].

What is an “affirmation of fact”? It is not all the glowing statements the vendor may make about a software product; it is a statement that the product is, will do or will not do something. “This program is wonderful,” “it’s a real timesaver,” and “no modern office can get by without it” generally are not considered affirmations of fact. They are commonly known as “puffing.” They do not create warranties, because they have no precise meaning and are expressions of opinion rather than statements of fact.\(^{18}\) On the other hand statements such as “this program will run on an IBM PC equipped with 128K RAM and the CP/M-86 operating system,” and “this program will read, sort and store five thousand records in one hour,” are affirmations of fact and constitute warranties.\(^{19}\)

It is clear that the written technical specifications and the operational characteristics described in marketing literature and in the printed documentation provided with software may form part of the basis of the bargain between the vendor and the customer. Written technical specifications may create express warranties that the software will perform as specified.\(^{20}\) In addition, a vendor’s sales

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\(^{18}\) See Westfield Chemical v. Burroughs, 6 COMPUTER L. SERV. REP. (Callaghan) 435, 21 U.C.C. REP. 1293 (Mass. Super. Ct. 1977) (representation as to man-hour savings was dependent upon factors not susceptible of personal knowledge and were mere expressions of opinion.)

\(^{19}\) See Wilson v. Marquette Elecs., Inc., 630 F.2d 575 (3d Cir. 1980) (oral statements of capability of a computer-assisted, electrocardiographic system constituted express warranties).

\(^{20}\) Although express warranties are easily created under the U.C.C., the parole evidence rule (U.C.C. § 2-202) may prevent proof of express warranties which are inconsistent with the provisions of a contract determined to be the final expression of the parties’ intentions (i.e. an integrated contract). Standard vendor contracts, therefore, should contain a merger clause which states that the contract embodies the full understanding between the parties. These clauses are typically held to be valid. See Investors Premium Corp. v. Burroughs Corp., 389 F. Supp. 39 (D.S.C. 1979); Pennsylvania Gas v. Secorn Bros., 73 Misc. 2d 1031, 343 N.Y.S.2d 256 (Sup. Ct. 1973), aff’d, 44 A.D.2d 906, 357 N.Y.S.2d 702 (4th Dept. 1974); NCR v. Modern Transfer Co., 302 A.2d 486 (Pa. Super. Ct. 1973). Courts are, however, often willing to recognize exceptions to the parol evidence rule if matters important to the agreement have been left out of the contract. Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F. Supp. 325 (E.D. Pa. 1973) (evidence of oral contract relating to programming services could be submitted to the jury); Teamsters Security Fund v. Sperry Rand Corp., 6 COMPUTER L. SERV. REP. (Callaghan) 951 (N.D. Cal. 1977) (form contracts for the sale of hardware, software and maintenance were not the final understanding of the parties notwithstanding an integration clause when there was no mention of systems software and vendor’s technical assistance responsibility). See also Diversified Env’t, Inc. v. Olivetti Corp., 461 F. Supp. 286, 291 (M.D. Pa. 1978).

Furthermore, courts may allow parole evidence to prove consistent additional terms. W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76 (Tex. Civ. App. 1979) (integration clause not conclusive where buyer had previously been furnished with written statement of installment conditions).
and marketing personnel and a vendor's distributors and dealers may create express warranties with their sales presentations.21

A software vendor's efforts to control the nature and scope of its express warranties must begin with its product documentation. The documentation must be as accurate as possible. Documentation frequently is prepared under pressure to get the product to market. It is frequently prepared by programmers who know the product too well to bother verifying that everything they write is clear and accurate. All too often the person writing the documentation would prefer to be writing computer code than documenting it. In addition the documentation for a complex computer program is itself complex and must, almost by definition, contain some errors or ambiguities.

Since the technical specifications described in software documentation may constitute express warranties under U.C.C. section 2-313, the preparation of software documentation should be given the same level of planning, thought and testing as the computer software itself. Higher quality documentation will serve two functions. Legally it will result in an express product performance warranty that is within the capability of the software and reduce the risk of warranty claims based on customer misunderstanding. In addition to the pure warranty considerations, clear and accurate documentation may reduce customer service problems and costs. The closer a vendor's documentation is to self-explanatory, the easier it will be to describe the software to potential customers, and the easier it will be to support customers after the sale.

Vendors would be well advised to educate their sales staffs to the warranty problems that can arise from misstatements or misrepresentations to potential customers, and the sales staff should be required to refer all technical questions to the documentation. If the sales staff uses the technical specification sheets and user's manuals as a textbook on the software, they can avoid misstatements that may result in unwanted warranties. In addition, if the customer knows the answers are in the documentation, post-delivery support

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21. Marketing personnel are always under pressure to get an order. They may not have a full technical understanding of the products they are marketing and they may make mistakes upon which customers rely. In addition, U.C.C. § 2-313(1)(c) provides that a sample may include product demonstrations. Chatlos Systems, Inc. v. National Cash Register Corp., 479 F. Supp. 738 (D.N.J. 1979) (promise in writing); Automated Controls, Inc. v. MIC Enter., Inc., 599 F.2d 288 (8th Cir. 1979) (product demonstration); Wilson v. Marquette Elecs., Inc., 630 F.2d 575 (3d Cir. 1980) (oral representations).
problems may be reduced by encouraging the customer to look in
the book before he reaches for the telephone.

3. The Implied Warranty of Merchantability: U.C.C.
Section 2-314

Section 2-314 provides that absent exclusion or modification
under section 2-316, a warranty of merchantability is implied in a
contract for the sale of goods between a merchant vendor and a
buyer. Merchantable goods must be fit at least for the ordinary pur-
pose for which they were intended, pass without objection in the
trade, be adequately packaged, and conform to any promises made
on the container or label. Further, section 2-314 provides that addi-
tional implied warranties may arise from course of dealing or usage
of trade.

Section 2-314 imposes a warranty that any product in the mar-
ket place will be of a minimum standard quality. This standard
requires a product to do what a product of its description is sup-
posed to do. Products must be "fit for the ordinary purposes for
which such goods are used." For example, word processing
software should be capable of processing written words on at least
some rudimentary level. It need not be easy to use or have any
complex features to pass under the description of a word processor.
A computer program marketed as a word processor that is in fact a
video game would clearly not be merchantable. A word processor
that loses parts of documents or drops words at random may or

22. U.C.C. § 2-314 provides:
(1) Unless excluded or modified (Section 2-316), a warranty that the goods
shall be merchantable is implied in a contract for their sale if the seller is a
merchant with respect to goods of that kind . . . .
(2) Goods to be merchantable must be at least such as
(a) Pass without objection in the trade under the contract description; and
* * *
(c) Are fit for the ordinary purpose for which such goods are used; and
* * *
(e) Are adequately contained, packaged, and labeled as the agreement
may require; and
(f) Conform to the promises or affirmations of fact made on the container
or label if any.
(3) Unless excluded or modified (Section 2-316) other implied warranties may
arise from course of dealing or usage of trade. [Emphasis added].

23. Generally speaking, software need not fulfill all of a buyer's expectations, or be
suitable for a specific application. See R. BERNACCHI & G. LARSEN, DATA PROCESSING &
THE LAW, 146-47 (1974) [hereinafter cited as BERNACCHI & LARSEN]. See also Zammit,

may not be merchantable depending upon the standards of the trade.

In addition to performing at some rudimentary level, a product must "pass without objection in the trade." It does not have to be the best product of its type, but merchants in the trade must be willing to accept it in the ordinary course of business. Standards are likely to change. As the general level of software quality improves with time, the minimum software quality that will pass in the computer trade will change, and the standard of merchantability will change with it. A product of average quality today may be unacceptable in a year or two.

The product must be "adequately contained . . . and labeled." It must live up to its billing and "conform to the promises or affirmations of fact made on the container or label." Labels should be clear and accurate, and software packaging must be functional. Fragile program media must be protected from damage in ordinary handling, and the media and documentation must be properly and adequately labeled so that they can be identified and used by customers. As in the case of what will pass without objection in the trade, these standards are probably dynamic and changing. They also may be different for different types of customers. If a vendor markets its products to other computer professionals, there is probably a lower level of care required in the packaging and labeling than if the vendor's market is made up of untrained home users.

The most interesting and possibly the most ambiguous of the standards of merchantability are those standards that arise from the vendor's or the industry's "course of dealing or usage of trade." If a vendor operates over time with an unwritten policy of "product satisfaction or your money back," the vendor may find that it has created an implied warranty to that effect. A vendor may also find that its products are covered by certain standard industry warranties if they are normal in the trade. This provision is no doubt intended to protect the reasonable expectations of customers that a transaction will be on the normal basis unless they are given notice of a change in past practices.

27. U.C.C. § 2-314(2)(f).
28. U.C.C. § 2-314(3).
29. Because such warranties are implied, they can be excluded or modified under U.C.C. § 2-316. See U.C.C. REP. SERV. (MB) § 2-314, Official Comment 12.
4. The Implied Warranty of Fitness for a Particular Purpose: U.C.C. Section 2-315

If a vendor is aware that the buyer intends to use the goods for a particular purpose, and that the buyer is relying on the vendor's judgment to select the goods, section 2-315 creates an implied warranty that the goods are fit for such purpose. This applies unless the vendor modifies or excludes this implied warranty under section 2-316.

When a customer asks a vendor to provide for particular needs or where the vendor holds itself out as providing solutions to specific problems, the vendor provides a warranty that the vendor's software will meet the customer's needs and solve the customer's problems. If the customer says: "I need a payroll program that will process my payroll with one hundred employees in six states. What should I get?" And the vendor answers, "Take this one here," there is a warranty that it will process a payroll of "one hundred employees in six states."

In addition, any time a vendor knows or has reason to know what its customer needs, there may be a warranty that the product provided is fit for the customer's particular purpose. The warranty of fitness for a particular purpose may even pose a problem for the remote software author distributing products through a chain of distribution. If the remote software dealer is acting as the author's agent in the transaction with the customer, the author may be held to know everything the agent knows. If a dealer is unscrupulous or does not know how the software functions, a remote author could conceivably breach the warranty of fitness for a particular purpose, even if the author did not personally know the customer's requirements.

