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THE NCCUSL SHOULD ABANDON ITS SEARCH FOR CONSENSUS AND ADDRESS MORE DIFFICULT AND CONTROVERSIAL ISSUES APPLYING “PROCESS” CONCEPTS

*Richard A. Elbrecht**

I. INTRODUCTION

The need for a comprehensive commercial code is greater than ever. That is because the private business sector needs well-drafted rules to govern its transactions, and business is more active and diverse than in the past. The Uniform Commercial Code (UCC or Code), however, is not meeting today's needs. As evidence, one need only look at the large volume of non-UCC statutes and regulations covering one of its most important subject areas—the sale of goods.¹ If the Code were a true “code,” these non-UCC provisions would not be needed.

Webster's Dictionary defines “code” as “a systematic complete written collection of law arranged logically with index and table of contents and covering fully one or more subjects of law.”² *Black's Law Dictionary* defines “code” as “[a] systematic collection, compendium or revision of laws, rules, or regulations.”³ While a code of statutes can never be a “complete” statement of the law that applies to a particular situation, the volume of statutes that supplement the UCC's provisions is now large enough to put its status as a code into question.

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1. See *infra* appendix.

2. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 437 (Philip Babcock ed. 1976).

3. BLACK'S LAW DICTIONARY 257 (6th ed. 1990).

The Code is deficient in both its scope and depth of coverage. It excludes many important subject areas—for example sales of services⁴ and sales of real property improvements. Furthermore, many of its assumptions in the areas it does cover are no longer valid. While there are at least four parties in the typical sale of a durable commercial or consumer product—the manufacturer, the retail seller, the buyer, and a third-party financier—Article 2 is written as though there were only two parties—a seller and a buyer.⁵ The UCC hardly references third-party credit, even though third-party credit usually forms an integral part of most big-ticket product sales.⁶

While the courts do craft rules to fill in the gaps and try to adapt the Code to the real world, judicial law making is a slow, expensive, and haphazard process. This process also lacks the checks and balances of the democratic lawmaking process, and has unpredictable results. While this antiquated public-policy making process unfolds, the guidance needed by businesses and consumers is not there.

A major source of the Code's shortcomings is the perspective of its drafters, who view the Code primarily as a system of rules to decide disputes. Virtually all past and contemporary commentaries on the Code see it in this way.⁷ The Code's focus on litigation results from the world view of the drafters—law professors, lawyers, and judges—all, including the Author, introduced to the law by a study of past litigated cases.

Today's society requires something better. A commercial code should have functions much broader and more responsive to the needs of the business sector and society than simply providing rules for dispute resolution. In particular, a commercial code ought to help structure and guide business transactions with a view to facilitating fair exchanges and avoiding disputes. The concept of "process" is im-

4. See Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 726 (1993).

5. See, e.g., U.C.C. §§ 2-210, -301, -306 (1990).

6. See DEPARTMENT OF CONSUMER AFFAIRS, DEPARTMENT OF COMMERCE AND THE DEP'T. OF FIN., REPORT ON A PERMANENT APPROACH TO INTEREST RATE CEILINGS IN RETAIL INSTALLMENT SALES 173, 191-202 (Richard A. Elbrecht ed., 1987) (reporting statistics on long-term history and volume of use of credit to finance sales of goods).

7. See, e.g., 1 STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION FOR 1954, 28-36 (1954) (citing statement of Law Revision Commission by Professor Karl N. Llewellyn, Chief Reporter of Code and Member of Editorial Board); Peter A. Alces, *Roll Over, Llewellyn?*, 26 LOY. L.A. L. REV. 543, 545-48 (1993) (arguing that "the measure of a commercial statute is not the volume of litigation it engenders or discourages, but the quality of the results that courts can reach when they correctly apply the statute's provisions"). For a somewhat contrasting view, see Nimmer, *supra* note 4, at 732.

portant if our system of law is used for this larger purpose—aiding business and preventing litigation.

II. THE CONCEPT OF PROCESS

The concept of process is fundamental to the discipline of quality management.⁸ A quality-conscious business crafts a process to carry out each task. It deploys that process, it assesses the results, and it uses the gathered information to improve the process continuously. The concept of process calls for an identification and analysis of all the steps taken to accomplish a task. Only then is it possible to know enough about how the task is performed to be able to identify and improve those elements in the process that can be improved.

A. *Applying Process Concepts to Enhance Productivity*

Today almost every successful business employs the concept of process creation, deployment, assessment, and continuous improvement. Businesses do it to be efficient, productive, and competitive.⁹ The United States does it so that the United States will remain competitive in an increasingly competitive world market. In all of these efforts, the goal is to achieve customer satisfaction, the key to long-term success in any business.

Legal institutions, including courts, practicing lawyers, law schools, law professors, and institutions, such as the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL), are not separate from society and should be more active in these efforts. The legal profession's reluctance to work harder and faster to achieve quality in our legal institutions is distressing to businesses whose economic survival depends on a higher level of efficiency and productivity than our legal system is now delivering.

Process concepts can be applied to all tasks, including policy making and statute drafting. Viewing a transaction as a process means identifying each element of the transaction from beginning to end. A consumer transaction may begin with certain disclosures made before the sale. Or it may begin at the product design, testing, manufacturing, or packaging stage, or even earlier in classrooms where students

8. See, e.g., W. EDWARDS DEMING, *OUT OF THE CRISIS* 87 (2d ed. 1986) (noting that "[e]very activity, every job is a part of a process").

9. Cf. *id.* at 18-96 (outlining "14 points" to make Western management more competitive).

learn about the subject of the transaction, or where sales and service agents learn how to sell and service the product. Defining each element of the process helps lawmakers identify all the points at which the law can be used to respond to a particular business or consumer need.

B. Using Process Concepts to Draft Statutes

The first message of this Essay is that the NCCUSL should view the subject of future drafting projects as a multidimensional process. Like courts and business executives, legislators are problem solvers. Breaking down a problem transaction into its components gives legislators a better opportunity to solve problems. By looking at a transaction in this multidimensional way, legislators can zero in on the real cause of a problem, identify a menu of potential remedies, select the one that seems best overall, and in so doing, hopefully avoid either overkill or a complete miss. Regrettably, few legislators have the inclination or time to actually do this. Thus, organizations such as the NCCUSL are of critical importance because they can proceed in a more leisurely and thoughtful way with the needed specialists at hand.

