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SUPPLEMENTARY NOTES:
COMPUTER SOFTWARE AND UCC LITIGATION

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In ten (10) days, the National Conference of Commissioners on Uniform State Laws will approve or disapprove the 350-page Uniform Computer Information Transactions Act (UCITA) (available at www.law.upenn.edu/bll/ulc/citaam.htm).

If you represent consumers, you should be interested in this bill because it will harm your clients and limit your ability to help them. Here are a few of the ways (in the 350 pages of mischief that constitute UCITA, there are many more problems than this. For detailed analyses, see papers by Stephen Y. Chow (UCITA Drafting Committee member) (http://www.2bguide.com/docs/CITmem.rtf), Gail Hillebrand (Consumers Union) (1999 www.2bguide.com/docs/cu699.html, 1998 www.2BGuide.com/docs/cu1098.html, 1997 www.ali.org/ali/hillga.htm, 1997 www.2bguide.com/docs/a.html), the Society for Information Management (www.2BGuide.com/docs/simltr1098.html), and Cem Kaner (1998 memo to NCCUSL http://www.badsoftware.com/kanerncc.htm, 1998 American Bar Association memo http://www.badsoftware.com/abba1998.htm, 1998 drafting committee meeting report http://www.badsoftware.com/uccnov98.htm, 1999 Analysis of e-commerce rules for FTC http://www.ftc.gov/bcp/icpw/comments/kaner.htm).

Consumer Problems of Particular Interest to Litigators

- *Enforces post-sale contract terms:*

    Terms are presented to the customer after she buys the product, takes it away, and starts to install it. The consumer who objects to the terms can return the (uninstalled, unused) product for a refund. Otherwise, the terms are enforceable unless they are found unconscionable. Post-sale warranty disclaimers and remedy limitations are specifically approved. This is an invitation for sharp practices.

- *Limits your clients' ability to sue*

    - *Choice of forum*. Any forum specified in the (post-sale, adhesion) contract is enforceable unless it is both "unfair and unjust."

    - *Choice of law.* The contract can specify any choice of law. Most choices, certainly any choices within the U.S., will be enforced.

    - *Compulsory arbitration.* This was approved directly in UCITA, but we got the language taken out. However, courts applying UCITA reasoning have enforced compulsory arbitration clauses. In a landmark case, Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997), the plaintiff was required to arbitrate a RICO case based on allegation of mass-market consumer fraud.

- *No damages*

    The contract (post-sale, adhesion) can exclude incidental and consequential damages, even the incidental expenses associated with reporting a defect that the manufacturer knew about at time of sale. (Software publishers often charge $3 to $5 per minute for technical support calls, so these

incidental expenses can run high.) Unlike Article 2, the principle of *minimum adequate remedy* is not part of UCITA. The best the typical consumer can hope for is rescission, with no damages.

- *Harder to prove breach of contract*
  - *"Material breach"* is redefined and the new definition is more seller friendly.
  - *Express warranties created by demonstration* are subject to reasonable expectation tests.

Additional Problems for Larger Customers

- Eliminates Perfect Tender Rule for non-mass-market software.

- Contract can be non-cancellable, even in the event of material breach.

- A customer who objects to post-sale terms can reject the contract and won't be bound by it if he doesn't install or use the product, but he has no right to return the product for a refund.

2B's Principles Are Being Applied to Regular Goods

- *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997).
  - Computers (not software, just goods).
  - Broadly approves enforcement of terms presented post-sale.
  - Allegations of consumer fraud, racketeering
  - Post-sale contract term (enforced) required arbitration of all disputes, under expensive (ICC not AAA) circumstances.
  - Why would this not apply to arbitration of products liability, if it applies to fraud?
- *Boyd v. Homes of Legend*, 981 F. Supp. 1423 (M.D. Ala. 1997)
  - Applies Gateway reasoning to Mobile Homes
- *M. A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. Ct. App., 1999)
  - Broadly approves enforcement of terms presented post-sale. Little of the reasoning of the case seems software-specific.

