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FEATURE ARTICLE

Consumer Myths v. Legal Realities: How Can Businesses Cope?

By Caroline O. Shoenberger*

I. Introduction

Should we blame the Bill of Rights for a lot of our daily consumer problems? Did our founding fathers and great leaders who followed them err when they created the first ten amendments? Whether one subscribes to the theory that the Constitution and its amendments are to be judged on their exact words alone or the school of thought that the Constitution is to be interpreted as a brilliant, evolving document,¹ it is clear that the Bill of Rights still contains ten amendments.

Ask any law professor or law student about the Bill of Rights and they will, by rote response, reel off a few examples: freedom of speech,² the right to due process,³ the right against self-incrimination,⁴ and the right to peaceful assembly.⁵ But, average

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¹ Linda Greenhouse, *Competing Visions of the Role of the Supreme Court*, CHI. DAILY LAW BULLETIN, July 8, 2002, at 1 (reprinted from the N.Y. TIMES).

² U.S. CONST. amend. I.

³ U.S. CONST. amend. V.

⁴ *Id.*

consumers have added their own set of rights: the unlimited right to privacy; the right to return goods and get full refunds; and the right to a three-day cooling-off period in which contracts can be voided. These rights represent a few of the best-known examples. Yet, others exist, such as the right to a discount and the right to park in front of one's home. But, the point is clear: consumer expectations have evolved far more quickly than the law, or at a minimum, the Bill of Rights. These expectations have posed a problem for modern businesses as well as the consumer.

Since the adoption of the Constitution, the basic goal of business has been the need to make money.⁶ Whether business is for-profit or not-for-profit, the bills must be paid in order to stay alive. For-profit businesses are even expected to generate profits for their investors.⁷ Most businesses focus on relevant consumer groups: identifying their best customers; inducing them to part with their consumer surplus;⁸ and ensuring that customers will retain their business.

Attracting customers involves the art of marketing. Regardless of the marketing tactics used, such as "branding,"⁹ "guerilla marketing,"¹⁰ "relationship marketing,"¹¹ target

⁵ U.S. CONST. amend. I.

⁶ Interview with Nicholas Lash, Finance Professor, Loyola University Chicago, School of Business (Mar. 2, 2004). See also 46 AM. JUR. 3d *Proof of Facts* § 2 (2003).

⁷ 46 AM. JUR. 3d *Proof of Facts* at § 2 ("a for profit corporation is incorporated with a view towards realizing gains that are thereafter to be distributed to members or shareholders. . .").

⁸ "Consumer surplus is defined as the difference between what consumers are willing to pay for a unit of the good and the amount consumers actually do pay for the product." Steven M. Suranovic, *International Trade Theory and Policy Lecture Notes*, at <http://www.internationalecon.com/test/ch90/90c080.html> (last visited Mar. 14, 2004).

⁹ Branding is defined as giving a product "[a] name, term, sign, symbol, design, or some combination of these, which identifies them as the marketer's and differentiates them from competitor's offerings." See http://www.fuel4arts.com/sauce/10_glossary/glossary.htm (last visited Mar. 14, 2004).

¹⁰ Guerrilla marketing is a marketing strategy created by Jay Conrad Levinson in 1984. The strategy involves non-traditional, low-cost effective marketing. See <http://www.jayconradlevinson.com> (last visited Mar. 14, 2004).

¹¹ Relationship marketing is a customer relationship strategy that customizes products and services to meet the consumer's needs. JIM NOVO, DRILLING DOWN:

marketing,”¹² or “viral marketing,”¹³ marketers are trying to identify customers, retain customers, and induce spending.¹⁴ Some hardy marketers may even be bold enough to try to recruit old customers to help find new ones.¹⁵ Whichever tactic marketers use, the goal of successful marketers is to please their customers. Ignoring or defrauding customers is bad for business. Marketers involved in slick, get-rich-quick schemes risk the wrath of law enforcement and even worse, class actions and personal liability.

