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D. Michael Reilly

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COMMERCIAL LAW: CHANGES IN IMPLIED WARRANTY DISCLAIMERS

Recent amendments to the District of Columbia commercial code significantly affect the relationship between consumer-buyer and merchant-seller.¹ The Uniform Commercial Code Act of 1981 (the 1982 amendments) had two purposes. First, it incorporated into the District of Columbia commercial code the 1966 and 1972 official recommended amendments to the Uniform Commercial Code as promulgated by the Uniform Commercial Code Permanent Editorial Board.² Second, with respect to consumer goods and services, the Act restricted the use of limitations on the implied warranties of merchantability and fitness for a particular purpose of consumer goods and services.³ While the amendments of Article Nine bring the District of Columbia into conformity with the majority of other states,⁴ the warranty amendments have virtually the opposite effect.⁵ Un-

1. Uniform Commercial Code Amendments Act of 1981, 29 D.C. Reg. 393 (1982). [The Uniform Commercial Code as adopted by the District of Columbia is hereinafter cited as Code]. The amendments to Article 9 are not within this survey's scope, however. For a general, practical evaluation of Article 9 amendments similar to those of the District of Columbia, see Smith & Faint, *The 1981 Revisions to the Maryland Law of Secured Transactions: An Overview for the Practitioner*, 40 MD. L. REV. 508 (1981).

These amendments are the first changes to the District of Columbia Code since Congress adopted the 1962 version of the Code for the District of Columbia in 1963. Pub. L. No. 88-243, 77 Stat. 631 (current version at D.C. CODE ANN. § 28 (1981)). The amendments became law in 1982.

2. Memorandum from David A. Clarke, Chairperson of the District of Columbia Committee on the Judiciary to members of the District of Columbia Council (Oct. 28, 1981) [hereinafter cited as Judiciary Committee Memorandum].

3. *Id.* See *infra* text accompanying note 48. For a well-reasoned argument for extending the implied warranty provisions to the sale of services, see Singal, *Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services*, 12 NEW ENG. L. REV. 859 (1977).

4. By December 1982, the 1972 version of Article 9 had been adopted in 37 states. State Correlation Table, U.C.C. Rep. Serv. (Callaghan Dec. 1982).

The rationale for adopting amendments to Article 9 is supplemented by the reasons for approving the 1962 version of the Code. Rep. John McMillan, then chairman of the House Committee on the District of Columbia, stated that the Code would: (1) unify District of Columbia law with the laws of other jurisdictions; (2) minimize conflict of laws problems; (3) make more pertinent the numerous decisions of other jurisdictions aiding District of Columbia lawyers with Code interpretations; and, (4) provide a modern body of law extending to matters previously unaddressed by District of Columbia law. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, UNIFORM COMMERCIAL CODE FOR THE DISTRICT OF COLUMBIA, H.R. REP. NO. 219, 88th Cong., 1st Sess. 154 (1963).

5. Section 42 of the Uniform Commercial Code Amendments Act of 1981 provides:

like provisions in most other states, the 1982 amendments provide a general prohibition against warranty disclaimers in consumer transactions, while extending the Code disclaimer and remedy sections to consumer transactions.

Prior District of Columbia warranty laws for sales of goods, which now apply only to sales between merchants as a result of the 1982 amendments, can be found in Article 2 of the 1962 version of the Code adopted by Con-

Section 28:2-316.1. Limitation of exclusion or modification of warranties [to] consumers.

(1) The provisions of section 28:2-316 do not apply to the sale of consumer goods, as defined by section 28:9-109, services, or both.

(2) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability or fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. However, such merchant may recover from the manufacturer any damages resulting from breach of the implied warranty of merchantability or fitness for a particular purpose.

(3) The provisions of subsection (2) do not apply to particular defects and limitations of consumer goods and services noted conspicuously in writing at the time of sale.

(4) Any oral or written language used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties is unenforceable, unless the manufacturer provided reasonable and expeditious means of performing the warranty obligations.

D.C. CODE ANN. § 28:2-316.1(c) (Supp. 1982). The warranty provision amendments are nonuniform changes to Article 2 of the Code. Several other states, however, have enacted similar provisions. See *infra* note 44 and accompanying text; see also Millspaugh & Cofinberger, *Seller's Disclaimers of Implied Warranties: The Legislatures Fight Back*, 12 U.C.C. L.J. 160 (1981).