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30. U.C.C. § 2-315 provides:
   Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

31. Sperry Rand Corp. v. Industrial Supply Corp., 37 F.2d 363 (5th Cir. 1964) (recommendations submitted for company's computer needs created an implied warranty of fitness); Chatlos Systems, Inc. v. National Cash Register Corp., 479 F. Supp. 738 (1979). See generally BERNACCHI & LARSEN, supra note 23, at 147-54. However, the purchaser sophisticated in the use of computer software or who has a data processing staff would have a difficult time arguing reliance as required by the implied warranty of fitness. See Steinberg, Dispute Over Software Warranties, NAT'L L.J., Apr. 18, 1983, at 16, col. 3.

32. Whether a seller has reason to know a customer's particular needs is a question of fact. BERNACCHI & LARSEN, supra note 23, at 150-51. See also Sperry Rand Corp. v. Industrial Supply Corp., 37 F.2d 363 (5th Cir. 1964).
B. Modification of Warranties: U.C.C. Section 2-316

Where it is reasonable to do so, section 2-316\textsuperscript{33} states that words or conduct creating express warranties and limiting or excluding a warranty will be construed as consistent with each other. Section 2-316 indicates that to exclude the implied warranties of merchantability and fitness for a particular purpose the language must be in writing and be conspicuous. A provision excluding the warranty of merchantability must mention merchantability specifically.\textsuperscript{34} Implied warranties can be excluded in most cases by stating the goods are sold “as is.” Finally, 2-316 provides that remedies for breach of warranty may be limited in accordance with U.C.C. provisions on liquidation or limitation of damages.

It is clear that U.C.C. section 2-316 is intended to provide considerable freedom for the modification of statutory and implied war-

\begin{footnotesize}
33. U.C.C. § 2-316 provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subdivision (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description of the face hereof.”

(3) Notwithstanding subdivision (2)

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and . . .

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this division on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

[Emphasis added].

However, U.C.C. section 2-316(1) also indicates that a "negation or limitation is inoperative to the extent that such construction is unreasonable." This requirement has the potential to render the typical disclaimers contained in software distribution warranties unenforceable.

The 1982 California Court of Appeal opinion in the case of \textit{A \\& M Produce Co. v. FMC Corporation}\textsuperscript{36} provides an interesting in-


\textsuperscript{36} 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982). The court in \textit{A \\& M Produce} affirmed a judgment totaling $300,000 against FMC in a $32,000 transaction where FMC had used all the magic words of disclaimer. The following excerpts from the court's opinion provide some of the reasoning behind this somewhat unusual result that may seem to be more appropriate to a consumer transaction than a commercial transaction.

\textbf{[U]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. . . . "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. . . . [C]ommercial practicalities dictate that unbargained-for terms only be denied enforcement where they are also substantively unreasonable. . . . [T]he greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated. . . .}

The warranty allegedly breached by FMC went to the basic performances characteristics of the product. . . . \textit{Since a product's performance forms the fundamental basis for a sales contract, it is patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry vendor without any enforceable performance standards. . . .}

Especially where an inexperienced buyer is concerned, the vendor's performance representations are absolutely necessary to allow the buyer to make an intelligent choice among the competitive options available. A vendor's attempt, through the use of a disclaimer, to prevent the buyer from reasonably relying on such representations calls into question the commercial reasonable-

ness of the agreement and may well be substantively unconscionable. . . .

If the vendor's warranty was breached, consequential damages were not merely "reasonably foreseeable"; they were explicitly obvious. . . . [T]his shifting is socially expensive and should not be undertaken in the absence of a good reason. . . . FMC was the only party reasonably able to prevent this loss by not selling A \& M a machine inadequate to meet its expressed needs. . . . If there is a type of risk allocation that should be subjected to special scrutiny, it is probably the shifting to one party of a risk that only the other party can avoid. . . .

[T]hese contract clauses were oppressive, contrary to oral representations made to induce the purchase, and unreasonably favorable to the party with a superior bargaining position. No experienced farmer would spend $32,000 for equipment which could not process his tomatoes before they rot and no \textit{fair and honest merchant would sell such equipment with representations negated in
depth discussion of the exclusion of warranties in standard printed form adhesion contracts. *A & M Produce* did not involve software's, however the principles would be similar in a typical mass distributed software transaction. Negotiated risk allocations between knowledgeable buyers and sellers should normally be given effect. However, the situation may be quite different where a knowledgeable seller uses a printed form adhesion contract to shift all risks to a technically ignorant buyer who must depend on the skill, knowledge and judgment of the seller.

*A & M Produce Co.* was an Imperial Valley farming company that needed weight-sizing equipment to process its tomato crop. They had no previous experience in processing tomatoes. FMC recommended and sold $32,000 worth of equipment to *A & M* under a form agreement containing standard disclaimers of express and implied warranties and a disclaimer of consequential damages in much the same form as the IBM and DEC warranties mentioned in note 2 above. The court affirmed a judgment against FMC for breach of express and implied warranties in the net sum of $255,000 plus $45,000 in attorney’s fees. The court concluded that no fair and honest merchant would sell such equipment with representations negated in its own sales contract.\(^37\)

*A & M Produce* indicates that in certain cases an unconscionable disclaimer of warranty may be denied enforcement despite technical compliance with the requirements of U.C.C. section 2-316. There is a qualitative difference between a software acquisition agreement negotiated between computer professionals and a software acquisition agreement in the form of a printed adhesion contract. It is clearly unreasonable for a software vendor to induce its customers to purchase or license software with detailed technical documentation explaining what the product will do and then for the same vendor to deliver the software with a printed form warranty stating that the software is provided “as is” without warranty of any kind.\(^38\)

While substantial arguments and case law support the practice

\(^{37}\) Id. at 486-97.

\(^{38}\) Id. at 125, 186 Cal. Rptr. at 129.

\(^{37}\) However, it may be passable for a disclaimer to prevent express warranties created by product documentation from becoming a part of the basis of the bargain as required under U.C.C. § 2-313. See United States Fibres Inc. v. Proctor & Schwartz Inc., 509 F.2d 1043 (6th Cir. 1975).
of shifting risks to the customer by using merger provisions and
disclaimers of warranty, there is always a risk that a court may
find the practice unconscionable. When standard software is dis-
tributed under adhesion contracts containing all the available risk
shifting provisions, vendors may place a judge in a position where
he will have no choice but to find the disclaimers unconscionable.
If a customer is induced to buy or license software based on express
written representations of the vendor, and then is left without a
meaningful remedy when the software does not perform as docu-
mented, a court will face a difficult choice: either to sustain the dis-
claimers in the vendor's adhesion contract and protect a course of
dealing that may resemble fraud or to find the disclaimers unconscionable.

C. The Cumulation and Conflict of Warranties Express or
Implied: U.C.C. Section 2-317

Section 2-317 addresses the problem of conflict of express
and implied warranties. If it is unreasonable to construe express
and implied warranties as consistent and cumulative, a court will
examine the intention of the parties. In this respect, exact or tech-
nical specifications displace samples and general language, and ex-
press warranties displace inconsistent implied warranties except for
the implied warranty of fitness for a particular purpose.

Technical specification such as those contained in product in-
stallation manuals, users' guides and other detailed documentation
are normally essential for the successful commercial operation and
use of computer software. The documentation provides the com-
mon point of reference for both the software vendor and the
software user. It is essential that the software perform in accord-
ance with those specifications.

39. See supra notes 34, 35 and 38.
40. U.C.C. § 2-317 provides:
Warranties whether express or implied shall be construed as consistent with
each other and as cumulative, but if such construction is unreasonable the in-
tention of the parties shall determine which warranty is dominant. In ascer-
taining the intention the following rules apply:
   (a) Exact or technical specifications displace an inconsistent sample or
   model or general language of description.
   * * *
   (c) Express warranties displace inconsistent implied warranties other than
   an implied warranty of fitness for a particular purpose.
   [Emphasis added].
   (D.N.J. 1979) (implied warranty of fitness cumulative of express warranties).
General language to the effect that the software is being provided "as is" and without warranty should be inoperative where a vendor represents specific product performance. An overreaching blanket disclaimer may result in no effective limitation of the vendor's express warranties. A contractual limitation of warranty and liability that leaves the customer with no meaningful remedy is probably unconscionable and may leave the customer with the full range of remedies provided by the U.C.C. and other law for breach of the vendor's express warranties.

This does not mean that it is impossible or inappropriate to have an "as is" transaction where the vendor makes no specific representations of performance. If the vendor were to say simply that "this is a computer program and it is provided 'as is' and 'with all faults'," the customer should have no logical recourse against the vendor if the program turns out to be a video game and not an accounting package. The proper situation for an "as is" transaction is vastly different from the typical situation where the vendor of computer software makes many specific representations such as "this is a payroll processing software package which will run on an IBM PC with 128k RAM and two floppy disk drives. The program will process the payroll for up to six employers with a maximum of 20 employees each who are resident in not more than two states."

When a software vendor makes program performance representations that form part of the basis of the bargain between the vendor and its customers, and then attempts to disclaim all responsibility for the performance of the software by providing that the program is provided on an "as is" basis in a form contract, he should find little sympathy for his position in the courts. The sympathy of the legal system and the public clearly should be on the side of the customer who finds that the program will not run on his IBM PC unless he has 256k RAM, that it will process only one company's payroll, and cannot cope with 15 employees who live in California and Nevada.

42. See supra note 33. U.C.C. § 2-316 (3)(a) provides for the exclusion of implied warranties by expressions such as "AS IS" and "WITH ALL FAULTS," but it does not provide for the exclusion of any express warranties with this language.

43. See A & M Produce Co. v. FMC Corp. supra note 36, and accompanying text.

D. Buyer's Rights and Remedies

1. The Buyer's Rights on Improper Delivery: U.C.C. Section 2-601

If the goods or tender of delivery of goods fail[s] to conform in any respect to the contract, section 2-601 of the U.C.C. allows a buyer to accept or reject the whole or to accept any commercial units and reject the rest. This right is subject to any prior agreement limiting remedies under U.C.C. section 2-718.

If the goods do not conform to the contract, for example if they do not perform in strict accordance with their manual specifications, the buyer may reject them. That is not a very pleasant prospect for any business. If the customer rightfully rejects the vendor's software, the vendor will not be paid or will have to refund any fees which might have been paid since the time the seller failed to deliver conforming products. In addition to the right to reject nonconform-

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45. U.C.C. § 2-601 provides:
   [U]nless otherwise agreed under the sections on contractual limitations of remedy (§ 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
   (a) Reject the whole; or
   (b) Accept the whole; or
   (c) Accept any commercial unit or units and reject the rest.

