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DECEPTIVE SALES PRACTICES AND FORM CONTRACTS—DOES THE CONSUMER HAVE A PRIVATE REMEDY?

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We cannot be surprised that lawlessness breeds lawlessness. The subtle, sophisticated lawlessness of many slum merchants breeds the violent lawlessness of their victims. [Statement by Earl Johnson, Jr., Director, Legal Services Program, OEO, before the National Advisory Commission on Civil Disorders.

All consumers occasionally encounter deceptive, misleading and even fraudulent practices on the part of merchants and high pressure salesmen. There is evidence that these practices are most commonly encountered by low income consumers who lack the education or sophistication needed to protect themselves,[1] and the President's Commission on Civil Disorders found that the ill will and frustration engendered by unconscionable practices has been a contributing cause of riots in the poverty areas of American cities.[2]

Most commentators on the consumer problems of the unsophisticated buyer have felt that present law is inadequate to remedy existing abuses and have called for new legislation.[3] Professor Caplovitz, who studied the consumer problems of low income residents of the upper and lower East Side in Manhattan, came to the

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[1] PRESIDENT'S COMMITTEE ON CONSUMER INTEREST, THE MOST FOR THEIR MONEY 7 (1965); *Hearings on H.R. 7179 Before the Subcomm. of the House Comm. on Government Operations*, 89th Cong., 2d Sess. (1965); Baum, *The Consumer and the Federal Trade Commission*, 44 J. URBAN L. 71 (1966).

[2] *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 4, 81-82, 139-40 (1968).

[3] *E.g.*, CAPLOVITZ, THE POOR PAY MORE (1963) [hereinafter cited as CAPLOVITZ]; W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE (1968); Comment, *Translating*

conclusion that existing law discriminated against the low income consumers he interviewed:

> The legal structure is based on a model of the "sophisticated" consumer, not that of the "traditional" consumer prevalent among low income families. It assumes, for example, that the consumer understands the conditions to which he is agreeing when he affixes his signature to an installment contract. But we have seen time and again, that this assumption does not hold for many of these consumers.
> The present legal system thus falls short of its goals because its image of the low income consumer is not correct. As a result, it unwittingly favors the interest of the merchant over those of the consumer by permitting deviant practices which take advantage of the consumer's ignorance.[4]

New legislation may be necessary fully to redress the imbalance in our legal system that "favors the interests of the merchant over those of the consumer." For the present, lawyers need to be aware of the possibility of protecting the defrauded consumer under the existing legal rules. The present article explores this possibility in a number of typical cases of deceptive sales practices. The cases considered involve disputes between merchants and consumers and do not involve the additional problems faced by a consumer who has signed a negotiable instrument which the merchant has sold to a bank or finance company.[5]

The practical assertion of legal rights by defrauded consumers will depend in most cases upon the availability of professional legal advice and assistance. So long as legal services are unavailable to low income consumers, the existence of legal remedies may be of little importance to them. However, expanded programs of legal aid, such as the Legal Services Program of the Office of Economic Op-

Sympathy for Deceived Consumers into Effective Programs for Protection, 114 U. PA. L. REV. 395 (1965); Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); Note, *Installment Sales: Plight of the Low Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1 (1966).

[4] CAPLOVITZ at 188-89.

[5] The law of some states already severely restricts the availability of the holder in due course defense where a merchant deals on a regular basis with a particular financing agency. *E.g.*, Unico v. Owen, 232 A.2d 405 (N.J. 1967). A few states have enacted legislation restricting the availability of the holder in due course defense in the consumer area. *See, e.g.*, 69 PA. STAT. tit., 69, § 615(g) 1963. A provision is included in the Uniform Consumer Credit Code which would make it unlawful for the seller to take a negotiable instrument in a consumer credit sale. UNIFORM CONSUMER CREDIT CODE § 2.403. For a recent discussion of the holder in due course defense, see Littlefield, *Good Faith Purchase of Consumer Paper*, 39 S. CAL. L. REV. 48 (1966).

portunity, may make legal advice increasingly available to low income groups. In addition, the growth of group legal services programs provided through organizations such as labor unions may also contribute to the availability of legal advice to these low income groups.[6]

This study will proceed by separately considering the possibility of legal remedy afforded to consumers by each of the following bodies of law: first, the contract law of rescission; second, the contract law of warranty; third, the tort law of fraud and deceit, and the new tort theory of strict liability; fourth, the rules relating to estoppel and illegal bargains; and finally, section 2-302 of the Uniform Commercial Code, which allows the court to refuse to enforce "unconscionable" contracts or clauses. Throughout the following discussion, reference will be made to five typical sales schemes described below.

TYPICAL CASES

A brief perusal of the proceedings noted in paragraph 7500 and following of the CCH Trade Regulation Reporter reveals a bewildering variety of deceptive sales practices. The situations discussed herein are not representative of all the various types of fraud and misrepresentation in the market place and are presented here only for purposes of illustration. However, these cases do depict common situations, and are drawn from the actual facts of FTC proceedings, reported cases, studies such as that by Caplovitz, and personal interviews.

Case 1. Fear Sale Schemes. A salesman calls on Mr. and Mrs. Adams and falsely claims that he is from the Housing Authority. He informs them that they must buy a certain attachment for the sinks in their apartment or they will be expelled from public housing. This is completely untrue. They sign an installment contract purchasing the attachments.[7]

Case 2. Referral-Sales Schemes. A salesman calls on Mr. Basset and offers to let him in on a "money-making" plan. If Basset will sign a contract to buy a new refrigerator, he can earn money by referring names to the company. The salesman says Basset will earn $50.00 for every person referred by him who "enrolls in the plan," and says that six or seven out of every ten persons referred will decide to

[6] *See* UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[7] *See* CAPLOVITZ at 61; Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 759 n.84 (1967).

enroll. Basset is told the sales contract is merely a formality since he will have no trouble earning more in referral commissions than the small amount of the monthly payments and, consequently, he will never have to pay anything out of his own pocket for the refrigerator. Basset signs the contract, but finds he is unable to earn any referral commissions[8] and, therefore, cannot make the payments.

Case 3. False Description of Goods. Mr. Coley purchases a suite of furniture on the installment plan for $900 plus interest. The salesman stressed to Coley the low payments and lauded the quality of the furniture, telling him that it was the best on the market, that it would never wear out, and that he would be much better off in the long run buying high quality furniture rather than some of the cheaper furniture that might be available. The salesman also said the furniture was solid maple. In fact, the furniture Coley bought was very low quality and made of plywood with a veneer of maple. It normally retailed for $400, and it quickly became very worn and shoddy under normal use.[9]

Case 4. False Statement of Contract Terms. A salesman calls on Mrs. Daley and demonstrates a new sewing machine. She is doubtful about whether she needs the machine, but the salesman urges her to purchase it, telling her that the contract allows her to return the machine and pay nothing if she changes her mind within thirty days. He also tells her that there is a five-year warranty on the sewing machine. In fact the contract provides that it cannot be cancelled and that the warranty is limited to ninety days. Mrs. Daley signs the contract without reading it and receives the machine.[10]

Case 5. Phony Gift Schemes. A salesman calls on Mr. and Mrs. Ely and tells them that they are a specially selected demonstration family for a new encyclopedia. Because of this, they are entitled to receive a new encyclopedia absolutely free if they will agree to tell their neighbors about it. However, to show that they have a genuine interest in the product, they must agree to purchase supplements to the encyclopedia for ten years at the actual cost to the company. The salesman says the entire set is worth $989, but they will only have to pay the nominal cost of the revision service. The Elys are induced to sign a contract which calls for payments of approximately

[8] *E.g.*, State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966); Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wash.2d 630, 409 P.2d 160 (1966).

[9] *See* CAPLOVITZ at 18-19, 81-93. *See generally* 2 TRADE REG. REP. ¶ 7619 at 12,338 (1965).

[10] State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966). *See generally* 2 TRADE REG. REP. ¶ 7845 at 12,605.

$400 over a three year period, plus finance charges. In return they will receive an encyclopedia and the revision service for ten years. Mr. and Mrs. Ely are not in fact specially selected and the contract price is actually the normal retail price of the encyclopedia and the revision service.[11]

In each of the above cases the contract which is signed by the buyer contains an integration clause stating: "This written agreement contains the entire contract between the parties; there are no representations, warranties, promises, or conditions of any kind not contained in this written agreement, and no such representations, warranties, promises or conditions were made to buyer by way of inducement or otherwise." The contract also contains a warranty disclaimer clause giving a limited warranty for a short period, but stating that there is no other warranty or liability of any kind, and that the limited warranty given is expressly in lieu of the warranty of merchantability and of fitness for a particular purpose. This language is conspicuous so as to comply with requirements of scction 2-316 of the Uniform Commercial Code.

Each of the hypothetical cases set forth above involves deceptive trade practices which are unlawful under section 5 of the Federal Trade Commission Act if they are "in commerce."[12] These practices may also be unlawful under various state statutes,[13] but such statutes do not provide a private remedy for the consumer.

CONTRACT LAW—RESCISSION

All of the above cases involve some form of misrepresentation on the part of the seller or his agent. In general, misrepresentation is a ground for rescission of a written contract if the misrepresentation is either intentional or innocent and material.[14]

Rescission will often provide a more satisfactory remedy to low income consumers than recovery of damages since rescission directly

[11] *See, e.g.*, Basic Books, Inc. v. FTC, 276 F.2d 718 (7th Cir. 1960); California v. P.F. Collier, Inc., Civil No. 894, 934 (L.A. County Super. Ct. 1967).

[12] 15 U.S.C. § 46 (1964). *See generally* G. ALEXANDER, HONESTY AND COMPETITION (1967); W. MAGNUSON & J. CARPER, note 3 *supra*, 3-31; Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964); Weston, *Deceptive Advertising and the Federal Trade Commission Decline of Caveat Emptor*, 24 FED. B.J. 548 (1964).

[13] *See* UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 2(a)(6), (7), (9), (11), (12); Dole, *Merchant and Consumer Protection: Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1119-39 (1967).

[14] RESTATEMENT OF CONTRACTS § 476(1) (1932); RESTATEMENT OF RESTITUTION §§ 8, 28, 55 (1936).

bars enforcement of the contract and allows the consumer to avoid paying what is often a very high purchase price. Often consumers will not seek legal assistance until their wages are garnisheed or they are faced with legal proceedings to enforce payment.[15] For instance, in case 4 Mrs. Daley may not seek help until after the seller has already repossessed the sewing machine and is attempting to collect the remaining balance of the price by taking away Mrs. Daley's furniture.[16] At this point a judgment for damages against the seller often will not relieve the buyer's immediate distress as effectively as rescission and restitution.[17] The buyer's path to rescission may be barred, however, by one or more of the legal obstacles discussed below.

A. The Parol Evidence Rule

In theory the parol evidence rule does not bar the introduction of oral evidence which shows fraud or material misrepresentation, since the effect of such evidence is not to vary or contradict the terms of a valid written instrument, but to show the invalidity of the instrument.[18] For example, the reluctant buyer of the sewing machine in case 4 believed the written contract contained terms providing a five-year warranty and permitting return of the merchandise without obligation within thirty days. The salesman knew of this belief and, whether or not he knew it was erroneous, he had no reason to suppose that the buyer actually assented to the different terms of the written instrument she signed. Since there was no effective assent on the part of the buyer, a valid written contract was never created and the parol evidence rule should not apply. The buyer should be entitled to either rescission or reformation, regardless of whether the salesman was aware of the actual terms of the written instrument.[19] Similarly, if a buyer's assent to the contract is induced by fraud or a

[15] ATLANTA COMMISSION ON CRIME AND JUVENILE DELINQUENCY, OPPORTUNITY FOR URBAN EXCELLENCE 77 (1966); *see* CAPLOVITZ at 177-78.

[16] *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[17] Of course, if substantial damages can be obtained, this may be offset against the seller's claim, or used as a bargaining weapon by buyer's attorney.

[18] 3 A. CORBIN, CONTRACTS § 573 (1960) [hereinafter cited as CORBIN]; RESTATEMENT OF CONTRACTS § 238 (1932); RESTATEMENT (SECOND) OF AGENCY § 260, comment d (1958). *But see* 9 J. WIGMORE, EVIDENCE § 2439 (3d ed. 1940) (interprets the parol evidence rule as barring rescission for material and innocent misrepresentation in some cases where rescission would be permitted for fraud) [hereinafter cited as WIGMORE].