The question then becomes, how do businesses cope? This article will focus on some of the legal basics behind common consumer myths as well as offer some strategies that businesses may employ to accommodate such misunderstandings while still enabling businesses to operate profitably.

II. Consumer Myth: The Right to Unlimited Privacy

A thorough reading of the Bill of Rights reveals the absence of the word “privacy.” Nevertheless, consumers are convinced that they have an unlimited constitutional right to privacy that includes, but is not limited to, their home telephone number, home address, and buying habits.

In analyzing some of these perceptions, a few minor details have been overlooked. Home addresses, for example, are considered private.¹⁶ However, home addresses are written on the outside of

TURNING CUSTOMER DATA INTO PROFITS WITH A SPREADSHEET (Jim Novo ed., 2002), *excerpt available at* <http://www.booklocker.com/sampledillingdown.pdf> (last visited Mar. 14, 2004).

¹² Permission marketing is a marketing strategy under which the consumer agrees, or in some cases requests, to receive information about specific areas of interest. See William C. Taylor, *Permission Marketing*, FAST COMPANY MAG., April 1998, at 198, *available at* <http://pf.fastcompany.com/magazine/14/permission.html> (last visited Mar. 14, 2004).

¹³ Viral marketing is also known as “pass it on marketing.” See Joyce Slaton, *Pass It On*, INDUSTRY STANDARD MAG., Sept. 25, 2000.

¹⁴ ROBERT CRAVEN ET AL., *CUSTOMER IS KING: HOW TO EXCEED THEIR EXPECTATIONS* (Virgin Publishing 2002).

¹⁵ This market innovation was allegedly pioneered by Sears, Roebuck, & Co. See <http://www.sears.com/history> (last visited Mar. 14, 2004).

¹⁶ The ACLU, for example, has argued that even the home addresses of sex offenders should be private. Michael Symons, *Addresses listed Online*, JOURNAL NEWS.COM (Sept. 27, 2003), *at* <http://www.thejournalnews.com/newsroom/092703/b0527megan.html> (last visited Mar. 14, 2004) (citing a Third Circuit case that upheld the online publication of such information).

letters, magazines, and other mail delivered by the United States Postal Service. Home addresses, and until recently, social security numbers, are also on drivers' licenses, such as the licenses issued by the Illinois Secretary of State.¹⁷ Home telephone numbers and home addresses are included on all credit applications. Home telephone numbers are routinely given to businesses, government, and other third parties with the request that the numbers be used to return calls. If all of this private information is used and given out freely to the public, how can it be private?

Buying habits are also considered private. Nonetheless, marketers often make assumptions about consumers based on their purchases at a grocery store. Do consumers buy dog food, baby food, beer, wine, or organic food? Consumers now receive grocery store discounts if they use a special "loyalty" card through which their purchases can be electronically tracked.¹⁸ Department stores target their sales and promotional material to customers who have frequented their stores.¹⁹ So, how private are these buying habits? Goods are also bought in public areas of stores. Thus, is it reasonable to assume that buying habits are private when anyone can see what consumers are buying?

Finally, with the use of computer cookies,²⁰ and other new technology, does privacy really exist on the Internet? Consider, for instance, that an employer can monitor how work-related computer technology and equipment are being used.²¹ An employer can even check up on how such technological systems are being used from home.²²

¹⁷ Social Security numbers were removed from Illinois drivers' licenses and identification cards, starting December 2001. Press Release, Illinois Secretary of State, Drivers License to Undergo Changes January 1 (Dec. 30, 2002), at <http://www.sos.state.il.us/press/2002/december/021230d1.html> (last visited Mar. 14, 2004).

¹⁸ Katherine Albrecht, *Supermarket Cards: The tip of the retail surveillance Iceberg*, 79 DENV. U. L. REV. 534, 558 (2002).

¹⁹ See <http://www.supermarketpromotions.com/shopper.htm> (last visited Mar. 14, 2004) (noting that the hottest marketing efforts are in the supermarket).

