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Fulfilling A Promise: Extending A Cooling-off Period to Retail Sales in General

By Michael B. Metzger and Dennis B. Wolkoff*

I. INTRODUCTION

The idea of a "cooling-off" period during which a buyer may cancel a sale without justification is not a new one. The genesis of this concept was the Final Report of the English Committee on Consumer Protection (the "Molony Committee") presented to Parliament in 1962.1

In the United States the concept has gained some acceptance through limited incorporation into the statutes of several states,2 model consumer legislation3 and the Uniform Consumer Credit Code.4 With one exception,5 however, all major recognition of the cooling-off period as a legitimate and desirable consumer remedy has been confined within the narrow parameters of "direct sales" (those made at some place other than the seller's place of business, usually at the home of the buyer) on a credit basis.6

The authors advocate extending this remedy to cover a much broader range of consumer transactions.7 As a vehicle for furthering discussion, the authors have drafted a proposal

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1. COMMITTEE ON CONSUMER PROTECTION, FINAL REPORT, CMND. No. 1781, at 171-74 (1962) [hereinafter cited as MOLONY REPORT].
3. MODEL CONSUMER CREDIT ACT §§ 2.701, 2.703 (1973); NATIONAL CONSUMER ACT §§ 2.501, 2.505 (First Final Draft 1970).
5. NATIONAL CONSUMER ACT § 2.505 (First Final Draft 1970).
7. See Proposal § (1) in text accompanying note 35 infra.
which exemplifies what is considered to be a desirable approach to consumer remedies in this area. This Article will be divided into two parts: first, an explanation of the reasons for such a broad extension of the remedy; and second, the proposal itself with a detailed explanation of the reasoning which dictated the specific decisions evidenced by the language of the proposal.\(^8\)

II. THE REMEDIAL NEED

The major impetus to those who have accepted the idea of a cooling-off period appears to have been a desire to check high-pressure salesmanship. Historically, this desire may in part stem from the thrust of the Molony Committee's report, which urged a cooling-off period "because of its obvious value as a check on the excesses of salesmanship."\(^9\) The Committee found such excesses to be especially prevalent in the door-to-door sales area\(^10\) and thus decided against extending the remedy to retail sales in general, thinking that such an extension would not be "practicable."\(^11\) Additionally, the Committee found that "the need for further protection [beyond that afforded by conventional remedies] is not so marked in the case of persons who go to shops or showrooms, presumably because of their self-inspired interest in the articles on display."\(^12\) In drafting the Uniform Consumer Credit Code, the Uniform Commissioners apparently also singled out high-pressure salesmanship as the main reason for arming a certain class of consumers with a limited right to cancel without justification.\(^13\) The Commissioners concurred with the Molony Committee in finding that "the sale in the home is particularly susceptible to such methods."\(^14\)

In contrast to the findings of the Committee and the Com-

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8. We will not discuss the fundamental efficacy of the cooling-off period as a remedy, though this has been a question of considerable controversy. Those desiring exposure to this aspect of the problem are referred to Professor Sher's definitive and exhaustive work on the cooling-off period in door-to-door sales. Sher, The "Cooling-Off" Period in Door-to-Door Sales, 15 U.C.L.A.L. Rev. 717, 721-37 (1968). We concur in the main with his conclusions in this regard.

9. MOLOHY REPORT 172.
10. Id. at 243.
11. Id. at 173.
12. Id.
13. UNIFORM CONSUMER CREDIT CODE § 2.501, Comment 1. "An underlying consideration for Part 5 is the belief that in a significant proportion of such sales the consumer is induced to sign a sales contract by high pressure techniques."
mission, Professor Sher concluded that "[s]ince it is undisputed that abusive selling practices can and do occur at stores and showrooms, . . . installment sales made at retail premises, as well as those made in the home, should be subject to some sort of cooling-off period." 15 In line with Professor Sher, the authors reject the contention that the consumer's "self-inspired interest" 16 in goods purchased on retail premises justifies a lesser degree of protection. Even if it were true that those who purchase in the traditional retail setting enter with a firm objective in mind and consistently confine their purchases to the items they initially desired, such idealized buyers can still be victimized by high-pressure or deceptive tactics upon arrival. Additionally, in a world where all consumers hear the call of Madison Avenue's ubiquitous siren songs, "self-inspired interest" may indeed be a rare phenomenon.