The process approach to statute drafting is illustrated by the combined efforts of the ALI, the NCCUSL, Congress, the Federal Trade Commission, and the California Legislature in the statutes and regulations adopted on consumer product warranties. As imperfect as they are, the current laws and regulations on consumer product warranties—including the UCC¹⁰—when taken together, view the consumer warranty transaction as a process and provide standards and rules that help to structure and govern most of the major elements of that process. While these laws do not take the form of a single code, together they look at the warranty transaction in its entirety and point toward what a process-reflecting Uniform Consumer Product Warranty Code might look like.¹¹

It would be wrong simply to combine these statutes and regulations, and enact the resulting collection of words and phrases as state

10. See U.C.C. §§ 2-312 to -317 (1990).

11. The appendix following this Essay demonstrates the wide range of elements of today's consumer product warranty transaction that are addressed by existing federal and California statutes and regulations. See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1988); Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1790-1795.8 (West 1985 & Supp. 1994); Federal Trade Commission (FTC) regulations issued pursuant to the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 16 C.F.R. §§ 701-703 (1994); U.C.C. Article 2 (1990).

or federal law. Many of the statutes and regulations are poorly organized or drafted. They do not contain a consistent approach and they lack common definitions. Some provisions do not reflect contemporary practices. Moreover, there are important gaps in coverage. Thus, the entire package would need to be integrated and organized systematically. One of the merits of the NCCUSL's statute-drafting process is that the viewpoints of many people are brought to bear on a proposed statute through repeated exchanges over a long period of time during which refinements of these kinds naturally occur.

Why then has the NCCUSL not done a better job of drafting process-reflecting statutes? One answer, given above, is the focus on delivering a statute that will help lawyers and judges decide disputes, as distinguished from a statute that is written primarily for use by nonlawyers, as well as lawyers, as a guide for conducting business.

III. SCOPE OF UNIFORM LAW DRAFTING EFFORTS

A frequently expressed explanation for the NCCUSL's lack of attention to statute drafting on subjects affecting consumers is that "consumer protection" is a "local" need that can better be met by state legislatures. Therefore, consumer protection neither necessitates nor allows for uniform treatment.¹² From the perspective of one who has spent three decades drafting statutes of this kind, that rationale is wrong on both counts. Consumer problems tend to be the same in all states and, for that matter, in market economies throughout the world, and there is a pressing need for uniformity in the United States.

Since retail transactions are conducted in essentially the same way throughout the United States, the value of and need for uniformity is clearly present and is steadily increasing as more consumer transactions are consummated across state boundaries. Businesses that address mass markets have a special need for uniformity, since it is costly to adapt a product or service to the laws of fifty states. At state government agencies like the California Department of Consumer Affairs, there is a regular flow of inquiries from law firms throughout the country seeking to identify the various state laws with which their national clients must comply. This, by and large, is a truly wasteful effort, the costs of which we all pay. The lack of uniformity in our laws also makes it difficult for educators to write materials that will be useful to consumers.

12. See, e.g., Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679, 682-83 (1991).

A. *Preoccupation with Achieving Consensus*

The real reason the NCCUSL has devoted relatively little effort to drafting consumer protection statutes is neither the local nature of "consumer protection" nor the lack of need for uniformity, but rather the NCCUSL's attempt to achieve consensus in its work products. That approach means that projects on which a consensus is not foreseeable—such as the drafting of rules on sales of services—tend not to be addressed. Since consumer protection tends to present difficult policy and drafting issues, the drafting of statutes governing consumer transactions—and other potentially controversial topics—is off limits for the NCCUSL. The Uniform Consumer Credit Code (UCCC)¹³ is often cited as an example of an attempt of this kind which, for that reason, was bound to fail. The real reason for not drafting rules governing consumer transactions, however, is the NCCUSL's reluctance to tackle difficult tasks.

B. *Charting a New Path for Uniform Law Drafters*

The second message of this Essay is that the NCCUSL should abandon its pursuit of consensus and perfection. It should become more involved in issues—however difficult—including "consumer protection," in which it can make a valuable contribution, and especially issues that others will address if it does not. The NCCUSL should continue striving to fashion proposals whose usefulness to society will result in their prompt adoption in every state. However, it should also view its efforts as do most businesses today; some of its products will hit the mark while others will miss it, and the true measure of its success will be the net, overall results.

By focusing on writing statutes that will have the consensus needed to guarantee their adoption in almost every state, the NCCUSL is not serving the interests of either the business community or the consumers. Business and consumer interests in turn have been forced to look to other statute-drafting bodies or individuals for help, particularly where the difficulty and importance of the issue requires that it be addressed head on. For example, the federal Magnuson-Moss Warranty Act¹⁴ was an act of desperation as much by consumer product manufacturers seeking to forestall nonuniform state rules on

13. UNIF. CONSUMER CREDIT CODE, 1974 Act, 7A U.L.A. 1 (1985).

14. 15 U.S.C. §§ 2301-2312.

written warranties as by consumers seeking to abolish unfair implied warranty disclaimers or mandate more informative warranties.¹⁵

The rapid changes in business and society, especially the arrival of an "information age" in which paper is no longer central,¹⁶ have given rise to many difficult legal issues whose resolution lies within the expertise of the legal profession. The need for creative work is so great that every law professor and every practicing lawyer should cultivate at least one niche within our legal system in which he or she devotes real, sustained energy and resources to its improvement. Organizations like the NCCUSL can do their part by channelling the profession's creative energies in an organized and responsible way.

C. *Advocacy of Special Interests*

In carrying out these acts, the NCCUSL also needs to deal with several other basic problems. Of paramount importance is that the NCCUSL should not allow itself to be used by business, consumer, or other special-interest advocates. NCCUSL participants should pledge to limit their advocacy to the larger public interest, and the NCCUSL should enforce that rule when reviewing and approving its drafting committees' work products.

The allegations that the NCCUSL has been co-opted by private interests¹⁷ may not be true. However, the NCCUSL must establish and enforce the principle that advocacy of special interests, or the drafting or approval of proposals that subordinate the public interest to the needs of certain private interests, have no place in its activities.¹⁸

Private interests can continue to draft and promote their own proposals, but the NCCUSL's leadership should make it clear that the

15. See BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* ¶ 17.05 (1984 & Supp. 1993); Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive le Roi*, 26 *LOY. L.A. L. REV.* 625, 627, 632 (1993).

