Contracting with Consumers in the US: Overview

by Rebekah B. Kcehowski, Jones Day

Practice note: overview | Law stated as at 01-Jun-2023 | United States

A Practice Note for foreign counsel to those providing goods, services, or digital content directly to consumers in the US. This Note provides an overview of how the laws of the US regulate contracts with consumers for the sale of goods and the supply of services and digital content and includes consideration of key terms commonly included in consumer contracts.

In the US, consumer contracts are governed by multiple bodies of law that can vary from jurisdiction to jurisdiction. This Note discusses the relevant regulatory regimes for consumer contracts under US law, including who qualifies as a consumer, and looks at:

- Rights, controls, and limitations in contracting with consumers, including rules related to key contract terms like delivery, quality, guarantees, and limitations of liability.
- Rights and remedies at each stage of the consumer contracting process, including pre-contract, contract formation, and post-contract assistance.

This Note does not address industry- or sector-specific legislation protecting consumers in, for example, the financial services, pharmaceutical, or travel industries, or regulations governing advertising, marketing, packaging, or product liability or safety. This Note is also intended to be an introduction and overview of key consumer contract issues. It is not a 50-state survey and does not summarize specific rules or laws on a state-by-state basis.

When the Laws Regulating Contracts with Consumers Apply

The US does not have a general national law of consumer contracts. Instead, each state (as well as territories in the US and the District of Columbia) has its own contract law. While many of the principles discussed in this Note regarding consumer agreements are shared by different states, it is important to determine:

- Which state’s law governs the consumer contract at issue.
- The specific requirements of the laws in that particular state.

(Restatement (Second) Conflict of Laws §188.)

While the basic framework of consumer contract law comes from judge-made common law at the state level, statutes have played a larger role in recent years, in particular:

- At the state level:
    - Article 2 of the Uniform Commercial Code (UCC) is the most important statute covering the sale of goods and has been implemented across many states in whole or with small variations; and

    - other model statutes exist in related areas. For example, the Uniform Deceptive Trade Practices Act deals with consumer protection, and many states have adopted consumer protection statutes modeled on that Act.

- At the federal level, there are statutes regulating specific aspects of consumer contracts, for example:
    - the Federal Trade Commission Act (which regulates fair commercial practices for consumers);
    - the Federal Arbitration Act (which covers arbitration clauses); and
    - the Magnuson-Moss Warranty Act (which covers written warranties and some aspects of implied warranties on consumer products).

Across these state and federal laws, consumers are typically understood to be individuals who transact with a business for personal, family, or household purposes, not for business purposes. The UCC, for example, defines a consumer as "an individual who enters into a transaction primarily for personal, family, or household purposes" (UCC § 1-201). State consumer protection laws provide similar definitions of "consumer" (see, for example, 815 Ill. Comp. Stat. 505/1(e); Mont. Code 30-14-102(1); see also 9 Vt. Stat. § 2451a (1) ("consumer" is a person purchasing goods or services for household/business use); Kan. Stat. § 50-624(b) (same)).

In some states, consumer protection laws extend to protect business organizations acting as consumers or contract counterparties in addition to individual consumers (see, for example, 815 Ill. Comp. Stat. 505/1(c), (d); Tex. Bus. & Com. Code § 17.45(4)).

The UCC applies to all sales of goods whether the sales are made by individuals or businesses, but extra protections can apply to sales of goods by merchants. See Minimum Standards for Goods, Services, and Digital Content.

State consumer protection laws apply to consumer transactions, regardless of whether the seller is a business or an individual (see, for example, Colo. Rev. Stat. §§ 6-1-102(6), 6-1-105; Conn. Gen. Stat. §§ 42-110a (3), 110-b(a)).

General Principles of the Laws Regulating Contracts with Consumers

Both US federal and state laws impose general principles of fair commercial practices for consumer contracts. In addition, most jurisdictions impose a duty of good faith and fair dealing on sellers and thereby require that they adhere to commercially reasonable practices (see Minimum Standards for Goods, Services, and Digital Content).

Federal Law

The Federal Trade Commission Act regulates fair commercial practices for consumers. In particular, the Act prohibits "unfair or deceptive acts or practices in or affecting [interstate] commerce" (15 U.S.C. § 45(a)(1)). Under the Act, the Federal Trade Commission (FTC) has the authority to define a practice as unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition" (15 U.S.C. § 45(n)).

The FTC has issued numerous guides interpreting the prohibition on unfair or deceptive acts in the context of different industries and practices (16 C.F.R. Part 17). Many of these guidelines are very specific. For example, 16 C.F.R. § 24.3 addresses when leather and imitation leather products may be defined as waterproof. For other consumer statutes and regulations enforced by the FTC, see *Statutes Enforced or Administered by the Commission*.

State Law

Many states have also enacted consumer protection statutes. These statutes vary significantly by state. Some state consumer protection laws are general and do not define many specific types of prohibited acts. New York's statute, for example, prohibits "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state" (N.Y. Gen. Bus. Law § 349(a)).

By contrast, other state consumer protection statutes list specific unfair practices. For example, Pennsylvania's statute lists 21 specific unfair practices, California's lists 27, and Texas's lists 34. Many of these statutes follow the Uniform Deceptive Trade Practices Act (UDTPA) and therefore list the same types of practices as unfair. There are 12 overlapping unfair practices in the Pennsylvania, California, and Texas statutes:

- Passing off goods or services as those of another.
- Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- Misrepresenting the affiliation, connection, or association with, or certification by, another.
- Using deceptive representations or designations of geographic origin in connection with goods or services.
- Representing that:
    - goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have; or
    - a person has a sponsorship, approval, status, affiliation, or connection that they do not have.
- Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or second-hand.
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model if they are of another.
- Disparaging the goods, services, or business of another by false or misleading representation of fact.
- Advertising goods or services with intent not to sell them as advertised.
- Advertising goods or services with intent not to supply reasonably expectable demand unless the advertisement discloses a limitation of quantity.
- Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.
- Representing that a part, replacement, or repair service is needed when it is not.