As the authors see it, however, the main reason for extending this sort of remedy into the general retail sales area is simply to provide a large number of consumers with a simple, inexpensive and speedy remedy in all cases where they have been victimized by defective products, dilatory delivery, deceptive or high-pressure sales practices, or even their own stupidity. It is clear, for example, that a consumer who buys a small appliance which self-destructs on its maiden voyage is totally at the mercy of the seller, who is then virtually free from legal retribution. Theoretically, in sections 2-601 and 2-608 the Uniform Commercial Code provides a self-help remedy in the form of rejection of the non-conforming goods and revocation of acceptance. 17 Putting aside for the moment the important question of whether the consumer is even aware of these rights, one must ask whether they are of any avail to the consumer who has already paid for his purchase and is confronted with a refusal to return his payment. Such a consumer must still resort to litigation, with its attendant delay and inconvenience, to vindicate his rights.

Litigation is not an economically feasible mechanism for dealing with most consumer rights problems. The high cost

15. Sher, supra note 8, at 729.
16. MOLONY REPORT 173.
17. It should be pointed out, however, that the application of these sections to actual controversy is a subject fraught with confusion and disagreement. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 247-66 (1972) for a discussion of the problems surrounding rejection and revocation of acceptance.
of legal fees and the general denial of their recovery to successful consumer litigants combine to shut the legal door in the victim's face. As one commentator has observed, "today except for lawsuits involving substantial amounts of money, the law courts are no longer an effective or even feasible mechanism for serving the great bulk of the needs of our citizens." The Molony Committee, though it did not pursue the idea to what the authors consider to be its logical conclusion, recognized that "[i]t is profitless to afford rights without conferring the remedies necessary to support them." This sort of legal duplicity has long furnished critics of the legal system with ample ammunition.

What is needed then, is a simple, self-effectuating remedy available to consumers on a broad basis. Although by no means a panacea for all the law's ills in this area, a generalized cooling-off period is a step in the right direction. When the buyer can return goods without cause for a limited period, a great many of the problems discussed above are obviated. Hopefully, the very existence of such a right will provide the impetus for improvements in sales techniques, advertising, product design and quality control.

Certainly, if one accepts the logic of extending the remedy simply because it is necessary to provide consumers with a genuinely effective remedy, there is no logical justification for lim-

19. Id. at 134-35.
21. MOLONY REPORT 151.
22. The reader is directed, for example, to Ambrose Bierce's Devil's Dictionary definition of law (in fact a sad statement of what law is not).

Law, n.
Once Law was sitting on the bench,
And Mercy Knelt a-weeping.
"Clear out!" he cried, "disordered wench!
Nor come before me creeping.
Upon your knees if you appear,
'Tis plain you have no standing here."
Then Justice came. His Honor cried:
"Your status?—devil seize you!"
"Amica curiae," she replied—
"Friend of the court, so please you."
"Begone!" he shouted—"there's the door—
I never saw your face before!"

7 A. BIERCE, THE COLLECTED WORKS OF AMBROSE BIERCE 186 (1911).
23. See Proposal § (1) in text accompanying note 35 infra.
iting the remedy to door-to-door situations or installment sales. The English Hire-Purchase Act of 1965, the child of the Molony Committee's Report, applies only to sale agreements payable in installments.\(^{24}\) Likewise, the coverage provided by the Uniform Consumer Credit Code\(^{25}\) is restricted to "consumer credit" sales.\(^{26}\)

The authors can find no valid conceptual reason for distinguishing between cash and credit sales in this regard. It might be argued that the limitation to credit sales excludes inconsequential transactions which, for one reason or another, do not merit coverage. Clearly this purpose can be more satisfactorily accomplished by a minimum-dollar-amount exclusion.\(^ {27}\) The argument has been made that "consumers who can afford to make a lump sum payment possibly have less need for protection against high-pressure selling than do less pecunious purchasers who must rely on installment credit."\(^ {28}\) While the validity of this argument when viewed from the high-pressure sales perspective is doubtful, it is clearly erroneous from the perspective of providing adequate remedies. A cash transaction need not be a large one, and, as suggested above, the lower the price of the goods involved, the more inadequate the conventional remedies appear. The budgets of many families, not only those in the lower income brackets, could well feel the impact of a 10 or 15 dollar loss.

The most persuasive argument against extending a cooling-off period to retail sales is simply that such an extension is impractical because of the large number of sales it would embrace and the practical burdens it would place upon merchants. While not denying that such an extension would place additional burdens on merchants, the authors contend that careful drafting can minimize these burdens. Provisions which operate to exclude certain classes of sales from coverage,\(^ {29}\) deter frivolous re-

\(^{24}\) Hire-Purchase Act 1965, ch. 66, § 1(1).
\(^{25}\) Uniform Consumer Credit Code § 2.501.
\(^{26}\) "Consumer Credit Sale" is defined by § 2.104(1) of the Uniform Consumer Credit Code as

\[ A \] sale of goods, services, or an interest in land in which

(a) credit is granted by a person who regularly engages as a seller in credit transactions of the same kind,

\[ \text{[and]} \]

\[ \text{[d]} \] either the debt is payable in installments or a credit service charge is made . . . .