16. See John F. Dolan, *Changing Commercial Practices and the Uniform Commercial Code*, 26 *LOY. L.A. L. REV.* 579, 582-84 (1993); Patricia Brumfield Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 *LOY. L.A. L. REV.* 607 (1993); Guttman, *supra* note 15, at 628.

17. See, e.g., Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC?*, 26 *LOY. L.A. L. REV.* 563, 571-77 (1993); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 *ALA. L. REV.* 551, 570-79 (1991); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 *LOY. L.A. L. REV.* 743, 787-88 (1993).

18. Participants in uniform law drafting could find helpful guidance in the ideal of the "lawyer-statesman." See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 353-81 (1993).

NCCUSL cannot be used as a forum for those activities. Advocates of consumer interests who might object to this should be reminded that if special interests can participate explicitly, their sheer number will guarantee that the larger public interest will come in second.

IV. ECONOMIC AND POLITICAL PHILOSOPHY

Another issue that the NCCUSL must address involves the economic and political philosophy that guides the substance of its efforts. Policy decisions are implicit in every statute-drafting exercise. Statutes are not drafted in a policy vacuum. The NCCUSL, in all its statute-drafting exercises, should make its policy decisions explicit, both in the commission to its drafting committees and in the official comments to proposed statutes. By making the NCCUSL's policy decisions explicit, a proposed statute is more likely to reflect the NCCUSL's underlying and overriding policies as well as the policies that the drafting committee proposes to adopt to implement those broader policies.

A. *Consensus on the Market Process*

While matters of policy often seem too controversial even to discuss, there are some basic principles on which widespread, although never total, agreement is possible. While the United States frequently toys with the idea that government can solve all problems, government can be a major source of problems if it tries to do too much. The best service that a government can provide its people is establishing an infrastructure, including the necessary laws and legal institutions, in which the market process can operate in a free but disciplined and civilized way. A functioning market requires functioning legal institutions, as well as political and economic stability, and these can be provided only by government.¹⁹

In practical terms, therefore, most business and consumer representatives now widely accept that "the market works best," and laws that interfere with the market should be avoided and, where they exist, should be phased out. If they are competently drafted, market-supporting rules tend to benefit all parties, even when they limit the conduct of the participants. An excellent example is the federal Electronic Funds Transfer Act (EFTA),²⁰ an originally controversial statute that has provided a serviceable set of rules which in turn have

19. See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 26-33 (1980).

20. 15 U.S.C. §§ 1693-1693r (1988 & Supp. V 1993).

facilitated the emergence of a new industry and is serving bankers, businesses, and consumers well.

B. Promoting Disciplined and Civilized Markets

The debacle of the Soviet Union and Eastern Europe and the ascendancy of the Asian market economies has persuaded most people that a command-and-control economy will ultimately fail and leave consumers "high and dry" with shelves literally bare. A well-functioning private market is therefore the friend and not the enemy of consumers. Beyond that, there is an increasingly widespread consensus that government should affirmatively promote the emergence of competitive markets. It should do so in all areas of commerce, including professions and occupations, as well as those industries and lines of business that are owned by government or operate under the umbrella of protective regulation. Surely, these principles can serve as useful guides in a great deal of needed statute drafting by the NCCUSL.

Without standards, however, freedom can readily degenerate into chaos. Like all freedoms, market freedoms will be abused, and our laws must take account of that fact. Businesses everywhere, for instance, work to achieve market power and, if possible, monopoly or oligopoly status. Some businesses seek to achieve those ends using unfair means. Our law of unfair competition identifies hundreds of business activities that are made unlawful because they undermine the competitive market process.²¹

The freedoms that business requires in order to be creative, efficient, and productive can be abused in other ways as well. In all lines of activity, one may carry on business in a way that will shift some of the costs to nonparticipants and thereby allow the business to price its products or services below the actual, overall costs and still make a profit. It is for that reason that laws are needed to ensure that important public values that are not respected by the market—for instance, a healthy and attractive environment—are taken into account in business decisions.²²

The same freedoms can also be abused in ways that are unfair to the parties to a transaction, especially consumers. A properly func-

21. See EARL W. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES: A GUIDE FOR THE BUSINESSMAN 9-13 (1971); EARL W. KINTNER, A ROBINSON-PATMAN PRIMER 1-5 (2d ed. 1979).

22. See HERMAN E. DALY AND JOHN B. COBB, JR., FOR THE COMMON GOOD 41-61 (1989).

tioning competitive market requires an equality of bargaining power that is difficult to achieve in a retail context.²³ That is one reason that the process-oriented approach to statute drafting is important. If a consumer transaction is viewed as a process involving diverse components occurring at possibly different times and places, it is possible to identify those which are most amenable to creative solutions that will help equalize the parties' bargaining power while avoiding undue, or possibly any, costs or market impairment.

The challenge for lawmakers is to craft policies and laws that will accomplish both ends simultaneously: provide entrepreneurs the freedom they need to be creative, efficient, and productive while, at the same time, ensuring that they do not abuse that freedom. The challenge is to create a context that will both promote the market process and its attendant benefits, and ensure that the market functions in a disciplined and civilized way, without imposing manifestly unfair or unbargained-for burdens on participants or undue burdens on nonparticipants.

This approach invites a decision by the NCCUSL to commit itself to actively promoting a disciplined and civilized market process—the traditional, mainstream, political, and economic philosophy of the United States. Thus, the NCCUSL's proposals should respect and promote the market, and at the same time promote the best interests of the public—the fourth message of this Essay.

C. *Achieving the Right Balance*

This balance is not as difficult to achieve as it might seem. Most "consumer protection" legislation is very pro-marketplace in its orientation. Intuitively, most legislators know that the best interests of their business and consumer constituents are promoted by market-friendly policies. Legislative support for proposals that "fight the market" do not tend to be adopted or are limited in the depth or scope of their impact. For instance, where a contract term is specified by statute, it is usually a term that does not lie at the heart of the transaction and is rarely the subject of real bargaining or consumer choice. On the other hand, proposals that help to enhance the efficiency of the market—by giving consumers needed information and the time to digest it—tend to be adopted if the information is genu-

²³ See COLSTON E. WARNE, *Advertising and the Consumer Movement*, in CONSUMER MOVEMENT 91, 91-113 (Richard L.D. Morse ed., 1993).

inely needed and not otherwise available, and the statute or regulation is competently crafted.