Background

UCITA was previously known as Article 2B, a proposed amendment to the Uniform Commercial Code. UCC revisions are joint projects of NCCUSL and the American Law Institute (ALI). However, Article 2B was so imbalanced against customers that the ALI passed this resolution:

> "The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records [§§2B-111, 2B-203, 2B-207, 2B-208, and 2B-304] and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent." (http://www.ali.org/ali/ACTIONS.HTM)

These changes were not forthcoming. Recently, the ALI withdrew from the project (Jean Braucher http://www.2bguide.com/docs/0499jb.html). NCCUSL chose to go forward, renaming the bill UCITA (no longer part of the UCC). All of the ALI members of the Article 2B drafting committee refused to participate in this new project. (Memo from the ALI advisors http://www.2bguide.com/docs/50799dad.html).

The most technology-sophisticated member of the NCCUSL drafting committee (apart, perhaps, from the Reporter) says the bill has "fundamental defects in the structure and approach" Stephen Y. Chow, (http://www.2bguide.com/docs/CITmem.rtf).

The Federal Trade Commission has twice taken the unusual step of submitting an analysis of this bill, has raised significant "consumer welfare" concerns, and in its recent analysis concluded,

> "We question whether it is appropriate to depart from these consumer protection and competition policy principles in a state commercial law statute." (http://www.ftc.gov/be/v990010.htm).

Opposition to UCITA / Article 2B has been widespread. Over the past four years, consumer advocates proposed several compromises but got nowhere. Eventually, we gave up and called for cancellation of the project. (Consumer advocates include: Consumers Union, Nader's Consumer Project on Technology, the Working Group on Consumer Protection, American Bar Association Business Law Section, Committee on the Law of Cyberspace, Subcommittee on Electronic Commerce and a few individuals such as myself.)

As far as I can tell, none of the Trial Lawyers Associations have played a role in this work.

Joining the consumer advocates have been software developers' professional associations, library associations, entertainment industry and newspaper/magazine publishing trade groups, and many scholars. I've appended a list of links to opposition statements to the end of this paper.

Plea For Help

As usual, public interest resources are stretched thin. I do my work *pro bono.* Consumers Union and Nader's groups can only afford limited support.

- Need help at NCCUSL meeting next week. Killing it there will be much more effective than killing it state by state.

- Need support, planning for legislative fight.

Delaying introduction of UCITA into state legislatures by another year is possible, but there is a spreading influence of UCITA on the common law and on other statutes (Article 2 revision, Uniform Electronic Transactions Act draft). If we wait too long, we might kill UCITA but lose on all of the terms that we oppose.

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Cem Kaner practices law, usually representing individual developers, authors, and customers. His focus is on the law of software quality. He is also actively involved in legislation affecting the law of software quality. He attends, as a participating observer, Drafting Committee meetings for Uniform Commercial Code Article 2B and for the Uniform Electronic Transactions Act. He has also served *pro bono* as a Deputy District Attorney, and as an investigator/mediator for a California county's Consumer Affairs Department. He has just published a new book on consumer protection*, Bad Software: What to Do When Software Fails.* See http://www.badsoftware.com.

Kaner consults on technical and software development management issues and teaches about software quality control at UC Berkeley Extension, and at several software companies. He founded and hosts the Los Altos Workshops on Software Testing. His book, *Testing Computer Software*, received the *Award of Excellence* in the Society for Technical Communication's 1993 Northern California Technical Publications Competition. Kaner has worked as a director of documentation and software testing, software development manager, manager of technical publications, manager of software testing, programmer, human factors analyst, user interface designer, software salesperson, and as an associate in an organization development consulting firm. See http://www.kaner.com.

Kaner holds a B.A. (Math, Philosophy), a Ph.D. (Experimental Psychology) and a J.D.. He is Certified in Quality Engineering by the American Society for Quality.