46. Acceptance can occur by failure of a buyer to effectively reject the goods after a reasonable opportunity to inspect them. U.C.C. § 2-606(1)(b). However, what constitutes a reasonable opportunity will depend on the nature of the good and the nature of the defect. See Zabriske Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968). Although acceptance precludes later rejection of the goods, the buyer may be able to revoke acceptance under U.C.C. § 2-608.

47. The manner in which a buyer must reject the goods is set forth in U.C.C. § 2-602. Section 2-602 requires the buyer to reject the goods and to notify the seller within a reasonable time. In addition, the buyer must not have waived his right of rejection by failing to particularize the defect in the goods in his notice to the seller if the defect could have been cured. See U.C.C. § 2-605. A buyer who rejects the goods too precipitously may be liable to the seller for wrongful rejection. See U.C.C. § 2-708. See generally Spanner & Mack, Shaping Your Clause, DATAMATION (Aug. 1980). On the other hand, a purchaser who continues to use the product may be deemed to have accepted the product by virtue of acts "inconsistent with the seller's ownership." See U.C.C. § 2-606(1)(c); Dumont Handkerchiefs, Inc. v. Nixdorf Computers, Inc., 63 A.D.2d 618, 405 N.Y.S.2d 89 (1978) (ineffective rejection where buyer continued to use computer after initial opportunity to reject). But see Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F. Supp. 325 (E.D. Pa. 1973) (use of computer system for eight months reasonable where purchaser provided seller with written notice of deficiencies).

48. § 2-105(6) of the U.C.C. defines "commercial unit" as "such a unit of goods as by commercial usage is a single whole for purposes of sale... division of which materially impairs its character or value on the market or in use."

49. The buyer's right of rejection is, however, subject to the seller's right to cure the defect, unless the agreement expressly makes time of the essence. See U.C.C. § 2-508.
ing goods, a customer has a right to revoke acceptance after the fact in certain circumstances.

2. The Revocation of Acceptance in Whole or in Part: U.C.C. Section 2-608

Section 2-608\(^50\) allows the buyer to revoke his acceptance of the goods where the buyer accepted non-conforming goods with the expectation that the non-conformity would be cured and it has not been, or where the buyer failed to discover the defect due to difficulty of discovery or to the vendor's assurances. The non-conformity must impair substantially the value of the goods to the buyer. The buyer who revokes his acceptance under section 2-608 has the same rights and duties as if he had rejected the goods. There is a conventional wisdom in the software industry that there is no such thing as a complex computer program without some level of obscure "bugs." The right to revoke acceptance after the fact has very grave implications for the computer software vendor, because a transaction may theoretically remain open for a long time.\(^51\)

3. The Buyer's Remedies in General: U.C.C. Section 2-711

Section 2-711\(^52\) allows the buyer who has rightfully rejected or

\(^{50}\) U.C.C. § 2-608 provides:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

* * *

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

\(^{51}\) However, subsection (2) of U.C.C. § 2-608 provides the "revocation must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defect." It could be argued that a purchaser who continues to use a system and attempts to correct any defects has caused a "substantial change in condition of the goods." But at least one court has refused to accept this argument. See ARB Inc. v. E-Systems, Inc., 663 F.2d 189 (D.C. Cir. 1980).

\(^{52}\) U.C.C. § 2-711 provides:

(1) Where . . . the buyer rightfully rejects or justifiably revokes acceptance . . . the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

* * *

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on
justifiably revoked acceptance of the goods to recover that part of
the purchase price which he has paid. Further, it gives the buyer a
security interest in the goods to ensure recovery of the purchase
price plus reasonable expenses incurred.

Under section 2-711 a vendor may not only be required to re-
fund the entire purchase price which has been paid in the event of a
justified rejection or revocation, but the buyer acquires a security
interest in the vendor's software pending a refund. In addition, the
buyer may be entitled to reimbursement for his reasonable costs of
inspection, and ultimately may even resell the defective goods, if the
vendor does not pay the damages that the customer is entitled to.53

4. "Cover"; Buyer's Procurement of Substitute Goods:
   U.C.C. Section 2-712

Section 2-71254 gives the buyer who has rightfully rejected or
justifiably revoked acceptance of goods the right to "cover" by mak-
ing a reasonable purchase of substitute goods without unreasonable
delay. The buyer is not required to cover, but if he does, he can
recover the difference between the cost of cover and the contract
price, plus incidental or consequential damages, less any expenses
saved as a result of the vendor's breach. A buyer who chooses not
to cover may pursue any other remedy available to him.

If a product does not conform to the specifications on which
the customer reasonably relied, the customer may be free to go out
into the marketplace and procure competing products which do
meet those specifications and to charge the seller with the difference

their price and any expenses reasonably incurred in their inspection, receipt,
transportation, care and custody and may hold such goods and resell
them. . . .

[Emphasis added].

53. There are a number of interesting copyright law implications to a resale of licensed
copyrighted software to recover the fees paid for a nonconforming product where the license
prohibits any transfer of the software.

54. U.C.C. § 2-712 provides:
(1) After a breach within the preceding section the buyer may 'cover' by mak-
ing in good faith and without unreasonable delay any reasonable purchase of or
contract to purchase goods in substitution for those due from the seller.
(2) The buyer may recover from the seller as damages the difference between the
cost of cover and the contract price together with any incidental or consequential
damages as hereinafter defined (§ 2-715), but less expenses saved in conse-
quence of the seller's breach.
(3) Failure of the buyer to effect cover within this section does not bar him
from any other remedy.

[Emphasis added].
between the contract price of the nonconforming software and the contract price for a competitor's software.

As unpleasant and unpalatable as the remedies already discussed may be to a vendor, it is the specter of incidental and consequential damages that gives the greatest cause for concern. Unlike the previous damages which bear some relationship to the value of the transaction, incidental and consequential damages may, in some cases, be out of all proportion to the cost of the vendor's product.

5. The Buyer's Incidental and Consequential Damages: U.C.C. Section 2-715

Section 2-715 describes what is includable as incidental and consequential damages arising from a vendor's breach of warranty. Incidental damages are those reasonable expenses incident to the vendor's breach, such as expenses incurred in the receipt, inspection and transportation of the goods, and expenses incurred procuring cover. Consequential damages include injury proximately resulting from breach of warranty or loss, which the customer could not have prevented, resulting from a customer's requirements which the vendor would have reason to know of.

The real and imaginary horribles of consequential damages lurk in section 2-715. Consequential damages can emerge from a breach of warranty like ghosts and goblins from a fertile imagination on Halloween. For example, a major novelist might purchase a copy of a vendor's low-priced word processing software to prepare her next manuscript. After weeks of tireless effort to create a prime candidate for a Pulitzer prize, a software malfunction may erase the manuscript from the disk drive, as the author saves her concluding paragraphs. Or, a customer may license a $2,000 accounting system which works beautifully throughout the entire fiscal year, but as the year-end closing adjustments are being run, the program ze-

55. U.C.C. § 2-715 provides:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

[Emphasis added].
The customer’s CPA firm then spends 1,000 man hours to recreate the lost data. Or worse yet, a vendor may develop a program for producing computer-aided structural design analysis and the formula dealing with the tensile strength of steel is off by a power of ten. An architect might then rely on the calculations which emerge from his computer in designing a multi-million dollar structure which collapses shortly after completion. Even if no one is killed the architect’s malpractice carrier may come knocking on the vendor’s door for the five million dollars that it will cost to repair the roof of the damaged building.

The list of real and imaginary horribles is endless, and from the software vendor’s point of view, it poses the single greatest threat that can flow from ineffective warranty disclaimers. One of the problems posed by incidental and consequential damages is that they may bear no relationship to the cost of the software. In addition, the software vendor may have little or no idea of the nature of use and abuse to which customers may subject the software. Under these circumstances, it is frequently difficult to form an accurate estimate of potential damages.

If marketplace considerations require a vendor to offer an express warranty, or if a vendor does not want to take a chance by trying to market software on an “as is” basis in situations where the software is provided with technical specifications, what steps may a software vendor take to protect himself from the imaginary horribles? The best protection for a vendor would be a provision for liquidated or limited damages. The idea of stipulating as to what the damages will be at the time of a breach greatly simplifies the process of determining what the damages are in the event of any given breach. In addition, a carefully drafted limitation of damages provision may provide an effective ceiling to a vendor’s exposure for incidental and consequential damages resulting from defects in the vendor’s products.

E. Liquidation or Limitation of Damages: U.C.C. Section 2-718 and Section 2-719

Section 2-718 allows the buyer and vendor to agree to a maxi-

56. U.C.C. § 2-718 provides:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

* * *
mum amount of damages to be imposed in the event of a breach by either party. The amount stipulated must be reasonable considering anticipated or actual losses and the difficulty of proof of loss. The liquidated amount must not be so large as to constitute a penalty.

Under section 2-719 a vendor may add or substitute remedies for those provided to the buyer under the U.C.C. and thereby limit or change the measure of damages recoverable. Remedies included by the vendor under this section will be optional unless they are expressly made the customer's exclusive remedies. Two important qualifications to this section are stated. The remedy must not fail of its essential purpose; if it does, the U.C.C. provisions are reinstated. Secondly, consequential damages may not be limited or excluded if the limitation or exclusion would be unconscionable. Limitation of commercial loss is stated to be valid unless proved unconscionable.

In many cases it may be reasonable to limit the licensee's remedies to the repair or replacement of the defective item. To defend the position that such a limitation is reasonable, the vendor should provide warnings regarding consequential losses and provide suggestions on how to avoid such losses in the software's instructions and documentation. For example, a vendor could give clear instructions to make backup copies of all data files on a regular basis and to audit and verify critical calculations. In addition, as required by section 2-719(1)(b), a vendor seeking to limit its cus-

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57. U.C.C. § 2-719 provides:

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

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

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

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

3. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable.

[Emphasis added].

58. See U.C.C. §§ 2-719(2) and (3).

Software Warranties

tomer's remedies must expressly provide that the limited remedies are to be the customer's exclusive remedies. Otherwise, the limited remedies will be optional.