²⁰ A cookie is defined as a "text-only string that gets entered into the memory of your browser." David Whalen, *The Unofficial Cookie FAQ*, at <http://www.cookiecentral.com/faq/> (last visited Mar. 14, 2004).

²¹ *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), cert. denied, 123 S. Ct. 182 (2002).

²² *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).

A. Consumer Privacy and the Constitution

The perception of what is and what is not private necessitates a mention that the word “privacy” does not appear anywhere in the Bill of Rights. However, it has been suggested that the main thrust of the Bill of Rights embodies the heart of privacy, the right to be free from government interference.²³

United States Supreme Court Justice Louis Brandeis memorialized the watchword of privacy advocates, “the right to be left alone,” in his dissent to *Olmstead v. United States*:²⁴

The makers of our Constitution...conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²⁵

The Supreme Court as well as lower courts quoted the eloquence of this pronouncement on numerous occasions.²⁶ The most recent and comprehensive discussions of the right to individual privacy from government interference have arisen in cases surrounding birth control and abortion.²⁷ In *Griswold v. Connecticut*, for example, the Supreme Court declared the right of privacy to be a fundamental right under the Constitution in a “penumbra” of several amendments constituting the Bill of Rights.²⁸ The Court stated, “[t]hat specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and

²³ The right to privacy first gained currency from a law review article written by Samuel Warren and Louis D. Brandeis, 4 HARV. L. REV. 193 (1890) (Brandeis later became Justice of the Supreme Court). *See also* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

²⁴ 277 U.S. 438 (1928).

²⁵ *Id.* at 478 (Brandeis, J., dissenting).

²⁶ *Stanley v. Georgia*, 394 U.S. 557 (1969) (discussing obscenity in private homes); *Katz v. United States*, 389 U.S. 347 (1967) (police recording of telephone calls).

²⁷ *Roe v. Wade*, 410 U.S. 113 (1973); *see also* *Griswold*, 381 U.S. at 479.

²⁸ *Griswold*, 381 U.S. at 483.

substance. Various guarantees create zones of privacy.”²⁹ The Supreme Court in *Roe v. Wade*³⁰ further explained the fundamental right of privacy:

The Constitution does not explicitly mention any right of privacy. [But] the Court has recognized that a right of privacy does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment. . . in the Fourth and Fifth Amendments. . . in the penumbras of the Bill of Rights. . . in the Ninth Amendment or in the concept of liberty guaranteed [by] the Fourteenth Amendment.³¹

Notwithstanding the strong declarations in these cases, the assertion that a consumer’s right to privacy has been violated is not sufficient to result in the imposition of a legal remedy. The assertion must be “reasonable” and the facts of the particular case must be consistent with the assertion.³² In other words, there must be a reasonable expectation of privacy.³³ Such a concept has arisen in many cases involving the Fourth Amendment.³⁴ Generally, an individual has a “reasonable expectation of privacy” under the following circumstances: (1) as an overnight guest in a private home;³⁵ (2) in his or her use of a public pay telephone;³⁶ and (3) as a passenger with personal baggage on a bus.³⁷ However, other cases have held that such a reasonable expectation of privacy does not exist

²⁹ *Id.* at 484.

³⁰ 410 U.S. 113 (1973).

³¹ *Id.* at 152-53.

³² See *McCarthy W. Constructors, Inc. v. Phoenix Resort Corp.*, 821 P.2d 181, 187 (Ariz. Ct. App. 1991); *U.S.A. Petroleum Corp. v. United States*, 821 F.2d 622, 627 (Fed. Cir. 1987).

³³ *Minnesota v. Carter*, 525 U.S. 83 (1998) (quoting *Smith v. Maryland*, 442 U.S. 735 (1979)); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

³⁴ See generally *infra* notes 35-41.

³⁵ *Minnesota v. Olson*, 495 U.S. 91 (1990).

³⁶ *Katz*, 389 U.S. at 353.