(Cal. Civ. Code § 1770(a); see Tex. Bus. & Com. Code § 17.46(b); 73 P.S. § 201-2(4)).)

Some state consumer protection statutes also list specific unfair practices that other states' statutes do not. California's statute, for example, makes it unfair to advertise "furniture without clearly indicating that it is unassembled if that is the case" or to insert "an unconscionable provision in the contract" (Cal. Civ. Code § 1770(a)(11), (19)).

Although state laws vary and are not required to follow (but cannot conflict with) federal law, many states follow the FTC in interpreting their own unfair trade practices acts (for example, Ga. Code § 10-1-391(b) (Georgia) and Mass. Gen. Laws ch.

93A § 2(b), (c) (Massachusetts)). Accordingly, practices listed as unfair by the FTC may also be considered unfair under state law in some states.

State Common Law and the UCC

Under both the UCC and the common law, states may refuse to enforce unconscionable consumer contract terms. (UCC § 2-302).

To determine if a consumer contract term is unconscionable, courts typically consider both procedural unconscionability and substantive unconscionability. Some states, like California, require that both types of unconscionability be present to void a contract, but "they need not be present in the same degree" (*Baltazar v. Forever 21 Inc*., 367 P.3d 6, 11 (Cal. 2016)).

Rather, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (Id.) But in other states, like Illinois, unconscionability "can be either ‘procedural’ or ‘substantive’ or a combination of both." (*Razor v. Hyundai Motor Am*., 854 N.E.2d 607, 622 (Ill. 2006)).

Procedural Unconscionability

Procedural unconscionability exists when there is a significant disparity in information or bargaining power between the parties. Some states, like California, consider all consumer contracts of adhesion to "contain a degree of procedural unconscionability" (*Baltazar*, 367 P.3d at 11). Other states, like New Jersey, do not (see *Stelluti v. Casapenn Enters*., LLC, 1 A.3d 678, 687-88 (N.J. 2010)).

In *Gillman v. Chase Manhattan Bank*, the New York Court of Appeals listed several factors to consider when determining procedural unconscionability:

- The size and commercial setting of the transaction.
- Whether deceptive or "high-pressured" tactics were employed.
- The use of fine print in the contract.
- The experience and education of the party claiming unconscionability.
- Whether there was a disparity in bargaining power.

(*Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 828 (N.Y. 1988).)

Substantive Unconscionability

Substantive unconscionability exists when a contract term is "so one-sided as to 'shock the conscience'" (*Sanchez v. Valencia Holding Co*., LLC, 353 P.3d 741, 748 (Cal. 2015)). In judging substantive unconscionability, courts look at "the terms of the contract . . . in light of the circumstances existing when the contract was made," as well as "the mores and business practices of the time and place" (*Williams v. Walker-Thomas Furniture Co*., 350 F.2d 445, 450 (D.C. Cir. 1965)).

Pre-Contract Considerations

Provision of Pre-Contract Information to Consumers

Consumers typically need to have access to contract terms before an agreement can be reached as to those terms, but a consumer contract does not have to define all performance details to be enforceable.

Under the UCC, for example, a seller and a consumer may agree to a contract without agreeing on price or delivery terms (UCC §§ 2-305(1), 2-308). In that circumstance, the price must be "reasonable . . . at the time for delivery" (UCC §2-305(1); Restatement (Second) of Contracts § 33 cmt. (e)), and the time of delivery must be "reasonable" (UCC § 2-309(1); Restatement (Second) of Contracts § 33 cmt. (d).)

Therefore, the terms of a consumer contract need only be "reasonably certain" to be enforceable (Restatement (Second) of Contracts § 33 cmt. f.). "If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract" (Restatement (Second) of Contracts § 33 cmt. a).

Liability for Pre-Contract Statements

At common law, misrepresentation generally makes a contract voidable by a party if that party's "manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party on which the recipient is justified in relying." (Restatement (Second) of Contracts § 164.) Therefore, to void a contract on grounds of misrepresentation, a party must generally show that:

- A misrepresentation was made.
- The misrepresentation was either fraudulent or material.
- The misrepresentation induced the party to enter into the contract.
- The party was justified in relying on the misrepresentation.

(Restatement (Second) of Contracts § 164 cmt. a).)

The UCC adopts the common law standards for fraud and misrepresentation (UCC § 1-103(b)).

Non-contract remedies may also be available for misrepresentation in certain states. For example, some states allow victims of fraudulent misrepresentation to sue for tort, in addition to breach of contract, and so they can seek to recover more damages than would be available in a standard breach of contract suit (for example, *Lazar v. Super. Ct.*, 909 P.2d 981 (Cal. 1996); *Formosa Plastics Corp. U.S. v. Presidio Eng'rs & Constrs.*, 960 S.W.2d 41 (Tex. 1998)).

Most states have also enacted consumer protection or unfair trade practices statutes allowing consumers to recover damages for misrepresentation and other unfair practices if the statutory provisions are met. For example, a California statute allows a "consumer who suffers any damages as a result" of an unfair trade practice to bring suit for:

- Actual damages.
- An order enjoining the methods, acts, or practices.
- Restitution of property.
- Punitive damages.
- Any other relief that the court deems proper.

(Cal. Civ. Code § 1780(a).)

In addition to consumer protection statutes, misrepresentations may also breach state advertising or unfair competition statutes (for example, Cal. Bus. & Prof. Code § 17500 (creating penalties for "untrue or misleading" advertising) and § 17200 (declaring false advertising to be unfair competition)).

The Second Restatement identifies four situations where silence can constitute misrepresentation:

- The party knows disclosure of the fact is necessary to prevent some previous statement from being a misrepresentation or from being fraudulent or material.
- The party knows disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract, and non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
- The party knows disclosure of the fact would correct a mistake of the other party as to the contents or effect of a written document, which verifies or embodies an agreement in whole or in part.
- The other party is entitled to know the fact because of a relation of trust and confidence between them.