[19] CORBIN, §§ 577 & 582; RESTATEMENT (SECOND) OF AGENCY § 259A (1958); RESTATEMENT OF CONTRACTS § 491.

material misrepresentation, such as the false claim of public authority in case 1, the parol evidence rule does not prevent the buyer from showing these faets and withdrawing his assent. This view of the parol evidence rule is reflected by section 2-202 of the UCC, which gives effect to the rule only in cases where the writing was "intended by the parties as a final expression of their agreement."[20] This puts to the court the question of whether the writing was in fact so intended, and to answer this question the court must look outside the recitals of the writing.

The case law is less clear than the above theory indicates, particularly in cases where the written instrument contains a so-called "integration clause" providing that there are no representations, warranties, or promises not contained in the written instrument.[21] Some courts still take the view that if the buyer signs a paper stating that there were no representations made by the salesman, the buyer cannot later prove that representations were made.

Nearly forty years ago a study of the effect of integration clauses in North Carolina found the following:

> The large manufacturer distributor selling to the small consumer usually has as one of the terms of the written contract of sale a stipulation that it contains the entire agreement of the parties, and that no representations or warranties of the agent shall be binding on the company unless included in the writing. The written provisions seem always to control. A realistic view of the situation of the parties might conduce to the opposite conclusion. * * * The court might take the view that this was patently a tribute of the weak to the strong, that both parties knew that the written provision did not express the buyer's real intention; and that consequently it was of no effect. Suffice it to say that this view has not been taken, though a perusal of these cases leads to the conclusion that often it would have worked more substantial justice than the legalistic view of the transaction.[22]

The results of these old North Carolina cases are consistent with recent cases in many states if the buyer brings suit for breach of

[20] *But see* Green Chevrolet v. Kemp, 241 Ark. 62, 406 S.W.2d 142 (1966).

[21] *See, e.g.*, Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 COLUM. L. REV. 858 (1953); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1965).

[22] Chadbourne & McCormick, *The Parol Evidence Rule in North Carolina*, 9 N.C.L. REV. 151, 161 (1931).

warranty.[23] If the buyer instead seeks rescission based on fraud or material misrepresentation, most jurisdictions will consider oral evidence of the fraud or misrepresentation,[24] although a few jurisdictions take a more rigid approach.[25] A standard clause in a form contract should not be sufficient to shield fraud and eliminate a recognized exception to the parol evidence rule. Efforts on behalf of consumers are crippled by a contrary view since the great majority of cases in which a consumer feels he has been defrauded by deceptive sales practices probably involves contracts with integration clauses. The contract is usually a form-pad contract prepared by the seller, and sellers and their attorneys are widely aware of the advantages of such clauses.[26]

The parol evidence problem is especially troublesome in the above examples of the overpriced furniture and the non-returnable sewing machine (cases 3 and 4) because in these cases the oral statements which the buyer seeks to prove are contrary not only to the general recital that no representations were made, but also to specific terms of the written contract. In case 3 the oral statement that the furniture is solid maple would, if allowed in evidence, create an express warranty,[27] but the written form expressly disclaims any warranties. In the sewing machine case the buyer seeks to prove that he was promised a right to rescind and a five-year guarantee, whereas the form says there is no right to rescind and only a three-month guarantee.

In *Apolito v. Johnson*[28] plaintiff sought to rescind a contract to purchase real estate on the ground that defendant seller had fraudulently misrepresented both the price and terms of payment. Plaintiff alleged she was told that the total price would be $26,250, but the contract actually provided for a price of $52,500. When signing the contract, plaintiff said she inquired about the higher figure and

[23] *E.g.*, Quinn v. Bernat, 80 R.I. 375, 97 A.2d 273 (1953); Sanders v. Allis Chalmers Mfg. Co., 237 S.C. 133, 115 S.E.2d 793 (1960); *see* CORBIN § 578 and cases at n.40.

[24] *E.g.*, Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551 (1941); Rizzi v. Sussman, 9 App. Div.2d 961, 195 N.Y.S.2d 672 (1959); Dallas Farm Mach. Co. v. Reaves, 158 Tex. 1, 307 S.W.2d 233 (1957); Wachtman v. Derran Food Plan, 71 Dauph, 121 (C.P. Dauphin Co., Pa. 1957); *see* CORBIN § 578 at n.42.

[25] *See, e.g.*, Collins v. Abel Holding Co., 89 Ga. App. 337, 79 S.E.2d 436 (1953).

[26] *See* Duesenberg, *The Manufacturer's Last Stand: The Disclaimer*, 20 BUS. LAW. 159, 162-63 (1964).

[27] UNIFORM COMMERCIAL CODE § 2-313 [hereinafter cited as UCC].

[28] 3 Ariz. App. 358, 414 P.2d 442 (1966).

was told by seller, "That don't mean nothing . . . . Don't worry about it. That is something that has to be marked in there for the escrow people."[29] The court held that the evidence of the alleged fraud was inadmissible because of the parol evidence rule and that plaintiff was not entitled to rescind the contract..

> [The] purported representations . . . were contrary to and inconsistent with the express terms of the written contract executed by the parties. Evidence of such statements which are squarely against the terms of the writing cannot be received or counted upon to support a finding of fraud, for to allow otherwise would do violence to the parol evidence rule.[30]

The decision in *Apolito* unfortunately is consistent with much authority from other jurisdictions,[31] although it may be against the trend of modern decisions.[32] If a generalized merger clause does not bar proof of fraud, then a more specific clause should not be effective unless the real basis of the decision is the contributory negligence of the buyer.[33] "Assuming fraud, the emphasis upon details merely indicates a more elaborate trap. If all that is needed to make exculpatory clauses effective is the use of a few more words, fraudulent dealers can be counted upon to use them."[34]

The parol evidence rule is a vague doctrine with ample exceptions, and it need not prevent a court from hearing any evidence which shows deceptive or fraudulent sales practices on the part of a seller. It may be that courts are rightly suspicious of oral evidence which would vitiate a written contract between merchants. However, in the merchant-consumer area the courts must take account of the realities of a marketplace where false representations and promises are used to induce buyers to sign form-pad contracts designed to cut off the buyer's rights. Perhaps most courts are already aware of this, and the greatest obstacle posed by the parol evidence rule may be that it

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[29] 3 Ariz. App. 232, 234, 413 P.2d 291, 293 (1966).

[30] 3 Ariz. App. at 359, 414 P.2d at 443.

[31] *E.g.*, Newmark v. H & H Prods. Mfg. Co., 128 Cal. App. 2d 35, 274 P.2d 702 (1954); Greenwald v. Food Fair Stores Corp., 100 So. 2d 200 (Fla. App. 1958).

[32] *E.g.*, Nelson Realty Co. v. Darling Shop, Inc., 267 Ala. 301, 101 So. 2d 78 (1958); Cobbledick-Kibbe Glass Co. v. Pugh, 161 Cal. App.2d 123, 326 P.2d 197 (1958); Texas & P. Ry. v. Presley, 137 Tex. 232, 152 S.W.2d 1105 (1941); Mawhinney v. Jensen, 120 Utah 142, 232 P.2d 769 (1951).

[33] As to the role of contributory fault, see Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439, 446-47 (1960).

[34] Seavey, *supra* note 33, at 448-49.

intimidates counsel and often deters them from developing oral evidence pointing to fraud. With regard to the parol evidence rule, Corbin states:

> Without doubt it has deterred counsel from making an adequate analysis and research and from offering parol testimony that was admissible for many purposes. Without doubt, also it has caused the court to refuse to hear testimony that ought to have been heard. The mystery of the written word is still such that a paper document may close the door to a showing that it was never assented to as a complete integration.[35]

B. Puffing

Assuming that the parol evidence rule does not bar evidence of the deceptive sales practices, the next problem which buyer's counsel will encounter is the permissive view of "puffing" by a seller. At common law a misrepresentation by a seller or his agent did not give rise to any legal remedy if it was considered a statement of opinion, a category generally considered to include most statements of value, vague commendations, and predictions of future events.[36] If the misrepresentation was made innocently, it was not considered to be materially misleading and, even if intentional, it was not considered fraudulent.

The rules allowing puffing were based upon the expectation that the buyer would behave as a reasonably prudent man who would presumably not rely upon statements of opinion by a party with an adverse interest.[37] The law was shaped for cynical traders, with little concern for the millions of consumers who lack the prudence of the law's hypothetical reasonable man. It is interesting to contrast the common law's approach to puffing with the approach of the FTC in interpreting section 5 of the Federal Trade Commission Act outlawing "unfair or deceptive acts or practices."[38] The Commission holds that a practice is not considered deceptive unless it has a capacity to deceive the public, but this includes "the ignorant, the un-

[35] CORBIN § 582, at 447.

[36] *See* UCC § 2-313(2); W. PROSSER, TORTS § 104 (1964) [hereinafter cited as PROSSER]; 1 S. WILLISTON, SALES §§ 202-03 (rev. ed. 1948) [hereinafter cited as WILLISTON, SALES]; 3 *id.* §§ 628-30. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643 (1937).

[37] RESTATEMENT OF CONTRACTS §§ 470(2), 474 (1932); Harper & McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 942-45 (1938); *cf.* Keeton, *supra* note 36, at 650-51.

[38] 15 U.S.C. § 46 (1964).

thinking and the credulous, who in making purchases, do not stop to analyze but too often are governed by appearances and general impressions."[39] A brief glance at the FTC decisions is sufficient to demonstrate that a great many practices which were usually considered not actionable at common law are held to be unlawful under section 5 of the Act.[40]

The only case above which clearly falls outside the puffing category is case 1, in which the seller used false assertions of official authority to intimidate the buyers. All the other misrepresentations are arguably privileged. In the referral-sales scheme (case 2) the representation that the buyer of the refrigerator will be able to earn more than enough money from his referral commissions to cover the easy monthly payments falls into a standard puffing category, predictions of future events.[41] In case 3 involving false description of the goods, most of the statements of the furniture salesman ("best on the market," "never wear out," "high quality furniture") might also be considered statements of opinion which would not constitute fraud.[42] However, the statement that the wood is solid maple in case 3 would be considered a statement of fact. Case 4 may involve still another category of permissible puffing, if the salesman's assertions as to the terms of the contract are seen as misrepresentations of law. "[A] conscious misstatement of the meaning of certain terms in a written instrument has been held immaterial."[43] In case 5 the statement that the encyclopedia is worth $989 might be considered a mere statement of value. The buyer is on stronger ground, however, with respect to the statement that the supplement is sold to the buyer at its "actual cost" since misrepresentations of cost, unlike mis-

[39] Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942); *see, e.g.*, Moretrench Corp. v. FTC, 127 F.2d 792 (2d Cir. 1942); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940).

[40] *See, e.g.*, 2 TRADE REG. REP. ¶¶ 7533.37, at 12,036, & 7837.85, at 12039-40. "It is easy to understand that national policy concerning consumer protection did not focus on the tort model: the reasonable man. He did not need protection from the blandishments of ambiguous advertising because of his inherent skepticism. Where falsity was more clearly the problem, he was known to inspect and make his own evaluation." ALEXANDER, HONESTY AND COMPETITION 7 (1967).

[41] *See* McAlpine Co. v. Graham, 320 S.W.2d 951 (Mo. App. 1959); Cummings v. Lehigh Brickface, Inc., 11 Cumb. 70 (C. P. Cumberland Co., Pa. 1960).

[42] *E.g.*, American Laundry Mach. Co. v. Skinner, 225 N.C. 285, 34 S.E.2d 190 (1945); Currie v. Mohasco Indus., Inc., 371 S.W.2d 771 (Tex. Civ. App. 1963); RESTATEMENT OF CONTRACTS § 474, Illustration 3 (1932).