The Uniform Commercial Code Permanent Editorial Board as well as the National Conference of Commissioners on Uniform State laws failed to promulgate consumer protection satisfactory to a "consensus" of the nation's consumer advocates. National Consumer Act iv (Nat'l Consumer Law Center 1970).

Widespread displeasure with the efforts in promulgating the Uniform Commercial Code as well as the Uniform Consumer Credit Code spurred the development of a model act known as the Model Consumer Credit Act. Model Consumer Credit Act iv (Nat'l Consumer Law Center 1973). Along with prohibiting disclaimers of express or implied warranties, the proposed model act also provided for penalties against the disclaiming party. *Id.* §§ 2.503, 8.108. Thus, while the District of Columbia amendments are nonuniform, they do follow similar theories in the proposed, yet never adopted, model act.

Only 195 of the Code's 399 sections have been unamended by any Code jurisdiction. Therefore, although the Code stands on the statutes of 49 states and the District of Columbia, "it is not a uniform Code" in the literal sense. Handbook of the National Conference on Commissioners on Uniform State Laws 152 (1966). Furthermore, at least one commentator maintains that "we are again moving toward significant nonuniformity." Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 366 (1978). Professor Taylor finds a trend toward nonuniformity in the U.C.C. resulting from state-option, alternative sections, and local amendments, as well as a variety of other influencing factors.

gress for the District of Columbia in 1963.⁶ The Code provides for three types of warranties that specifically affect consumer related transactions: express warranties,⁷ the implied warranty of merchantability,⁸ and the implied warranty of fitness for a particular purpose.⁹ The 1982 Code amendments reshape only the implied warranty sections, leaving the express warranty provisions untouched.

The purpose of the implied warranties has been articulated in several ways: to advance good business behavior while frustrating unethical trade practices;¹⁰ to hold responsible for losses those who manufacture, market or profit from the sale of goods;¹¹ to place responsibility upon those who have greater control over the product or who are best able to bear the risk of loss;¹² to create incentives to produce and market higher quality products;¹³ and to facilitate the process of moving goods through the marketplace.¹⁴ More succinctly, the purpose of implied warranties is "to police, to prevent, and to remedy" unfair consumer transactions.¹⁵ The effect of the implied warranties may be felt throughout many transactions as they give rise to certain presumptions in all merchant sales of goods,¹⁶ and are unaffected by either party's conduct.¹⁷

6. See *supra* note 2. The significance of the warranty provisions may be found through an analysis of the results of two studies. Professor Taylor examined a sample of 493 cases reported in the *U.C.C. Reporting Service* between 1970 and 1975. In determining which Code article was predominantly involved in each case, he found that 206 cases, representing 42% of the sample, hinged on Article 2. Taylor, *supra* note 5, at 342. In an empirical study, Professor J.J. White surveyed three jurisdictions for the 1975 calendar year, and found that 55 of 219 Article 2 cases, or 25% of all Article 2 cases cited Code warranty provisions. White, *Evaluating Article Two of the Uniform Commercial Code: A Preliminary Empirical Expedition*, 75 MICH. L. REV. 1262, 1269-70 (1977). While the two studies construed together may provide only a rough evaluation of the use of the warranty provisions, they do indicate that the warranty sections play a meaningful role in a large number of code-related cases.

7. D.C. CODE ANN. § 28:2-313 (1981).

8. D.C. CODE ANN. § 28:2-314 (1981). The implied warranties of merchantability and fitness for a particular purpose also appeared in the earlier Uniform Sales Act. The District adopted the Uniform Sales Act on Mar. 17, 1937. Act of Mar. 17, 1937, ch. 43, 50 Stat. 29, but later repealed it.

9. D.C. CODE ANN. § 28:2-315 (1981).

10. *Abestos Prods. Inc. v. Ryan Landscape Supply Co.*, 282 Minn. 178, 163 N.W.2d 767 (1968).

11. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967); Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw. L.J. 575 (1974).

12. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 28.19, at 1576 (1956).

13. *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 610, 164 S.W.2d 828, 829 (1942).

14. L. VOLD, *HANDBOOK OF THE LAW OF SALES* 39 (2d ed. 1959).

15. See Llewellyn, *On Warranty of Quality, and Society*, 39 COLUM. L. REV. 699 (1936).

16. D.C. CODE ANN. 28:2-314(1) (1981).

17. See Note, *Warranty Disclaimers and Limitation of Remedy for Breach of Warranty Under the Uniform Commercial Code*, 43 B.U.L. REV. 396, 400 (1963).