\(^{27}\) See Proposal § (5) (a) in text accompanying note 35 infra.
\(^{28}\) Sher, supra note 8, at 744.
\(^{29}\) See Proposal § (5) in text accompanying note 35 infra.
turns,\textsuperscript{30} place the onus of returning the goods upon the con-
sumer\textsuperscript{31} and minimize the merchant's burden of giving notice
of the right to cancel\textsuperscript{32} should reduce the inconvenient effects
of the extension to tolerable levels. Moreover, were the pervasive acceptance
of such a right to cancel to have a salutary effect upon the quality of consumer transactions, the number of
situations calling for the exercise of the right would decline. Fi-
ally, the cost of such a provision is not too great a price for
fairness in the marketplace and reduction of legal hypocrisy, es-
pecially inasmuch as, in the final analysis, it will be the con-
suming public who pays the cost via increased prices.

The authors are aware, however, that political realities may
relegate this proposal to that great dusty attic where so many other “oughts” and “shoulds” reside. Certainly a legislature
which has balked at enacting a truncated cooling-off period will
not welcome a generalized one with open arms.

The following proposal is therefore drafted to fit the con-
text and style of the Uniform Commercial Code, not because
the authors envision ready acceptance by the Uniform Commiss-
ioners and state legislatures, but because such a proposal is nec-
essary to fulfill the Code's implicit promise to the consumer of
fairness in commercial transactions. It would also seem that
an amendment of the Code would be the simplest means of
achieving the desired universality, should public and legislative
temperament become receptive to the adoption of a broad cool-
ing-off provision. Even so, the proposal is drafted in an inte-
grated manner so as to facilitate its adoption as an independent
piece of legislation, apart from the Code. Additionally, the de-
vice of fictionally integrating the proposal into the Code enabled
the authors to take advantage of the Code's extensive defini-
tional structure and its underlying obligation of good faith.\textsuperscript{33}
It also, however, necessitates operation within the Code's limitations, most importantly the exclusion of service transactions
from coverage by the proposal.\textsuperscript{34} While improvements are also
needed in the area of sales of services (just as Code principles in
general should be applied to sales of services), it is enough
at this juncture to recognize that the unique problems attendant
to that area probably merit separate and careful consideration.

\begin{footnotesize}
\begin{footnote}
30. \textit{Id. §§ (2), (4) (b).}
31. \textit{Id. § (1) (a).}
32. \textit{Id. § (3).}
33. \textit{Uniform Commercial Code § 1-203.}
34. \textit{Id. § 2-102.}
\end{footnote}
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III. THE PROPOSAL: A BUYER’S RIGHT TO CANCEL WITHOUT CAUSE

1) When a non-merchant buyer purchases consumer goods from a merchant seller, the buyer may, without cause, elect to cancel the transaction by delivering proper notice to the seller by the close of seller’s regular business hours on the third full business day after the date upon which the transaction was consummated or the goods were delivered, whichever is later.

   a) In the case of goods delivered at the seller’s place of business or mailed to a place other than the seller’s place of business, proper notice shall consist of any manifestation of intent to cancel the transaction accompanied by the return of the goods by the buyer to the seller’s place of business.

   b) In the case of goods delivered to a place other than the seller’s place of business by means other than mailing, proper notice shall consist solely of any manifestation of intent to cancel the transaction. Buyers giving notice pursuant to this subsection shall cooperate with the seller in making reasonable arrangements to allow the seller to take possession of the goods, or forfeit their right to cancel without cause.

   c) Mailed notices and returns pursuant to this section shall be effective when deposited with the United States Postal Service properly addressed to the seller with postage prepaid.

2) When a buyer exercises the right of cancellation provided by this section the seller shall, upon actual receipt of the goods, immediately return to the buyer any consideration received from the buyer together with any evidence of the buyer’s indebtedness the seller may possess; except that

   a) the seller may retain as a cancellation fee five percent (5%) of the cash price of the goods; and

   b) if the goods have been installed the seller may, in

35. Should this Buyer’s Right to Cancel Without Cause be adopted, it is most easily integrated into the Uniform Commercial Code at the end of article 2, part 7, Sales Remedies, although it might more logically follow U.C.C. § 2-711, Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods.
addition to the cancellation fee, retain any installation charge specifically assessed in the original transaction.