There is always a possibility that a vendor may not be able to provide a limited remedy. For example the vendor may not be able to correct some problem with its software. As a result, it is generally desirable to provide for the refund of the purchase price or any license fees paid in the event the vendor is unable to repair or replace a non-conforming item be it software, documentation or media. If a vendor limits its customer's remedies short of a refund provision, and the vendor is unable to provide the limited remedy, the customer is effectively left with no remedy at all. In that circumstance, a court may find that the remedy provided by the agreement failed of its essential purpose and therefore the limitations of remedies are unenforceable. In contrast, a provision for refunding the price the customer paid at least arguably puts the customer in as good a position as he was in before he contracted for the vendor's defective product. In the absence of an enforceable limitation on remedies, the vendor may be faced with the full range of statutory remedies under section 2-719 (2).

F. Statute of Limitations and Cause of Action Accrual:
U.C.C. Section 2-725

Generally, under section 2-725, a lawsuit for breach of a warranty extending to future performance must be initiated within four years of the date the customer knew or should have known of the breach of warranty. Section 2-725 provides for the shortening of

60. A remedy limited to repair or replacement will be deemed to fail of its essential purpose and thus be unenforceable when "goods which buyer purchases are not substantially defect free, and in addition seller is unable or unwilling to conform goods to contract." Office Supply Co., Inc. v. Basic/Four Corp., 538 F. Supp. 776 (E.D. Wis. 1982); Chatlos Systems, Inc. v. National Cash Register, 479 F. Supp. 738 (D.N.J. 1979) (remedy limited to correction of program defects appearing within 60 days of furnishing of program failed of its essential purpose).


62. U.C.C. § 2-725 provides:
this period to as little as one year. In commercial contracts where software is being supplied to non-consumers, it is probably a good idea to include a provision in the licensing agreement shortening the statute of limitations as provided in this section. By doing this, a vendor is limiting the period of exposure to warranty claims. After the time limit provided in the agreement for bringing lawsuits, or commencing an arbitration proceeding in the event an arbitration clause is used, the software vendor can face the future with greater certainty that old warranty claims will not come back to haunt him.

A statute of limitations such as that provided by the U.C.C. or by contract is not an absolute bar to a proceeding. Under certain rare circumstances such as fraud the limitation will not generally be enforceable. However, in the vast majority of commercial transactions, the statute of limitations period will provide a routine cleaning of the slate on past transactions and leave the vendor free to concentrate his energies on recent products.

G. Conclusion

The preceding introduction to the U.C.C., its warranties, provisions for disclaimers, and the remedies it provides to customers in the event of a breach of warranty is by no means complete. There are a number of additional provisions of the Code relevant to these issues, and while the U.C.C. is largely uniform in the forty-nine states where it is the law, it is not completely uniform. Each state has adopted a “version” of the Code and each state’s courts have interpreted it with room for variations. The state to state variations in the interpretation of the U.C.C. may be greater than usual in the application of the Code to software. As the level of litigation involving these issues increases in the months and years ahead, many of the questions addressed in this article will be clarified.

In the absence of clear answers on how far one can push limitations of warranty and liability one should approach the open ques-

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

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With one eye to the Code and the other eye on some idea of fair play. If the software vendor makes his agreements too one-sided and oppressive the courts will find ways to help the oppressed customer. If on the other hand a software vendor takes reasonable steps to protect the reasonable expectations of his customers, the courts are much more likely to give effect to vendor’s agreements and their limitations of warranty and liability.

III. CONSUMER WARRANTIES

The federal and state consumer warranty laws overlay the U.C.C., but they do not supersede it. The consumer warranty laws make comparatively few changes to the warranty law outlined by the U.C.C.; however they do provide strict standards covering the form and content of consumer warranties and are intended to protect consumers. The general U.C.C. doctrines surrounding the creation of warranties, the customer’s remedies for breach of warranty, and the general power of the parties to limit both warranties and remedies provides the starting point for any review of the consumer warranty laws.

The federal consumer product warranty law is commonly known as the Magnuson-Moss Act. It applies to consumer sales in the fifty states. When Congress enacted the Magnuson-Moss Act it intended to establish standards for presenting warranty information rather than basic standards for the warranties themselves. The Act authorizes the FTC to promulgate rules designed to “fully and conspicuously disclose in simple and readily understood language the terms and conditions” of consumer warranties. The

66. For the Magnuson-Moss Act to apply, the warranty must be offered to a consumer. A consumer is defined as:

[a] buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty . . . and any other person who is entitled by the terms of such warranty . . . or under applicable state law to enforce against the warrantor . . . the obligations of the warranty . . . .

67. The Magnuson-Moss Act, effective six months after January 4, 1975, is inapplicable to consumer products manufactured prior to such date. 15 U.S.C. § 2312 (1982).
Act spells out in some detail the types of consideration that Congress expected the FTC to address in its regulations. Since the FTC regulations govern the form and content of any warranties for products distributed into the consumer market, substantial portions of these rules are set forth in the footnotes.

The Magnuson-Moss Act gives the FTC the primary responsibility for creating the interpretative regulations under the law and enforcing it. However, it also provides private remedies that make it very attractive for a plaintiff to join a Magnuson-Moss based claim with a U.C.C. breach of warranty claim if the defendant failed to comply with the requirements of the Act in a consumer transaction.69 Those requirements start with what a vendor may call a warranty.

A. Designation of Warranties

In addition to the format requirement of Magnuson-Moss, there are four specific requirements of the Act which must be considered by anyone giving a warranty for a consumer product. The statutory language is inflexible. Under section 103 of the Act, a consumer warranty must either be labeled a “full (statement of duration) warranty,” for example, “full ninety day warranty” or “full one year warranty” if it meets the statutory requirements. If a warranty does not meet the statutory requirements, then it may only be labeled a “limited warranty.”70

The statutory language did not leave any room for the insertion of a statement of duration in a limited warranty. However, the FTC has interpreted the Magnuson-Moss Act to permit such statements of duration.71 It is unlikely that a software vendor would want to give a full warranty because of the various damage and

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70. 15 U.S.C. § 2302 (1982) provides:
   (a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission . . .
   (1) If the written warranty meets the Federal Minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a “full (statement of duration) warranty.”
   (2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a “limited warranty.”

It should be noted that § 105 of the Magnuson-Moss Act provides that a consumer product may be sold with both full and limited warranties provided the warranties are “clearly and consistently differentiated.” 15 U.S.C. § 2305 (1982). 71. 16 C.F.R. § 700.6(a) (1984).
remedy considerations discussed in the section on the U.C.C. As a result, most software warranties intended for consumers should be clearly titled "limited warranty."

B. Duration of a Warranty

The Magnuson-Moss Act does not impose a minimum duration for a warranty to qualify as a full statement of duration warranty. The vendor giving a warranty may want to choose the shortest time frame that is conscionable and commercially reasonable. If the term of an express warranty is too short, one would run the risk of having a court find that the warranty had failed of its essential purpose, was void, and that the customer therefore had the full array of statutory remedies available to him for breach of warranty.

As indicated earlier in the section on the U.C.C., what is conscionable and commercially reasonable in a given situation depends on the facts surrounding each transaction. It is useful to keep in mind the standards of conduct required in a merchant-to-merchant transaction as one considers a duration for warranties in consumer transactions; merchant-to-consumer transactions will probably require a higher standard. Merchants must deal with each other in "good faith" which means "honesty in fact and the observance of reasonable commercial standards of fair dealing." Given the rationale of the A & M Produce Co. case, would the outcome have been different if the vendor had given a "full (statement of duration) warranty" with a duration that caused the warranty to expire before the tomato harvest? Would a warranty that expires before the customer has a chance to use a product be unconscionable?

In deciding how long to warrant software, one should consider the complexity of the program and the normal use that it will receive from its intended customers. If one is marketing fairly simple products that can be thoroughly tried and tested in a short period of time, and that have a low probability of having a meaningful malfunction occur, then one would probably be safe with a comparatively short period of time such as sixty or ninety days. On the other hand, if a vendor is marketing a more sophisticated product

74. U.C.C. § 1-203.
75. U.C.C. § 2-103(b).
76. See text accompanying notes 36 and 37.
requiring a substantial amount of time for a reasonably diligent customer to discover any defects, then a substantially longer warranty period may be necessary.

A video game—even a video chess game—should not require a long period of time for the customer to determine whether or not it works. The chance that a court would find a warranty on game software to be unconscionable is remote. In addition, the chance that a customer might incur substantial consequential damages from using a video game would also appear to be remote. On the other hand, a financial accounting package that provided various year-end closing functions would be an example of a program requiring a long period of time for the customer to determine whether or not it works as documented. Such a program would appear to require a warranty period long enough to allow the customer to use the software through an entire accounting cycle. In the case of accounting packages running on an annual cycle, this may require a twelve- or thirteen-month warranty at a minimum.

C. Minimum Standards for Warranty

Section 10477 of the Magnuson-Moss Act states the minimum

77. 15 U.S.C. 2304 provides:

(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum, remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 108(b), such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part . . . .

(b)(1) In fulfilling the duties under subsection (a) respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, . . . [Emphasis added].

The term "remedy" is defined to mean repair or replacement with a new product which is identical or reasonably equivalent to the warranted product. (15 U.S.C. § 2301(10)). The warrantor may elect either to repair or replace the product. In addition, the warrantor can elect to refund the purchase price if repair is commercially impracticable or impossible within a reasonable time and the warrantor is unable to provide a replacement, or if the purchaser is willing to accept a refund. 15 U.S.C. § 2301(10)(c).
standards for a warranty on a consumer product. Defects or non-compliance with a written warranty must be remedied within a reasonable time. Implied warranties may not be limited as to duration. Consequential damages may be limited by conspicuous language on the face of the warranty. If a warrantor has tried several times without success to repair any defects in a product, a consumer has the right to elect either a refund or a replacement without charge. Finally, the only obligation which can be imposed on a buyer seeking a remedy under a written warranty is notice. 78

Section 104(a)(1) does not pose a serious obstacle to a software vendor providing a full warranty for its software. As discussed in the section on the U.C.C., the section 104(a)(1) standard is probably the minimum defensible standard for a warrantor to use in designing a warranty policy. A software product should be warranted to conform to the affirmative performance representations contained in the documentation for the product.