Very often, opponents attack proposals designed to promote free and open competition by asserting that these proposals are anti-market. Opponents sometimes characterize proposed statutes that limit conduct as ipso facto anti-market without regard to whether they facilitate the market process. While it is true that some proposals for legislation that benefit consumers, or businesses, are injurious to the competitive market, it is important for the NCCUSL and those participating in its statute-drafting exercises to objectively determine the impact that a proposed statute is likely to have on the market process. Certain basic questions should be asked of any proposal; for instance:

a) First, does it promote the market process? If yes, all other things being equal, it is probably desirable. Measures that promote the market process, by providing needed information in a cost-efficient way, tend to be desirable because market outcomes are generally beneficial to the community at large.

b) Second, does it resonate well with the market process? Unless this question is answered affirmatively, the proposal probably should not be adopted. Proposals that do not resonate with the market generally should be avoided because the resulting losses in efficiency and limits on freedom of action can result in significant net losses for everyone, possibly overriding the advertised benefits of the proposal. At the very least, a particularly rigorous assessment should be made of a nonresonating proposal's benefits and costs before the proposal is adopted. In making such an assessment, it should be recognized that statutes that limit major contract terms can nonetheless resonate with the market process.²⁴

c) Third, do its costs—measured in the broadest sense—exceed its benefits? If so, it should not be adopted. All statutes and regulations must satisfy the most rigorous standards of both external (public policy) and internal (legislative drafting) quality. Mandating disclosure of information that costs more to the industry, and ultimately consumers, than the resulting benefits to consumers, or that has little real value to consumers, serves no one.

24. An example is the EFTA's limit on liability for unauthorized use of a debit card. 15 U.S.C. §§ 1693g-1693h (1988) (outlining liability limits for consumers and financial institutions respectively). It is a reasonable, indeed necessary, term that allocates risks and then allows market forces to allocate to the parties the resulting costs. For that reason, it is a provision that resonates with the market.

Many legislative proposals, including many sponsored by business interests, do just the opposite of facilitating market processes. They give a competitive advantage to one private industry or line of business over its competitors. By so doing, they undermine the market process and injure consumers by denying them the price as well as other benefits of competition. There probably is more reason to be on guard against abuses of the market process by legislative proposals made at the behest of business interests than by proposals that are advanced by consumer groups.²⁵

In order to evaluate the trade-offs inherent in policy making of this kind, the NCCUSL should make extensive use of skills that most lawyers do not have. Law training usually does not extend to engineering, economics, business management, environmental studies, or a host of other subjects that may lie at the heart of a needed statute. It is especially important that the NCCUSL's drafters mobilize the expertise of capable economists, so that market principles are reflected in its proposals.

D. Applying Market-Supporting Policies

How would these proposed NCCUSL policies work in practice? If they had been in effect in the 1960s, the UCCC would have taken the lead in proposing the use of simple interest as the measure of the cost of credit. Instead, despite evidence that the annual percentage rate (APR) was the most universally understood method of disclosing credit cost, and therefore would constitute an excellent comparison-shopping and market-facilitating measure,²⁶ the drafters proposed a less meaningful measure—dollars of finance charge per hundred dollars of amount financed per year. Furthermore, they totally excluded that measure from disclosure transactions involving an amount financed of less than \$300.

25. Economists Bruce M. Owen and Ronald Braeutigam state:

No industry offered the opportunity to be regulated should decline it. . . . Regulation protects such industries against competition from outsiders and from within the industry. It provides a degree of protection from attack. It provides a degree of protection from congressional investigation. Regulation greatly reduces the risk of bankruptcy from causes other than competition. And, while regulation may make very high rates of return difficult to achieve, it does virtually guarantee a steady stream of adequate profits.

BRUCE M. OWEN & RONALD BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 2 (1978).

26. See *Truth in Lending Bill Hearings on S.5 Before the Subcomm. on Financial Institutions of the Committees on Banking and Currency*, 90th Cong., 1st Sess. (1967) (testimony of former Sen. Paul H. Douglas), reprinted in HOMER KRIPKE, *CONSUMER CREDIT: TEXT—CASES—MATERIALS* 38, 38-49 (1970).

Since the APR's use as a uniform standard for measuring the cost of credit would have promoted the competitive market for credit—as the Truth in Lending Act's²⁷ adoption of that standard actually has done²⁸—the NCCUSL should have had no difficulty incorporating that concept into its first public draft of the UCCC, rather than waiting until federal legislation was imminent.²⁹ With the benefit of hindsight, one can speculate that the UCCC would have fared much better if it had proposed the APR at the outset, and not under pressure and before its reputation had begun to suffer as a result of that and other compromises of the public interest. That is regrettable, since the UCCC had come close to adopting the process approach to statute writing recommended here.

Similarly, an NCCUSL proposal for the uniform disclosure of warranty terms and conditions, like that adopted by Congress in the Magnuson-Moss Warranty Act,³⁰ would have constituted a pro-market, pro-competitive, and pro-consumer measure. Requiring that written warranties address all of the key terms of a warranty in clear and conspicuous language cannot help but promote the competitive market for warranties, and making them available for reading by purchasers before sale cannot help but facilitate comparison shopping by consumers.³¹ Fair credit-reporting legislation similarly provides rules that help ensure the quality of the information that businesses and consumers need to function in an economy that relies on credit to finance consumer purchases.³²

Those who oppose measures that help to structure and civilize important market mechanisms like warranties and credit fail to appreciate the constructive role that law can play in a modern market economy. Their advocacy, while possibly providing short-term benefits to some parochial interests, is not supportive of the market process. The NCCUSL's commitment to the market process would recast the debate on issues of this kind in terms of whether the proposal would

27. 15 U.S.C. §§ 1601-1667e (1988 & Supp. V 1993).

28. See Richard L. Peterson, *Consumer Finance*, in *FINANCIAL SERVICES: THE CHANGING INSTITUTIONS AND GOVERNMENT POLICY* 185, 200 (George J. Benston ed., 1983).

29. See *CONSUMER CREDIT IN THE UNITED STATES: A REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE* 170-71 (1972).

30. 15 U.S.C. §§ 2302(a) (1988) (requiring full and conspicuous disclosure in "simple and readily understood language" of terms and conditions of warranty).