(*Harley-Davidson Motor Co. v. Powersports, Inc*., 319 F.3d 973, 991 (7th Cir. 2003) (quoting Restatement (Second) of Contracts § 161).)

Contractual terms excluding liability for misrepresentation are valid unless they are unreasonable (Restatement (Second) of Contracts § 196). While states define unreasonableness in different ways, a common approach is to distinguish between innocent and intentional misrepresentations.

Parties often exclude liability for innocent misrepresentations by including a "merger clause" in their contracts stating that the contract is the complete expression of the parties' agreement. Under both the UCC and the common law, such a merger clause triggers the parol evidence rule, which prohibits parties from contradicting their contract with evidence of past statements regarding agreement terms or contemporaneous oral agreements (UCC § 2-202; Restatement (Second) of Contracts § 213).

Therefore, the parol evidence rule shields parties from liability due to any innocent inconsistencies between the contract and the party's past statements. It does not, however, prohibit introduction of evidence regarding fraudulent misrepresentation. (Restatement (Second) of Contracts § 214; see, for example, *Bird Lakes Dev. Corp. v. Meruelo*, 626 So.2d 234, 238 (Fla. Dist. Ct. App. 1993)).

Contract Formation

At common law, forming a contract requires two elements:

- **Assent.** This typically takes the form of an offer and acceptance. It must be "sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Express Indus. & Terminal Corp. v. New York State Dep't of Transp*., 715 N.E.2d 1050, 1053 (N.Y. 1999)). Nevertheless, "not all terms of a contract need to be fixed with absolute certainty" (Id.). In judging assent, courts look to "objective" manifestations of assent (Id.).
- **Consideration.** Consideration is a promise, performance, or forbearance provided by a contract counterparty for their own promises. In the typical consumer contract, there is consideration because the consumer receives a good or service, while the seller receives payment.

(Restatement (Second) of Contracts § 17(1).)

The UCC focuses on assent and does not emphasize consideration. Therefore, a "contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract" (UCC § 2-204).

As to accepting offers, the common law typically provides that, "[u]nless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received" (Restatement (Second) of Contracts § 65). The UCC takes an even broader approach, providing that unless the offer "unambiguously" indicates otherwise, it may be accepted "in any manner and by any medium reasonable in the circumstances" (UCC § 2-206(a)).

Even when a contract is formed, it may be void or voidable, for example:

- Contracts may be void if they are illegal or violate public policy.
- Contracts may be voidable by one or more parties for other reasons, such as mistake, misrepresentation, duress, undue influence, or unconscionability.

Incorporation of Terms and Conditions

Under the common law, consumer contracts may incorporate contract provisions by reference. In order for such an incorporated provision to become part of a contract, the incorporated provision must be clearly referenced in the contract "in such terms that its identity may be ascertained beyond doubt" (11 Williston on Contracts § 30:25 (4th ed.)). Consumers must also have knowledge of and agree to the incorporated terms (Id.).

For an online contract, it is generally sufficient to require the consumer to tick a box confirming acceptance of terms accessible via a link when the consumer has reasonable notice of the terms, a reasonable opportunity to review them, and an "unambiguous method" to accept or decline the terms (*Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012); E-Commerce and Internet Law § 21.03[2] (2020) (collecting cases); Restatement of Consumer Contracts § 2(a) (2019 draft)).

Format and Presentation of Terms and Conditions

A combination of court decisions and statutes governs the format and presentation of terms in consumer contracts. The common law rule is that even if a consumer signs a contract, the consumer does not agree to "the terms of a document [that] are not fairly legible . . . unless they were actually known" (2 Williston on Contracts § 6:47 & n.1 (4th ed.)).

In addition, various jurisdictions have established requirements that particular terms appear conspicuously in consumer contracts or otherwise appear in particular font or sizes (Id. & nn. 10, 11; see, e.g., Va. Code § 11-4). This includes, in particular, jury waivers, arbitration clauses, and other terms limiting remedies. (42 A.L.R.5th 53 § 9; 1 Domke on Com. Arb. § 9:13; 4B Anderson U.C.C. § 2-719:27 (3d. ed.)).

Jurisdictions also vary in their requirements concerning sellers making consumer contracts available in non-English languages (*Rosana Hernandez-Nieto, Language Legislation in the United States, *44-49 (2017)).*

Nevertheless, "courts generally hold that the fact that an offeree cannot read, write, speak, or understand the English language is immaterial if no fraud is practiced upon the offeree" (2 Williston on Contracts § 6:47 (4th ed.)).

Further rules govern contracts with minors and adults with mental illness, who have distinct rights to void contracts. A minor may void contracts before reaching the age of 18, excluding contracts for necessities (see *Rodriguez v. Reading Hous. Auth.*, 8 F.3d 961, 964 (3d Cir. 1993), Restatement of Contracts (Second) of Contracts, § 14), while an adult who cannot understand a transaction as a result of "mental illness or defect" may void a contract if the seller knows of the adult's incompetence and the contract's terms are commercially unreasonable (Restatement of Contracts (Second) of Contracts, § 15).

As a final matter, under the UCC and the common law, most contracts for the sale of goods for the price of US$500 must be in writing (UCC § 2-201; Restatement (Second) of Contracts § 110(2)).

Controls on Changes to Products and Contract Terms

The parties to a consumer contract can agree to reasonable terms regarding changes to products and contract terms.

Generally, in the absence of specific contract terms providing otherwise, consumers can accept or reject goods that do not adhere to the terms of a contract. Under UCC § 2-601, "if the goods . . . fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest" (see also Restatement (Second) of Contracts § 278).