3) The seller shall post a conspicuous notice of the buyer's right to cancel at every location at which payment is received at seller's place of business; or, in the case of goods delivered or mailed to a place other than the seller's place of business, notice shall accompany the goods.

a) The notice shall include
   1) the conspicuous caption: "BUYER'S RIGHT TO CANCEL"; and
   2) a clear and concise statement of the buyer's basic rights under this section; and
   3) a listing of business hours sufficient to enable the buyer to determine when his right to cancel terminates; or in the case of a delivered notice, the address to which notice of cancellation may be sent.

b) The cancellation period provided by subsection (1) shall not commence until the seller has complied with the notice requirements of this subsection.

4) The buyer's right of cancellation provided by this section
   a) is absolute and shall prevail without penalty over the rights of any assignee of the seller or any transferee, holder, or holder in due course of any negotiable instrument arising out of the original transaction; and
   b) shall also prevail against a secured party who retains a purchase money security interest pursuant to section 9-107(b). The security agreement may authorize the secured party's retention of a finance cancellation fee of up to two percent (2%) of the amount financed.

5) This section shall not apply to
   a) goods sold for less than ten dollars ($10.00); or
   b) goods which cannot be returned to the seller in substantially as good condition as when received by the buyer; or
   c) goods which are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business.
6) The seller shall forfeit the right to retain a cancellation fee and stand liable to the buyer for attorneys' fees and one hundred fifty dollars ($150.00) liquidated damages whenever a seller shall unreasonably
   a) refuse to allow a buyer to exercise the right to cancel provided by this section; or
   b) fail to return any consideration received or evidence of indebtedness as required by subsection (2).

7) A seller may not limit the operation of this section in any manner.

IV. DISCUSSION

A. Coverage

In drafting this section, the initial issue was whether to cover the transactions of all sellers and buyers of goods as defined by the Uniform Commercial Code. In view of the rationale previously advanced for extending a generalized cancellation right, the case for granting such a right to professionals who have some leverage as a result of a continuing sales relationship and who have relatively greater access to legal remedies is less than compelling. The proposal therefore grants the right only to buyers of consumer goods, that is, those bought primarily for personal, family or household uses. While there are certainly cases of merchant and other non-consumer purchasers who might benefit from the right to cancel without cause, it is assumed that they are more capable of determining their needs in advance and thus more able to benefit from existing remedies than are consumers. Furthermore, the potential for speculative buying and cancelling if the price does not increase is much greater if merchant buyers are included. Since the "costs" of a cancellation right must ultimately be spread among all purchasers, it is difficult to justify increasing the costs by extending the class of purchasers benefited to include those not truly in need of such a right.

36. The following lengthy discussion of the details of the proposal approximates the Comments to the Uniform Commercial Code in purpose, if not in form.
37. \textit{Uniform Commercial Code} § 2-103(1) (a), (d).
38. See id. § 9-109(1).
39. While a typical consumer might justifiably exercise the prerogative of cancellation if the item is priced significantly lower elsewhere, only merchants buying in quantity are likely to find it profitable to speculate on a continuing basis.
40. See note 45 \textit{infra} and accompanying text.
In distinguishing between merchant and non-merchant sellers as well as merchant and non-merchant buyers, the proposal adopts the logic underlying the Uniform Commercial Code.\textsuperscript{41} As the obligations that the proposal creates would be a particularly great burden on the occasional seller, the right of cancellation does not apply in a transaction with a non-merchant seller. The occasional seller does not have business hours, signs to post or forms to present, nor can he spread additional cost over many sales. Requiring him to resell an item implies the undertaking of a whole new project, not simply a continuation of his ordinary business of selling. And while a buyer from an occasional seller may be just as naive or remedy-poor as one buying from a merchant, or from one holding himself out as an expert, such a buyer presumably will rely less upon the non-merchant seller's expertise. In the typical case the buyer and the seller involved in an occasional sale will likely be on equal terms. The merchant-non-merchant distinction, as well as almost every other distinction made in this proposal, is the result of a balancing of interests rather than a simple selection of a clearly preferable choice. In recognition that most additional financial burdens placed upon sellers are passed on to buyers, the proposal attempts to limit the buyer's remedy when the costs of cancellation are great or when the value of the right to cancel is remote.

B. Cancellation Fee

Another fundamental question which confronted the authors was whether the right to cancel should be absolute, or whether the buyer who chooses to exercise the right should pay an additional fee above and beyond the general increase in prices which might result from the enactment of the proposal.

1. Purpose

The proposal adopts a cancellation fee,\textsuperscript{42} a device designed primarily to accomplish two goals. The first purpose of the cancellation fee is to inhibit purchasing with the intention of cancellation and to discourage totally frivolous returns. The difficulty, of course, is that any such device will also discourage the type of cancellation which the provision is designed to allow.

\textsuperscript{41} Uniform Commercial Code § 2-104, Comment 1.