The implied warranty of merchantability requires that goods in transactions involving a merchant-seller must meet certain quality-related standards.¹⁸ Unless the merchantability warranty is disclaimed or modified, it is implied in every sale of goods by a merchant seller.¹⁹ The implied warranty of fitness for a particular purpose contemplates that goods meet the standards necessary to satisfy the purpose or purposes for which they were sold.²⁰ Until the 1982 amendments to the Code, however, a merchant-seller of goods could disclaim or limit the effect of the implied warranties by several means.²¹

Merchants could limit implied warranty liability by disclaiming warranties under section 2-316, or limiting buyers' remedies for breach of warranty under section 2-719.²² To disclaim the implied warranty of

18. These quality related standards include merchantability trade standards and standards mandated by label statements. D.C. CODE ANN. § 28:2-314(2) (1981). Although the Code supposedly only covers the sale of goods, the recent amendments also bring services within the implied warranty framework. See *infra* notes 47-51 and accompanying text.

19. D.C. CODE ANN. § 28:2-314(1) (1981). Whenever reasonable, the Code construes words tending to negate or exclude warranties as consistent with each other. D.C. CODE ANN. § 28-316(1) (1981).

20. The merchant must know that the buyer, desiring the goods, relies on the skill of the merchant to select suitable goods. D.C. CODE ANN. § 28:2-315(1) (1981).

The express and implied warranties of the Code are a reversal of the ancient legal maxim of caveat emptor. That maxim contemplates that a purchaser is able to protect himself in business dealings where there is an opportunity to inspect merchandise. See *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 112 (1884). Caveat emptor, a product of the middle ages, presumed that the buyer and merchant stood in equal bargaining positions. See *Hamilton, The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); W. PROSSER, *THE LAW OF TORTS* 636-37 (4th ed. 1971). The policy rationale behind § 28:2-216 of the Code explains the section as an effort to deal with clauses seeking to exclude "all warranties express or implied." See U.C.C. § 2-316, official comment 1 (1977). This provision may indicate that the Code drafters understood that a consumer-purchaser may be at a disadvantage and, therefore, must be afforded additional protection. See, e.g., Clark & Davis, *Beefing up Product Warranties: A New Dimension in Consumer Protection*, WARRANTIES IN THE SALE OF GOODS 549, 559 (PLI Handbook Series No. 193, 1978).

21. D.C. CODE ANN. § 28:2-316 (1981) provided the warranty disclaimer provisions previously applicable in consumer transactions. D.C. CODE ANN. § 28:2-719 (1981) allowed for remedy limitations for breach of warranty.

22. A disclaimer controls the seller's liability by reducing the number of situations in which the seller can breach, whereas a limitation clause restricts the remedies available once a warranty breach is established. Although many courts confuse these two quite different concepts, the District of Columbia recognizes the difference between a disclaimer and a limitation of remedy. *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974), *rev'd mem.*, 527 F.2d 853 (D.C. Cir. 1975); see also Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code*, 65 VA. L. REV. 791, 797 (1977).

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2308 (1976), represents another integral part of the disclaimer-limited remedies area. The Act advances the implied warranty theory by: (1) requiring clearer statements of

merchantability, the seller had to disclaim the warranty conspicuously,²³ if in writing, and mention "merchantability."²⁴ The implied warranty of fitness for a particular purpose could also be disclaimed, but no specific wording was necessary.²⁵ Furthermore, all implied warranties could be disclaimed by general disclaimer clauses such as "as is" or "with all faults."²⁶ Finally, a consumer lost the implied warranty of merchantability where the defects should have been noticed upon an examination of the goods, or where he could have noticed a defect had he examined the goods.²⁷

The ease with which a merchant may circumvent these important buyer protections has prompted some criticism.²⁸ The "as is" and "with all faults" provisions, contrary to their original purpose of affording more

written warranties; (2) prohibiting the seller or manufacturer from offering a full written warranty that would circumvent any of a consumer's Code-prescribed implied warranties and, (3) expanding the number of forums available to a consumer in a breach of implied warranty action. Each individual claim must exceed \$25.00; the matter in controversy must exceed \$50,000 on the basis of all claims determined in a suit. If brought as a class action, the number of named plaintiffs must exceed 100. 15 U.S.C. § 2310(d)(3) (1976). Prior to seeking judicial redress, however, the consumer must first exhaust the informal settlement procedures available to him if they are reasonable.