And even if the buyer accepts non-conforming goods upon delivery, a consumer may revoke acceptance "within a reasonable time" of goods "whose non-conformity substantially impairs [their] value," if either:

- The seller does not cure non-conformity despite a reasonable expectation that it would occur.
- The seller assured that the goods provided adhered to the contract, or the nonconformity of the goods was difficult to discover.

(UCC § 2-608.)

Therefore, under the UCC, a contracting party must obtain consumers' consent through prior agreement or otherwise to adjust the products supplied to a consumer.

Contract terms in consumer contracts can typically be modified, consistent with the terms of any agreed-upon modification clause in the contract. Consumer agreements often contain modification clauses allowing changes and requiring varying degrees of notice to the consumer.

Under the UCC, barring any agreement otherwise, if a party desires to modify the provisions of a contract involving the sale of goods for the price of US$500 or more, that modification must be in writing and accepted by the consumer, but does not require consideration to be binding. (UCC § 2-209; see also Restatement (Second) of Contracts § 279).

Cancellation Rights (Cooling-Off Periods)

Once a consumer contract is formed, the right to cancel the agreement and the parties' associated obligations are generally set by the terms of the contract itself. Parties to consumer contracts can agree to cancellation terms and return rights, up to and including the ability to cancel an agreement at any time for any reason.

Special Cancellation Rules Apply to Door-to-Door Sales

Generally, no national laws regulate door-to-door selling. This issue is typically regulated on a more local level by counties or cities within states. For example, the county containing Las Vegas, Nevada passed a law in 2016 requiring most door-to-door

salespeople to carry identification, respect certain signage, and operate only during the daytime (*Clark Cnty. Ordinance No. 4374*). Many other states have similar laws, usually restricting door-to-door sales by minors (see *State Regulation of For-profit Door-to-door Sales by Minors, Dep't of Labor (Jan. 1, 2020)).*

The FTC has instituted a rule that gives consumers three business days to cancel any door-to-door sale of US$25 or more if made at the consumer's home and US$130 or more if made elsewhere (16 C.F.R. §§ 429.0, 429.1(a)). For these consumer contracts, the seller bears the costs of picking up the goods, although the consumer can be liable if they are not "in substantially as good condition as when received" (16 C.F.R. § 429.1(b)). Buyers can waive this cancellation right "to meet a bona fide immediate personal emergency" by drafting a written statement to this effect" (16 C.F.R. § 429.0.(a)(3)). This federal rule does not apply to consumer contracts formed by telephone (16 C.F.R. § 429.0.(a)(4)), although "[a]t least 29 states specifically include telephone sales in their cooling-off statutes, or have had them included by court decision" (Consumer Credit and the Law § 14:12 (2022)).

Cancellation Rights and Contractual Mistake

In most states, a contract may be voided, and treated as if it had not been formed, based on mutual mistake by both parties if three conditions are met:

- The mutual mistake was made as to a basic assumption on which the contract was made.
- The mistake has a material effect on the agreed exchange of performances.
- The adversely affected party should not bear the risk of the mistake.

(Restatement (Second) of Contracts § 152(1).)

Most states also allow a contract to be voided, and treated as if it had not been formed, based on a unilateral mistake by one party, but only if one of the following requirements is met in addition to the above three:

- The effect of the mistake is such that enforcement of the contract would be unconscionable.
- The other party had reason to know of the mistake or its fault caused the mistake.

(Restatement (Second) of Contracts § 154.)

However, a party cannot void a contract based on mistake (mutual or unilateral) if that party bears the risk of mistake. This can occur in at least three situations:

- The parties agree to allocate the risk to that party.
- The party knows, at the time the contract is made, that it only has limited knowledge of the facts to which the mistake relates but treats that limited knowledge as sufficient.
- The risk is allocated to that party by the court on the grounds that it is reasonable in the circumstances to do so.

(Restatement (Second) of Contracts § 154.)

The UCC adopts these common law standards for mistake (UCC § 1-103(b)).

Duration and Automatic Renewal of Consumer Contracts

For consumer contracts requiring a single performance, sellers must deliver the goods or perform the contracted services within a reasonable time (Restatement of the Law (Second), Contracts § 33 cmt. d; see UCC § 2-309(1)). If a consumer contract "provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party" (UCC § 2-309(2); Restatement of the Law (Second), Contracts § 33 cmt. d.).

Automatic renewals of consumer contracts are subject to federal and state regulation. Under the Restore Online Shoppers' Confidence Act, for example, sellers offering automatic-renewal contracts involving the sale of goods or services online must "clearly and conspicuously disclose… all material terms of the transaction before obtaining the consumer's billing information," "obtain… a consumer's expressed informed consent before charging the consumer…," and "provide…simple mechanisms for a consumer to stop recurring charges" (15 U.S.C. § 8403).

Many states also regulate automatic-renewal contracts, but vary in their applicability and requirements (see Eric C. Surette, Annotation, Consumer Protection: Automatic Renewal Clauses, 32 A.L.R. 7th 5 (2017); see also, for example, 815 Ill. Comp. Stat. 601/10(a), (b)).

Pricing and Payment

Whether a contract must state the price to be valid varies by state and the type of contract, and also depends on the context and the other terms of the parties' agreement. Under the UCC, the parties "can conclude a contract for sale [of goods] even though the price is not settled." (UCC § 2-305(1).) In that case, the price defaults to "a reasonable price at the time of delivery if" the parties do not agree on some other price for the goods (id.).

Similarly, at common law, in some states, "open price provisions are enforceable in sales contracts." (*Am. Trading & Prod. Corp. v. Fairfax Cnty. Bd. of Supervisors*, 200 S.E.2d 529, 532 (Va. 1973) (collecting cases)).

In both contracts for the sale of goods and services "involving an open price term," the courts may impute a "reasonable" price if the parties do not specify one of their own (*Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515, 519-21 (Ohio 1990)*). A reasonable price will typically mean the item's fair market value or a price established by the parties' previous course of performance.

