

Computer Software & UCC Litigation

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Overview: UCITA

- Uniform Computer Information Transactions Act
- 350 page proposed statute to govern all contracts involving software and digitally stored information.
- Opt in clauses can bring in goods sold with software.
- Was proposed as an amendment to the Uniform Commercial Code, known as Article 2B, but American Law Institute withdrew from the drafting project, knocking it out as a UCC amendment.
- **Will be voted on by National Conference of Commissioners on Uniform State Laws on July 29. Meeting: July 22-29 in Denver.**

Current Law

- Packaged software (commercial off the shelf software, COTS) is governed by UCC Article 2.
- Custom software is treated variably, sometimes under Article 2 even though the essence of the contract is a service contract.
- UCITA goal is to unite goods/services law as it applies to software transactions.

UCITA is Customer Unfriendly

- Primary backers are
 - the UCITA drafting committee,
 - NCCUSL executives,
 - Business Software Alliance (the largest software publishers)
 - Software Publishers Association
 - Silicon Valley Software Industry Coalition
 - some banks, some computer manufacturers, Chrysler

UCITA is Customer Unfriendly

- Primary opponents are
 - consumer advocates
 - software development professional societies
 - quality assurance professional societies
 - librarians
 - news media trade associations
 - many reporters (especially, but surprisingly, the trade press)
 - entertainment industry
 - many IP and contracts professors

UCITA: Pre-Sale Disclosure

- Most terms of contract can be disclosed post sale.
 - Mass-market customer either returns the product on learning of bad terms (while installing the software) or is bound by them.
 - Non-mass-market customer can reject the terms but has no right to a refund if she does so.
- American Law Institute resolution:
 - “The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision.”

UCITA Issues

- Post sale warranty disclaimers are fully enforceable
- Limits formation of express warranties. Demonstrations that would create express warranties under Article 2 do not do so under 2B.
- Takes software outside of the scope of Magnuson Moss and other state consumer protection statutes that apply to sales of goods, by defining a software transaction (even a purchase of consumer software in a box at a bookstore) as a licensing transaction, not a sale of goods.

UCITA Issues

- Remedy limitations, including you cannot cancel this contract clause.
- No accountability for known defects.
 - 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.
- Vendor can charge nonrefundable fees for "support" when customer calls to complain about defects.
- No "minimum adequate remedy".

UCITA Issues

- Choice of law
 - minimal restriction
 - for consumers, must have US-like protections
- Choice of forum
 - minimal restrictions
 - choice cannot be both unfair and unjust

Compulsory Consumer Arbitration

- Not a UCITA case, but applies UCITA reasoning
 - 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

Plea For Help

- Denver, July 22-- Final UCITA meeting
- Denver, July 23 ~~26~~- UCITA debate
- Denver, July 29-- NCCUSL vote

- Write Commissioners from your State
 - Commissioner list, hotel address / fax, at my website,

www.badsoftware.com

- Come to Denver
- Write a letter for broad distribution to NCCUSL
- Do something else that exercises influence.