[43] 5 S. WILLISTON, CONTRACTS § 1495 (rev. ed. 1937) [hereinafter cited as WILLISTON, CONTRACTS].

representations of value, do not constitute privileged puffing. The paper thin distinction between the two is illustrated by cases holding that misrepresentations of value go beyond permissible puffing if they amount to a misrepresentation of "market value" or "standard selling price."[44]

The rules permitting puffing have not been consistently applied, and courts have nearly always disregarded the rules in extreme cases, as in a case where property worth $2500 was sold for $15, the buyer representing that the property was "worth $15 to him."[45] Furthermore, the scope of permissible puffing varies widely from one case to another. On one hand, it has been held that statements that an automobile will get 18 miles per gallon,[46] or that a dealer's trucks will not consume any more gas and oil than those presently owned by a customer,[47] are non-actionable statements of opinion. On the other hand, statements that goods are of "first grade quality"[48] or that an automobile is in "A-1 condition"[49] have been held to constitute a basis for relief. Such decisions are not necessarily inconsistent since there is a growing awareness that statements of fact can be distinguished from statements of opinion only if the court takes into consideration the circumstances under which the statements were made.

> Statements very positive in form, asserting facts without qualification, may be held to be only those of opinion, where the recipient is aware that the speaker has no sufficient information or knowledge as to what he asserts; and . . . there are numerous circumstances in which statements which are in form only of opinion will be held to convey the assertion of accompanying facts.[50]

Under the older cases a seller could lie with impunity so long as he avoided statements of existing fact. This approach has been frequently criticized,[51] and the pressure to narrow the categories of permissible

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[44] *E.g.*, Gray v. Wikstrom Motors, Inc., 14 Wash.2d 448, 128 P.2d 490 (1942).

[45] Benedict v. Dickins' Heirs, 119 Conn. 541, 177 A. 715 (1935).

[46] Batchelder v. Birchard Motors, Inc., 120 Vt. 429, 144 A.2d 298 (1958).

[47] Pate v. J.S. McWilliams Auto Co., 193 Ark. 620, 101 S.W.2d 794 (1937).

[48] Diepeveen v. Larry Vogt, Inc., 27 N.J. Super. 254, 256, 99 A.2d 329, 330 (1953).

[49] Smith v. Leppo, 360 Mich. 557, 559, 104 N.W.2d 128, 129 (1960).

[50] PROSSER § 104, at 736; RESTATEMENT OF CONTRACTS § 474, Comments a-c (1932); RESTATEMENT (SECOND) OF TORTS § 539(1) (Tent. Draft No. 10, 1964); *see* 3 WILLISTON, SALES § 628.

[51] *E.g.*, PROSSER § 104, at 737 & n.12, 739, 741; RESTATEMENT (SECOND) OF TORTS §§ 539, 542 (Tent. Draft No. 10, 1964); Seavey, *supra* note 33, at 442.

puffing has produced numerous exceptions to the rule.[52] Perhaps the most common means the courts use to avoid the rule is to find that a statement of opinion conveys an implied assertion of fact.[53] Several other rationales are available, and the recent reformulation of the scope of permissible puffing in the Restatement (Second) of Torts has proliferated the exceptions to a point where little is left of the rule. Statements of opinion may be actionable (1) if the maker knows of facts incompatible with the opinion expressed,[54] or (2) if he does not know of sufficient facts to justify the opinion,[55] or (3) if he purports to have special knowledge,[56] or (4) if he has secured the confidence of the hearer, or (5) if he has any other special reason to expect the hearer to rely upon the opinion,[57] or (6) if the opinion is one of law and expressly or impliedly includes a misrepresentation of fact.[58]

Any absolute exemption from liability for puffing would seem to be on the way out, although one can still find many backward looking decisions. What remains of the exemption should be limited to honest statements of opinions and should not shield intentional misrepresentations. This viewpoint was adopted in the Tentative Draft of the Restatement (Second) of Torts.[59] Many courts also endorse this point of view, at least where it is possible to find that the seller possesses superior knowledge or superior means of information.[60] In a case involving misleading promises and statements of value, the D.C. Municipal Court of Appeals stated:

> A mere misstatement of value of property may be deemed a fraudulent misrepresentation of fact, where there is special reliance placed upon it and superior knowledge on the part of the promisor, and where the misstatement is made under conditions which show that it was intended . . . to be treated as an immediate factor inducing action and was made with knowledge that it would be accepted as a basis of action.[61]

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[52] *See* PROSSER § 104; RESTATEMENT OF CONTRACTS § 474 and Comments a-c (1932); RESTATEMENT (SECOND) OF TORTS §§ 538A, 539, 542 (Tent. Draft No. 10, 1964); Keeton, *supra* note 36, at 643 (1937).

[53] *See* Crown Cork & Seal Co. v. Hires Bottling Co., 371 F.2d 256 (7th Cir. 1967); Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n, 29 Wis. 2d 355, 138 N.W.2d 729 (1966).

[54] RESTATEMENT (SECOND) OF TORTS § 539(1)(a) (Tent. Draft No. 10, 1964).

[55] *Id.* § 539(1)(b).

[56] *Id.* § 542(a).

[57] *Id.* §§ 542(b), (c), (d).

[58] *Id.* § 545.

[59] RESTATEMENT (SECOND) OF TORTS § 542(d) and Comment *i* (Tent. Draft No. 10, 1964).

[60] *E.g.*, Shepherd v. Woodson, 328 S.W.2d 1 (Mo. 1959); Russell v. Industrial Transp. Co., 113 Tex. 441, 251 S.W. 1034, 51 A.L.R. 1 (1923); *see* PROSSER § 104, at 742-43; RESTATEMENT

This rationale is broad enough to cover nearly all cases of intentional deception of consumers if it is recognized that in most consumer transactions the seller does possess superior knowledge concerning the product being sold and concerning the legal effect of the seller's form-pad contract.

C. *The Innocent Principal*

Assuming that the buyer is able to introduce evidence of misrepresentations on the part of the seller and that such misrepresentations constitute fraud or material misrepresentations rather than mere puffing, the buyer may next encounter the contention that the fault is that of the salesman-agent and that there is therefore no remedy against the innocent corporate principal who was the actual seller.[62] The theory behind this argument is essentially one of agency law—the agent was not authorized to make the misrepresentations alleged by buyer and buyer was on notice of this lack of authority since the written contract stated that no representations were made unless contained in the written contract.

An example of the role the above doctrine can play in perpetrating fraud is provided by *Holland Furance Co. v. Williams*.[63] In this case, plaintiff brought suit for the purchase price of a furnace sold to defendants by an agent of the plaintiff. The contract signed by defendants stated: "This Contract Contains the Entire Agreement Between the Parties. Verbal Understandings and Agreements with Representatives Shall Not Bind the Seller Unless Set Forth Herein. There are No Warranties, Express or Implied, Other than those Herein Stated." Defendants sought to avoid the contract on the ground of fraud, alleging that the representatives of the seller told defendant that their old furnace allowed carbon monoxide gas to escape into the house and that defendants and their children would be asphyxiated unless the old furnace was immediately replaced. These statements were alleged to be false and fraudulent and to have induced

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(SECOND) OF TORTS § 542(a) (Tent. Draft No. 10, 1964); *cf.* RESTATEMENT OF CONTRACTS § 474(a) (1932); RESTATEMENT OF RESTITUTION § 8(3)(b) (1937).

[61] Hiltpold v. Stern, 82 A.2d 123, 126 (D.C. Mun. Ct. App. 1951).

[62] This defense is not available unless the principal is really innocent. If the principal desires the agent to make the misrepresentation, or suspects that the agent may make it, the principal will be held to have impliedly authorized the misrepresentation. *See* RESTATEMENT (SECOND) OF AGENCY § 260, Comment *b* (1958).

[63] 179 Kan. 321, 295 P.2d 672 (1956).

the sale. The court held that proof of these allegations would not constitute a defense because the agent had no authority to bind plaintiffs by such statements.

The doctrine applied by the court in *Holland Furnace* places the risk of fraud on a buyer who had an opportunity to know of the salesman's limited authority even though the fraud serves the interests of the seller. This may be reasonable in transactions between businessmen.[64] It is unfair, however, when applied to an unsophisticated consumer who has limited understanding of the meaning of the written contract. Fortunately, a majority of jurisdictions no longer deprive a buyer of the remedy of rescission based on an agent's misrepresentations merely because of statements in a written contract which disclaim responsibility for the agent's representation.[65] The buyer is allowed to rescind in such cases prior to a change of position by the principal. Shipping or delivering goods covered by the contract of sale is not considered such a change of position as will deprive the buyer of his remedy.[66] This is reasonable since rescission involves the return to seller of any goods received by the buyer, and an allowance to seller for the fair rental value of buyer's use.[67] However, the buyer may still lose the right to rescind in a case where the seller must contract with a third person to obtain the goods which are to be sold to the buyer.[68]

D. Affirmance of the Contract

The next obstacles in the path of a buyer seeking to rescind may be the equitable rules prescribing the manner in which the right of rescission must be exercised. These rules, like the rules of puffing, are founded upon 19th century assumptions concerning how the reasonably prudent man should behave—upon discovery of the misrepresentation; he should promptly manifest to the seller his election to rescind the contract, tendering the return to the seller of anything received in the transaction, and thereafter holding his tender open by refraining from exercising dominion over the goods he has received and by exercising reasonably care to protect them.[69] If

[64] *See* Ernst Iron Works v. Duralith Corp., 270 N.Y. 165, 200 N.E. 683 (1936).

[65] *See* RESTATEMENT (SECOND) OF AGENCY § 260(2) (1958) (Reporter's Notes cite cases).

[66] *E.g.*, Harnischfeger Sales Corp. v. Coats, 41 Cal. 2d 319, 48 P.2d 662 (1935).

[67] 5 CORBIN §§ 1107, 1114-15

[68] *See* RESTATEMENT (SECOND) OF AGENCY § 8B(3) (1958).

[69] *E.g.*, Fines v. West Side Implement Co., 56 Wash.2d 304, 352 P.2d 1018 (1960); 5 CORBIN §§ 1104, 1114-16; RESTATEMENT OF CONTRACTS §§ 480-84 (1932); RESTATEMENT OF

the seller refuses to allow rescission the buyer must promptly file suit.[70] Failure to comply with any of these conditions may deprive the buyer of the right of rescission.[71]

These rules are heartbreakingly unrealistic when applied to many low income consumers. Caplovitz found that many of the consumers he interviewed were "too naive, too uniformed, too intimidated to know their rights or to exercise them when they do."[72] As a result, half of the consumers interviewed by Caplovitz did not complain to the merchant even if they felt that they had been cheated.[73] If consumers seek professional legal help, it will often be not when they first discover the seller's misrepresentations, but much later when a financial crisis is precipitated by sickness or loss of employment, or by a foreclosure or garnishment by the seller. Furthermore, unscrupulous merchants may be able to intimidate consumers who complain or attempt to rescind. A recent case describes such conduct as follows:

> Any attempts made by consumers to cancel contracts, even as early as the very next day, before any delivery of a product was made, were met with threats to enforce the penalty clause (20% of the contract price) contained in the installation order. ***[A]ny complaint was met with ugly and unscrupulous threats to garnishee and to cause consumers to lose their jobs and the institution of law suits.[74]

RESTITUTION §§ 64-67 (1937). The Uniform Commercial Code does not significantly change these rules. Shreve v. Castro Trailer Sales, Inc., 150 W. Va. 669, 149 S.E.2d 238 (1966). It is possible that the rules of Parts 6 & 7 of Article Two of the Code do not apply to all cases of rescission of the contract for fraud or material misrepresentation since these parts seem concerned only with the situation where rejection of the goods and "cancellation" of the contract arise out of the failure of the goods or the tender of delivery to conform to the contract. UCC §§ 2-601, 2-608(1). *But cf. id.* § 2-721. If this is so, then the common law decisions concerning rescission of the contract for fraud or material misrepresentation continue to state the applicable standard. *See* UCC § 1-103. Cases for rescission based on fraud arising under the Code have often not considered the possibility that Article Two would be relevant to the means of exercising rescission. *E.g.*, Myers v. Rubin, 399 Pa. 363, 160 A.2d 559 (1960). However, if the Code does govern the manner of rescission in all cases subject to Article Two, the election to rescind must still be made in much the same manner as at common law. *See* UCC §§ 2-602(1), 2-606(1)(c), 2-608(2).

[70] Fines v. West Side Implement Co., 56 Wash.2d 304, 352 P.2d 1018 (1960).

[71] *E.g.*, Cummings v. Jack Hurwitz, Inc., 204 A.2d 332 (D.C. Ct. App. 1964); Wolin v. Zenith Homes, Inc., 219 Md. 242, 146 A.2d 197, *cert. denied*, 361 U.S. 831 (1959); Caruso v. Moy, 164 Neb. 68, 81 N.W.2d 826 (1957); Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 123 (1958); McBee v. Moody, 358 S.W.2d 215 (Tex. Civ. App. 1962); RESTATEMENT OF RESTITUTION § 148 (1937).