Price can be a required term in at least two circumstances:

- "The parties intend not to be bound unless the price be fixed or agreed." In this case, there will be no contract if the parties do not agree on the price, or if it is not fixed (UCC § 2-305(4)).
- The contract is also missing other important terms and the lack of a price may make the contract too indefinite to enforce. For example, New York's highest court has refused to enforce a contract that lacked duration as well as price (Exp. Indus., 93 N.Y.2d at 590-91). Other courts have also declined to enforce contracts lacking price terms along with other important terms (for example, ATA Airlines, Inc. v. Fed. Express Corp., 665 F.3d 882, 885-88 (7th Cir. 2011); White Sands Grp., L.L.C. v. PRS II, LLC, 998 So.2d 1042, 1052 (Ala. 2008); see also Conkling v. Turner, 18 F.3d 1285, 1301 (5th Cir. 1994)).

Many states require that sales tax be stated separately from the purchase price (see, for example, Fla. Stat. § 212.07(c)(2); N.Y. Tax Law § 1133(d)(1)(ii)).

The Fair Debt Collection Practices Act requires that for sellers to charge consumers interest on late payments, it must be "expressly authorized by the agreement creating the debt or permitted by law" (15 U.S.C. § 1692f(1)). Various state regulations also provide restrictions on when sellers can impose costs on consumers for late payments (see, for example, Norman I. Silber,

Late Charges, Regular Billing, and Reasonable Consumers: A Rationale for a Late Payment Act, 83 Chi. Kent L. Rev. 855, 860 (2008)).

Various states have precluded sellers from imposing surcharges on consumers who use credit cards in transactions (see, for example, Tex. Bus. & Com. Code § 604A.0021(a)). Depending on the provisions of such surcharge statutes, they may violate the First Amendment by restricting sellers' freedom of speech (see, for example, *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1168 (9th Cir. 2018)).

Sellers may not retain non-refundable deposits when non-refundable deposits violate restrictions on liquidated damages (see, for example, *Lee Oldsmobile, Inc. v. Kaiden*, 363 A.2d 270, 274 (Md. Ct. App. 1976); UCC § 2-718). "The fact that the contract expressly states that the buyer will forfeit the deposit which will be retained by the seller as damages for a breach of the contract by the buyer does not entitle the seller to retain the deposit when the provision would be void as a liquidated damages clause" (4A Part II Anderson U.C.C. § 2-718:39 (3d. ed.)). Sellers may nevertheless request that consumers pay before delivering any goods or performing a service.

Delivery of Goods and Supply of Services and Digital Content

Deadlines for Delivery and Supply

Parties may agree to a specific time for the delivery of goods or it may otherwise be "implied from the contractual circumstances, usage of trade, or course of dealing" (UCC § 2-309 cmt. 1). In addition, unless a contract or circumstances indicate otherwise, the performance of a service or delivery of goods must occur at one time if possible (Restatement of the Law (Second), Contracts § 233(1); UCC § 2-307).

For contracts that call for a single performance at an unspecified time, such as the delivery of goods or the rendering of a service, performance must occur within a "reasonable time" (Restatement of the Law (Second), Contracts § 33 cmt. d; UCC § 2-309(1)).

Transfer of Title to and Risk in Goods

The transfer of title to goods can occur "in any manner and on any conditions explicitly agreed on by the parties" (UCC § 2-401(1)).

Absent an explicit agreement, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods" (UCC § 2-401(2)). If a contract obliges a seller to send the goods to a buyer, but not to deliver them to a particular destination, "title passes to the buyer at the place and time of shipment" (UCC § 2-401(2)(a)). If delivery at a particular destination is required by contract, title of the goods passes upon tender there (UCC § 2-401(2)(b)).

If a contract does not provide for the movement of goods, no document of title needs to be delivered, and the seller has identified the goods being sold, title passes at the time and place of contracting. If a title document must be delivered, title passes when the document is delivered (UCC § 2-401(3)(a), (b)).

If a contract requires a seller to ship goods via carrier but not to deliver them to a particular destination, the seller passes the risk to the buyer when the goods are given to the carrier. (UCC § 2-509(1)(a).) If the seller is required to deliver the goods to a particular destination, however, and a carrier delivers the goods, "the risk of loss passes to the buyer when the goods are duly tendered as to enable the buyer to take delivery" (UCC § 2-509(2)).

Notification of Defects by Consumers

Barring specific contract provision stating otherwise, a buyer must "seasonably" notify a seller of a rejection of goods, which must occur within a reasonable time after the goods' delivery (UCC §§ 2-602(1), 1-205(b)). If a buyer does not communicate a readily identifiable defect to a seller, the buyer may not rely on that defect "to justify rejection or to establish breach where the seller could have cured it if stated seasonably" (UCC §§ 2-605(1)(a)). In addition, if a buyer accepts a tender and thereafter discovers or should have discovered a breach by the seller, the buyer must notify the seller of the breach within a reasonable time. (UCC § 2-607(3)(a)). A buyer generally cannot waive the right to inspect goods for defects, which may be exercised at "any reasonable time" (UCC § 2-513(1) & cmts. (1), (3)).

A buyer can renounce any claim for damages caused by the seller's breach of contract in delivering defective goods or rendering defective services (Restatement of the Law (Second), Contracts § 277). The buyer must sign and deliver the written renunciation to the seller for total breaches, but oral renunciations are sufficient for partial breaches (Restatement of the Law (Second), Contracts § 277 cmts. b, c.).

Quality of Goods, Services, and Digital Content

Minimum Standards for Goods, Services, and Digital Content

States typically imply the following terms into most consumer contracts:

- The implied warranties of merchantability and fitness for a particular purpose.
- The more general duty of good faith and fair dealing.