Section 104(a)(2) on the other hand, prohibits the vendor from placing any limitation on the duration of the implied warranties of merchantability and fitness for purpose provided by the U.C.C. and other state law. The chief disadvantage of an implied warranty of merchantability and an implied warranty of fitness for purpose that lasts for the full period of the statute of limitations is that the vendor does not clear the slate of the contingent liability posed by those warranties for a long period of time.

In general terms the warranties of merchantability and fitness for purpose do not hold products to the highest levels of performance. However there is a risk that the standards are vague and subject to a wide range of views as to what constitutes a merchantable or fit product. Particularly in an industry such as the software industry, where the commercially acceptable standards of performance are rising very rapidly, it is probably undesirable to have one's product subjected to scrutiny for merchantability and fitness three or four years after the software was developed. Typically, in the microcomputer industry at least, the rate of software product obsolescence is much faster than that. A typical court may have difficulty making adequate allowances for the state of software technology at the time a program was written, if it is faced with a justifiable customer complaint at a time when product standards have evolved to a much higher level.

78. This is the case unless a warrantor can demonstrate in an administrative, judicial, or informal dispute settlement proceeding that a condition imposed is reasonable. 15 U.S.C. § 2304(b)(1).
On the other hand a small number of states do not allow the warranties of fitness and merchantability to be limited in consumer transactions, and in many contexts these warranties may not represent a serious problem or risk. If a vendor does most of its business in states that do not allow the limitations or if a vendor is marketing a low risk program, any increased financial risk may be offset by the marketing or price advantage that the vendor may be able to gain by offering a full warranty while the competition is marketing their software on an "as is" basis.

Sections 104(a)(3) and (4) do not impose standards materially different from those required by the U.C.C. and other state law. Any disclaimer of consequential damages and the implied warranties must be conspicuous if it is to be sustained by a court. If one does not provide standby remedies such as product replacement or the refund of the purchase price, in those circumstances where a warrantor is unable to correct non-conformities in warranted products, the warranty runs the risk of being found to have failed of its essential purpose and thus resurrecting the entire range of statutory remedies.

It is the inability to limit the duration of any of the implied warranties which may make it undesirable to provide a full statement of duration warranty under the Magnuson-Moss Act for the vast majority of consumer software products. While it is important that express warranties be made of sufficient duration to provide a reasonable level of protection for the customer's legitimate expectations of product performance, it is equally important from the warrantor's perspective that once the customer's basic legitimate expectations have been met, that the ongoing warranty liability be terminated as far as permitted by law. As a result of this consideration, it is probably prudent to designate the warranties for the vast majority of consumer software items as limited warranties and take advantage of the ability to limit the duration of implied warranties under section 108 of the Magnuson-Moss Act unless product risk and competitive considerations dictate otherwise.

D. Limitation on Disclaimer of Implied Warranties

Section 108 of the Magnuson-Moss Act provides that any

80. 15 U.S.C. § 2308 provides:
disclaimer or modification of the implied warranties contrary to the provisions of section 108 is void. Section 108(b) provides that implied warranties may be limited to the same duration as the written express warranty as long as it is of a reasonable duration, is conscionable and is clearly stated on the face of the warranty. While this provision allows one to limit the duration of the implied warranties of merchantability and fitness for purpose in the case of a limited warranty, it contains the trap that if the limitation that one attempts to impose is determined to be unreasonable, it is void. If a warrantor makes an express warranty which is too short in duration to allow the customer a reasonable opportunity to determine whether or not the product conforms to specifications, the warrantor's limitation on the duration of the implied warranties may be too short as well. If the duration is too short, the limitation will be ineffective and the customer will have the benefit of full statutory remedies for breach of the implied warranties.

The Magnuson-Moss Act does not allow the disclaimer of implied warranties of merchantability and fitness for purpose which is permissible under the U.C.C. Instead, it allows the vendor of a consumer product to limit the duration of the implied warranties to the duration of the express warranties. Because the limitations are void if they are unconscionable, the vendor of a consumer product should provide the customer with a meaningful warranty of a clearly reasonable duration so that the law does not impose a greater obligation.

E. Buyer's Rights and Remedies

The buyer of a consumer product covered by the Magnuson-Moss Act has access to the full plethora of statutory remedies under

(a) No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if
   (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or
   (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title (other than section 104(a)(2)), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law. [Emphasis added].

81. However, state statutes which prohibit limiting the duration of implied warranties will be given effect since state legislation which is more protective in this area is permitted to control. 15 U.S.C. § 2311(b)(1).
the U.C.C. In addition, section 110 of the Magnuson-Moss Act provides that it is a violation of federal law not to comply with any requirement imposed by Magnuson-Moss, and provides that a consumer who is harmed by a warrantor's failure to comply with the law may sue the supplier of the offending product in any state court of competent jurisdiction and any United States district court. In addition, if the customer prevails in his action against the warrantor, he may be entitled to recover his expenses including attorney's fees "reasonably incurred" in addition to his other damages.

If a plaintiff is able to successfully join a claim that the supplier of a consumer product failed to comply with the Magnuson-Moss Warranty Act to his underlying breach of warranty claim, the consumer has a statutory right to attorney's fees. This provision of the Magnuson-Moss Act may render it cost-effective to pursue breach of warranty actions that would otherwise be too expensive to litigate. If one does not comply with the warranty laws in a consumer transaction and the product does not live up to either the express or implied warranties, all of the attempts to limit damages may be void and unenforceable, the customer may have the full

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82. 15 U.S.C. § 2310 provides:

(b) It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) for any person to fail to comply with any requirement imposed on such person by this title (or a rule thereunder) or to violate any prohibition contained in this title (or a rule thereunder).

* * *

(d)(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

Federal court jurisdiction is limited to claims involving at least $25 per plaintiff and $50,000 in the aggregate. 15 U.S.C. §§ 2310(d)(1) - 2310(d)(3).


range of statutory remedies, and the offending vendor may have to pay his customer’s attorneys for bringing suit against the vendor to collect those damages.\textsuperscript{85}

\section*{F. FTC Rules on Written Warranty Terms}

Section 701.3 of the Rules promulgated by the FTC under the Magnuson-Moss Act provide the warrantor of a consumer product with a detailed checklist which must be taken into consideration when planning any written consumer warranty.\textsuperscript{86} In addition to being required for consumer product warranties, section 701.3 of

\textsuperscript{85} Furthermore, the private right of action is in addition to any state’s remedies to which a buyer may be entitled. 15 U.S.C. § 2311(b)(1). These include rights under Article 2 of the U.C.C. and common law breach of contract claims.

\textsuperscript{86} § 701.3 provides:

(a) Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:

(1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

(2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty;

(3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

(4) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;

(6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in § 108 of the Act, accompanied by the following statement:

\textit{Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.}

(8) Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in sub-paragraph (7) above:
the FTC Rules is a useful checklist for drafting any warranty, because it provides a step-by-step list of the items that need to be considered when preparing warranty documents of any kind.

Section 701.3 of the FTC Rules provides that if a written warranty is given on a consumer product costing more than $15.00, that the warranty shall clearly and conspicuously disclose information including: to whom the warranty applies, a description of the product or parts the warranty is applicable to, what the warrantor will do in case of a defect or failure to conform with the warranty, the commencement date and duration of the warranty, and an explanation of what the consumer must do to obtain relief under the warranty.

In addition to the general considerations listed in section 701.3, there are three sets of required magic words which must be used under certain circumstances. Section 701.3(a)(7) requires that the warrantor make the following statement if the warrantor imposes any limitations on the duration of the implied warranties: “[s]ome states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.” Section 701.3(a)(8) also provides that if the warrantor provides any limitations for incidental and consequential damages that the following statement must be made: “[s]ome states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.” Finally, section 701.3(a)(9) requires the following language as part of any consumer warranty whether or not there is a limitation of duration of an implied warranty or a disclaimer of consequential damages: “[t]his warranty gives you specific legal rights, and you may also have other rights which vary from state to state.”

The three required notices of varying state rights in the consumer product warranty area are designed to draw the various consumer and additional warranty laws implemented by the several states to the attention of consumers. The underlying idea is to make it clear to the consumer that his rights may not be limited to the

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

(9) A statement in the following language:
This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

88. Id. § 700.3(a)(8).
89. Id. § 700.3(a)(9).
terms and conditions set forth in the written warranty document. For those consumers or their attorneys who take the hint and look beyond the face of the warranty document, there is waiting the full range of complex warranty doctrines and principles previously discussed in this chapter.

G. *Pre-Sale Availability of Written Warranty Terms*

Section 702.3 of the FTC Rules under the Magnuson-Moss Act spells out a complex set of requirements for presale availability of written warranty terms. The general intent of this section is to provide warranty information to customers prior to the customer making the decision to purchase a product. The rules impose a

90. 16 C.F.R. § 702.3 (1984) provides:

[The] seller of a consumer product with a written warranty shall:

(1) make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

(i) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale . . . .

* * *

(b) Duties of the warrantor.

(1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than $15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section, by the use of one or more of the following means:

(A) Providing a copy of the written warranty with every warranted consumer product; and/or

(B) Providing a tag, sign, sticker, label, decal or other attachment to the product which contains the full text of the written warranty; and/or

(C) Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for display purposes. If the warrantor elects this option, a copy of the written warranty must also accompany the warranted product; and/or

(D) Providing a notice, sign, or poster disclosing the text of a consumer product warranty. If the warrantor elects this option, a copy of the written warranty must also accompany each warranted product.

(ii) Provide catalog, mail order, and door-to-door sellers with copies of written warranties necessary for such sellers to comply with the requirements set forth in paragraphs (c) and (d) of this section.

16 C.F.R. § 702.3 (1984). This Rule applies to products manufactured after December 31, 1976 and actually costing the consumer more than $15.

91. 15 U.S.C. § 2302(b)(1)(A) (1982) directs the FTC to promulgate rules which require that "the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the products to him."
specific burden on the retail vendor of a consumer product by requiring that the full text of the warranty be made available to the buyer prior to sale. The warrantor is required to provide the retail vendor with the necessary materials to comply with the presale notification requirements. In addition, section 702.3 spells out detailed provisions for presale availability of warranties in the context of mail order sales. The warranties must either be disclosed in catalogs or the customer must be told that the warranties may be obtained free of charge on written request and provided with the address for making such request.