[72] CAPLOVITZ at 169.

[73] *Id.* at 171.

[74] State v. ITM, Inc., 52 Misc. 2d 39, 51, 275 N.Y.S.2d 303, 318-19 (Sup. Ct. 1966).

Fortunately, there is a considerable amount of leeway in the above rules regulating the exercise of the remedy of rescission. Since the standard required of the buyer is basically one of reasonableness, which is usually a question for the trier of fact, judges and juries will sometimes bend the rules to favor a deceived consumer, particularly if the seller is guilty of deliberate fraud or if the buyer's delay was induced by misleading assurances of the seller.[75] Nevertheless, the buyer will find it extremely difficult to obtain rescission if he used the goods for any appreciable period without complaining at all, or without any grounds for expecting that the seller would remedy his complaints. Ironically, the seller who bluntly repudiates the buyer's complaints and denies any responsibility will be in a better posture to resist a subsequent claim for rescission than the merchant who attempts to meet the buyer's complaints in some fashion. In the former case the buyer is considered solely responsible for the delay in electing rescission.

The Restatement of Contracts gives the following illustration of this fact:

> A fraudulently induces B to buy an automobile from A. B discovers the fraud and immediately offers to return the machine to A, on condition that money and notes given for the price be returned. A refuses to accept the machine and make restitution. B, thereafter uses the machine and also brings an action for restitution. He cannot recover. His continued use of the machine is an affirmance of the transaction.[76]

One can hardly expect the unfortunate furniture buyer in case 3 above to refrain from using the merchandise and to store it for use of the seller pending the outcome of a lawsuit. Nor is the purchaser of a sewing machine or encyclopedia, once his complaints have been rebuffed by the seller, likely to refrain from using the goods. Probably few buyers in any income bracket possess this degree of legal

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[75] *See, e.g.*, Tuscaloosa Motor Co. v. Cockrell, 272 Ala. 1, 132 So. 2d 742 (1958); Gross v. Rosenhaus, 282 App. Div. 129, 121 N.Y.S.2d 803 (1953), *appeal dismissed*, 306 N.Y. 631, 116 N.E. 2d 241 (1953); Brown v. Hassenstab, 212 Or. 246, 319 P.2d 929 (1957); Lester v. Percy, 58 WASH. 2d 501, 364 P.2d 423 (1961); RESTATEMENT OF RESTITUTION § 64, Comment *c* and Illustrations 5 & 7 (1937).

[76] *Compare* RESTATEMENT OF CONTRACTS § 482, Illustration 1 (1932), *with id.* § 484, Illustration 3.

sophistication. Unfortunately, the Restatement's story about A and B has as little relevance to the situation of the buyer in the slums as the Dick and Jane reader has to the life of his children.

E. Failure to Read the Contract

In each of the five cases outlined above, the buyer may well have signed the contract without reading it carefully, or without reading it at all. The interviews reported by Caplovitz show that this is very common,[77] and it is also a factor which frequently crops up in cases.[78] A typical example is described by the D.C. Municipal Court of Appeals: "Mrs. Saylor, who at seventeen years of age handled the family's financial matters because of her husband's illiteracy, testified only that she 'glanced through it'; without noticing at the bottom of the paper the warning in bold print. . . ."[79] The willingness of consumers to sign blank contracts has been recognized by many state legislatures which have passed laws requiring installment contracts to state in large print, "Do Not Sign This Agreement if it Contains Any Blank Space."[80] If a buyer nevertheless signs a blank contract, and the price or payment terms later written into the contract vary from the terms of the buyer's agreement, he is allowed to rescind.[81]

Apparently, signing a contract lacks, in the minds of many consumers, the mystic significance accorded to this act by the common law. This factor is relevant primarily in case 4 above where the buyer, by carefully reading the contract instead of relying upon the seller's misrepresentation of its contents, could have discovered that it did not accord with her understanding of the transaction. It is often stated that a party who is negligent in failing to read a document which he signs will not be allowed later to object to its contents, and in the past some courts have insisted on this view even when it meant rewarding the fraud of one party because of the negligence of the other. Today the legal encyclopedias are still giving color to this view,[82] but the courts almost universally hold that a party's failure to

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[77] CAPLOVITZ at 144-45.

[78] *E.g.*, Hollywood Credit Clothing Co. v. Gibson, 188 A.2d 348 (D.C. Ct. App. 1963).

[79] Saylor v. Handley Motor Co., 169 A.2d 683, 684 (D.C. Mun. Ct. App. 1961).

[80] Credit Union Guide § 9031.2.

[81] Universal C.I.T. Credit Corp. v. Hudgens, 234 Ark. 1127, 356 S.W.2d 658 (1962); Saylor v. Handley Motor Co., 169 A.2d 683 (D.C. Mun. Ct. App. 1961).

[82] *See* 17 C.J.S. *Contracts* § 138 (1963); 37 Am. Jur. 2d *Fraud & Deceit* § 269 (1968); 23 Am. Jur., *Fraud & Deceit* § 171 (1939).

read a contract will not bar him from obtaining rescission where the other party is guilty of fraud or material misrepresentation.[83]

F. Other Obstacles to Rescission

The buyer who is not barred from rescission by any of the above legal obstacles may still encounter various other difficulties. In a kind of penumbra to the parol evidence rule, the court may require that the proof of facts which entitle buyer to rescind the written contract must go beyond a mere preponderance of the evidence and be shown by "clear and convincing evidence."[84] This would be especially true in cases involving verbal warranties which are disclaimed by the contract or misstatement of the contract terms, since the parol evidence in such cases disparages the validity of specific provisions in the contract. In such cases Corbin indicates that the buyer's evidence of fraud or mistake will need to be "strongly supported by circumstances or by disinterested witnesses."[85]

It is sometimes held that rescission will not be allowed unless damages can be shown,[86] but the weight of authority is to the contrary.[87] This factor might be important in the fear-sale example of case 1 in the unlikely event that the value of the sink attachment was equal to the contract price.

Another obstacle is the requirement that the misrepresentation be an inducing cause of the contract, and if the misrepresentation was innocent rather than fraudulent, the misrepresentation must be material as well.[88] This might be a factor in case 3, if the buyer did not really care whether the furniture was maple, birch or pine. However, it is presumed that any material misrepresentation is an inducing cause of the transaction, so it would be necessary for the seller to produce evidence indicating lack of reliance by the buyer.[89] In

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[83] *E.g.*, Saylor v. Handley Motor Co., 169 A.2d 683 (D.C. Mun. Ct. App. 1961); Lippire v. Eckel, 178 Neb. 643, 134 N.W.2d 802 (1965); CORBIN § 607 at 656; 3 WILLISTON, SALES § 634, at 443; RESTATEMENT OF CONTRACTS § 505 (1932).

[84] RESTATEMENT OF CONTRACTS § 511 (1932); *see* CORBIN § 581, at 440.

[85] CORBIN § 585, at 486.

[86] *E.g.*, Russell v. Industrial Transp. Co., 113 Tex. 441, 251 S.W. 1034, 51 A.L.R. 1 (1923).

[87] *See* PROSSER § 105, at 749-50 & nn.35-41; WILLISTON, CONTRACTS § 1525, at 4271 & n.10.

[88] 3 WILLISTON, SALES §§ 627, 633; RESTATEMENT OF CONTRACTS § 476 and Comment *b*, § 471 and Comment *i* (1932); RESTATEMENT OF RESTITUTION § 9 (1937).

[89] RESTATEMENT OF CONTRACTS § 479 (1932).

addition, it is not necessary that the fraud or misrepresentation constitute the sole inducing cause; it needs only to have been a material inducement.[90]

The above gamut of substantive and procedural limitations will make it difficult for the buyer to rescind the contract in any of the 5 cases above. The salesman's misrepresentations concerning referral commissions (case 2) and concerning the encyclopedia (case 5) may be considered to be only permissible puffing. The same is true in case 3 except for the statement that the wood is solid maple. The parol evidence problem may be insurmountable in cases 3 and 4 where evidence of the furniture salesman's false description of the goods and the sewing machine salesman's misstatement of the contract terms directly contravenes specific language in the signed contracts. In any event, it is likely that the buyer will have failed to act with sufficient celerity and decisiveness to meet the requirements for exercising the remedy of rescission and avoiding affirmance of the contract. In case 1, involving a fear sale, affirmance should be the only substantial obstacle to rescission, however,[91] and the buyer of the sewing machine in case 4 may still be entitled to reformation even if she fails to qualify for rescission.

CONTRACT LAW—DAMAGES

If the remedy of rescission is for some reason unavailable, the aggrieved buyer may next consider the possibility of obtaining a remedy on the contract.[92] This will be a realistic possibility principally in cases where the obstacle to rescission is affirmance of the contract resulting from failure to promptly elect the remedy of rescission. As the discussion below will indicate, the parol evidence problem is probably greater if the buyer seeks contract damages than if he seeks rescission, and the innocent—principal defense may also be more formidable. The rules concerning puffing are virtually the same,[93] and if the salesman's puffing is not considered grounds for rescission, it will not give rise to a right to recover damages. A further restric-

[90] 3 WILLISTON, SALES § 633 and authorities cited therein at n.6.

[91] For an analogous case where buyers were able to obtain a remedy see Bross v. Home Supermarket Grocery Co., 32 Pa. D. & C.2d 75 (Co. Ct. of Phila. 1962).

[92] I have treated the action for breach of warranty as a contraetual remedy, although warranties are often not consensual and sometimes arise where there is no contract.

[93] *See* PROSSER § 104; WILLISTON, SALES § 203. In some cases, a misrepresentation which will constitute grounds for rescission may be insufficiently definite to give rise to a warranty.

tion arises out of the nature of the contract remedy which requires the showing of a breach resulting in measurable money damages to the buyer.[94]

Misrepresentations by way of inducement are often collateral to the contract terms, as in case 1 (fear sale) and case 2 (referral-sales scheme). In such cases the misrepresentations do not evidence a breach of contract and usually do not produce discrete money damages. In case 4 the buyer of the sewing machine will be able to show a breach only if she is first able to have the contract reformed to reflect the actual terms of her understanding with the salesman.[95] Assuming this is done, she probably will still not be relieved of the obligation to pay for the sewing machine. Although the seller would be guilty of a breach if it refused to allow Mrs. Daley to return the machine within 30 days, she may have lost her right to return the machine if she continued to use it after initially seeking to return it and being rebuffed.[96] She may be unable to prove any money damages resulting from seller's refusal to allow her to return the machine. With respect to the five-year guarantee, she can presumably recover damages in the amount of any repairs she has been forced to pay because of the seller's failure to honor the guarantee and she can also seek assurance of future performance.[97] However, this may be an unsatisfactory remedy if what she really wants is to avoid having the seller levy on her furniture to enforce payment of the purchase price.

The most difficult questions concerning the possibility of recovering damages for breach of contract arise in connection with the furniture salesman's statements in case 3. Under the Uniform Commercial Code, the statement of the salesman that the furniture was solid maple would create an express warranty to that effect.[98]

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[94] It may be argued that § 2-721 of the Uniform Commercial Code changes this. The section states that "[r]emedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach." Literally this might mean that if there is fraud in the inducement of a contract, one can recover damages for non-delivery or breach of warranty, even though there has been no non-delivery or breach. *See* UCC §§ 2-711, 2-713, 2-714. To make sense out of § 2-721, it must be read as applying only where the fraud or material misrepresentation corresponds to some non-fraudulent breach for which the code provides a remedy.

[95] *See* Brandwein v. Provident Mut. Life Ins. Co., 3 N.Y.2d 491, 146 N.E.2d 693, 168 N.Y.S.2d 964 (1957).

[96] UCC §§ 2-606(1)(c) and Comment 4, 2-607(1), 2-608(2).

[97] *Id.* § 2-609.

[98] *Id.* § 2-313(1)(b).