As defined by the UCC, the implied warranty of merchantability applies to contracts for the sale of goods where "the seller is a merchant with respect to goods of that kind." (UCC § 2-314(1).) The implied warranty requires that the goods meet six requirements:

- Pass without objection in the trade under the contract description.
- In the case of fungible goods, are of fair average quality within the description.
- Are fit for the ordinary purposes for which such goods are used.
- Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved.
- Are adequately contained, packaged, and labeled as the agreement may require.
- Conform to the promise or affirmations of fact made on the container or label, if any.

(UCC § 2-314(2).)

The implied warranty of fitness for a particular purpose applies where the seller at the time of contracting has reason to know:

- Any particular purpose for which the goods are required.
- That the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.

In that case, there is "an implied warranty that the goods shall be fit for such purpose" (UCC § 2-315).

These implied warranties, however, may be waived (UCC § 2-316(2)). For the requirements for waiving these warranties, see Limiting Liability.

In addition to the implied warranties, both the UCC and the common law of most states impose a more general duty of good faith and fair dealing (UCC § 1-304). For merchants, the UCC defines good faith as "honesty in fact and the observance of reasonable commercial standards for fair dealing in the trade" (UCC § 2-10(1)(b)).

The duty of good faith and fair dealing is more difficult to define precisely at common law. The US Supreme Court has cautioned that: "While most states recognize some form of the good faith and fair dealing doctrine, it does not appear that there is any uniform understanding of the doctrine's precise meaning." (*Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014).) Some states allow parties to waive the duty of good faith, while others do not.

In the US, "courts . . . have consistently classified the sale of a software package as the sale of a good for UCC purposes" (*Rottner v. AVG Techs. USA, Inc*., 943 F. Supp. 2d 222, 230 (D. Mass. 2013) (collecting cases)), thereby implying the same warranties as other goods. For example, a federal court concluded that "computer software system and upgrades, to be merchantable, must have been capable of passing without objection in the trade under the contract description, and fit for the ordinary purposes for which they were intended." (*Vision Graphics, Inc. v. E.I. Du Pont de Nemours & Co*., 41 F. Supp. 2d 93, 99 (D. Mass. 1999).) That said, courts have acknowledged that software is not necessarily a good subject to an implied warranty of merchantability. Courts instead generally evaluate the contract in question to determine whether the sale of goods or services predominates (*Rottner*, 943 F. Supp. 2d at 230; *Advent Sys. Ltd. v. Unisys Corp*., 925 F.2d 670, 676 (3d Cir. 1991); *RRX Indus., Inc. v. Lab-Con, Inc*., 772 F.2d 543, 546 (9th Cir. 1985).) Regardless, consumer contracts for digital content impose duties of good faith and fair dealing (see Restatement (Second) of Contracts § 205).

Updating Digital Content

State law does not generally impose any obligations on a party contracting with a consumer to supply updates to digital content. These obligations could arise only in a contract to provide current digital content to consumers. If such a contract required that consumers receive updated digital content, a consumer would have access to standard contractual remedies to enforce such a requirement.

Nevertheless, if a consumer agrees to waive a contractual right to receive updated digital content, then the waiver would bind the consumer upon agreement to a substitute contract or other amended performance provided by the seller (see Restatement (Second) of Contracts §§ 278, 279).

Consumers' Remedies for Defective or Misdescribed Goods

Consumers can pursue various remedies for deceptive or misdescribed goods.

At common law, damages are the standard remedy for breach of contract, including in consumer contracts. Damages are typically awarded based on the injured party’s expectations and are intended to "put the promisee in the same position as if the promisor had performed the contract" (*Duncan v. TheraTx, Inc*., 775 A.2d 1019, 1022 (Del. 2001)).

Under a typical formulation, the non-breaching party’s damages are calculated as:

- The loss to the non-breaching party.
- Minus any cost or other loss that it has avoided by not having to perform.

(*VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 293-94 (3d Cir. 2014) (citing Restatement (Second) of Contracts § 347).)

At common law, damages are also limited by the duty to mitigate. Under that duty, "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation" (Restatement (Second) of Contracts § 350). However, if the injured party made "reasonable efforts . . . to avoid loss," then it may recover damages even if its reasonable efforts were ultimately unsuccessful (Id.). In addition, damages may not be recoverable for losses that were unforeseeable at the time the contract was made (Restatement (Second) of Contracts § 351).

State consumer protection laws may also provide additional statutory penalties and remedies for consumer claims, amplifying damages available to consumers in certain contexts (see Liability for Pre-Contract Statements).

Less commonly, a court may order a party to comply with a contract (specific performance). Courts award this remedy only if "the subject matter of the contract is unique" such that there is too much "uncertainty of valuing it" for the purposes of assigning damages (*Van Wagner Adver. Corp. v. S & M Enters.*, 492 N.E.2d 756, 760 (N.Y. 1986)). Moreover, courts will not order specific performance if it would "be an undue hardship" on the breaching party (Id. at 761). The UCC follows this approach, allowing specific performance only "where the goods are unique or in other proper circumstances," subject to "such terms and conditions . . . as the court may deem just" (UCC § 2-716; see also *Sherwin Alumina L.P. v. AluChem, Inc.*, 512 F. Supp. 2d 957, 970 (S.D. Tex. 2007)).

Contracts may also set their own damages, such as through fixed early termination fees. These provisions are known as liquidated damages provisions. But unreasonably large liquidated damages are "unenforceable on grounds of public policy as a penalty" (UCC § 2-718(1); see Restatement (Second) of Contracts § 356(1) (same)).

Guarantees and Warranties From Sellers or Manufacturers

Under federal law, the contents of warranties and guarantees from sellers to consumers are governed by the Magnuson-Moss Warranty Act (see 15 U.S.C. § 2301 et. seq.). While the Act sets rules and procedures governing the form and contents of written warranties, it does not require that manufacturers issue written warranties (15 U.S.C. § 2302(b)(2)). The Act calls for warrantors to set up dispute resolution procedures in their warranties but also provides a right for consumers to bring civil suits in federal court to recover for alleged warranty violations so long as they first follow any enumerated dispute-resolution procedures (15 U.S.C. § 2310(a), (d)).