The easiest way to comply with the requirement of section 702.3 in the retail sales context where software products are being marketed through a computer store or similar outlet would be to print the full text of the warranty on the computer software box or package, thereby making it unavoidably available to the customer prior to the decision to license a particular item of software. The alternatives under the Act which require retail merchants to display signs or to maintain binders of warranty materials are likely to be administratively far more difficult given a natural resistance on the part of many merchants to be bothered with these legal formalities.

For various aesthetic and other reasons, it may not be desirable to clutter up attractive, eye-catching packaging with a dreary Magnuson-Moss Warranty. At the present time, however, the vast majority of software suppliers are telling their customers in fine print that they are making no representations or warranties of any kind and that the product is being provided on an "as is" basis. The bold, clear statement provided by a commercially reasonable warranty, that a vendor stands behind the product for a finite period of time, may be a very useful marketing tool.

The concise statement that "the product contained in this package will conform to its written documentation which is available for inspection; if it does not, the vendor will either correct any non-conformities or if unable to correct the non-conformities and satisfy the legitimate expectations of the customer, will refund the

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92. This can be done in any one of four ways: (1) displaying the warranty text in close conjunction to the product, (2) displaying the product in a package which discloses the warranty, (3) placing a notice near the product which identifies the product and gives the test of the warranty, or (4) maintaining a binder with copies of the warranties, see 16 C.F.R. § 702.3(a) (1984). The use of a microfiche and ultralite reader system has been held by the FTC to be acceptable as a warranty binder, see 88 F.T.C. 1027 (1976); 89 F.T.C. 660 (1977).

93. A warrantor may do this by (1) providing a copy of the warranty with every product, (2) providing a tag or other attachment to the product which contains the text of the warranty, (3) putting the warranty on the product's package, or (4) providing a sign containing the warranty, see 16 C.F.R. § 702.3(b) (1984).
customer's money" may prove to be an effective and comparatively safe means of distinguishing a software product from the growing array of competitive products.

If the above considerations do not prevail over aesthetic preferences, it is feasible to provide distributors and retail dealers with the necessary paraphernalia and let them sink or swim on their own. However, with retail shelf space at a premium, dealers may prefer to shelve another product rather than post warranty notices.

If a vendor does engage in direct mail-order marketing on its own, the vendor should make it clear in any document which constitutes a catalog within the meaning of the FTC Rule, that a copy of the written warranty is available free of charge prior to ordering on written request.

H. Products Covered

If one accepts the argument that computer software is covered by the U.C.C. and the consumer product warranty laws, one then needs to consider whether a particular item of software is a consumer good covered by the Magnuson-Moss Act and the state consumer warranty laws or is a non-consumer good covered only by the U.C.C. Section 700.1 of the FTC's interpretation to the Magnuson-Moss Act sets forth in broad terms the nature of the

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94. See 16 C.F.R. § 702.3(c) (1984).

95. The presale availability rules along with most of the other provisions of the Magnuson-Moss Act, are being violated on a wholesale basis by the microcomputer software industry at this time. One of the western regional offices of the FTC has begun to consider the subject of computer software and the Magnuson-Moss Act. To date, that office has limited itself to a more or less informal preliminary consideration of the subject and informal conversations with some of the attorneys practicing in the industry.

Given the limited funding of the FTC under the present administration and this administration's anti-regulatory inclinations, the odds of the FTC taking aggressive action in this area are not as high as they would have been a few years ago. However, one must always keep in mind that as long as the consumer product warranty laws are on the books, where they are likely to remain, any violation of those rules poses not only the risk of potential action by the FTC, but provides a useful means for any aggrieved consumer to be able to add a claim for attorney's fees to whatever provable damages may exist. If for no other reason, it is the availability of statutory attorney's fees under the Magnuson-Moss Act that should provide a substantial incentive for any software vendor to take all reasonable steps to comply with the Magnuson-Moss Act.

96. 16 C.F.R. § 700.1 (1984) provides in part:

This means that a product is a "consumer product" if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage. [Emphasis added].
products covered by the Act.\textsuperscript{97}

There is a certain amount of variation in the approaches taken by the various states in deciding whether or not a product derives its character as a consumer product or nonconsumer product on a transaction-by-transaction basis. One view is that a product purchased by a business is not a consumer good, but the same product purchased by an individual is a consumer good. Another view is that if a product is sometimes or frequently used by consumers it is a consumer product even if in a given case it is being used in a commercial setting.

As with the examples given by section 700.1 of the FTC's interpretations of the Magnuson-Moss Act, automobiles constitute consumer products whether or not they are used for household purposes or as business transportation, and typewriters are consumer products whether they are used in the home or office. To apply this concept by analogy to software, it is likely that word processing software used in both home and office would be a consumer good but that a complex financial accounting package designed for a bank, a manufacturing facility, a law office or other clearly commercial institution may not come within the meaning of a consumer product.

However, a commercial customer who does not have a professional data processing department might argue that he ought to be afforded the protections of the consumer product warranty laws because he is no better able to protect himself than an individual consumer. Such a customer might argue that, in the standard commercial transaction, both parties are to some extent merchants with respect to the goods involved in the transaction.

In the context of retail computer software transactions, the vast majority of the population is at the mercy of the technical ability and integrity of its suppliers. If a software vendor supplies software on an OEM basis to a computer manufacturer, that transaction reasonably may be viewed as a commercial transaction between merchants, both of whom are in a position to evaluate the product. On the other hand, if a software vendor is supplying an accounting package for use by small business or professional organizations, the customer will frequently have no idea what he is getting and will be at the complete mercy of his supplier. The typical small

\textsuperscript{97} Id. § 700. See supra note 66 for the definition of consumer product under 101(1) of the Act.
law office seeking to acquire client billing software and word processing software for use in its "business activities" is in practically the same situation as a homemaker seeking a word processing package and financial spread sheet package for purposes of managing home correspondence and finance.

A producer of microcomputer software may be marketing the same product to both commercial and individual consumer customers. Because of the uncertainty of the distribution system, the producer may have no way of knowing who the ultimate customers for its software products will be when products are marketed through retail distribution channels such as computer stores. As a result, any ambiguity or question as to whether or not a given computer program is a commercial product intended for use in a merchant-to-merchant transaction only or is a consumer product should be resolved in favor of treating it as a consumer product.  

IV. THE USE OF WARRANTY REGISTRATION CARDS

Section 700.7 of the FTC's interpretations of the Magnuson-Moss Act provides that requiring a customer to return a warranty registration card is an unreasonable duty to impose on the customer. As a result, warranty registration cards cannot be required if a warrantor decides to give a "full warranty." One may impose a warranty card requirement as part of a limited warranty. However, there is a risk involved in imposing a requirement that warranty registration cards be returned before warranty service will be provided under a limited warranty.

99. 16 C.F.R. § 700.7 (1984) provides in part:

(b) A requirement that the consumer return a warranty registration card or a similar notice as a condition of performance under a full warranty is an unreasonable duty. Thus, a provision such as "This warranty is void unless the warranty registration card is returned to the warrantor" is not permissible in a full warranty, nor is it permissible to imply such a condition in a full warranty.  
(c) This does not prohibit the use of such registration cards where a warrantor suggests use of the card as one possible means of proof of the date the product was purchased . . . . Any such suggestion to the consumer must include notice that failure to return the card will not affect rights under the warranty, so long as the consumer can show in a reasonable manner the date the product was purchased. Nor does this interpretation prohibit a seller from obtaining from purchasers at the time of sale information requested by the warrantor.
100. Warranty cards can, however, be used as proof of the date the product was purchased. Id. § 700.7(c). If employed for such purpose, the card must indicate that failure to return the card will not prevent the warranty from being effective if the consumer can reasonably indicate the date of purchase. Id.
It is arguably an unfair or deceptive trade practice under some state unfair or deceptive practices acts (little FTC Acts) to tell a customer that he must return a warranty registration card before warranty service will be provided if the warrantor in fact will provide warranty service even if the registration card is not returned. If the return of a registration card reasonably appears to be a condition precedent to warranty coverage and performance, but a warrantor will provide warranty service without it, the FTC requires that this fact be disclosed in the warranty document. Therefore, if a software vendor decides to require a warranty registration card, the vendor must consistently refuse to provide warranty service to those customers who have not returned the registration cards.

While it appears to be permissible to require warranty registration cards as a precondition of warranty service, it does pose two additional, distinct business risks. The first is that most people are not in the habit of returning warranty registration cards. A paying customer with a legitimate warranty claim who is refused warranty service will be a very unhappy customer, and unhappy customers are very bad for business. The negative publicity, and to some extent the intrinsic unfairness, of refusing to provide reasonable service to customers because they failed to comply with what is at best a technicality, is seldom a good business practice.

In addition, since the primary use that is made of warranty registration cards by most companies has little to do with the warranty process, one runs the additional risk that an irate customer may be able to persuade a court that the warranty card requirement is unconscionable. The primary reasons for requesting warranty cards or registration cards are to gain marketing information, and in the context of software licensing, to have some document signed by the customer acknowledging the restrictions imposed by the license agreement. If it is desirable to employ or require warranty registration cards, the warrantor should make it as easy as possible for customers to comply with the requirement, for example by making them business reply mail cards.

V. STATE TREATMENT OF IMPLIED WARRANTY; DURATION; REMEDIES OF BUYERS

A. In General

It may be difficult to comply with the consumer product warranty laws of all of the states unless a vendor develops a number of

separate warranty forms for use in different states where the vendor does business. In most cases, the cost of doing so will be clearly too high for most software vendors to consider. Because the laws of each of the states are different, and some of them have a pro-vendor bias and some a noticeable pro-consumer bias, the laws may be conflicting and difficult to reconcile.

A number of states now prohibit the disclaimer of consequential damages in consumer transactions and a number of states prohibit the limitation of duration of the implied warranties of merchantability and fitness for purpose in consumer transactions. In one or two states, those limitations on disclaimers are so broadly drafted that they may arguably apply to commercial contracts as well. It is likely that over time this tendency to limit the power of warrantors to disclaim liability will grow. It is for this reason that the Magnuson-Moss Act requires the notice that some states do not allow these disclaimers and the notice the consumers may have additional legal rights which vary from state to state.

B. California as an Example

1. Duration

For purposes of illustration, and because at the present time California is the largest center of microcomputer industry activity, excerpts from California's Song-Beverly Consumer Warranty Act are discussed below as an illustration of some of the pitfalls to be found in state consumer warranty laws.