31. See CLARK & SMITH, *supra* note 15, ¶ 14.01, at 14-3 (noting that "[t]hrough the Warranty Act's sometimes tightly woven provisions runs a free-market thread").

32. 15 U.S.C. § 1681(a) (1988 & Supp. V 1993) (citing congressional findings of fact that banking system depends upon fair and accurate credit reporting).

promote the market process and whether its technical drafting was capable of being improved.

In point of fact, most of the important statutes affecting consumers—a prime example being the federal Truth in Lending Act³³—have the function of improving the competitive market by providing consumers with information that helps them to fend for themselves. While such statutes do impose constraints on behavior, those constraints generally have the effect of improving the competitive market. Well-crafted, market-supporting statutes can also reduce the need for market-restricting laws by making the market itself operate more evenhandedly.³⁴ It was only after the Truth in Lending Act made consumers knowledgeable about and sensitive to interest rates that state legislatures began to feel comfortable about repealing statutory ceilings on interest rates in consumer credit transactions.³⁵

What consumers most often need is not “protection” in a literal sense. The vast majority of consumers need a level and fair playing field that provides basic, minimal standards of conduct—particularly involving fraud and other forms of sharp dealing—and information that will help them engage in meaningful comparison shopping. They, and the businesses that serve them, need well-crafted “rules of the road,” just like the drivers of automobiles and trucks need well-crafted rules of the road for travel on the highways.

V. CONCLUSION

That the NCCUSL is inactive in subject areas that would benefit from its attention is regrettable. Today, state legislatures continue to adopt, piecemeal, with almost no coordination among the states, statutes on a wide range of subjects, for example, electronic shopping,³⁶ “rent-to-own,”³⁷ liability arising from unauthorized “800” and “900”

33. 15 U.S.C. §§ 1601-1667e.

34. See RETAIL CREDIT ADVISORY COMM., STATE OF CAL., FINAL REPORT OF THE RETAIL CREDIT ADVISORY COMMITTEE 42 (1982) (discussing effect of APR disclosures on consumer sensitivity to interest rates, and its impact on market). The report notes that “[c]onsumers who shop for credit offer protection for those who do not.” *Id.*

35. See, e.g., Act of Aug. 22, 1988, ch. 479, §§ 1, 9, 1988 Cal. Stat.; Act of Oct. 11, 1991, ch. 819, §§ 2, 14, 1991 Cal. Stat. (codified as amended at CAL. CIV. CODE §§ 1805.1, 1810.2 (West 1985 & Supp. 1994)); IOWA CODE ANN. § 537.1301(19)(a)(1) (West 1987 & Supp. 1994) (removing interest rate ceilings in consumer credit transactions).

36. See, e.g., CAL. CIV. CODE § 1789-1789.8 (West 1985 & Supp. 1994).

37. Act of Sept. 29, 1994, ch. 1026, § 1, 1994 Cal. Stat. (to be codified at CAL. CIV. CODE §§ 1812.620-.649).

telephone calls,³⁸ and sales made pursuant to uninvited home solicitations by telephone.³⁹ Subjects of this kind are ideal for NCCUSL efforts.

If the NCCUSL is willing to relax its insistence on perfection and consensus, it can begin working harder to meet the real needs of the business community and the public by its process-oriented, market-supporting efforts, while realizing that its work products will rarely meet with universal acclaim.

Statute drafting of this kind will not result in uniform laws, but neither will the proposals be ignored. Most of them will be adopted. Those that are adopted and that meet the needs of the business community and consumers will gain favor because of their excellence and as a result will be enacted in other states or by Congress.

The NCCUSL is ideally suited to the production of needed statutes that reflect our commitment to both law and the market process. The NCCUSL should boldly get into the fray and live out its enormous potential for good.

38. There is little explicit guidance by statute or regulation on the formation of contracts or resolution of disputes in this area. Until that is provided, courts probably will base decisions on regulation, orders, and decisions of state public utilities commissions, the Federal Communications Commission, and the Federal Trade Commission, and on common-law contract principles.

39. No explicit guidance is yet provided to telemarketers and consumers on the rules that govern formation of sales contracts and resolution of disputes in this context.

APPENDIX

Existing Statutes That Together Might Constitute a Uniform Consumer Product Warranty Code⁴⁰

List of Statutes:

- 1) Federal Trade Commission (FTC) regulations, 16 C.F.R. §§ 701-703 (1994).
- 2) Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1988).
- 3) Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1790-1795.8 (West 1985 & Supp. 1994).
- 4) U.C.C. §§ 1-201, 2-202, -301, -313, -314, -508, -601, -608, -711, -713, -714, -715, -717, -719 (1990).
- 5) CAL. COM. CODE § 2719 (West 1964 & Supp. 1994); CAL. COM. CODE § 2801 (West Supp. 1994).
- 6) CAL. BUS. & PROF. CODE §§ 472-472.5 (West Supp. 1994).
- 7) CAL. CODE REGS. tit. 16, §§ 3396.1-3399.6 (1990).

I. CONSUMER INFORMATION AND EDUCATION

A. *Advertising of Warranty Terms*

FTC has the power to adopt rules on labeling and advertising of written warranties. 15 U.S.C. § 2302(b)(1)(B).

B. *Pre-sale Availability of Written Warranties*

1. FTC has the power to adopt rules on pre-sale availability of written warranties. 15 U.S.C. § 2302(b)(1)(A).
2. Seller must make the text of written warranties available for examination by prospective buyers before sale. 16 C.F.R. § 702.3(a).

40. A selection of provisions in Article 2 of the Uniform Commercial Code, federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1988), Federal Trade Commission (FTC) regulations adopted pursuant to that act, 16 C.F.R. §§ 701-703 (1994), and California Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1790-1795.8 (West 1985 & Supp. 1994), which together address the consumer warranty transaction as a process.

3. Supplier must provide sellers with warranty materials necessary for sellers to comply with the pre-sale availability rules. 16 C.F.R. § 702.3(b).
4. Catalogues must either include the text of a written warranty or provide an address from which free copies can be obtained. 16 C.F.R. § 702.3(c).
5. Door-to-door sellers must have the text of the warranty available for inspection and notify the buyer of its availability orally and in any written materials. 16 C.F.R. § 702.3(d).