Under the Act, it is generally permissible for sellers to condition a warranty’s validity on the use of specific repair services or parts that are provided free of charge (see 15 U.S.C. § 2302(c)). Therefore, a warrantor may void a warranty if the consumer fails to use the free replacement parts and support services established in the warranty in favor of other parts or services from third-party sellers (16 C.F.R. § 700.10(a)).

The UCC establishes implied warranties of merchantability and fitness for goods sold by merchants (UCC §§ 2-314-2-316) (see Minimum Standards for Goods, Services, and Digital Content). The UCC requires that the buyer notify the seller of any alleged defect before seeking any post-acceptance remedies (UCC § 2-607(3)(a)).

Limiting Liability

In consumer contracts, the enforceability of releases or limitations of liability depends on what is being released or limited. The UCC contains different rules depending on whether the releases exclude liability for implied warranties, breach, or consequential damages.

Implied Warranties

Consumer contracts for the sale of goods may exclude implied warranties as long as they do so conspicuously and using clear language (UCC § 2-316(2)). The UCC gives three examples of effective language:

- "There are no warranties which extend beyond the description on the face hereof."
- "As is."
- "With all faults."

Such warranties may not, however, be excluded if the federal Magnuson-Moss Warranty Act applies (15 U.S.C. § 2301 et seq.). The Act provides that sellers offering a written warranty on the sale of goods cannot exclude the implied warranty of merchantability. For other requirements for warranties under the Act, including requirements related to disclosure, pre-sale availability, and dispute settlement procedures, see 15 U.S.C. § 2301 et. seq. and 16 C.F.R. Parts 701 and 702.

Limitations of Remedies

A consumer contract may contain terms that limit the remedy for breach. For example, in sales of goods, a term may "limit the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts" (UCC § 2-719(1)(a)). If the remedy is so limited that it "fail[s] of its essential purpose," however, the limitation may not be valid in certain circumstances (UCC § 2-719(2)). For example, if a contract limits a consumer's remedy to repair, but repeated repairs fail to solve the problem, then the limited remedy may "fail of its essential purpose" and may not be enforced (*Razor*, 854 N.E.2d at 615).

Consequential Damages

A contract may include terms that limit or exclude consequential damages "unless the limitation or exclusion is unconscionable" (UCC § 2-719(3)). "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not" (UCC § 2-719(3)). Moreover, these limitations generally should be "prominently, conspicuously, and clearly set forth" (*Gladden v. Cadillac Motor Car Div., Gen. Motors Corp.*, 416 A.2d 394, 402 (N.J. 1980)).

Arbitration Clauses

In addition to provisions limiting substantive liability, consumer contracts may contain arbitration clauses restricting the consumer's right to litigate disputes in court or to pursue class action proceedings. These provisions are usually enforced unless found unconscionable. (See, for example, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236-38 (2013); *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).)

Unconscionable Limitations of Liability

If a contract contains an unconscionable limitation of liability, depending on severability and other contract terms, courts may invalidate the contract, refuse to enforce the limitations term, or apply it in a manner "to avoid any unconscionable result" (UCC 2 §-302(1)).

The same applies under the Restatement of Consumer Contracts, § 9 (2019 draft). That section adds that if a court chooses to strike an unconscionable limitations term and insert a substitute term, it may be either:

- A term that is reasonable in the circumstances.
- A term that effects the minimal correction necessary to bring the contract into compliance with the mandatory rule.
- If the contravening term was placed by the business in bad faith, a term that is calculated to give the business an incentive to avoid placing such terms in consumer contracts.

(Id. & cmt. 3.)

Limitations Periods

A jurisdiction's governing statutes of limitations for filing breach of warranty, design defect, manufacturing defect, and statutory unfair practice claims determine the limitation periods for consumer claims related to defective or misdescribed products. The defendant bears the burden of proving any statute-of-limitations defense, while the plaintiff must prove any such claim by a preponderance of the evidence.

Treatment of Consumers in Default

If a buyer defaults on a required payment, the seller may withhold delivery and sue for damages (see Consumers' Remedies for Defective or Misdescribed Goods). If the transaction is secured, the seller may collect the collateral in a commercially reasonable manner and must provide a consumer with notice before disposing of it (UCC §§ 9-609(a), 9-614). Between the repossession and disposition of the debtor-consumer's property, the debtor-consumer may reobtain the collateral by fulfilling the obligations that originally caused default (UCC § 9-623).

In secured transactions, a consumer may not waive the right to sue a seller for violating Article IX of the UCC, including for actions involving the disposition of collateral on default (UCC § 9-602).

The UCC provides that acceleration provisions, allowing insecure sellers to accelerate payment from buyers, are permissible and may only be exercised by a seller upon belief that "the prospect of payment or performance is impaired" (UCC §1-309; see also *Ben Franklin Fin. Corp. v. Davis*, 589 N.E.2d 857, 860 (Ill. App. Ct. 1992) (upholding contract provision for full payment upon default)). (See Pricing and Payment for a discussion of sellers retaining upon default deposits paid in advance.)

The Fair Debt Collection Practices Act provides other protections to consumers in debt or default and precludes, as set out in that statute, "unfair or unconscionable means to collect or attempt to collect any debt" (see 15 U.S.C. §§ 1692-1692p).

Transfer or Assignment of Consumer Contracts

Consumer agreements are generally assignable according to their terms. The UCC authorizes sellers and buyers to assign all contractual rights "except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance" (UCC § 2-210(2)).