³⁷ *Bond v. United States*, 529 U.S. 334 (2000).

with respect to: (1) property in plain view of the public;³⁸ (2) detection through non-intrusive technology of marijuana growing in a private home;³⁹ (3) police checkpoints to monitor compliance with immigration laws;⁴⁰ and (4) sobriety laws.⁴¹

As summarized above, the Constitution affords the consumer minimal privacy protections, which only truly extend to government intrusions. Even privacy rights against government intrusion will likely be challenged as a result of the U.S.A. Patriot Act of 2001, enacted after September 11, 2001.⁴² The Act authorizes the government to investigate foreign related transactions using means that seemingly contradict the First and Fourth Amendments.⁴³

While the Bill of Rights creates privacy rights through the government, what happens in other situations? How are private parties impacted? Unlike French law, the U.S. Constitution does not address “private” privacy rights.⁴⁴ Nevertheless, privacy rights between private parties have been accorded some protections through common law and by a patchwork of numerous statutes, some of which are discussed below.

B. Consumer Privacy Rights Based on Common Law and Statute

In claiming damages incurred as a result of breaching an individual’s right to privacy, the *Restatement (Second) of Torts* identifies four causes of action: (1) an unreasonable intrusion upon the seclusion of another; (2) appropriation of the likeness of another or the name of another; (3) the public disclosure of private facts; and

³⁸ *Payton v. New York*, 445 U.S. 573, 586 (1980).

³⁹ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁴⁰ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

⁴¹ *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

⁴² U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). *See also* Adam Liptak, *In the Name of Security: Americans of Two Minds on Privacy Rights*, CHI. DAILY LAW BULLETIN, P.1, col. 3, Nov. 25, 2002 (reprinted from the N.Y. TIMES).

⁴³ *See id.*

⁴⁴ Article 9 of the French Civil Code was adopted by an Act of Parliament on July 17, 1970. *See* <http://www.info-france-usa.org/atoz/privacy.asp> (last visited Mar. 14, 2004). The Conseil Constitutionnel incorporated Article 9 into the French Constitution of 1958 on January 18, 1975.

(4) publicity that portrays an individual in a false light.⁴⁵

Although the Restatement enumerates possible causes of action under the common law right to privacy, individuals attempting to seek redress under these theories have fared poorly in the courts, particularly when objecting to the unauthorized use of their personal data.⁴⁶ Three state court cases are worthy of discussion on this issue.

In *Shibley v. Time*,⁴⁷ the plaintiff, a homeowner, sought to enjoin magazine publishers from distributing lists containing personal data to direct mail marketing companies without his prior consent.⁴⁸ The plaintiff claimed that, by doing so, the publishers had appropriated his personality.⁴⁹ In denying the plaintiff's assertion of an invasion of his privacy, the Ohio Superior Court quoted *Lamont v. Commissioner of Motor Vehicles*,⁵⁰ an earlier New York case that observed that, while the receipt of junk mail was annoying, it was still a short trip from the mailbox to the trash can.⁵¹

A similar result occurred in *Dwyer v. American Express*.⁵² In *Dwyer*, the Illinois Appellate Court denied a claim that the sale or rental of data concerning the plaintiff's purchase history did not constitute tortious appropriation.⁵³ The court ruled that, ". . . a single random cardholder's name has little or no intrinsic value to defendants," merchants.⁵⁴ The *Dwyer* court relied extensively on *Shibley* in dismissing the claim.⁵⁵

The Massachusetts Superior Court, however, suggested a

⁴⁵ RESTATEMENT (SECOND) OF TORTS, §§ 652(B), 652(C), 652(D), 652(E) (2000); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351 (Ill. App. Ct. 1995) (citing PROSSER & KEETON ON TORTS, §117 (1984)).

⁴⁶ *Shibley v. Time, Inc.*, 341 N.E.2d 337 (Ohio Ct. App. 1975); *Dwyer*, 652 N.E.2d at 1351; *Weld v. CVS Pharmacy, Inc.*, No. CIV. A. 98-0891F, 10 Mass. L. Rptr. 217, 1999 WL 494114 (Mass. Superior Ct. June 29, 1999).