Some members of Congress considered class actions an important way of enforcing the Act's fundamental sections. See H.R. REP. NO. 1107, 93d Cong., 2d Sess. 42, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7702, 7724; see generally Note, *Consumer Class Actions in California: A Practical Approach to the Problem of Notice*, 7 PAC. L.J. 811, 811-12 (1976). The class suit requirements of 15 U.S.C. § 2310(d)(3), however, have been a major snag to potential litigants. See Miller & Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10, 18-21 (1980). For further analysis of the obstacles inherent in the Magnuson-Moss Act, see Statutory Commentary, *The Magnuson-Moss Act Class Action Provisions: Consumer's Remedy or An Empty Promise?*, 70 GEO. L.J. 1399 (1982).

23. "Conspicuous" is defined in § 1-201(10) as being so written that "a reasonable person against whom it is to operate ought to have noticed." D.C. CODE ANN. § 28:2-316(2) (1981) states:

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

24. *Id.*

25. *Id.*

26. D.C. CODE ANN. § 28:2-316(3)(a) (1981).

27. D.C. CODE ANN. § 28:2-316(3)(b) (1981). Of course, a nonprofessional buyer is held only to those defects a nonexpert could have noticed upon inspection of the goods. *Id.* at § 2-316, comment 8.

28. One critic, for example, posits that inadequate consumer representation during the Code's drafting resulted in deficient consumer protection. Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 W. RES. L. REV. 10, 20 (1966).

consumer protection, seemed to become objective standards that seasoned sellers could meet, thereby precluding warranty liability.²⁹ Specific criticism of the warranty disclaimer provisions has been directed against "as is" disclaimers, the effects of the parol evidence rule upon warranty disclaimers, and the rules of construction where express and implied warranties conflict.³⁰

The legislative history of the District of Columbia's warranty amendments provides evidence of serious concern over the less formal "as is" disclaimer.³¹ The argument has been made that consumers do not understand the meaning of an "as is" disclaimer.³² Evidence that this type of disclaimer is misunderstood by a large portion of consumers was stated in a recent study by the Federal Trade Commission.³³ Consequently, the disclaimer did not always alert the consumer to the ramifications of a transaction, as intended, but allowed merchants to disguise a transaction's effect.

A similar concern exists with the application of the parol evidence rule to warranty disclaimers.³⁴ The parol evidence rule provides that if a court finds a written contract to have been intended as a complete and exclusive agreement between the parties, then that writing alone frames the contract. The deleterious effect occurs when a consumer accepts a seller's oral promises or representations, only to realize subsequently that the written

29. Clark & Davis, *supra* note 20, at 559.

30. See generally Littlefield, *supra* note 28, at 20; Millsbaugh & Coffinberger, *supra* note 5, at 160. The parol evidence rule provides that any writing "intended by the parties as a final expression . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . ." *Id.*

31. A comprehensive special project concerning Code warranty law concluded that this informal disclaimer procedure "seems wholly to undermine section 2-316(2)'s disclaimer requirements." Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 191 (1978).

32. Letter from Willie E. Cook, Executive Director of the Neighborhood Legal Services Program, to David Clarke, Chairman of the District of Columbia Committee on the Judiciary (Mar. 13, 1980) (available in District of Columbia legislative records) [hereinafter referred to as Cook letter]. See also Federal Trade Commission study, *infra* note 33.

33. Federal Trade Commission, *Facts for Consumers* (Mar. 23, 1979). The study itself evaluated the consumers' understanding of the meaning of the "as is" disclaimer. More than 35% of those surveyed mistakenly believed the dealer would have to pay some, if not all, costs if a car broke down within 25 days of an "as is" sale. This very problem provided another incentive to institute further protective provisions on the state level. See generally Millsbaugh & Coffinberger, *supra* note 5, at 160.