\textsuperscript{42} For a typical cancellation provision, see Uniform Consumer Credit Code § 2.504(3).
While hopefully cutting down on some cancellations that serve no apparent function, the penalty fee requires that the buyer whom the provision is intended to protect pay for his new right and thus deters him from exercising the right to cancel in wholly legitimate situations. The penalty fee, then, is again the result of a somewhat uncomfortable balance. In the end, however, the need to deter frivolous purchases and cancellations outweighs the disadvantage of forcing the one exercising the right to pay for it, an idea which in any case has some merit from the standpoint of social economy.

An even more upsetting consequence of the fee is that retail establishments that now freely allow cancellations may begin to collect the cancellation fee. While there will be no compulsion to collect the fee, the very existence of the provision may encourage and legitimize it. There seems to be no way of predicting the incidence of this practice because the good will generated by free returns may still be a strong motivating factor in a retailer’s decisions.43

The second purpose of the cancellation fee is to compensate the seller for the costs incurred in processing the cancellation. These might typically include the costs of inspecting, repackaging and reshelving the item, as well as the record keeping involved. Although the fee will ideally not go so far as to compensate the merchant for his loss of profit, it will hopefully approximate a break-even situation.44 Since any actual expenses that are not reimbursed are likely to be passed on to other buyers in the form of higher prices, the provision of a cancellation fee should act to minimize this cost of the proposal.45

The ideal cancellation fee is, of course, at once low enough so as not to discourage legitimate returns nor to give a profit

43. The right of unlimited returns is an important factor in many retail strategies. An example is catalog sales in which many consumers will purchase goods unseen because they know that they can be returned.

44. Inasmuch as most merchants will actually gain on some cancellations and lose on others and a few merchants may consistently gain or lose, the five percent charge is intended to reach a balance as consistently as such a fixed rate can.

45. Merchants are likely to treat any consistent losses resulting from cancellations as just another cost of doing business to be passed on to consumers to the fullest extent possible. Interestingly, however, a merchant in a competitive market who experiences a proportionately higher incidence of returns may not be able to pass on the cost by raising his price. Such a situation would reward those sellers whose product quality and selling techniques cause few cancellations.
to the seller and high enough to discourage frivolous returns and to cover the seller's expenses.

2. Form and Amount

For simplicity, the proposal adopts a flat percentage of cash price rather than any type of fixed or other varying dollar amount. It is important that a buyer be able quickly and easily to determine the cost of exercising his right. The five percent figure is an intuitive choice; it has been utilized in analogous legislation and seems to strike the desired balance between the interests of consumers and merchants. Although the five percent cancellation fee may overcompensate sellers of very expensive goods—$250 on a $5000 item covers quite a lot of paper work and reshelving expense—the likelihood of a substantial loss of profit on such goods renders a partial replacement of profit less repugnant than in a more typical smaller sale. A ceiling on the dollar value of goods covered is an obvious method of preventing extreme cases of overcompensation. A ceiling of $500, for example, would exempt those purchases that most people make only rarely and usually with increased care. It can, however, be postulated that a buyer is therefore less likely to cancel such a sale without just cause, considering the large cancellation fee involved.

The most important consumer good falling into this high cost category is the automobile. However, as in the sale of less expensive goods, some right of cancellation is needed because consumers are unable or unwilling to utilize existing legal remedies. Rather than calling for an upper dollar limit on cancellations, therefore, the proposal relies on higher penalty fees to somewhat discourage cancellation and to assuage the merchants involved. An auto dealer might not be totally opposed to receiving a several hundred dollar cancellation fee within

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46. A 10 percent cancellation fee was given special consideration because it was assumed that many consumers would find it simpler to compute the 10 percent fee and therefore be more likely to make a rational decision as to whether to cancel. Ten percent, however, did not appear to strike the desired balance between the interests of consumers and those of merchants.

47. Uniform Consumer Credit Code § 2.504(3).

48. A special consideration of the $500 amount is that under the U.C.C. a contract for the sale of goods for the price of $500 or more requires a writing. Uniform Commercial Code § 2-201(1).

three days of sale and then being able to sell the auto again.\textsuperscript{50} In any case, the number of returns during a short cancellation period is not likely to be great. In addition, some consumers may wish to use cancellation in preference to conventional remedies, judging the five percent fee less expensive than legal fees and choosing an instant and certain refund over a remote and uncertain recovery.\textsuperscript{51} Such nonjudicial remedies, of course, represent a savings for all the parties involved.\textsuperscript{52}