The written contract, however, expressly disclaims the existence of any express warranties. The inconsistency would be resolved in favor of the consumer by virtue of section 2-316(1) of the Code, which provides that warrantly limitations are inoperative to the extent that they are inconsistent with an express warranty arising from the seller's words or conduct. However, this rule of construction in section 2-316(1) is expressly made subject to the provisions of the parol evidence rule. As noted above, parol evidence of the salesman's statements to buyer should be admissible for the purpose of showing fraud or material mistake which would render the agreement voidable. If the instrument is not voidable, the same parol evidence may be inadmissible for the purpose of establishing a warranty inconsistent with the written disclaimer on the theory that this would not vitiate the contract, but would vary or contradict the terms of the contract. Although some authority expressly takes this point of view,[99] and considerably more authority lends it indirect support,[100] it is not a view which appeals to one's reason or sense of justice. For example, in *Deaver v. J.C. Mahan Motor Co.*,[101] Deaver alleged that he was induced to purchase a car from defendant by false representations that the car was in good condition and had never been in a wreck. He sought rescission of the transaction, or in the alternative damages for breach of warranty. The lower court held that Deaver was not entitled to rescission but allowed him to recover damages, evidently being persuaded that the misrepresentations were actually made. The Tennessee Supreme Court reversed, holding that parol evidence could not be relied upon to establish a claim for breach of warranty because the written instrument stated that there was no warranty except warranty of title. Thus the fact that plaintiff was not entitled to the equitable remedy of rescission forced the court to ignore the evidence of misrepresentation altogether. The court might

[99] Archer v. Bucy, 235 Ark. 244, 357 S.W.2d 636 (1962); Sabo v. Delman, 3 N.Y.2d 155, 143 N.E.2d 906, 164 N.Y.S.2d 714 (1957); Stryker v. Rusch, 8 App. Div.2d 244, 187 N.Y.S.2d 663 (1959); Miller v. Troy Laundry Machinery Co., 178 Okl. 313, 314, 62 P.2d 975, 976 (1936) (dicta); Deaver v. J.C. Mahan Motor Co., 163 Tenn. 429, 43 S.W.2d 199 (1931); WIGMORE § 2439.

[100] *Compare, e.g.*, Barnsdall Refining Corp. v. Birnamwood Oil Co., 92 F.2d 817 (7th Cir. 1937) (evidence admitted in suit for rescission), Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551 (1941), *and* Rizzi v. Sussman, 9 App. Div. 2d 961, 195 N.Y.S.2d 672 (1959), *with, e.g.*, Quinn v. Bernat, 80 R.I. 375, 97 A.2d 273 (1953), Sanders v. Allis Chalmers Mfg. Co., 230 S.C. 133, 115 S.E.2d 793 (1960), *and* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) (evidence inadmissible in suit for breach of warranty).

[101] 163 Tenn. 429, 43 S.W.2d 199 (1931).

just as easily have allowed the parol evidence on the ground that the misrepresentation voided the disclaimer clause and showed that the contract was not fully integrated. If parol evidence of misrepresentation is admissible to allow one to avoid a written contract entirely in an action for rescission, it would not seem a radical step to admit the same parol evidence to allow the buyer to avoid one clause of a written contract in an action for breach of warranty.[102] The reasoning in both cases is the same—if assent to the contract was obtained by misrepresentation, the instrument is not the kind of "valid written instrument" which cannot be varied by parol evidence. Although the weight of pre-Code case law is hostile to this view, courts may justifiably adopt the above view in actions governed by the Uniform Commercial Code since the Code expressly restricts the parol evidence rule to writings which were "intended by the parties as a final expression of their agreement."[103] The above view is also supported by some pre-Code cases.[104] In *Lone Star Olds Cadillac v. Vinson*[105] plaintiff had purchased a used car from defendant. Plaintiff could not rescind the contract because the negotiable note given for the purchase price had passed into the hands of a holder in due course. Plaintiff instead sued for breach of warranty alleging that seller had warranted the car to be in good mechanical condition and had promised to repair the car if buyer had any difficulty with it. The contract signed by the plaintiff recited that "no warranties, express or implied, representations, promises or statements have been made to plaintiff, unless endorsed on the contract in writing."[106] The buyer testified that he did not read the contract because the salesman told him it was not necessary to read the instrument and assured him that the instrument did not affect the oral warranty. The court held that buyer could recover damages for breach of the oral warranty.

The *Lone Star Olds* case differs from the false description of the furniture in case 3 in two respects. First, the seller in the *Lone Star* case said that he would guarantee the car to be in good condition; in case 3 the salesman merely described the furniture as solid maple without using the word "guarantee." This is not a basis for

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[102] *See* CORBIN § 578 at 406 n.43.

[103] UCC § 2-202. *But see* Green Chevrolet v. Kemp, 241 Ark. 62, 406 S.W.2d 142 (1966).

[104] *E.g.*, International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 110 A.2d 186 (1955), *discussed in* 2 CORBIN § 482 at 458-59.

[105] 168 S.W.2d 673 (Tex. Civ. App. 1942) (writ of error refused, want of merit).

[106] *Id.* at 674.

distinguishing the cases, however, because under the Uniform Commercial Code the salesman's words of description create an express warranty just as an express promise or guarantee.[107] The second difference is that the seller in *Lone Star* induced the buyer to sign the contract without reading it by telling buyer that it was a routine form and he need not read it. This is not meaningfully different from a case where seller implies by his words or actions that the signature is a routine matter and buyer need not read the form. For example, the seller may simply have put the form in front of the buyer, pointed to a blank and said "sign here." This gives the buyer little opportunity to read the form and gives him the feeling that reading it is unnecessary. The case becomes more difficult if buyer's failure to read the form is not attributable to any action on the part of the seller. However, the result should still be the same if the buyer in case 3 signed the form as a routine matter, not intending to modify the oral agreement or waive any rights and not understanding that he was doing so, and if the seller knew or had reason to know the buyer did not understand the contract and the legal consequences of signing it. This is consistent with the objective theory of contract that a party is bound by assent to a contract only if his actions lead the other party to reasonably believe that there was assent. The comment to section 2-316(1) of the Code (providing that words creating an express warranty prevail over inconsistent clauses negating or limiting warranties) states that the section "seeks to protect a buyer from unexpected and unbargained language of disclaimer."[108] Although section 2-316(1) is expressly made subject to the parol evidence rule, the rule should be interpreted in a manner consistent with the protection section 2-316(1) seeks to provide for buyers. This does not defeat the purpose of the parol evidence rule or of the reference to the rule in section 2-316(1), since the rule will still apply in any case in which the buyer actually or apparently agrees to the clause disclaiming warranties.[109]

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[107] UCC § 2-313(2).

[108] *Id.* § 2-316, Comment 1.

[109] This view of the parol evidence rule is probably an iconoclastic one. *See* WIGMORE §§ 2434, 2434a. However, it is in complete harmony with Corbin's interpretation of the rule. *See* 2 CORBIN §§ 582-89. *See generally* CORBIN §§ 573-96. Corbin often undertakes to explain contrary authority on the ground that the court actually heard the parol evidence, decided it was unconvincing, and then invoked the parol evidence rule. This is similar to McCormick's view of the parol evidence rule as a device to allow the judge to pass on the credibility of oral evidence

The result urged above can also be reached in a different fashion under the Uniform Commercial Code. The comments to section 2-202 on parol or extrinsic evidence provide a cross reference to section 2-302 on unconscionable clauses in contracts. If a court feels it cannot consider parol evidence which would give rise to a warranty because of a written integration clause stating that no oral representations or warranties were made, the court should always consider whether the integration clause is unconscionable and should therefore be disregarded as permitted by section 2-302. In passing on the question of unconscionability, the court may hear evidence without regard to the strictures of the parol evidence rule, since section 2-302(2) expressly provides that the parties are entitled to present evidence regarding the "commercial setting, purpose, and effect" of the clause or contract alleged to be unconscionable.[110] The integration clause should be considered unconscionable in any case in which the clause is not bargained for and is not in accord with the expectations of the buyer, if the salesman knew or had reason to suspect that the buyer did not understand the effect of the clause. Such a result is strongly indicated by several of the cases cited in the comments to section 2-302, which illustrate the ingenuity of courts prior to enactment of the code in allowing proof of warranties in spite of clauses in the contract expressly disclaiming any warranties.[111]

It is worthwhile to consider whether the furniture buyer in case 3 would have any remedy for breach of contract if the salesman had not represented the furniture to be solid maple. In this event, the buyer's claim for breach of warranty would have to rest upon the existence of an implied warranty of merchantability or of fitness for a particular purpose.[112] If the furniture is of very poor quality, it may not meet the minimum standards required for goods to be considered merchantable. Under pre-Code law the parol evidence rule was usually held not to bar evidence of implied warranties,[113] and the language of the Code reinforces this result.[114] However, the written

before the jury hears it. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932).

[110] Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966); *see* 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-302:5 (1961).

[111] *See* UCC § 2-302, Comment 1. *But cf.* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 501-08 (1967).

[112] *See* UCC §§ 2-314, 2-315.

[113] *See* 2 CORBIN § 585 at 488; WILLISTON, SALES § 239a.

[114] UCC §§ 2-314, 2-315, 2-316(2).

contract expressly disclaims implied warranties in the manner authorized by section 2-316(2) of the Code. Most commentators on the Code have felt that a warranty disclaimer meeting the requirements of section 2-316(2) is nonetheless subject to challenge on the ground that it is unconscionable.[115] This view is supported by the fact that a number of the cases cited in the official comments to section 2-302 are decisions restricting the operation of warranty disclaimer clauses. However, the argument has also been made that since section 2-316 sets forth specific requirements for disclaiming implied warranties and since the official comments to the section contain no reference to section 2-302, then a disclaimer meeting the specific tests of section 2-316 cannot be held ineffective under section 2-302.[116] This argument is not persuasive. Any student of the Code learns at an early date that he cannot rely exclusively on the cross references provided by the official comments. Furthermore, section 2-316(2) does not say that a disclaimer clause is effective if it meets the requirements of that section—it only states that the clause is ineffective if it fails to meet those requirements.[117] The view that warranty disclaimers should be tested exclusively by the requirements of section 2-316 is an overly technical approach and could lead to disquieting results. Suppose, for instance, that a buyer expressly and unambiguously agrees that there is to be no warranty of merchantability. The written contract states that there is no warranty of merchantability, but this language is not conspicuous. A literal application of section 2-316 would make the disclaimer ineffective and the buyer could assert a warranty of merchantability under section 2-314, although he clearly understood there was to be no such warranty. This result can be avoided by the application of section 1-203 requiring good faith in the enforcement of a contract, although there is no cross reference to section 1-203 in the comments to section 2-316. Conversely, if the disclaimer is included in conspicuous language, but it was not bargained for and the buyer was induced to overlook the disclaimer in signing the contract, the buyer should be entitled to invoke section 2-302 to avoid the disclaimer. The prohi-

[115] *E.g.*, R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UCC, §§ 7.03(1)(b)(iii) at 7-37 & 7.03(2) at 7-46 (1966); W. HAWKLAND, SALES AND BULK SALES 48 (1958); Donnelly, *After the Fall of the Citadel*, 19 SYRACUSE L. REV. 1, 26 (1967); Note, 109 U. PA. L. REV. 401, 420 (1961).

[116] Leff, *supra* note 111, at 523.

[117] *But see* UCC § 2-316(3)(a).

bition against unconscionable clauses, like the requirement of good faith, is a broad principle cutting across all the provisions of Article Two of the Code.

In case 3, the buyer was led to believe by the blandishments of the salesman that he was purchasing good quality furniture. The written contract, however, by disclaiming the warranty of merchantability, deprived buyer of any legal assurance that the furniture would even be fit for use as furniture.[118] If buyer was aware that he was buying on a no-warranty basis and the seller was not willing to stand behind the goods even to a limited degree, there is no objection to the warranty disclaimer. On the other hand, if the seller acquired buyer's signature on a form designed to shield the seller from the consequences of buyer's inevitable disappointment, while expressly or impliedly representing that the signature was a formal matter of no importance, the courts should have no difficulty in striking down the disclaimer clause as unconscionable. If this is done, then the buyer may be able to recover damages for breach of the implied warranty of merchantability.

There are also defenses which are peculiar to the action for breach of warranty. One problem is the notice requirement of section 2-607(3)(a) of the Code. This section states that a buyer is barred from any remedy for breach of contract unless he notifies the seller of the breach "within a reasonable time after he discovers or should have discovered any breach." As mentioned above, low income consumers often fail to complain when they feel they have been cheated, and it would be unfortunate if timidity should deprive such buyers of their remedy for breach. The official comments to the Code indicate that courts should be generous to consumers in their interpretation of what constitutes a reasonable time: " 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."[119] There are already some indications that the courts will be willing to implement this policy in cases where the seller has not been prejudiced by delay in giving notice.[120]

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[118] *See Id.* § 2-314(2)(c).