34. D.C. CODE ANN. § 28:2-202 (1981). Of course, there are a variety of ways the parol evidence rule may be avoided. See, e.g., *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 220 Va. 109, 255 S.E.2d 682 (1979) (fraud); *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971) (unconscionability); *O'Neil v. International Harvester Co.*, 575 P.2d 862 (Colo. Ct. App. 1978) (technical reading of "intent" in § 2-202).

contract voided the implied warranties by an "as is" disclaimer.³⁵ Moreover, where express and implied warranties conflict, section 2-317(c) provides that the express warranty terms supplant the implied merchantability warranty.³⁶ This provision has its greatest limiting effect where a merchant expressly warrants that goods are merchantable for a limited period of time.

In addition to the criticism that warranty disclaimer provisions are unfair to consumers, the remedy limitations section of the Code also has distressed consumers. Disclaimers control the seller's liability by reducing the number of situations in which the seller can be in breach. Remedy limitations restrict the relief available to the consumer once a breach is established. Thus, a deceptively or unfairly written remedy limitation can affect a consumer much like an unforeseen warranty disclaimer.

Section 2-719, the remedy limitation section of the Code, allows parties the freedom to provide remedies for a breach, either supplementing or supplanting those provided by operation of law.³⁷ In most cases, the remedies are considered cumulative,³⁸ but the parties have the ability to make an agreed remedy the exclusive remedy, so long as this is expressed clearly in the contract. Thus, as long as the remedy does not fail of "its essential purpose,"³⁹ and allows for at least "minimum adequate remedies,"⁴⁰ the

35. Letters submitted in support of the amendment documented similar experiences by District of Columbia consumers. See, e.g., Cook letter, *supra* note 32.

36. "Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose." D.C. CODE ANN. § 28:2-317(c) (1981). Of course, the intention of the parties is the crucial issue in the event that a consistent construction of the express and implied warranties is unreasonable. D.C. CODE ANN. § 28:2-317 (1981).

37. Section 2-719 provides:

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

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

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

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

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.

38. D.C. CODE ANN. § 28:2-719(1)(b) (1981).

39. For a comprehensive discussion of the fails-of-essential-purpose principle, see Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-*

parties may provide for as many or as few remedies as desired. Such limitations, however, significantly frustrate the consumer in need of a remedy.⁴¹

While the consumer has been given some protection through the operation of implied warranties, the various disclaimers and remedy limitations have allowed merchants to circumvent much of this protection. These deficiencies prompted the District of Columbia, following the lead of a number of other states, to reduce the merchant's advantages while enhancing consumer protection.⁴²

The District of Columbia Council made four fundamental changes in District of Columbia law.⁴³ The changes include a general prohibition on disclaimer provisions where consumer transactions are involved and an

719(2), 65 Calif. L. Rev. 28 (1977). Limited remedies often fail the essential purpose where the buyer cannot discover an unseen defect within the established time limitations, and where the merchant fails to provide the bargained-for remedy.

40. See U.C.C. § 2-719, official comment 1 (1977). Commentators have realized the flexible meaning of words like "minimum adequate remedy," "fails of essential purpose," and "unconscionability." While the amendments foreclose some of the abuses of § 2-719, these words provide the courts with much discretion, and thus they can achieve further consumer protection.

41. For example, a piano seller may agree "to promptly repair or replace without charge any part which is found to be defective." While this may seem fair on its face, the contract may further require that the piano be delivered to the factory designated by the seller. If the consumer resides in Washington, D.C., for example, the shipping costs to a Baltimore repair facility may be extensive. *Hearings on H.R. 4809 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 100 (1971) (testimony of Benjamin S. Rosenthal, Representative from New York).

42. Several states have amended their Codes in a manner similar to the District of Columbia, including: ALA. CODE §§ 2-316(5), 2-719(4) (1975) (repeals the disclaimer in personal injury cases involving consumer goods); MISS. CODE ANN. vol. 16 (Cum. Supp. 1979) (repeals the disclaimer intending to make all implied warranty disclaimers unenforceable); MASS. ANN. LAWS ch. 106, § 2-316A (Michie/Law. Coop. 1958 & Supp. 1983-84) (repeals disclaimer in sale of consumer goods); MD. COM. LAW ANN. § 2-316 (Supp. 1982) (disclaimers of implied warranties or remedies unenforceable in consumer sales); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1981) (repeals disclaimers of implied warranties or remedies in consumer sales); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (Supp. 1982) (repeals disclaimers of implied warranties and remedies in consumer sales); WASH. REV. CODE § 62A.2-316(4) (1974) (implied warranty disclaimers unenforceable except where disclaimer specifically indicates those qualities or characteristics not to be warranted).