⁴⁷ *Shibley*, 341 N.E.2d at 337.

⁴⁸ *Id.* at 338.

⁴⁹ *Id.* at 339.

⁵⁰ *Id.* (quoting *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967)).

⁵¹ *Id.* at 338 (quoting *Lamont*, 269 F. Supp. at 880).

⁵² 652 N.E.2d 1351 (Ill. App. Ct. 1995).

⁵³ *Id.* at 1355-56.

⁵⁴ *Id.* at 1356.

⁵⁵ *Id.*

different result in *Weld v. CVS Pharmacy*.⁵⁶ In *Weld*, a pharmacy had transmitted lists containing customers' names, addresses, and dates of birth to marketing companies which had culminated in a direct mail campaign promoting various drug companies and their products.⁵⁷ While all three cases concerned the distribution of personal data, the court drew a distinction between the legal ramifications involved in transmitting financial information as opposed to disseminating medical data.⁵⁸

As described above, common law causes of action asserting the breach of a consumer's right to privacy have succeeded far better in theory than in practice. A similar complaint can also be directed towards most legislative attempts to enact privacy protection laws. Over the past forty years, a plethora of statutes have been hailed by their proponents as significant tools to protect the privacy rights of the public. Examples of such legislation have included: (1) the Family Educational Rights and Privacy Act of 1974,⁵⁹ which recognizes privacy rights with respect to access and disclosure of student records; (2) the Fair Credit Reporting Act of 1970 ("FCRA"),⁶⁰ which limits access to credit histories and other personal information; (3) the Tax Reform Act of 1975,⁶¹ which safeguards an individual's tax returns; (4) the Gramm-Leach-Bliley Act of 1999 ("GLBA"),⁶² which limits the transmission of personal data to third parties; (5) the Fair Debt Collection Act of 1977 ("FDCA"),⁶³ which protects debtors from harassment; (6) the Driver's Privacy Protection

⁵⁶ *Weld v. CVS Pharmacy, Inc.*, No. CIV. A. 98-0897F, 10 Mass. L. Rptr. 217, 1999 WL 494114 (Mass. Superior Ct. June 29, 1999).

⁵⁷ *Weld*, 1999 WL 494114, at *2.

⁵⁸ Such a distinction may be becoming less relevant. On August 8, 2002, the Department of Health and Human Services modified rules issued under the Health Insurance Portability and Accountability Act of 1996. See 42 U.S.C. §§ 242(k), 1301, 1395(cc)(a)(1) (West 2004). The modifications permit marketing to health care consumers without first obtaining their prior consent. See <http://www.epic.org> (last visited Mar. 14, 2004); <http://www.healthprivacy.org> (last visited Mar. 14, 2004).

⁵⁹ 20 U.S.C. § 1232 (1974).

⁶⁰ 15 U.S.C. § 1681 (1970).

⁶¹ 26 U.S.C. § 6103 (1975), amended by Act of Dec. 8, 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

⁶² 15 U.S.C. § 6801 (1998).

⁶³ 15 U.S.C. § 1692 (1977).

Act of 1994,⁶⁴ which limits the access and dissemination of information stored by state motor vehicle licensing agencies; (7) the Do-Not-Call Implementation Act,⁶⁵ which calls for the creation of a do-not-call registry restricting telemarketers' ability to call consumers for purposes of solicitation; and (8) the CAN-SPAM Act,⁶⁶ which places limits on marketers sending unsolicited commercial emails to consumers.