[119] *Id.* § 2-607, Comment 4.

[120] *See* Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

Another difficulty may be the "innocent principal" argument, which was discussed above in connection with the availability of rescission. The argument is that the agent's statements creating the warranty were unauthorized and the exculpatory clauses in the contract gave buyer notice of the lack of authority. This argument is not available to the seller in any case where the warranty claimed by the buyer is one arising by implication of law (such as the implied warranty of merchantability) rather than one arising from the salesman's statements. Where the warranty is based on the salesman's statement (such as the "solid maple" statement in case 3), the principal may not avoid responsibility if it had reason to expect that the misrepresentation would be made or if it desired the salesman to make the misrepresentation in order to make the sale, since this would indicate that the salesman had implied authority.[121] The remaining cases, where the agent's statement was neither expressly nor impliedly authorized, are more difficult, and the law in this area is unclear. The Restatement (Second) of Agency in section 260 takes the position that an exculpatory clause in a written contract which indicates that an agent has limited authority does not provide the principal with a defense to an action for rescission but does provide a defense to a tort action for deceit. Nothing is said about the effect of the clause when the buyer seeks damages for breach of warranty. Under general principles of agency law, constructive notice to the buyer of the salesman's lack of authority would prevent the principal from being bound by the misrepresentations.[122] On the other hand, some authorities indicate that if the principal insists upon enforcement of the contract after obtaining knowledge of the agent's unauthorized acts, the principal is considered to have ratified the agent's actions and is therefore liable.[123] This theory apparently destroys the defense in all cases where the buyer seeks rescission either prior to bringing his action for breach of warranty, or in an alternate count.

Most American jurisdictions allow plaintiff to recover the "benefit of his bargain" in a tort action for deceit, with the result that a buyer who successfully seeks damages because of a salesman's

[121] *E.g.*, Dargue v. Chaput, 166 Neb. 69, 88 N.W.2d 148 (1958); Gray v. Wikstrom Motors, Inc., 14 Wash.2d 448, 128 P.2d 490 (1940); RESTATEMENT OF AGENCY § 256 (1933); *see* RESTATEMENT (SECOND) OF AGENCY § 260, Comment *b* (1958).

[122] *See* RESTATEMENT (SECOND) OF AGENCY §§ 9, 161, 258 (1958).

[123] Floor v. Mitchell, 86 Utah 203, 41 P.2d 281 (1935); RESTATEMENT (SECOND) OF AGENCY §§ 94, 99 (1958).

misrepresentation will usually recover the same amount whether he sues in contract or in tort.[124] In light of this, it would seem hypertechnical to allow the exculpatory clause to effectively preclude damages in one area and not in the other. As noted above, the Restatement (Second) position is that the exculpatory provision effectively shields the principal from liability in tort. The case law, however, is not entirely consistent with this view. The Restatement (Second) view is supported by some authorities,[125] but a majority of the decisions have permitted tort actions to be maintained against the principal for the misrepresentation of his agent, despite the existence of an exculpatory clause, in situations where the agent's fraud is incidental to his regular duties on behalf of the principal and induces a sale which benefits the principal.[126] The same result should follow if the gravamen of the complaint is breach of warranty instead of tort. There is no sound reason why an exculpatory clause should be able to achieve, as a matter of agency law, what cannot be directly achieved as a matter of contract. The courts have long held that a clause in a contract which expressly provides that the contract is not contestable on the ground of fraud is void as against public policy.[127] In spite of such a clause, the contract may be rescinded for fraud or the buyer may maintain an action for deceit. Today the nation's business is carried on through agents, and the above rule would be reduced to impotence if a denial of responsibility for agents' representations could shield the principal from tort or warranty liability arising out of an agent's fraud. For whatever reason, recent cases of this kind reveal few attempts by corporations to disclaim responsibility for statements of their agents while carrying out their normal duties for the benefit of their employer.

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[124] C. MCCORMICK, DAMAGES § 121 (1935); Note, 47 VA. L. REV. 1209 (1961).

[125] *E.g.*, Herzog v. Capital Co., 27 Cal.2d 349, 164 P.2d 8 (1945).

[126] *E.g.*, Lufty v. R.D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941); Utilities Eng'r Institute v. Criddle, 65 Idaho 201, 141 P.2d 981, 984 (1943) (dictum); National Equip. Corp. v. Volden, 190 Minn. 596, 252 N.W. 444 (1934); Burns v. Vesto Co., 295 S.W.2d 576 (Mo. Ct. App. 1956); Miller v. Troy Laundry Mach. Co., 178 Okla. 313, 62 P.2d 975 (1936); Annot., 133 A.L.R. 1360 (1941); Annot., 127 A.L.R. 132, 143-46, 151-52 (1940).

[127] 6A CORBIN § 1516; RESTATEMENT OF CONTRACTS § 573 (1932).

TORT LAW—DAMAGES

A. Misrepresentation

A tort action for deceit is the third major remedy which the common law provides for misrepresentation. Traditionally the elements of the action of deceit are a false and fraudulent representation made to induce reliance by the plaintiff, which plaintiff justifiably relies upon.[128] Under the orthodox view no remedy is given for innocent misrepresentations, but only for statements which are fraudulent in the sense of being knowingly false, or made recklessly by one who does not know whether the statement is true or false.[129] However, an expansion of the tort remedy for misrepresentation has been underway for some years, and many jurisdictions now allow recovery for negligent misrepresentations[130] and for innocent misrepresentations neither fraudulent nor negligent, if made to induce a business transaction and relied upon by the plaintiff.[131] The gradual dilution of the requirement of scienter has been widely noted by commentators.[132] For example, in *Clark Auto Co. v. Reynolds*,[133] seller's agent had represented to buyer that a used automobile was in "A-1 shape," and that it had not been driven hard. The jury, in answer to interrogatories, found that the car was not in as good condition as represented, but that the agent who made the representations did not know at the time that the car was not in as good condition as represented. The court found that the buyer could not recover on a warranty count because of the parol evidence rule, but upheld a verdict for the buyer on a tort count, stating that the fact that the agent who made the representations did not know they were false did not preclude recovery. The court stated, "If the fact does not exist,

[128] PROSSER § 100, at 700; RESTATEMENT OF TORTS §§ 526, 531, 537-38 (1938); *cf.* RESTATEMENT (SECOND) OF TORTS §§ 531, 538 (Tent. Draft No. 10, 1964).

[129] *See* PROSSER § 102, at 715-16; *cf.* RESTATEMENT OF TORTS § 526 (1938).

[130] PROSSER § 102, at 710-24.

[131] *E.g.*, Lanning v. Sprague, 71 Idaho 138, 227 P.2d 347 (1951); Irwin v. Carlton, 369 Mich. 92, 119 N.W.2d 617 (1963); Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954); PROSSER § 102, at 724-29. Prosser lists 18 jurisdictions which impose tort liability for innocent misrepresentations.

[132] *See* Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929); Carpenter, *Responsibility for Intentional, Negligent and Innocent Misrepresentation*, 24 ILL. L. REV. 749 (1930); Green, *Deceit*, 16 VA. L. REV. 749 (1930); Miller, *Innocent Misrepresentation as the Basis of an Action for Deceit*, 6 TEXAS L. REV. 151 (1928); Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415 (1911); Note, 36 IOWA L. REV. 648 (1951).

[133] 119 Ind. App. 586, 88 N.E.2d 775 (1949).

and the defendant states of his own knowledge that it does . . . the law will impute to him a fraudulent purpose."[134]

The tort action may offer several advantages over the contract remedy. One advantage is avoidance of the parol evidence rule. It is generally held that the rule does not bar proof of oral misrepresentations in a tort action.[135] Only a few decisions take the view that the policy behind the parol evidence rule requires that the action in tort be barred along with the remedy on the contract.

Another advantage is the obvious one that the tort action may provide a remedy for misrepresentations which induce a contract but do not give rise to a warranty. For instance, if rescission is not available in case 1 where the seller falsely claimed to be from the Housing Authority, there would be no contractual remedy for the misrepresentation because there is no breach of contract. The same would be true of some of the misrepresentations made as inducements in the referral-sales and phony-gift cases (2 and 5). In tort, however, if the goods purchased have a fair value which is less than the price paid by the buyer, the buyer can recover the difference as damages. This is the so-called "out-of-pocket" measure of damages, and is generally less favorable to the plaintiff than "benefit-of-bargain" damages. However, it is impossible to compute benefit-of-bargain damages in cases like the public authority scheme in case 1, where the collateral misrepresentation, if true, would not affect the value of the goods being sold. Jurisdictions which generally allow "benefit of the bargain" damages will allow plaintiff to recover out of pocket damages if this is the only appropriate means of measuring damages.[136] In egregious cases the tort remedy also affords the possibility of recovering punitive damages.[137]

The necessity of computing money damages, however, may prevent recovery in cases where the value of the goods sold is equal to the price paid. In case 1, for example, there could be no recovery if the buyer ended up paying the normal retail price for the sink attachment which was represented to be required by the Public

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[134] *Id.* at 592, 88 N.E.2d at 778.

[135] Burns v. Vesto Co., 295 S.W.2d 576 (Mo. Ct. App. 1950); Miller v. Troy Laundry Mach. Co., 178 Okla. 313, 62 P.2d 975 (1936); PROSSER § 104, at 746-47.

[136] Rich v. Price, 340 Mass. 502, 164 N.E.2d 891 (1960); Salter v. Heiser, 39 Wash. 2d 826, 239 P.2d 327 (1951); *see* C. MCCORMICK, DAMAGES § 121, at 453 (1935); RESTATEMENT (SECOND) OF TORTS § 549 & Note to Institute (Tent. Draft No. 11, 1965).

[137] *See* King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960); PROSSER § 105, at 752.

Housing Authority. Although the sale was induced by misrepresentations actionable in tort, there would be no tort remedy if there were no legal damages.[138] Furthermore, the difficulty and expense of developing proof of damages may bar the assertion of a remedy as a practical matter—expert testimony may be needed to establish the value of the goods received.[139] In case 5, assuming that the "value" of the encyclopedia is the same as the contract price, there could be no recovery in tort if the only actionable misrepresentation is considered to be the statement that the supplements are sold at cost. If the statement that the buyer will receive goods worth $989 is held to be actionable, the buyer could recover the difference between the purchase price and $989 in a jurisdiction allowing benefit of bargain damages.

As noted above, the rules concerning the scope of permissible puffing are virtually identical in contract and tort.[140] However, the buyer who seeks a tort remedy for misrepresentation must show that he justifiably relied upon the misrepresentation. This sometimes introduces a difficulty not present in the same degree where the buyer seeks rescission, or damages for breach of warranty. Although a representation concerning goods does not give rise to a warranty under the Uniform Commerical Code unless it becomes "part of the basis of the bargain,"[141] the official comments interpret this language as not requiring any showing of reliance: "Rather, any fact which is to take such affirmations, once made, out of the agrcement, requires clear affirmative proof."[142] As noted above,[143] rescission cannot be obtained unless there is reliance on the misrepresentation, but if the misrepresentation is fraudulent and made for the purpose of influencing the buyer, the seller is usually not permitted to deny that buyer's reliance was justifiable.[144] On the other hand, in a tort action the requirement of justifiable reliance sometimes will bar recovery if the buyer was influenced by essentially irrelevant falsehoods (such as the statement in case 5 that the encyclopedia buyer was "specially selected"), or was negligent in failing to read the contract or in relying

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[138] PROSSER § 105, at 748.

[139] *See* Bangert v. Emmco Ins. Co., 349 Ill. App. 257, 110 N.E.2d 528 (1953).

[140] *See* PROSSER § 104; WILLISTON, SALES § 203.

[141] UCC § 2-313.

[142] *Id.* § 2-313, Comment 3.

[143] See text *supra* accompanying notes 89-90.