C. *Disclosure of Miscellaneous Information*

1. Date of sale of the warranted product, in the purchase receipt. CAL. CIV. CODE § 1795.6(d) (West 1985 & Supp. 1994).
2. Names and addresses of the supplier's service and repair facilities, at the time of sale. CAL. CIV. CODE § 1793.1(b)(1) (West 1985).
3. Election to require the buyer to directly notify the manufacturer of the need for repair, made at the time of sale with the warranty or owner's manual. CAL. CIV. CODE § 1793.22(b) (West 1985 & Supp. 1994).
4. Availability, operation, and effect of any informal dispute settlement process, made "timely"—for example, at the time of sale. CAL. CIV. CODE § 1793.22(c) (West 1985 & Supp. 1994).
5. Overview of the buyer's warranty rights and remedies, made in or with warranty service work orders. CAL. CIV. CODE § 1793.1(a)(2) (West 1985).
6. Dates when the repaired product was received for repairs and ready for delivery to buyer, made in the warranty service work order or receipt. CAL. CIV. CODE § 1795.6(d) (West 1985 & Supp. 1994).
7. Notice that a motor vehicle was returned by a previous buyer for a replacement or refund, made to the new buyer prior to the time of sale. CAL. CIV. CODE § 1795.8 (West 1985 & Supp. 1994).

II. SUPPLIER'S WRITTEN WARRANTY PERFORMANCE PROCESS

A. *Scope of Application*

1. Rules on performance of warranty service are applicable to sales of both new and used consumer products in which a written warranty that promises future performance characteristics is given. CAL. CIV. CODE §§ 1793.2, 1795.5 (West 1985 & Supp. 1994).
2. Supplier must maintain or authorize adequate warranty service facilities. CAL. CIV. CODE § 1793.2(a)(1)(A) (West 1985 & Supp. 1994).
3. Supplier may delegate servicing responsibilities to independent servicers. CAL. CIV. CODE §§ 1793.2(a)(1)(B), 1793.6 (West 1985 & Supp. 1994).
4. If supplier does neither, retailer must provide warranty service at the supplier's expense. CAL. CIV. CODE §§ 1793.2(a)(2), 1793.5 (West 1985 & Supp. 1994).
5. Supplier may suggest methods of effecting warranty service in addition to those specified by statute. CAL. CIV. CODE § 1794.5 (West 1985).

B. *Service Literature and Parts*

1. Supplier has a duty to make service literature and parts available during the warranty period. CAL. CIV. CODE § 1793.2(a)(3) (West 1985 & Supp. 1994).
2. Supplier has a duty to provide service literature and parts to servicers of low-cost electronic products for three years. CAL. CIV. CODE § 1793.03 (West 1985 & Supp. 1994).
3. Supplier has a duty to provide service literature and parts to servicers of higher-cost electronic products for seven years. CAL. CIV. CODE § 1793.03(b) (West 1985 & Supp. 1994).

III. CONTENT AND EFFECT OF WRITTEN WARRANTY

A. *Warranty Terms*

1. Must disclose express warranty terms fully, conspicuously, and in simple and readily understood language.

- 15 U.S.C. § 2302(a); CAL. CIV. CODE § 1793.1(a) (West 1985).
2. Must disclose the supplier's terms and conditions of warranty. 15 U.S.C. § 2302(a); 16 C.F.R. § 701.3(a).
3. Must disclose the procedures that the buyer must follow to obtain warranty service. 16 C.F.R. § 701.3(a)(5).
4. Must disclose the availability of any informal dispute settlement process. 16 C.F.R. § 701.3(a)(6).
5. Must label every warranty as either "limited" or "full." 15 U.S.C. § 2303(a).
6. May not offer a deceptive warranty or include deceptive warranty terms. 15 U.S.C. § 2310(c).
7. FTC has the power to adopt rules on warranty terms. 15 U.S.C. §§ 2302(b), (d), 2306(a).

B. Minimum Standards for "Full Warranties"

If a warranty is labelled "full," certain minimum rights and remedies apply. 15 U.S.C. § 2304(c).

C. Effect of Written Warranties

1. Supplier is obligated to perform in accordance with the terms of a written contract. U.C.C. § 2-301.
2. The warranty contract consists of the parties' agreement in fact, including the written warranty, as affected by all applicable law. U.C.C. § 1-201(3), (11).
3. FTC has the power to adopt regulations extending the term of a written warranty while the product is out of service for repairs. 15 U.S.C. § 2302(b)(3).
4. Term of a written warranty is extended while the product is out of service for repairs. CAL. CIV. CODE §§ 1795.6, 1795.7 (West 1985 & Supp. 1994).

IV. WRITTEN WARRANTY REPAIR AND REPLACEMENT PROCEDURES

A. *Obligations of Buyer*

1. Must deliver a nonconforming product to the supplier's service facility. CAL. CIV. CODE § 1793.2(c) (West 1985 & Supp. 1994).
2. Must notify the supplier if the product cannot be returned due to size, weight, et cetera. CAL. CIV. CODE § 1793.2(c) (West 1985 & Supp. 1994).

B. *Obligations of Supplier* [manufacturer or its representatives]

1. Must commence repairs within a reasonable time. CAL. CIV. CODE § 1793.2(b) (West 1985 & Supp. 1994).
2. Must service the product in accordance with the written warranty within 30 days, unless extended by the buyer and subject to justifiable delay. CAL. CIV. CODE § 1793.2(b) (West 1985 & Supp. 1994).
3. Must pick up a product that cannot be returned due to size, weight, et cetera or repair product at residence of buyer. CAL. CIV. CODE § 1793.2(c) (West 1985 & Supp. 1994).

C. *Obligations of Original Retail Seller*

1. Must service a nonconforming product if the supplier does not provide a process to do it. CAL. CIV. CODE §§ 1793.3(a)(1), 1793.4 (West 1985 & Supp. 1994).
2. May direct the buyer to an independent servicer that is willing to service the product under the statutory rules. CAL. CIV. CODE §§ 1793.3(a)(2), 1793.6 (West 1985 & Supp. 1994).
3. May replace the nonconforming product with an identical or reasonably equivalent one. CAL. CIV. CODE § 1793.3(a)(3) (West 1985 & Supp. 1994).
4. May refund the price, less its reasonable-use value. CAL. CIV. CODE § 1793.3(a)(3) (West 1985 & Supp. 1994).