California does not, at this time, prohibit the warrantor from limiting the duration of an implied consumer warranty. Like the Magnuson-Moss Act, the California Act requires the implied warranties of merchantability and fitness to have at least the duration of the express warranties. In addition, it imposes the additional requirement that in no event may an implied warranty have a duration of less than sixty days. Therefore, it would appear that anyone marketing a computer product aimed at the consumer market in the State of California would have to provide a minimum of


103. CAL. CIV. CODE § 1791.1 provides in pertinent part:

(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer . . . .

[Emphasis added].
sixty days coverage under the implied warranties. For administrative simplicity and to gain the advantages of express warranties outlined above, it is probably advisable that no consumer software be warranted for less than sixty days, if it is to be distributed in the State of California.

2. Maintenance of Service and Repair Facilities

The Song-Beverly Act contains an interesting pitfall for any provider of consumer goods who is not doing business within the State of California. Section 1793.2 of the Song-Beverly Act provides that every manufacturer of a consumer good providing an express warranty and distributing the product in the state, must maintain service facilities within the State of California. These service facilities must be reasonably close to the areas in which the consumer goods are sold.

This raises an interesting question for the software industry. If one authorizes retail dealers to provide product warranty service, as is frequently the case with hardware, this provision poses no difficulty. But what if a software vendor would prefer to have any warranty claims directed to its home office, and asks the customer to return defective media, documentation, or software to the manufacturer for exchange and replacement? This may not comply with the requirement of section 1793.2.

The local repair provision clearly was written into the Act to deal with large consumer items, such as automobiles and refrigerators, which are difficult and very costly to move great distances in order to obtain warranty service. So far, there has been no interpretation by the State Attorney General’s office as to what constitutes a reasonable number of repair facilities. It is arguable that small

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* 104. § 1793.2 provides in pertinent part:

(a) Every manufacturer of consumer goods sold in this state and for which the manufacturer has made an express warranty shall:

(1) *Maintain in this state sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties* or designate and authorize in this state as service and repair facilities independent repair or service facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties.

* * *

(c) It shall be the duty of the buyer to deliver nonconforming goods to the manufacturer’s service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, such delivery cannot reasonably be accomplished

* * *

[Emphasis added].
software packages are readily transportable through the mail and that it is not unreasonable to require them to be returned to a central location for warranty service. But this is true only if that central repair facility is located in the State of California. If one is doing business out of Massachusetts and distributing the software through retail outlets located in California, while requiring customers to return defective material to Massachusetts for repair or replacement, one clearly is not maintaining a service and repair facility in the State of California.

Many computer software retailers would prefer not to get involved in the warranty service process. Many software houses would prefer to handle warranty service and other customer service related matters directly rather than through their dealers. Yet for non-California software vendors marketing in California, this may be a technical violation of the state consumer product warranty law.105

3. Actions By Buyers

As is the case with the Magnuson-Moss Act, the violation of the Song-Beverly Act triggers a number of buyer's remedies. Section 1794 of the Song-Beverly Act106 spells out most of the standard

105. If the seller does not provide service facilities within California, the buyer has the option of returning the product to the manufacturer or any retail seller of the manufacturer's products. The seller has the option then to repair or replace the product or provide the purchaser with a refund. In the event the buyer still has not obtained relief, he may take the product to an independent service repair facility. In all cases the manufacturer is liable for the expense of repair, replacement or reimbursement. See CAL. CIV. CODE § 1793.3.

Furthermore, if the consumer product had a wholesale price of $50 or more, the manufacturer must provide written notice of these three options to the buyer. See § 1793.3(f).

106. § 1794 provides:

(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.

(b) The measure of the buyer's damages in an action under this section shall be as follows:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, the Commercial Code shall apply and the measure of damages shall include the cost of repairs necessary to make the goods conform.

(c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in . . . with respect to a claim based solely on a breach of an implied warranty.
U.C.C. and Magnuson-Moss remedies which have been previously discussed. In addition, like the Magnuson-Moss Act, the Song-Beverly Act provides for an award of attorney's fees as part of any judgment rendered in favor of a buyer who prevails in an action brought under the California consumer warranty law. Once again, a technical violation of an individual state's law may give the residents of that state substantial additional leverage in dealing with the vendor of covered goods that do not perform in accordance with the customer's expectations.

4. Actions by Retailers and Independent Servicemen

In addition to creating rights and remedies for retail customers, section 1794.1 of the Song-Beverly Act creates a right of action for retail dealers against the dealer's supplier if the supplier repeatedly violates the provisions of the Song-Beverly Act.107 In addition to creating a cause of action, section 1794.1 provides that dealers may recover treble damages if they are injured by a warrantor's failure to comply with the state statute.108 This provision would be of particular interest to an out-of-state supplier who ignores California law. In theory, a customer could sue his retail supplier for breach of warranty and violation of Song-Beverly, and the dealer could recover three times his loss if the supplier's violation of the act was willful or repeated.

VI. CONCLUSION

Mass-distributed computer software most likely constitutes a "good," and is most likely covered by the warranty provisions of the U.C.C. When it is distributed to consumers for home use, mass distributed software most likely constitutes a "consumer good," and
SOFTWARE WARRANTIES

warranties relating to consumer goods are regulated by the Magnuson-Moss Act and the various state consumer warranty laws.

Detailed express warranties are probably created by the technical specifications and documentation provided with mass distributed software. These express warranties are probably not waived by language in printed-form adhesion contracts that claim to provide the software “as is.” However, the U.C.C. does allow vendors to limit the duration of their express warranties, to limit or exclude the implied warranties of merchantability and fitness for a particular purpose, and to limit a customer’s rights and remedies. The Magnuson-Moss Act prohibits the exclusion of the implied warranties of merchantability and fitness for a particular purpose if a vendor gives an express warranty, but a vendor may limit the duration of the implied warranties to the duration of the vendor’s express warranties.

Since it is likely that attempts to provide mass-distributed software to customers on a true “as is” basis will not work where the vendor makes specific affirmations of fact regarding the use, function, and performance of the software, vendors probably should not attempt to use “as is” language to control the exposure to breach of warranty actions by their customers. Liability for breach of warranty in mass-distributed software transactions may best be limited by providing a commercially reasonable duration for the express warranties created by the vendor’s specifications and documentation and properly excluding or limiting the duration of the implied warranties. In addition, the vendor should structure a commercially reasonable set of limited remedies for their customers.

Vendors cannot afford to provide the same level of support to users of low cost, mass-distributed products that they provide to users of high priced products. However, when a vendor seeks to take advantage of a marketing opportunity in a low cost market, it does have some obligations to its customers. If a vendor publicizes product specifications in an effort to attract customers to its products, the customer has a right to rely on the accuracy of the vendor’s representations, and the vendor has an obligation to make good on its representations. However, vendors cannot assume unlimited responsibility for the risks associated with software errors or the risks associated with uses that were not contemplated or intended by the vendor. A well designed warranty policy should seek to share the risks associated with software errors in a fair and reasonable manner.
VI. APPENDIX

The following warranty drafting aid is designed to provide accurate and authoritative information in regard to the subject matter covered. However, it is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of competent professional personnel should be sought.

This drafting aid is in the general form of a consumer product warranty. It uses language which is intended to comply with some of the requirements of the consumer warranty statutes. In order to manage the risks associated with inadvertent omission of the required provisions, it may be more economical to use consumer warranty provisions in all warranties extended to customers who may be "consumers" as defined in the statutes. The difference in cost between providing a Magnuson-Moss "consumer" warranty and a U.C.C. non-consumer warranty may not have much practical significance in comparison with the cost of failing to comply with the consumer warranty laws if they are found to apply.

The written warranty document should describe the allocation of risks in clear language so that the customer understands what the vendor will and will not do. The following examples of warranty language reflect a limited number of the many possible approaches to the warranty problem. The provisions are intended to provide end users with limited warranty protection for a limited period of time. They may provide a useful starting point in the process of drafting a warranty to fit the unique needs of each vendor of software products once the vendor has made a determination that its software product may be a "good" rather than a "service" and a determination that its software product may be a "consumer good."

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109. *See supra* notes 66 and 96 and accompanying text.
110. *See supra* notes 82 and 106 and accompanying text.
111. *See supra* note 4 and accompanying text.
112. *See supra* note 96 and accompanying text.
LIMITED WARRANTY

WHAT IS COVERED:

SOFTWARE COMPANY, INC. (SCI) warrants to (insert the parties to whom the warranty is extended such as the “the original licensed end user” or “the buyer”) that the magnetic media on which the enclosed computer program is recorded (insert other tangible items such as documentation if desired) is (are) free from defects in materials and workmanship under normal use.

SCI warrants to (insert the parties to whom the warranty is extended such as the “the original licensed end user” or “the buyer”) that the computer program will perform substantially in accordance with (insert some standard against which the performance of the software can be measured such as the user manual, other documentation, or a set of specifications. (CAVEAT: If there are conflicts between different sets of specifications such as the documentation and a specification sheet there may be problems.)

113. The titles “Full (statement of duration) Warranty” (e.g. Full one year warranty) and “Limited Warranty” are terms of art under the Magnuson-Moss Act. The drafting aid is a Limited Warranty. It does not meet the requirements for a full warranty, because it limits the duration of the implied warranties. See Supra note 70 and the accompanying text.

114. The section headings “What Is Covered” etc. are not required, but the FTC suggests that the use of subheadings makes it easier for a consumer to understand a warranty. FEDERAL TRADE COMMISSION, WARRANTIES: MAKING BUSINESS SENSE OUT OF WARRANTY LAW at 16. See also FEDERAL TRADE COMMISSION, WRITING READABLE WARRANTIES (1983). Both these pamphlets make useful reading for anyone who is drafting a warranty for a consumer product. As a general rule, anything that improves the level of notice to a customer is desirable, because one of the primary functions of most warranties is to limit some of the customer’s statutory and common law rights.

115. The software vendor may want to provide separate warranties for the tangible materials and the intangible software itself. The sample language provides notice of (1) who is making the warranty, (2) who is intended to benefit from the warranty, (3) what is covered and (4) what the coverage is. The tangible media is given a broad materials and workmanship warranty while the nontangible software is warranted to a specific standard. The software vendor should not use a warranty against defects in materials and workmanship for the software itself, because there is no objective standard for what constitutes a defect in material and workmanship in a computer program. In most cases, there will be differences between the warranties for different parts of the product or there will be different durations for different parts of the warranty, and it may be clearer if the warranties are stated separately.