[144] 3 WILLISTON, SALES § 627.

on promises which were negated in the written contract.[145] However, most jurisdictions allow contributory negligence as a defense only if the basis of buyer's claim is that the misrepresentation was made negligently rather than fraudulently,[146] and in determining whether the buyer's reliance was justifiable, courts usually consider the actual capacity of the buyer rather than holding him to the standard expected of the reasonably prudent man.[147] Where the seller is guilty of intentional fraud, the anomaly of allowing buyer's negligence as a defense is apparent.[148] If buyer's negligence consists of failure to read the contract or to insure that the written contract accurately reflects the agreement, the result of disallowing the buyer's tort action on the ground of negligence is usually to reimpose the parol evidence rule in another guise.

B. Strict Liability

In situations where the gist of the buyer's complaint is that the goods he received were defective, as was the furniture in case 3 above, it is possible that the new products liability doctrine of strict liability may provide a remedy. This doctrine has its principal application in cases where defective products cause physical injury or property damage to a user or consumer.[149] However, a few cases have also applied the strict liability theory in situations where the buyer's complaint was that he received defective goods which were worth less than he paid for them.[150] The leading case of this kind is *Santor v. A & M Karagheusian, Inc.*[151] In that case the buyer paid $14 per yard for Grade #1 carpet. The carpet was defective and the buyer brought suit against the manufacturer. (The dealer who had sold the carpet to the buyer had gone out of business and moved out of the state.) The Supreme Court of New Jersey held that the buyer could recover from

[145] Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959); PROSSER § 103, at 731; RESTATEMENT OF TORTS §§ 537-38 (1938); RESTATEMENT (SECOND) OF TORTS §§ 538, 540 (Tent. Draft No. 10, 1964).

[146] RESTATEMENT (SECOND) OF TORTS §§ 545A, 552A (Tent. Draft No. 11, 1965).

[147] Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N.W. 353 (1913); PROSSER § 103, at 731-32; *cf.* RESTATEMENT OF TORTS § 538 (1938); RESTATEMENT (SECOND) OF TORTS § 538 (Tent. Draft No. 10, 1964).

[148] *See* Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439, 446-49 (1960); RESTATEMENT (SECOND) OF TORTS § 545A, Comment *a* (Tent. Draft No. 10, 1964).

[149] *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 10, 1964); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[150] *See* Prosser, *supra* note 149, at 821-23.

[151] 44 N.J. 52, 207 A.2d 305 (1965).

the manufacturer the difference between the price paid for the carpet and the actual market value of the defective carpeting at the time when the buyer knew or should have known that it was defective. As is usual in strict liability cases, recovery did not depend upon any showing that the manufacturer was negligent or that it had made any representations to the buyer concerning the quality of the carpet. Liability was held to exist if "the article is defective, *i.e.*, not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer . . . ."[152]

The decision in the *Santor* case has been criticized by leading authorities and rejected by several courts.[153] The decision has also found favor with some commentators.[154] The doctrine adopted in *Santor* is not without difficulties, since determining liability involves considering not only the quality of the goods purchased, but also the purpose for which they were purchased and the price paid. For example, there would have been no liability in the *Santor* case if the same carpet had been sold as low grade carpet for $3 per yard instead of being sold as grade #1 carpet for $14 per yard. Furthermore, the manufacturer would presumably not have been liable if it had sold the carpet to the dealer as carpet of an inferior grade, even though the dealer resold it as grade #1 carpet. Nevertheless, it would be premature at this point to conclude the *Santor* decision is erroneous. The decision may prove a needed adjunct to the arsenal of consumer remedies, and some of the critics of the decision are willing to concede that the decision was justified on the facts of the case.[155] The approach taken in *Santor* may be useful in some jurisdictions as a means of circumventing rigid rules which unjustifiably restrict the availability of a remedy for breach of warranty when there is a warranty disclaimer clause.[156] Another virtue of the de-

[152] *Id.* at 66-7, 207 A.2d at 313.

[153] *E.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *see* Prosser, *supra* note 149, at 821-23.

[154] *See* Donnelly, *After the Fall of the Citadel: Exploitation of the Victory or Consideration of All Interests*, 19 SYRACUSE L. REV. 1 (1967).

[155] Seely v. White Motor Co., 63 Cal. 2d 9, 17-8, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

[156] Disclaimers have generally not been effective as defenses to claims based on strict liability in tort. *See* Prosser, *supra* note 149, at 831-34.

cision is that it permits recovery against a remote supplier who may be actually responsible for the defective goods, but who may not be liable for breach of contract for want of privity. The doctrine of strict liability in tort usually is not restricted to claims against the manufacturer, however, and could be invoked against the retail seller in an appropriate case.[157]

As applied to case 3 above, it is likely that the furniture is defective only as to the retail seller, who represented it to be of good quality. If the manufacturer purported to supply the retailer with low grade furniture, one could hardly hold the manufacturer liable on the theory of *Santor*. The *Santor* doctrine is likely to be useful against the manufacturer primarily in cases involving mechanical goods such as washing machines, refrigerators, or automobiles which are sold new and which turn out to be "lemons." In such cases the manufacturer may or may not be liable on the basis of a standard written warranty which the dealer is authorized to give to purchasers.

ESTOPPEL AND ILLEGAL BARGAIN

There are several other traditional legal theories which may sometimes be helpful to consumers. The rules of estoppel may in some circumstances prevent a seller from denying the truth of his misrepresentation.[158] For example, in case 4 a court might hold that because the buyer bought the sewing machine in reliance upon seller's assertion that the machine could be returned within 30 days without liability, the seller is estopped to deny the truth of the assertion by showing that the terms of the written contract are otherwise.[159] However, misrepresentations of this kind have traditionally been remedied under the rules discussed above rather than under the law of estoppel. Furthermore, estoppel will not be available if the buyer's reliance is considered unreasonable.

If a buyer is sued upon a contract which has been obtained by methods which are unlawful under the Federal Trade Commission Act[160] or under some state law, buyer's counsel should consider defending on the ground that the contract is against public policy and should not be enforced by the courts.[161] The consequence of holding

[157] *See id.* at 814-15 & n.126.

[158] *See* PROSSER § 100, at 706-07.

[159] *Cf.* Laverty v. Hawkeye Security Ins. Co., 258 Iowa 717, 140 N.W.2d 83 (1966).

[160] 15 U.S.C. § 45 (1964).

[161] *See* 6A CORBIN §§ 1374-75, 1529; 3 WILLISTON, SALES §§ 663-81; RESTATEMENT OF CONTRACTS § 580 (1932).

that an installment sales contract is unenforceable because it is against public policy would often be very favorable to the buyer. In such situations the guilty party will usually be unable either to enforce payment of the remaining installments or to recover the merchandise.[162]

It has long been held that, in some circumstances, unethical practices in the inducement of a contract will render the contract unenforceable, even though the contract is itself a perfectly legal one.[163] For example, a number of cases have held that a referral-sales scheme involving misrepresentations similar to the ones in case 2 constitutes an illegal lottery and therefore any sales contract induced by such methods is unenforceable.[164] It would not be difficult for courts to follow the same approach and refuse to enforce sales contracts which are induced by violations of a statute forbidding unfair or deceptive sales practices. It may be that the courts as arbiters of "public policy" will someday decide that fraudulent and deceptive sales practices constitute as great a danger to the morals and fortunes of the foolish public as do raffles, lotteries, and gaming contracts. However, in one case the argument was rejected that a note given for the purchase of a used automobile could not be enforced because the speedometer had been turned back in a manner prohibited by statute.[165] The court allowed the purchaser to recover damages for deceit, but held that the speedometer statute was "intended to impose upon the violator an additional penalty, not to enlarge the rights of the other party to the contract."[166] The fact that statutes such as the Federal Trade Commission Act specify certain narrowly circumscribed methods of enforcement might similarly be considered to reflect a legislative intent not to create any additional private rights.[167]

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[162] 3 WILLISTON, SALES §§ 677, 678; RESTATEMENT OF CONTRACTS § 598 (1932); *see* 6A CORBIN §§ 1518, 1534, 1536, 1540.

[163] *E.g.*, Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 N.Y.S. 830 (1908) (buyer's agent received kickback for placing order); *see* 6A CORBIN § 1518.

[164] *E.g.*, State v. ITM, Inc., 52 Misc. 2d 39, 56-61, 275 N.Y.S.2d 303, 324-29 (Sup. Ct. 1966); Sherwood & Roberts—Yakima, Inc. v. Leach, 67 Wash. 2d 630, 409 P.2d 160 (1965).

[165] Chapman v. Zakzaska, 273 Wis. 64, 76 N.W.2d 537 (1956).

[166] *Id.* at 68, 76 N.W.2d at 539.

[167] *Cf.* Kelly v. Kosuga, 358 U.S. 516 (1959). The mere fact that violations of the Federal Trade Commission Act are not grounds for a private action under sections 4 or 16 of the Clayton Act does not foreclose the argument that contracts obtained by violations of the Federal Trade Commission Act should not be judicially enforced. *See* Clayton Act §§ 1, 4, 16, 15 U.S.C. §§ 12, 15, 26 (1964).

UNCONSCIONABILITY

Section 2-302 of the Uniform Commercial Code provides that if a court "finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." This section has been widely discussed and sometimes warmly criticized.[168] The argument has been made, based on the official comments to section 2-302 and on the drafting history of the section, that the section was designed not as a weapon against deceptive sales tactics, but as a means of remedying one-sided clauses in form contracts prepared solely by one party.[169] The better view is that the section encompasses both goals. The closest analogy to section 2-302 under pre-Code law is the equitable power of the courts to refuse to grant specific enforcement of unconscionable contracts, and this analogous equity doctrine is frequently invoked in cases of fraud and misrepresentation.[170] The language of the statute is broad enough to permit its use in cases of this kind and the history of section 2-302 in the state legislatures specifically invokes the equity precedents as a guide to interpretation of the section. The original comments to section 2-302 stated that the section would "apply to the field of

[168] *See, e.g.*, Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Note, 45 IOWA L. REV. 843 (1960); Note, 109 U. PA. L. REV. 401 (1961); Note, 45 VA. L. REV. 583 (1959); Note, 63 YALE L.J. 560 (1954).

[169] *See* Leff, *supra* note 168.

[170] *See* 5A CORBIN §§ 1164-68; H. MCCLINTOCK, EQUITY §§ 69-72 (2d ed. 1948); J. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS §§ 40-43, 175-97, 209-87 (3d ed. 1926); 5 WILLISTON, CONTRACTS § 1425. It has recently been argued that the equity rules concerning unconscionability are not relevant to the concept of unconscionability in the Uniform Commercial Code. Leff, *supra* note 168, at 528-41 (1967). The reasons given to indicate the irrelevance of the equity precedents are that the deceptive and misleading bargaining practices found in the equity cases rarely occur today, that land transactions are likely to involve more money and be of greater importance to the parties than are chattel transactions, and that land is the "only thing that relatively unsophisticated people have which is worth tricking them out of." The first and last points are naive and completely unsupported by any evidence. Quite opposite conclusions have been reached by those who attempted to obtain evidence. *E.g.*, CAPLOVITZ at 12-48, 81-93, 137-54; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS at 139-40. With respect to the greater importance of land transactions, if one grants the relevance of the observation at all, one can only note that the equity doctrine was never restricted to real property and that the purchase of an automobile or heavy appliance is often of greater economic impact to low income buyers than the execution of a lease.

Sales the equity courts' ancient policy of policing contracts for unconscionability or unreasonableness."[171] Although this comment was not retained in the final draft, the legislative studies of the Code in many states reveal that the legislatures intended section 2-302 to "carry equity practice into the sales field."[172]

The equitable rule that specific performance will be denied in cases where the contract sought to be enforced is unconscionable has been stated as follows:

> [S]pecific performance of a contract will be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and where the specific enforcement would be oppressive or harsh upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice.[173]

As is apparent from the above statement, the equitable doctrine is extremely broad and is applied in a great variety of factual situations. The doctrine encompasses such legal defenses as fraud, mistake, duress, or illegality, but also goes much further and provides a defense to a suit for specific performance in cases where the unconscionable features would not give rise to a defense at law.[174] Among other situations, the doctrine is applied in cases where the contract is fair on its face, but one party has been tricked or deceived

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[171] UCC § 2-302, Comment 1 (May, 1949 draft).