C. Exemptions

1. Minimum Dollar Limit

The question of a minimum dollar limit is quite different from that of a maximum one. First, the cancellation fee on items costing under 10 dollars will often not cover the merchant's costs of accepting and reselling those which have been returned. In many cases, it may well be less expensive for the merchant to discard the item than to repackage and resell it. Although the exemption of small sales leaves the consumer with virtually no other remedy to invoke, this compromise provision assumes that the impact of a 10 dollar loss can be borne by most families with tolerable repercussions. Second, the small sales exemption should eliminate much of the proposal's nuisance potential for most merchants. Absent such an exemption, a two or three cent cancellation fee would not provide much of a deterrent to frivolous or malicious returns. Thus, by eliminating most retail sales by volume\textsuperscript{53} it is hoped that the cancellation right will be used on those sales which consumers most regret and on those which likely involve less than ideal conduct by sellers. The choice of the 10 dollar floor, again arbitrary, was made because 50 cents seemed a fair minimum cancellation fee and because sales of under 10 dollars seemed not to be of critical importance.\textsuperscript{54}

\textsuperscript{50} But see text accompanying notes 55-56 infra. 
\textsuperscript{51} This quick recovery will be particularly attractive to the poor who often cannot afford to have their money tied up during the months or even years needed to pursue conventional remedies in the courts. 
\textsuperscript{52} Increased reliance on such a nonjudicial remedy will also tend to alleviate crowded court dockets. 
\textsuperscript{53} While no statistics are compiled on what portion of retail sales are of goods selling for less than 10 dollars, with food items alone it certainly exceeds 50 percent. 
\textsuperscript{54} The alternative of a 50 cent minimum cancellation fee, even for small sales, is attractive because it allows cancellation of lower cost items while adequately compensating merchants. This refinement was
2. **Specially Manufactured Goods**

Following the general philosophy of the Uniform Commercial Code, goods which have been specially manufactured are exempt from cancellation. This limitation is, obviously, intended to protect a seller from being left with goods made to the taste of the original buyer which would be difficult to resell. Questions are likely to arise as to whether a particular good has been specially manufactured—for example, whether an automobile purchased with air conditioning becomes exempt from cancellation. However, by adopting the exact language of Uniform Commercial Code section 2-201(3)(a), the proposal should obviate most definitional litigation. Moreover, those ordering unique goods are more likely to have considered carefully their purchases than the conventional purchaser who buys “off the shelf.” The buyer’s very act of specifying his particular needs may tend to remove the normal reliance on a seller’s warranties.

3. **Damaged or Perishable Goods**

Goods which the buyer has damaged by misuse cannot be returned under the proposal. To allow cancellation in such cases would leave the risk of loss with the seller after he has lost control of the goods. The more troublesome question is how to treat goods that are perishable or consumed in use. The 10 dollar floor fortunately excludes many such items, particularly food. Although the arguments for allowing cancellation of the sale of these items are no less persuasive than for goods generally, to guarantee the right to return partially consumed goods puts the seller in the impossible position of having to refund, without demonstrated cause, 95 percent of the price and receive little or nothing in return. There seems to be no feasible alternative to the exemption of goods that have deteriorated or been consumed.

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55. See Uniform Commercial Code § 2-201(3)(a).

56. While the implication of the term “specially manufactured goods” is somewhat different from that in Uniform Commercial Code § 2-201(3)(a), the answer to the question of what constitutes such goods is the same and has had many years to develop.

57. See Uniform Commercial Code § 2-316, Comment 9.

58. A question may arise in the case of damaged goods as to whether the damage was caused by the buyer or by a defect in the goods themselves. Such conflicts will have to be resolved by resorting to conventional remedies.
4. Goods Which Cannot Be Resold as New

The general expectation is that any item which can be returned can be resold as new after repackaging and minor adjustments. If the items cannot be remarketed as new, it fails the test of being in substantially as good condition as when received by the buyer. There seems to be no practical alternative to requiring the buyer of these items to rely on conventional, and often unsatisfactory, legal remedies.

A few consumer oriented statutes have been enacted to limit a merchant's right to resell used goods as new. Jurisdictions having such provisions may have to redraft them to allow the resale of goods returned pursuant to the proposal's provisions in order to maximize consumer protection. That the provisions of the Uniform Consumer Credit Code allowing analogous cancellation and return in direct sales have apparently caused no problems may indicate that the conflict is unlikely to be significant.

5. "As is" Sales

There is no provision for the exemption of sales made on an "as is" basis. It is assumed that many purchasers would not understand what the term means and that some sellers would attempt to circumvent the operation of the proposal by selling all goods "as is". While this view may appear somewhat inconsistent with the existing Code provision on "as is" goods as they relate to warranties, the two situations are actually quite different. The inability to exclude implied warranties might deter the sale of old or damaged goods where the potential warranty expense greatly exceeds a reduced sale price. With returned goods, on the other hand, there is no potential warranty expense. Sellers will no doubt be inconvenienced whenever goods are returned after a short sale or special offering; however, allowing the return of "as is" goods should cause no special problems in addition to this inconvenience.