D. Options of Other Retail Sellers

Other retail sellers of like products from the same supplier may provide the same services as the original retail seller. CAL. CIV. CODE §§ 1793.3(b), 1793.4 (West 1985 & Supp. 1994).

E. Supplier's Duty to Compensate Retailers

A retail seller performing servicing duties is entitled to reimbursement from the supplier of the actual and reasonable costs of the service. CAL. CIV. CODE §§ 1793.5, 1794.1 (West 1985); *see also* CAL. CIV. CODE § 1792 (West 1985).

F. Supplier's Option to Delegate Duties

Supplier may delegate its duty to perform warranty service to others, if its agent is reasonably compensated and the supplier continues to be responsible. CAL. CIV. CODE § 1793.2(a)(1)(B) (West 1985 & Supp. 1994); 15 U.S.C. § 2307.

G. Supplier's Duty to Independent Servicer

Supplier must pay an independent servicer to which it has delegated performance duties the actual and reasonable costs of warranty service. CAL. CIV. CODE §§ 1793.6, 1794.1 (West 1985).

V. OTHER EXPRESS WARRANTIES

A. What Constitutes an Express Warranty

1. Oral or written affirmation of fact that becomes part of the basis of the bargain. U.C.C. § 2-313(1)(a).
2. Description of the product which is part of the basis of the bargain, including a description of the product's future performance characteristics. U.C.C. § 2-313(1)(b).
3. Advertising that includes an affirmation of fact or description that becomes part of the basis of the bargain. U.C.C. § 2-313(1)(a).
4. Sample or model which becomes part of the basis of the bargain. U.C.C. § 2-313(1)(c).

B. Legal Effect of Express Warranty

1. Supplier is obligated to deliver and perform in accordance with the terms of the contract of sale. U.C.C. § 2-301.
2. The contract of sale consists of the parties' agreement in fact, including any written warranty, as affected by all applicable law. U.C.C. § 1-201(3), (11).

C. Disclaimer of Express Warranty

1. Disclaimer that contradicts an express warranty is inoperative, unless the result is unreasonable. U.C.C. § 2-316(1).
2. Warranty term (e.g., a "merger clause") that contradicts an express warranty is operative if the parol evidence rule bars evidence of the express warranty. U.C.C. §§ 2-316(1), (2), 2-202.
3. Warranty term (e.g., a "merger clause") that contradicts an express warranty is inoperative, if it is unconscionable. U.C.C. § 2-302; *see also* CAL. CIV. CODE, § 1670.5 (West 1985).

VI. WARRANTIES IMPLIED BY LAW

A. Merchantability Warranty

1. Product must be fit for the ordinary purposes for which it is used. U.C.C. § 2-314(2)(c); CAL. CIV. CODE § 1791.1(a) (West 1985).
2. Present in sales by merchants of products of that kind, unless it is disclaimed. U.C.C. § 2-314(1).
3. Present in unwarranted sales of new consumer products, unless it is disclaimed. CAL. CIV. CODE § 1792 (West 1985).

B. Fitness for a Particular Purpose

Product must be fit for the buyer's particular purpose, if the supplier knew of that purpose, and the buyer relied on the supplier's skill or judgment in selecting the product. U.C.C. § 2-315; CAL. CIV. CODE §§ 1791.1(b), 1792.1, 1792.2 (West 1985).

C. Retailer's Right of Indemnity

A retailer has a right of indemnity against a supplier for any derivative merchantability liability. CAL. CIV. CODE § 1792 (West 1985).

D. Exclusion or Modification

1. Permissible, if manifested by a written, conspicuous agreement which is part of the basis of the bargain, if its terms make plain to the buyer that there are no implied warranties. U.C.C. § 2-316(2), (3).

2. Impermissible, if the supplier or seller also provides a written warranty. CAL. CIV. CODE § 1793 (West 1985).

3. Impermissible, if the supplier enters into a service contract with the buyer. 15 U.S.C. § 2308(a).

4. Impermissible, if the supplier provides a written warranty, except for the period that follows the expiration of the written warranty term, if reasonable. 15 U.S.C. § 2301(c).

VII. REGULATION OF WARRANTY-RELATED PRACTICES

A. Deceptive Warranties

U.S. Attorney General may maintain legal action to enjoin the use of a deceptive warranty or warranty term. 15 U.S.C. § 2310(c).

B. Tie-in Sales

Supplier may not tie warranty benefits to the consumer's use of articles or services for which charges are imposed. 15 U.S.C. § 2302(c).

C. Warranty Registration

Buyer's failure to return a warranty registration form to the supplier does not invalidate the written warranty. CAL. COM. CODE § 2801.

VIII. SERVICE CONTRACTS

A. *Disclosure*

1. Contract terms must be expressed fully, clearly, conspicuously, and in readily understood language. 15 U.S.C. § 2306(b); CAL. CIV. CODE §§ 1794.4, 1794.41 (West 1985 & Supp. 1994).
2. Contract terms must include the servicer's promises on a wide range of important subjects. 15 U.S.C. § 2302(a); 16 C.F.R. § 701.3(a).

B. *Obligation of Servicer*

Must provide all servicing and parts needed for proper operation without further charge, except as otherwise expressly provided. CAL. CIV. CODE § 1794.4(b) (West 1985 & Supp. 1994).

C. *Cancellation by Buyer*

1. Buyer may cancel the purchase of a service contract within 60 days after receipt of the contract, or within 30 days if the product is a used product and is sold without a written warranty. CAL. CIV. CODE § 1794.41(a)(4) (West 1985 & Supp. 1994).
2. In the event of cancellation, the buyer is entitled to a full refund of the price; if the buyer has made a claim within that period, the refund is a pro-rata one. CAL. CIV. CODE § 1794.41(a)(4) (West 1985 & Supp. 1994).

IX. SELF-HELP BUYER REMEDIES CONFERRED BY LAW

A. *Rejection*

1. Buyer may reject a product, before its acceptance, if it fails in any respect to conform to an express warranty. U.C.C. § 2-601(a).
2. Seller may cure a nonconformity if the seller notifies the buyer of the seller's intention to cure and the time for performance has not expired. U.C.C. § 2-508(1).

B. Revocation of Acceptance

1. Buyer may revoke the buyer's acceptance of a product whose nonconformity substantially impairs its value. U.C.C. § 2-608(1).
2. Buyer must have been unaware of the nonconformity, or must have accepted the product on the reasonable assumption it would be cured. U.C.C. § 2-608(1).
3. Buyer must exercise any right to revoke an acceptance within a reasonable time. U.C.C. § 2-608(2).