Some other states, moreover, have chosen to enact separate consumer protection statutes rather than to amend the Code. See, e.g., CAL. CIV. CODE §§ 1790-1794.2 (West 1973) (implied warranty disclaimer allowed if in plain language); MINN. STAT. ANN. §§ 325.951-325.954 (West Supp. 1974) (parallels California statute but forbids implied warranty limitations where manufacturer or merchant makes written warranties); W. VA. CODE § 46A-6.107 (1974) (prohibits verbal or written modifications of implied warranty or remedy); KAN. STAT. ANN. §§ 50-623-43 (1974) (prohibits implied warranty disclaimers or remedy limitations unless consumer was informed of defect prior to sale).

43. See *supra* note 5.

express extension of the Code disclaimer and remedy sections to consumer services. Additionally, the 1982 amendments prohibit a merchant from modifying or excluding a consumer's remedies for breach of implied warranties.⁴⁴ Finally, the 1982 amendments make unenforceable certain attempts by consumer goods manufacturers to modify consumer remedies created through a manufacturer's express warranty. A proviso allows such modifications if the manufacturer provides a "reasonable and expeditious" means of performing the warranty obligations.⁴⁵

The amendments prohibit disclaimer provisions heretofore embodied in section 2-316 where consumer transactions are involved.⁴⁶ While neither the Code nor the amendments provide an express definition of "consumer," sections 2-103(3), and 9-109(1) define "consumer" as one who purchases goods "for use primarily for personal, family or household purposes"⁴⁷ The amendments, by specifying stricter disclaimer and remedy limitation standards and procedures where consumers are involved, implicitly place consumers in a better bargaining position with the seasoned merchant.

The amendments also expressly extend the disclaimer and remedy restrictions to consumer services.⁴⁸ Prior to this change, Article 2 applied only to goods.⁴⁹ While many courts have been willing to extend the Code warranty provisions to situations clearly not involving the sale of goods,⁵⁰

44. *Id.* The Code amendment insulates a merchant from total damage costs as the merchant may recover from the manufacturer any damages from an implied warranty breach. D.C. CODE ANN. § 28:2-316.1(2) (1982).

45. D.C. CODE ANN. § 28:2-316.1(4) (1982).

46. D.C. CODE ANN. § 28:2-316.1(1) (1982).

47. D.C. CODE ANN. § 28:9-109(1) (1981).

48. D.C. CODE ANN. § 28:2-316.1(1) (1982). For specific analysis of the implied warranty extension to service related transactions, see Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661; Brook, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 SW. L.J. 575 (1974); Comment, *Guidelines for Extending Implied Warranties to Service Markets*, 125 U. PA. L. REV. 365 (1976); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111 (1972); Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970).

49. D.C. CODE ANN. § 28:2-102 (1981).

50. See, e.g., *MacDonald v. Mobley*, 555 S.W.2d 916 (Tex. Civ. App. 1977) (application of warranty disclaimer to a home sale); cf. *Hoffman v. Horton*, 186 S.E.2d 79 (Va. 1972) (Article 2's auction section held inapplicable to land auction); see Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). The analogous use of the Code has been the result of confusion between "goods" and "services," as well as the result of hybrid transactions involving both goods and services. See Singal, *supra* note 3, at 891.

Proponents of the amendments claim that extending the Code to services is logical since the underlying policy and rationale justifying implied warranties in sales of goods applies

many courts, unpersuaded that the Code should be thus applied without legislative guidance, have refrained from doing so.⁵¹

The extension of the disclaimer and remedy restrictions creates questions for the courts, practitioners, and consumers. First, the amendment leaves undefined a most important term—"consumer services."⁵² Thus, the D.C. Council has left to judicial discretion the manner in which the Code will be applied in situations such as repair or maintenance, entertainment, medical, legal, and even insurance services. Furthermore, while the amendment disallows certain implied warranty disclaimers and limitations, it fails specifically to create service warranties. A legislative gap ex-

equally to most service transactions. See Singal, *supra* note 3, at 876-78. See also *supra* note 48. Several Code sections lend some support to such an extension. A U.C.C. official comment to § 2-313 states:

[t]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire. . . . The matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

U.C.C. § 2-313, official comment 2 (1977). The Code must be liberally construed, D.C. CODE ANN. § 28:1-102(1), and the provisions may be supplemented by the general principles of law and equity. D.C. CODE ANN. § 28:1-103. See *Wolfe v. University Nat'l Bank*, 270 Md. 70, 310 A.2d 558 (1973).