59. State laws on the return of personal items such as underwear may limit somewhat the scope of the cancellation privilege.
60. See, e.g., MINN. STAT. § 325.772(6) (Supp. 1973).
61. See UNIFORM CONSUMER CREDIT CODE § 2.502(5) (b).
62. The Uniform Commercial Code exempts "as is" sales from implied warranties application. UNIFORM COMMERCIAL CODE § 2-316(3) (a).
D. Operation

1. Installation Charges

Under the Uniform Commercial Code if the transaction is predominately a sale of goods, the entire price is generally considered to be the cost of the goods.63 It would seem unreasonable, however, for the seller to be required to refund that part of the purchase price which comprises installation charges. Therefore, the proposal permits the seller to retain, upon cancellation and after installation of the goods, any installation charge specifically noted in the original transaction. Moreover, many installed goods, such as carpeting, will be exempted as goods which cannot be returned in resalable condition.64 The installation charge provision is another compromise that will no doubt displease both buyers and sellers. Buyers may receive substantially less than 95 percent of the total price, and sellers will have to remove installed goods without compensation.

2. Notice of the Cancellation Right

Clearly, the proposal is meaningless if those it intends to benefit are not effectively apprised of its existence and terms. Perhaps the most certain method of informing the buyer of his right to cancel would be to require a written reaffirmation of purchase before a sale is considered final.66 Other methods of notice include mailing a cancellation form to the purchaser66 and giving notice of the right to cancel with each purchase.67 Although effective, these methods are expensive and arguably not only allow cancellation but encourage it.68 The right to return goods is such a basic right that, if broadly adopted, it will be easily understood and remembered. In addition, it is anticipated that a great deal of publicity would accompany the recognition of such a fundamental new right. Thus it appears sufficient

63. While not all authorities and courts have been clear and consistent on this question, this does appear to be the majority rule. See generally Epstein v. Giannattasio, 25 Conn. Sup. 109, 197 A.2d 342 (1963); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); 2 A. CORBIN, CONTRACTS § 475 (1950); 3 S. WILLISTON, CONTRACTS §§ 508, 509, 509A (3d ed. 1960).
64. See, e.g., the discussion of specially manufactured goods in text accompanying note 55 supra.
65. See, e.g., MODEL CONSUMER CREDIT ACT § 2.703.
to require the permanent posting of a notice\textsuperscript{69} of the right at each cash register on the seller's premises and to require actual presentation of the notice only when delivery is not made at the seller's place of business.\textsuperscript{70} Should this scheme of notice prove insufficient, one of the more direct methods should be adopted.

3. \textit{The Three-day Period}

Another product of compromise, the limitation of the cooling-off period to three full days was borrowed from the Uniform Consumer Credit Code.\textsuperscript{71} The seller must at some point have assurance that the sale will not be cancelled without cause, and yet, depending on the type of item and the type of sale, the purchaser must have enough time to make an intelligent decision on cancellation. In a parade of horribles, one can envision the vacationer who returns home a week after the purchase only to find the item will not fit through the doorway. Although the limitation thus may treat some meritorious claimants harshly, a line had to be drawn; the proposal opts for simplicity over precision. The three days is measured from the later of sale or delivery so that the purchaser will actually have the goods for at least three days before he must reach a decision on cancellation.\textsuperscript{72}

If delivery is made at the merchant's place of business, cancellation must be made by returning the goods to that place. While this may cause some hardship for those who wish to cancel, particularly travelers, any other scheme would be unfair to the typical merchant who makes all his sales over the counter. If the goods are delivered by mail, cancellation may be made by returning the goods in the mail. If the seller delivers the goods, they will in many instances be large items the return of which the buyer might find difficult to arrange within the three-day period. While the proposal puts an extra financial burden on the seller by requiring him to pick up such goods,

\textsuperscript{69} A type of posting has been required under the Economic Stabilization Program. See 6 C.F.R. § 300.13 (1974).

\textsuperscript{70} An unresolved problem is the effective communication of this information to illiterate or non-English speaking buyers.

\textsuperscript{71} \textsc{Uniform Consumer Credit Code} § 2.502(1).

\textsuperscript{72} The effective time period in which a consumer may cancel will vary greatly because of the three full business day requirement. That is, if a store is closed on the weekend, a purchase made on Friday morning could be cancelled up until closing time the following Wednesday. This imprecision is another cost of the desired simplicity.
many of these items can be expected to be costly enough that the five percent fee will defray a portion of the extra cost.