[172] *E.g.*, ILLINOIS COMMISSION FOR THE UNIFORMITY OF LEGISLATION, ILLINOIS ANNOTATIONS TO THE UNIFORM COMMERCIAL CODE 49 (1960); MASSACHUSETTS ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 31 (1953); NEW JERSEY UNIFORM COMMERCIAL CODE STUDY COMMISSION, SECOND REPORT TO THE GOVERNOR, THE SENATE AND THE ASSEMBLY OF THE STATE OF NEW JERSEY 52 (1960); OHIO LEGISLATIVE SERVICE COMMISSION, OHIO ANNOTATIONS TO THE UNIFORM COMMERCIAL CODE 17 (1960); PENNSYLVANIA GENERAL ASSEMBLY JOINT STATE COMMISSION, PENNSYLVANIA ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 18 (1953). Similar comments in other state studies are cited in Leff, *supra* note 168, at 528 n.166.

[173] J. POMEROY, SPECIFIC PERFORMANCE § 40, at 121 (3d ed. 1926).

[174] 5A CORBIN §§ 1164, 1167; J. POMEROY, SPECIFIC PERFORMANCE § 40 (3d ed. 1926); 5 WILLISTON, CONTRACTS § 1425; Annot., 87 A.L.R. 1345 (1933). The difference between the legal and equitable defense is illustrated by cases such as Panco v. Rogers, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952), where plaintiff sued for rescission of the contract and defendant counterclaimed for speeific performance. The court found no sufficient legal basis for rescission of the contract, but refused to order specific performance because it would be harsh and oppressive.

in the bargaining process,[175] as well as in cases where one or more terms of the contract are intrinsically unfair.[176] Although most cases to date involving section 2-302 have focused principally on the intrinsic unfairness of certain contract terms or of the exchange being made,[177] the section should also find use in cases where the unfairness is principally or exclusively in the deceptive practices which induced the buyer to sign the contract. One decision has already emphasized this aspect of unconscionability.[178]

The equity cases were easily broad enough to justify denial of specific performance in each of the cases outlined at the beginning of this article. The equitable doctrine of unconscionability did have one dramatic limitation, however—it applied only in cases where the remedy sought was specific performance. The result of refusing to grant specific performance of a contract of sale was nearly always to leave the parties where they were before contracting—the buyer kept his money and the seller kept his land or goods. In the unusual situation where this would not be the result, courts would sometimes refuse to consider the argument that specific performance should be denied because of unconscionability.[179] On the other hand, where the contract sought to be enforced was a contract to make a bequest by will, specific performance would often be denied even though the plaintiff had fully performed services which constituted the agreed consideration.[180] There are also a few cases, of an extreme nature, where considerations of unconscionability prompted the courts to deny a remedy other than specific performance.[181]

Section 2-302 cannot be restricted to cases of specific performance, since to do so would not effect any change in the law, and the section would be mere surplusage. Furthermore, section 2-302

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[175] *E.g.*, Barnett v. Cloyd's Ex'rs., 125 Va. 546, 557, 100 S.E. 674, 678 (1919).

[176] *E.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

[177] American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966), *rev'd in part*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967); Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966); Paragon Homes v. Crace, 4 UCC REP. SERV. 19 (N.Y. Sup. Ct. 1967); Paragon Homes v. Langlois, 4 UCC REP. SERV. 16 (N.Y. Sup. Ct. 1967); *see* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[178] State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 320-22 (Sup. Ct. 1966).

[179] Indianapolis N. Traction Co. v. Essington, 54 Ind. App. 286, 99 N.E. 757 (1912).

[180] *E.g.*, Neary v. Markham, 155 F.2d 485 (10th Cir. 1946).

[181] *See* Hume v. United States, 132 U.S. 406 (1889); James v. Morgan, 1 Lev. 111, 83 Eng. Rep. 323 (K.B. 1663). These cases are discussed in Davenport, *supra* note 168, at 121.

covers cases of non-enforcement or limitation of particular unconscionable clauses as well as non-enforcement of the entire contract. Where non-enforcement of the entire contract is at issue, however, the most conservative interpretation of section 2-302 would be to restrict it to cases where the contract is still wholly executory and one party seeks damages for the other party's failure to perform. In the sales context, this situation provides the legal counterpart of the equitable action for specific performance, since the non-defaulting party would ordinarily seek damages if this would provide a satisfactory remedy, or specific enforcement if damages would be an inadequate or impracticable remedy. If section 2-302 were limited in its application to cases of executory contracts, the section would be of limited assistance to low income consumers in cases involving installment sales contracts, since such buyers frequently do not object before receipt of the goods. There is no particular reason to limit section 2-302 in this manner, however, since the limitation in equity arose from the nature of the remedy sought rather than from any compelling considerations of policy. Although it may be unfair in some cases to apply section 2-302 where one party has fully performed, the determination of such cases can be safely left to the courts, which have the discretion to apply section 2-302 only in cases where it would be fair to do so on the basis of all the facts. The cases already decided under section 2-302 indicate that the section will not be restricted to situations involving executory contracts, regardless of whether the unconscionability relates to the means of obtaining the contract or to some specific clause.[182] Several recent cases illustrate the problems involved in applying section 2-302 in situations where a contract has been fully performed on one side.

In *State v. ITM*[183] the Attorney General of New York sought to enjoin defendants from operating a referral-sales scheme which involved a number of fraudulent and misleading sales practices. This case was quite similar to case 2 in that the consumers were told that they would never have to pay for goods out of their own pockets because the goods purchased would be paid for from commissions earned by referrals. As in case 3, the *ITM* case also involved the sale

[182] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966), *rev'd in part*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

[183] 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

of goods at prices much higher than the normal retail prices. The court granted the relief requested by the Attorney General, but also found that the installment contracts which consumers had been induced to sign by defendants were unconscionable, and were therefore unenforceable.[184] *Frostifresh Corp. v. Reynoso*[185] also involved facts similar to those in case 2. Plaintiff brought suit for $1364 which was alleged to be owed by defendants as a result of the purchase from plaintiff of a combination refrigerator-freezer.[186] The cost of the appliance to plaintiff was $348. The defendants had been told by plaintiff's agent, who negotiated the contract in Spanish, that they would really get the appliance for nothing because they would earn commissions from sales to neighbors and friends. The written contract, in English, was not translated or explained to the defendants. The trial judge held that the price and credit provisions of the contract were unconscionable and therefore would not be enforced under section 2-302. However, the court said, "since the defendants have not returned the refrigerator-freezer, they will be required to reimburse the plaintiff for the cost to the plaintiff, namely $348.00."[187] On appeal, the appellate division of the Supreme Court affirmed the finding of unconscionability, but held that the seller was entitled to recover not only the $348 cost, but also "a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges."[188]

It is instructive to compare the result in *ITM* with that in *Frostifresh*. Both cases involved goods which were sold for excessively high prices, and both also involved misleading and deceptive statements which induced the buyer to sign the sales contracts. In *ITM* the court focused its discussion of unconscionability around the misleading and deceptive practices, and enjoined the defendant from enforcing contracts induced by such practices. In other words, the court treated the case as one involving unconscionability of the contract as a whole, which made it unenforceable. On the other hand,

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[184] *Id.* at 62, 275 N.Y.S.2d at 321-22, 329.

[185] 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966), *rev'd in part*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

[186] The sale price was $900, to which had been added a credit charge of $245.88, a late charge of $22.87, and attorney's fees of $277.35, for a total of $1396.10, less $32.00 paid, which reduced the claim to $1364.10.

[187] 52 Misc. 2d at 28, 274 N.Y.S.2d at 760.

[188] 54 Misc. 2d at 120, 281 N.Y.S.2d at 965.

the court in *Frostifresh* focused its opinion on the excessive price charged, treating the case as one involving an unconscionable price clause, and held that the price and credit clauses of the contract were unenforceable. The result was not to completely bar enforcement of the contract, but to read in a "reasonable price" in place of the unconscionable price clause which was stricken from the contract. Thus the fact that the remedies in the two cases are quite different does not mean that the cases are inconsistent. However, one may question whether the approach taken by the appellate division in the *Frostifresh* case provided a sufficient antidote to all the unconscionable features involved in that case. The buyer was left with the obligation to pay for an appliance he was tricked into buying and the seller was allowed to recover a "reasonable profit" from his trickery. The remedy allowed in *Frostifresh* would be more appropriate in a case where the only unconscionable feature of the transaction was the price, as in *American Home Improvement Co. v. MacIver.*[189]

The approach taken by the court in *Frostifresh* would leave the buyer without any remedy under section 2-302 in cases where a sale is induced by unconscionable means but the sales price is not excessive. As noted above, the tort remedy for fraud is similarly limited due to the necessity of computing damages. There is no need for such a limitation on section 2-302 where sales at the standard price result from the seller's fraud. In such cases, the seller should not be allowed to recover any profit, whether reasonable or unreasonable. Cases of this kind were within the scope of the equity doctrine of unconscionability, which did not require a showing of damage as a condition of invoking the doctrine.[190] There will, however, be a question as to what constitutes a proper remedy under section 2-302 in cases like 1, 2 or 5, particularly if the value of the goods sold is not disproportionate to the purchase price. Section 2-302 says the court may refuse to enforce the contract. This could mean that the contract is void, so that the seller can replevy the goods sold and buyer can recover his payments, or that, as is usual in cases of illegal bargains, the parties will be left as the court finds them—the buyer keeping the goods and the seller keeping the payments made prior to the decision. Section 2-302 should be interpreted to give the courts flexibility

[189] 105 N.H. 435, 201 A.2d 886 (1964).

[190] Kelly v. Central Pac. R.R. 74 Cal. 557, 561, 16 P. 386, 388 (1888).

in dealing with unconscionable clauses and contracts, so that courts could properly take either of the above approaches in a given case, as well as the approach followed in *Frostifresh*. The equitable powers of the courts are easily broad enough to permit this, since the court can write a decree refusing absolutely to enforce the contract, or refusing to enforce it on the condition that the goods be returned to the seller or on any other conditions which are considered appropriate.[191]

The contours of section 2-302 remain to be developed in subsequent opinions, but the section should prove to be extremely useful in dealing with misrepresentations by sellers. The section will nearly always foreclose the seller from obtaining summary judgment, or judgment on the pleadings, because the buyer must be allowed an opportunity to present evidence of unconscionability.[192] The equitable background of the notion of unconscionability reflects a particular concern with protecting the ignorant and credulous from those who would exploit them, and the same concern is already apparent in the decisions invoking section 2-302. The defense of unconscionability is not hemmed about with the technical restrictions which have grown up around the older legal remedies, and which are often unrealistic when applied to high pressure, form-contract merchandising aimed at unsophisticated buyers. Rather than struggling with the intricacies of the parol evidence rule, courts will be free to consider whether or not the evidence of fraud is persuasive on the basis of all the facts, including the recitals of any written instrument. Factors which may constitute technical defenses at law, such as those discussed in earlier sections of this article, can be considered in each case as factors which may make it inequitable to invoke section 2-302, but not as hard and fast rules. Antiquated assumptions concerning the duties and capabilities of the hypothetical reasonably prudent man may be discarded where they are inappropriate. For example, the decisions in a particular jurisdiction may indicate that the misleading statements in the referral-sales scheme (case 2) are within the bounds of permissible puffing, or that the buyer may not rescind because of his use of the goods. Under section 2-302, the court would wish to consider such facts, but might well conclude that the buyer was

[191] *See* Neary v. Markham, 155 F.2d 485 (10th Cir. 1946).

[192] Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (N.Y. City Civ. Ct. 1967); Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

nevertheless deliberately exploited by the seller and that it is more equitable to refuse to enforce the contract, even with some loss to the seller, than to hold the buyer to the contract and reward the seller. Section 2-302 provides the courts with an opportunity to develop a body of a law in light of contemporary needs and problems and to redress the balance of power where it has tilted too far in the favor of sellers.

CONCLUSION

The above survey indicates that there is no lack of legal theories for dealing with fraud and misrepresentation on the part of sellers, but that some of the restrictions on remedies are unrealistic when applied to unsophisticated consumers. Many of the difficulties which may frustrate legal redress are being slowly dissolved by the continuing development of the common law. Section 2-302 of the Uniform Commercial Code is a promising addition to the common law remedies and should prove most helpful in jurisdictions where the common law is at present inhospitable to consumers. The situation is not hopeless for the buyer who believes he has been tricked or cheated and who has signed what purports to be an ironclad contract, even if he does not seek legal advice until some time after he has received the goods. The common law seems to be making an effort to accommodate itself to new times and new problems, and it is to be hoped that with occasional statutory assistance it will succeed.