51. See D. WHALEY, *WARRANTIES AND THE PRACTITIONER* 219-20 (1981).

52. D.C. CODE ANN. § 28:1-201 (1981). Although the definition could include all consumer services, commentators see such an extension as applying only to "most service transactions." Singal, *supra* note 3, at 876. Those services may be defined by looking to the policy considerations underlying imposition of liability upon those who make or market a defective product:

(1) Public interest in safeguarding the consumer from his own inability to protect himself from harm caused by the defectively manufactured product; (2) societal pressure upon those who market and advertise the product to meet their implied assurances of the safety of the goods, and (3) the superior risk-bearing ability of the manufacturer and seller to spread the cost of the injury through the price of the product or by liability insurance.

Wivagg v. Duquesne Light Co., 73 Pa. D. & C. 2d 694, 701, 20 U.C.C. Rep. Serv. 597, 601 (1975).

A broader definition may be found, however, in the National Consumer Law Center's Model Consumer Credit Act of 1973. Section 1.441 states:

"Services" includes:

- (a) work, labor and other personal services; and
- (b) the diagnostic work, maintenance, repair or improvement, other than as part of the manufacture or original construction, of property; and
- (c) privileges and contract rights with respect to accommodations or facilities including but in no manner limited to hotels and restaurants, transportation, education, entertainment, recreation, physical culture, hospital accommodations and the like; and
- (d) insurance.

Model Consumer Credit Act of 1973, § 1.441 (National Consumer Law Center, 1973).

ists, therefore, since a merchant need not disclaim that which never existed.

Most significantly, the 1982 amendments make unenforceable any exclusions or modifications of implied warranties in consumer transactions.⁵³ The amendment, found in section 2-316.1(3), prohibits exclusions or modifications of implied warranties or limitations on remedies in consumer transactions, unless the merchant notes in writing at the time of sale the particular defects in, and qualifications upon the consumer goods or service.⁵⁴

A potential concern with the District of Columbia approach to warranty disclaimers is determining what actually constitutes a written document describing "particular" defects. A written express warranty specifically indicating that all parts of an automobile are not warranted, for example, might conceivably meet this description. In such a case, the consumer would gain very little protection from the amendments, as this application of the express warranty is the type of problem the amendments were designed to prevent.

Moreover, merchants attempting to avoid the new disclaimer prohibitions will attempt to construe "particular defects" in the broadest terms possible. This may create consumer surprises similar to those resulting

53. D.C. CODE ANN. § 28:2-316.1(2) (1982). The changes to the disclaimer provision were likely inspired by Maryland's statute which disallows all disclaimers of implied warranties in consumer transactions. See MD. COM. LAW CODE ANN. § 2-316 (Supp. 1982). Organizations supporting the Maryland provisions included the D.C. City Wide Consumer Council, the Far East Community Services, the Southeast Consumer Aide House, the Near Northeast Community Improvement Corp., Legal Counsel for the Elderly, the D.C. Legal Aid Society, the Automobile Owners Action Counsel, the Consumer Protection Center of the National Law Center, and the D.C. Office of Consumer Protection. See District of Columbia Legislative Record, Uniform Commercial Code Amendments Act of 1981 (1982) (available in District of Columbia Government Offices).

54. D.C. CODE ANN. § 28:2-316.1(3) (1982). See *supra* notes 37-41 and accompanying text. With this provision, Washington, D.C. law now closely parallels provisions adopted in the State of Washington. See WASH. REV. CODE § 62A, 2-316(4) (1974 & Supp. 1982). The Washington State amendment to § 2-316(4) provides:

Notwithstanding the provisions of subsections (2) and (3) of this section . . . in any case where goods are purchased or leased primarily for personal, family or household use or for commercial or business use, disclaimers of the warranty of merchantability or fitness for a particular purpose shall not be effective to limit the liability of merchant sellers or lessors or manufacturers except insofar as the disclaimer sets forth with particularly the qualities and characteristics which are not being warranted.