The written documentation which may accompany the software may contain some “affirmations of fact” that arguably become part of the “basis of the bargain” between the vendor and the end user. If the end user chooses the software in reliance on performance representations contained in the vendor’s documentation, those representations may be express warranties.

One advantage to employing the documentation standard is that it is a written standard
FOR HOW LONG:

The warranty covering the magnetic media and DOCUMENTATION is made for _____ (__) days and the computer program warranty is made for _____ (__) days from the date of original delivery to you or your company as the user.

or

The above warranty is made for _____ (__) days from the date of original delivery to you or your company as the user. 116
WHAT WE WILL DO:

SCI will replace any magnetic media (and any other tangible material covered by the warranty such as the documentation) which proves defective in materials or workmanship on an exchange basis without charge. 117

SCI will, at its sole option, either replace or correct any computer program that does not perform substantially in accordance with its documentation (or other standard) with a corrected copy of the computer program or with corrective code on an exchange basis without charge. 118

SCI will correct errors in the documentation without charge by providing addenda or substitute pages. 119

If SCI is unable to replace defective documentation or defective media or if SCI is unable to provide a corrected computer program or corrected documentation within a reasonable time, SCI will, at its sole and exclusive option, either replace the computer program with a functionally equivalent program or refund the fees paid for licensing the computer program without charge (or the purchase price if the computer program is sold). 120

or required to run real sample data through a full test cycle before starting the routine use of the computer program or the customer may be offered an extra cost maintenance agreement. A California "consumer" warranty must last at least sixty days. See supra notes 72, 73, and 103 and accompanying text.

117. Since the tangible media and documentation are not readily fixable but are readily replaced at low cost, replacement is probably the remedy of choice for these products. Any remedy provided should protect the reasonable expectations of the customer that the product will perform as warranted. Be sure that the remedy provided by the warranty does not "fail of its essential purpose." See supra notes 56, 57, 60, 61, and 86 and accompanying text.

118. Since a nonconformity between the computer program and its documentation may result from either an error or bug in the program or from an error in the documentation, the following language may be a useful addition to the sentence above. See supra notes 56, 57, 60, 61, and 86 and accompanying text.

119. In some cases, the software functional warranty may require an additional choice of remedies. In most cases direct replacement of the nonconforming program may be the remedy of choice. However, there may be some problems with providing corrections to the documentation if the corrective changes eliminate functions that the end user requires and that played a part in the end user's choice of the software. See supra notes 56, 57, 60, 61, and 96 and accompanying text.

120. This language may be added to the above "fix or replace" language in order to be sure that the remedy provided by the warranty does not "fail of its essential purpose" in a case where the software vendor is unable to fix or replace. This option to replace the entire product or refund the license fees paid by the customer is intended as a stop loss provision. If the original product cannot be made to function in accordance with its specifications, a new product or a refund of the price paid may be substituted. The chief concern is that the limited remedies provided by the warranty never fail. If the remedies provided do fail the end user may be able to take advantage of the full list of remedies provided by law. See Supra notes 56, 57, 60, 61, and 86 and accompanying text.
These are your sole and exclusive remedies for any breach of warranty.121

WHAT WE WILL NOT DO:

SCI does not warrant that the computer program will meet your requirements or that the operation of the computer program will be uninterrupted or error free. The warranty does not cover any media or documentation which has been subjected to damage or abuse. The computer program warranty does not cover any computer program that has been altered or changed in any way by anyone other than SCI. SCI is not responsible for problems caused by changes in the operating characteristics of computer hardware or computer operating systems which are made after the release of the computer program nor for problems in the interaction of SCI's computer program with non-SCI software.122

ANY IMPLIED WARRANTIES COVERING THE MEDIA, THE DOCUMENTATION OR THE COMPUTER PROGRAM INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE LIMITED IN DURATION TO _____ (__) DAYS FROM THE DATE OF ORIGINAL DELIVERY. Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.123

121. The limited remedies listed will be in addition to the remedies provided by law unless the warranty agreement makes them the sole and exclusive remedies. Therefore it is essential that this language be included in any list of remedies if the vendor wants to limit the users statutory options. See supra note 57 and accompanying text.

122. This provision is intended to make clear what is not covered by the warranty and addresses some of the more likely problem areas that are beyond the control of the vendor. This provision helps to clarify what it is that the vendor may do. Particular attention should be paid to the last part of this paragraph covering changes in the operating characteristics of hardware and operating systems. An example of the type of problem this language is attempting to cover is the case where a third party software vendor provides application software for use on computers and devices manufactured by others. Hardware manufacturers frequently make small changes in their products that may adversely affect the performance of third-party software. Printer manufacturers who change microcode are frequent culprits.

123. This provision limits the duration of the implied warranties of merchantability and fitness for a particular purpose. In a non-consumer warranty these implied warranties may be excluded, but in a consumer warranty they may only be limited in duration to the duration of the express warranties. The state law notice provision is required by the Magnuson-Moss Act. There are state statutes prohibiting warranty disclaimers in Kansas, Massachusetts, Maryland, West Virginia, Alabama, Maine, Mississippi, and Vermont. In these states a vendor can not avoid the implied warranty obligations in some transactions. Statutes or common law limitations may also exist in other states as well. See supra notes 22, 29-33, 80, and 86 and accompanying text.
SCI SHALL NOT IN ANY CASE BE LIABLE FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, INDIRECT OR OTHER SIMILAR DAMAGES ARISING FROM ANY BREACH OF THESE WARRANTIES EVEN IF SCI OR ITS AGENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.124

In no case shall SCI's liability exceed the license fees (or purchase price) paid for the right to use the computer program or (insert some number of dollars which will depend on the value of the computer program intended to be covered by the warranty) whichever is greater.125

WHAT YOU MUST DO:

You must return the defective item shipping prepaid with the warranty service form provided during the warranty period, and we must receive it within ____ (__) days of the end of the warranty period. You must either insure the defective item being returned or assume the risk of loss or damage in transit. Address all warranty claims to: Warranty Service Department, SOFTWARE COMPANY, INC. _________________.

Any claim under the above warranty must include a dated proof of the date of delivery such as a copy of your receipt or invoice.

or

124. The special, incidental, consequential and indirect damages that may be incurred by a customer will vary from case to case depending on the nature and use of the computer program in question. It may be useful to list some of the damages excluded to improve the customer's understanding of the limitation. However, this does pose some risks if the list is not complete and is optional.

This provision is intended to exclude incidental and consequential damages. These damages may constitute the real exposure for many software vendors. Careful adherence to both the letter and the spirit of the complex web of warranty laws may be necessary to have this exclusion sustained in litigation. The explanation of what these damages are is intended to help inform consumers about what is being excluded and improve the level of notice they receive. The state law notice provision is required by the Magnuson-Moss Act. See supra notes 55-57, and 86 and accompanying text.

125. The vendor of the computer program may wish to put some additional cap on the exposure to damages by adding a paragraph such as the one set forth below (see text). If the vendor uses such an optional paragraph, it should be set forth separately from the others so that it would have to be stricken from the agreement by a court on its own, rather than as part of the other limitations of liability. The additional dollar limitation on damages is intended to provide a fall back liquidated damages position in case the outright exclusion fails. See Supra notes 55-57, and 86 and accompanying text.
You must return the defective item shipping prepaid to your dealer with the warranty service form provided during the warranty period. You must either insure the defective item being returned or assume the risk of loss or damage in transit. Any claim under the above warranty must include a dated proof of the date of delivery such as a copy of your receipt or invoice.

or

You must call our customer "Hot Line" for a return authorization during the warranty period. If our customer service representative is unable to correct your problem by telephone, you will be provided with a return authorization number and an address for returning the defective item for warranty service or replacement. You must either insure the defective item being returned or assume the risk of loss or damage in transit. Any items returned for warranty service must include a dated proof of the date of delivery such as a copy of your receipt or invoice.126

OTHER CONDITIONS:

This warranty allocates risks of product failure between YOU and SCI. The warranty set forth above is in lieu of all other express warranties, whether oral or written. The agents, employees, distributors and dealers of SCI are not authorized to modify this warranty, nor to make additional warranties binding on SCI. Accordingly, additional statements such as dealer advertising or presentations, whether oral or written, do not constitute warranties by SCI and should not be relied upon as a warranty of SCI.

SCI's Software pricing reflects this allocation of risk and the limitations of liability contained in this Warranty.127

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126. In this provision a vendor has a great deal of latitude to set up any reasonable return procedure. Some orderly system will be necessary, but it must not be unnecessarily burdensome to the customer. A vendor may require the customer to seek assistance from a dealer or from a telephone hot line before returning goods or require the customer to fill in a warranty service form. If a warranty service form is used it should be designed to simplify the processing of warranty claims by eliciting necessary information from the customer in the case of warranty service by mail.

A warranty must inform the beneficiary how to obtain warranty service. The Magnuson-Moss Act requires this provision. The requirement that any warranty claims be filed within some fixed number of days of the end of the warranty period is intended to allow the manufacturer to close the books on stale claims shortly after the warranty obligation ends. This time limit should be reasonable. CAVEAT: California's Song-Beverly Act requires every manufacturer of consumer goods distributed in California to maintain service and repair facilities in the state. See supra notes 86, 104 and 105, and accompanying text.

127. This provision is intended to be a general catch all. It provides an explanation to the customer that this warranty is limited to the printed words of the warranty document. It draws his attention to the risk allocation inherent in any limited warranty. In addition it
No action for any breach of this warranty may be commenced more than one (1) year following the expiration date of the above warranties.\textsuperscript{128}

**STATE LAW RIGHTS:**

This Warranty gives you specific legal rights, and you may also have other rights which vary from state to state.\textsuperscript{129}

\textsuperscript{128} The shortened statute of limitations is intended as a housekeeping measure to reduce the exposure to stale claims. It could be included in a general license agreement or other written agreement between the parties if they exist. The period of limitations may not be extended and may not be limited to less than one year. *See supra* notes 62 and 63 and accompanying text.

\textsuperscript{129} The state law rights notice is required by the Magnuson-Moss Act in "consumer warranties." Since the statement would also be true for non-consumer customers there is no harm in inserting it in pure commercial warranties as well. *See supra* note 86 and accompanying text.