C. Cancellation of Purchase

Buyer may cancel the purchase if the buyer rightfully rejects or revokes acceptance of the product. U.C.C. § 2-711(1).

D. Damages

Buyer who has rightfully cancelled may recover the price paid, damages, and other relief. U.C.C. §§ 2-711(1), 2-713.

E. Deduction of Damages from Price

Buyer may deduct damages for a breach of warranty from the unpaid balance of the price. U.C.C. §§ 2-714, 2-715, 2-717.

X. INFORMAL DISPUTE RESOLUTION PROCEDURES

A. Legislative Policy

Encourages fair and expeditious settlement of disputes by informal dispute resolution procedures. 15 U.S.C. § 2310(a)(1).

B. Supplier's Option to Establish

Supplier, either alone or with others, may sponsor an informal dispute settlement process. 15 U.S.C. § 2301(a)(3).

C. Rules Governing Process

FTC has rule-making power. 15 U.S.C. § 2310(a)(2).
Substantive requirements apply. 16 C.F.R. § 701.3(a).

D. Administrative Supervision

1. FTC has enforcement duties. 15 U.S.C. § 2310(a)(4).
2. California Department of Consumer Affairs certifies processes that comply with the governing rules. CAL. CIV. CODE § 1793.22(d)(9) (West 1985 & Supp. 1994); CAL. BUS. & PROF. CODE §§ 472-472.5.
3. Dispute resolution criteria
 - a. *FTC part 703 criteria.* CAL. CIV. CODE § 1793.22(d)(1) (West 1985 & Supp. 1994).
 - b. *other state criteria.* CAL. CIV. CODE § 1793.22(d)(2)-(8) (West 1985 & Supp. 1994).
 - c. *state regulations.* CAL. CODE REGS. tit. 16, §§ 3396.1-3399.6.

E. Incentives to Supplier and Buyer

1. A buyer must resort to an informal procedure that complies with federal law before asserting a federally conferred remedy, if the supplier so requires. 15 U.S.C. § 2310(a)(3).
2. A motor vehicle buyer must resort to the supplier's state-certified, informal dispute settlement procedure before asserting the state "lemon law" presumption, if the supplier so requires. CAL. CIV. CODE § 1793.22(c) (West 1985 & Supp. 1994).
3. A motor vehicle buyer may not assert a claim for a penalty for a supplier's willful violation of the duty to replace or refund the price of a nonconforming motor vehicle if the supplier has a state-certified settlement process. CAL. CIV. CODE § 1794(e)(2) (West 1985 & Supp. 1994).

XI. BUYER'S LEGAL REMEDIES

A. Damages

1. Buyer may recover damages for a failure to comply with a written warranty, other express warranty, service contract, statute, or regulation. 15 U.S.C. § 2310(d)(1);

U.C.C. §§ 2-714, 2-715; CAL. CIV. CODE § 1794(a) (West 1985 & Supp. 1994).

2. Only a supplier "actually making" a written warranty is liable. 15 U.S.C. § 2310(f).

B. Attorney's Fees

Buyer may recover reasonable attorney's fees if the buyer prevails in a legal action. 15 U.S.C. § 2301(d)(2); CAL. CIV. CODE § 1794(d) (West 1985 & Supp. 1994).

C. Penalty for Wilful Noncompliance

Buyer may recover a civil penalty of up to two times the buyer's actual damages for a willful failure to comply with a written warranty, service contract, or legal obligation. CAL. CIV. CODE § 1794(d)(1) (West 1985 & Supp. 1994).

D. Modification of Remedies

1. Parties may agree to different remedies, such as repair or replacement, and limit or exclude the buyer's right to damages; and they may agree that the remedy will be the buyer's exclusive remedy. U.C.C. § 2-719(1).

2. Power to modify the legal remedies conferred by the UCC is circumscribed:

a. modification is inoperative, if events cause an exclusive remedy to fail to provide a meaningful remedy. U.C.C. § 2-719(2); CAL. COM. CODE § 2719(2).

b. modification is inoperative, to extent that the modification is unconscionable. U.C.C. § 2-719(3); CAL. COM. CODE § 2719(3).

c. modification is inoperative, with respect to damages for injury to a consumer. U.C.C. § 2-719(3); CAL. COM. CODE § 2719(3).

d. attempted modification is inapplicable to legal remedies conferred by other laws. See, e.g., 15 U.S.C. § 2310(d)(1); CAL. CIV. CODE § 1794 (West 1985 & Supp. 1994).

XII. OBLIGATION TO REPLACE OR REFUND PRICE OF NONCONFORMING PRODUCT

A. *Warranted Products in General*

1. If the supplier is unable to successfully service a product after a reasonable number of attempts, it must either replace it or refund its price. CAL. CIV. CODE § 1793.2(d) (West 1985 & Supp. 1994).

2. Supplier is entitled to a credit for the value of the buyer's use of the product before the nonconformity was discovered. CAL. CIV. CODE § 1793.2(d)(1) (West 1985 & Supp. 1994).

B. *Special Rules for New Motor Vehicles*

1. If the supplier of a motor vehicle is unable to successfully service it after a reasonable number of attempts, it must either replace it or refund its price, in the manner specified. CAL. CIV. CODE § 1793.2(d)(2) (West 1985 & Supp. 1994).

2. It is presumed that a reasonable number of attempts to successfully service a new motor vehicle have been made when certain specified facts are present. CAL. CIV. CODE § 1793.22(b) (West 1985 & Supp. 1994).

a. *same nonconformity was subject to repair four or more times.* CAL. CIV. CODE § 1793.22(b)(1) (West 1985 & Supp. 1994).

b. *product was out of service for repair of nonconformities more than 30 days.* CAL. CIV. CODE § 1793.22(b)(2) (West 1985 & Supp. 1994).

c. *"nonconformity" means a nonconformity which substantially impairs the use, value, or safety of the vehicle.* CAL. CIV. CODE § 1793.22(e)(1) (West 1985 & Supp. 1994).

3. Supplier is entitled to a credit for the value of the buyer's use of the vehicle before the nonconformity was discovered. CAL. CIV. CODE § 1793.2(d) (West 1985 & Supp. 1994).