The Washington State statute, like the District of Columbia amendment, allows disclaimers provided the disclaimer is written and specifically states limitations. This unique provision, therefore, allows implied warranty disclaimers where Maryland and Massachusetts, for example, would not. Compare MASS. ANN. LAWS ch. 106, § 2-316A (Michie/Law. Coop. 1958 & Supp. 1983-84); MD. COM. LAW CODE ANN. § 2-316 (Supp. 1982).

from the "as is" disclaimer.⁵⁵ One commentator has maintained that the "particular defects" standard may allow the "as is" disclaimer to enter through the back door.⁵⁶ These concerns indicate the potential for confusion arising out of the new amendments.

The possibility for confusion is better understood by comparing the District of Columbia's qualified right to disclaim warranties with blanket bans on such provisions found in other states.⁵⁷ Instead of an unqualified prohibition of warranty disclaimers in consumer transactions,⁵⁸ District of Columbia consumers, merchants, and courts will necessarily grapple with relatively ambiguous exceptions. Surely the consumer would better appreciate a statute having a blanket disclaimer prohibition, that is, "there are no ifs, ands, or buts . . . that any attempt by the seller to modify or exclude implied warranties is unenforceable."⁵⁹

The last amended provision to the District of Columbia Code affects the remedy provisions embodied in section 2-719.⁶⁰ The amendment, adopting the same standard that governs Maryland's remedy section, states further that any oral or written remedy limitations attached to the manufacturer's warranty are unenforceable unless the manufacturer provides a "reasonable and expeditious" means of performing warranty obligations. The "reasonable and expeditious" standard provides a ceiling to obligations manufacturers may stipulate in a contract. This ceiling, however, is more ambiguous than, for example, the standard established in Washington State.⁶¹ In addition to requiring that the means of curing defects be "reasonable and expeditious," Washington State law invalidates

55. See *supra* notes 37-42 and accompanying text.

56. See Clark & Davis, *supra* note 20, at 570.

57. Compare MASS. ANN. LAWS ch. 106, § 2-316A (Michie/Law. Coop. 1958 & Supp. 1983-84); MD. COM. LAW CODE ANN. § 2-316 (Supp. 1982).

58. See *supra* note 42.

59. Maryland Independent Automobile Dealers Assoc. Inc. v. Administrator, 41 Md. App. 7, 11, 394 A.2d 820, 823-24 (1978) (characterizing the application of Maryland's disclaimer provision).

60. D.C. CODE ANN. § 28:2-719 (1981). For the text of this section, see *supra* note 37.

61. Section 2-719(3) of the Washington State statute provides:

(3) Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family, or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or nonconforming goods is invalid in sales of goods primarily for personal, family or household use unless the manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations.

Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.

WASH. REV. CODE § 62A.2-719(3) (1974 & Supp. 1982).

any limitations of remedy to repair or replace unless the manufacturer or seller maintains facilities within the state.⁶² The less precise "reasonable and expeditious" standard will, however, be supplemented by District of Columbia and Maryland case law, as both Codes share the same remedy limitations standard.⁶³ While the "reasonable and expeditious" standard appears imprecise, it will assist the consumer in obtaining implied warranty relief. The overall impact of the amendment, however, is not yet clear.

Adoption of the new Code provisions indicates the District of Columbia Council's intent to achieve a balance between consumer and business interests. While the amendments provide additional protective measures for the consumer, the changes also allow merchants to disclaim warranties in certain circumstances. Although these new provisions fail to place the District of Columbia consumer on an equal footing with, for example, a Maryland consumer, certainly the amendments enhance consumer protection. Not only will District of Columbia consumers enjoy more descriptive, specific disclaimers, but also they will benefit from the restrictions upon unreasonable manufacturer remedy obligations. Fulfillment of the purposes of the amendments, however, hinges upon ambiguous language, allowance of warranty disclaimers in certain circumstances, and an untested "reasonable and expeditious" standard.

D. Michael Reilly

62. *Id.* Although it may be impractical to require manufacturers or merchants to maintain facilities within the District, the "reasonable and expeditious" standard's ambiguity may have been alleviated with the addition of a "distance-from-the-District" standard. The Washington State requirement of in-state facilities, however, may result in wholly arbitrary decisions. Where a Vancouver, Washington merchant may fall within the remedy requirements, a Portland, Oregon merchant, five miles away, would not be afforded that privilege.

63. The District of Columbia follows the statutory construction rule that the adoption of an identically worded statute from another jurisdiction also includes that jurisdiction's judicial interpretation. *See Debruhl v. D.C. Hackers' License Appeal Bd.*, 384 A.2d 421 (D.C. 1978).