The common law has followed this rule too, adding that contractual rights may not be assigned when it would "materially reduce the value" of return performance to the other party, violate a statute or public policy, or be prohibited by a contract (Restatement (Second) of Contracts § 317). Indeed, when "a contract uses specific and express language sufficiently manifesting an intention to prohibit the power of assignment without the consent of one or more of the contracting parties, courts generally uphold these contractual anti-assignment clauses" (29 Williston on Contracts § 74:22 (4th ed.)). Courts will also usually uphold "a provision in a contract to sell goods that the buyer shall not assign its right" (Id).

Data Protection Issues

In many jurisdictions, to comply with data protection standards and statutes, sellers should take reasonable security measures to protect their sensitive information (see, for example, La. Stat. § 51:3074; 815 Ill. Comp. Stat. 530/45; R.I. Gen. Laws § 11-49.3-2). These laws generally protect consumer information that could be used to perpetrate identity theft, including personal sensitive information such as social security numbers.

As for specific data protection measures, the FTC has issued guidance based on more than 50 law enforcement actions that settled (see *Federal Trade Commission, Start with Security: A Guide for Businesses (2015)).*

Enforcement

Federal Level

The FTC is the largest federal agency responsible for consumer protection. The FTC has authority to target "unfair or deceptive acts or practices in or affecting [interstate] commerce." (15 U.S.C. § 45(a)). The FTC may also define a practice as unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (15 U.S.C. § 45(n)). Other federal agencies may also play a role in consumer protection. For example, in 2011, US Congress passed a law that created the Consumer Financial Protection Bureau and empowered the agency to regulate certain financial products and services.

To enforce its consumer protection mandate, the FTC has the authority to bring complaints against alleged violators and, after a hearing, order violators to cease and desist (15 U.S.C. § 45(b)). The FTC can then enforce those final orders by levying a civil penalty of up to US$10,000 per violation, and the Attorney General of the United States can sue in court to collect those penalties (15 U.S.C. § 45(l), (m)).

State Level

State attorneys general are the primary enforcers of consumer protection legislation, although some states may give partial or primary enforcement authority to a different agency as well. Each agency's exact enforcement powers vary by state. Unlike the FTC, many state agencies do not have the power to levy administrative penalties on their own but must instead bring claims for damages and injunctive relief in court. For example, New York's statute permits the attorney general to sue in court on behalf of the people of New York, after giving notice to the allegedly offending party (N.Y. Gen. Bus. Law § 349(b)).

In addition to administrative agencies, state courts play an important role in consumer protection through their enforcement (or non-enforcement) of contract terms. Courts may refuse to enforce consumer contracts that (among other things) result from misrepresentation, are unconscionable, or require unreasonable liquidated damages (see General Principles of the Laws Regulating Contracts with Consumers). Courts may also protect consumers through enforcing a duty of good faith and fair dealing, or by construing ambiguous terms in a contract in favor of consumers.

State consumer protection rules may be invalid if they conflict with federal law (see, for example, *AT&T Mobility LLC*, 563 U.S. at 352; *Northwest, Inc*., 572 U.S. at 287-88.)

Choice of Law, Jurisdiction, and Dispute Resolution

Choice of Law and Jurisdiction

Courts enforce provisions designating the parties' choice of state law to govern a consumer contract. Under the common law, a choice-of-law provision generally will be enforced unless the selected jurisdiction has "no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice"; or applying the selected jurisdiction's law "would be contrary to a fundamental policy" of the state "which has a materially greater interest . . . in the determination of the particular issue" (Restatement (Second) of Conflict of Laws § 187).

Parties can select the law of jurisdictions outside the United States only if the foreign nation has a "reasonable relation" to the "transaction" (UCC § 1-301(a); see also UCC § 1-301(c)). These clauses cannot be the result of fraud, practically deprive the complaining party of litigating the dispute in court, or contravene a strong public policy of the forum state (*Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996); *Annese v. Diversey, Inc.*, 2017 WL 2531590, at *2 (W.D. N.C. June 9, 2017); 1 Anderson U.C.C. § 1-105:100 (3d. ed.)).

Alternative Dispute Resolution

A seller is not obliged to engage in alternative dispute resolution with a consumer unless the governing contract requires it (*Vestax Sec. Corp. v. McWood*, 280 F.3d 1078, 1081 (6th Cir. 2002)). The types of ADR available for disputes involving consumer contracts include mediation, arbitration, mini-trial, and conciliation (Mass. Supreme Jud. Ct. Rule 1:18, 2; Tex. Civ. Prac. & Rem. Code § 154.023-154.025, 154.027). Sellers are not obliged to tell consumers whether they engage in ADR, and sellers cannot require consumers to engage in ADR if the governing contract provision does not contain such a requirement.

Arbitration

Mandatory arbitration clauses in consumer contracts are generally enforceable. Under the Federal Arbitration Act, a contract's "written provision" establishing that "a controversy thereafter arising out of such contract" shall be arbitrated is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2).

Applying this provision, the Supreme Court has overturned a state court's refusal to enforce a mandatory arbitration provision in a consumer contract when the state court did "not place arbitration contracts on equal footing with all other contracts" and therefore did "not give due regard . . . to the federal policy favoring arbitration" (*DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58 (2015) (marks omitted)). In short, arbitration clauses can be rendered unenforceable only on bases that exist for rendering any other contracts unenforceable under state law (see Limiting Liability).

Complaint Handling and Post-Contract Assistance

Absent a provision in a consumer contract, sellers have no obligations under contract law to respond to consumer complaints. The Magnuson-Moss Warranty Act, however, requires warrantors to respond to consumer disputes (16 C.F.R. § 703.2(e), (f)). State consumer protection laws also can apply to post-sale conduct and therefore sellers' engagement of consumer complaints (see, for example, *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 58 (Colo. 2001)). After completing performance, a seller may charge for additional services requested by a consumer, but it might violate consumer protection statutes for a seller to charge a consumer to submit a complaint about performance (see *Gray v. N. Carolina Ins. Underwriting Ass'n*, 529 S.E.2d 676, 683-84 (N.C. 2000)).

END OF DOCUMENT