4. The Buyer's Notice Requirement

The buyer need use no special form of notice to cancel. The return of the goods signifies cancellation, and if notice is to be given apart from return, as in the case of goods to be picked up by the seller, any manifestation of intent to cancel will suffice.\textsuperscript{73}

The Uniform Commercial Credit Code has again been followed in making mailed notices and returns effective upon proper mailing,\textsuperscript{74} thus placing the burden of lost or late mail on the seller. The rationale of this mailing provision rests upon the judgment that forcing a seller to accept a late return is less offensive than depriving a buyer of the right to return. And, although requiring that mailed notices be sent by certified mail would eliminate most proof problems created by this rule, such a requirement would present too great a barrier to unsophisticated consumers.\textsuperscript{75}

5. Cooperation by Seller and Buyer

The cancellation right would be of little value if the seller, by simply refusing to allow the cancellation, could force the buyer to rely on conventional remedies to compel compliance. While it is anticipated that most merchants will quickly accept the consumer's right of cancellation as a normal aspect of conducting business, the proposal provides an additional incentive. Any seller shown to have unreasonably denied a buyer's right to cancel loses the cancellation fee, is assessed 150 dollars in liquidated damages and must pay the consumer's attorney's fees.\textsuperscript{76} The liquidated damages should act as an incentive to sue, and the provision of attorney's fees should assist in making counsel

\begin{itemize}
\item \textsuperscript{73} The authors recognize that not requiring a written cancellation will create problems of proof, particularly if one party is operating in bad faith. Problems of proof, however, would not be totally eliminated by requiring written cancellation, and such a requirement would make cancellation more difficult for the unsophisticated buyer.
\item \textsuperscript{74} \textit{Uniform Consumer Credit Code} § 2.502(3).
\item \textsuperscript{75} See Sher, \textit{supra} note 68, at 764.
\item \textsuperscript{76} In cases in which a question arises as to whether to allow cancellation, the seller initially determines the outcome. The liquidated damages and attorney's fees provisions will encourage the seller to act fairly by making fair dealing consistent with the seller's best economic interests.
\end{itemize}
available. There will, of course, still be many wronged consumers who are too unsophisticated or unmotivated to pursue this remedy by litigation. It will suffice, however, if enough litigants pursue their remedies to discourage merchants from systematically denying buyers' rights of cancellation.

In the case where the merchant must pick up the goods from the buyer, the buyer, too, must fully cooperate by facilitating the pickup or forfeit the right to cancel. Clearly, a vengeful buyer should not be granted the boon of cancellation while frustrating the merchant's right to regain possession of his property.

6. Financing Consumer Purchases

The final and perhaps most complex group of problems arises in integrating the right to cancel with the financing of consumer purchases. When the merchant finances the sale and retains a security interest, the provision operates much like it would in a cash sale. The seller refunds the down payment, minus five percent of the full cash price, and returns the note to the buyer. There would seem to be no valid reason to limit the cancellation right simply because the seller accepts a note rather than cash.

A more difficult problem arises if the note is negotiated to a holder or holder in due course. While the holder in due course doctrine is justifiably under attack in many jurisdictions, the proposal simply makes the three-day right to cancel good against anyone, even a holder in due course. To provide otherwise would make the right too easily defeasible. The probable result of this subsection will be that notes will not be negotiated until the cooling-off period has expired. While perhaps inconvenient, this delay in negotiation should not create a significant burden on sellers.

The one situation in which a simple cancellation would be inequitable is when a finance company or other lender provides the cash for the purchase of consumer goods and takes a purchase money security interest in the goods. It would seem

77. See Comment, Abolishing Holder in Due Course in Oregon Consumer Transactions: Legal and Economic Consequences, 52 Ore. L. Rev. 461 (1973).

78. A potential holder in due course could, of course, purchase the note immediately and upon cancellation rely on the seller of the goods to refund what was paid for the note.

79. See Uniform Commercial Code § 9-107(b).
unfair to leave such a true "outsider" totally uncompensated if a sale is cancelled. The proposal, therefore, provides that while cancellation does terminate such a purchase money security interest, the lender may retain up to two percent of the amount financed. This two percent fee will further discourage the exercise of the right of cancellation, but seems necessary if for no other reason than to mollify lenders who would otherwise assert that the adoption of the proposal would lead to the elimination of this form of consumer credit. What remains to be seen is whether the existence of such an exception would greatly foster the interlocking sale and loan method of financing. With this method a merchant regularly sends consumers in need of credit to a particular lender instead of financing the sale himself or subsequently discounting the consumer's note to the same lender. Clearly the exception should not apply to one who is, in reality, an "insider" to the transaction.

The authors have drafted the suggested "Buyer's Right to Cancel Without Cause" to be easily understood and exercised by buyers and accepted by merchants as a uniform and inexpensive means of dealing with a variety of consumer complaints.