It is ironic that most privacy protection statutes are generally known more for their exceptions, exemptions, and exclusions than for their protections. The FDCA, for example, generally excludes businesses collecting their own debts.⁶⁷ The FCRA exempts anyone alleging a "legitimate business need" for information.⁶⁸ The GLBA requires businesses to send "privacy disclosure" notices to consumers so they can affirmatively inform businesses if they do *not* want their personal data sold to non-related third parties.⁶⁹ However, the consumer basically has no choice about the "sharing" of their data with related third parties.⁷⁰

Strange as it may seem, the privacy protection law considered to be one of the most stringent is the Videotape Privacy Protection Act.⁷¹ This statute was enacted during the aftermath of the embarrassing disclosure of Judge Robert Bork's personal choice of videotapes, which enlivened the Senate Hearing on his unsuccessful nomination to the United States Supreme Court.⁷²

Perhaps the most telling feature of U.S. privacy protection law is the burden placed on the consumer to assert his or her right to be left alone. Such a system, known as an "opt-out" system, requires consumers to notify an establishment that the business cannot use, share or sell their personal data. This system differs dramatically

⁶⁴ 18 U.S.C. § 2721 (1994).

⁶⁵ Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 15 U.S.C. §§ 6101-6108 (2003)).

⁶⁶ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), Pub. L. No. 108-187, 117 Stat. 2699 (2003).

⁶⁷ 15 U.S.C. § 1692(6) (1977).

⁶⁸ 15 U.S.C. § 1681(3) (1970).

⁶⁹ 15 U.S.C. § 6801 (1998).

⁷⁰ 15 U.S.C. § 6802(b)(2) (1999).

⁷¹ 18 U.S.C. § 2710 (1988).

⁷² *Dirkes v. Borough of Runnemede*, 936 F. Supp. 235, 238 (D.N.J. 1996).

from an “opt-in” system, required by European Union data protection laws, which mandates a business to proactively secure a consumer’s permission to use their data.⁷³ American businesses as well as the courts vastly prefer opt-out systems.⁷⁴

Additionally, American businesses frequently do not facilitate the use of the opt-out system.⁷⁵ One only has to check most websites to observe this reality. Assuming that a web site includes a privacy policy at all, it is probably a couple of “clicks” or web pages away from the home page, and is written in lengthy legal jargon. The privacy notices sent out pursuant to the GLBA are another example. The notices, costing billions of dollars, were usually tucked away inside of glossy brochures and systematically tossed out as junk mail by the public.⁷⁶ Additionally, every business seemed to utilize a different method in which the consumer could assert his or her limited privacy rights. The confusion that ensued caused the GLBA to be even less effective in protecting the rights of consumers than originally predicted.⁷⁷

⁷³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, at http://www.cdt.org/privacy/eudirective/EU_Directive_.html (last visited Mar. 14, 2004).

⁷⁴ *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1229 (10th Cir. 1999), *cert. denied sub nom.* Competition Policy Institute v. U.S. West, Inc., 530 U.S. 1213 (2000).

⁷⁵ The FCC and FTC recently rejected the opt-out approach for the national do-not-call registry, which also sustained constitutional attack by the Tenth Circuit. *See Mainstream Mktg. Serv., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004). Congress, however, adopted the opt-out approach for commercial email in the CAN-SPAM Act of 2003. *See* Pub. L. No. 108-187, 117 Stat. 2699 (2003).

⁷⁶ Comments of the Electronic Privacy Information Center, the Privacy Rights Clearinghouse, US PIRG, and Consumers Union, *In re* Fin. Serv. Modernization Act or Gramm-Leach-Bliley Act (GLBA) (Department of the Treasury, May 1, 2002), available at http://www.epic.org/privacy/financial/glb_comments.pdf.

⁷⁷ Paige Norian, *The Struggle to Keep Personal Data Private: Attempts to Reform Online Privacy and how Congress Should Respond*, 52 *Cath. U. L. Rev.* 803, 828 (2003). Norian states that:

[I]t is alleged that GLBA has not increased financial privacy. For example, ‘the amount of financial data that financial institutions can collect has increased rapidly’ since the bill’s enactment. In addition, most of the information sharing ‘is done without the knowledge or approval of the customers.’ This practice is largely attributed to unclear and unreadable opt-out notices provided by financial institutions.”

Id. (footnotes omitted).

Businesses, nevertheless, have underestimated consumer frustration with the steady barrage of unwanted intrusions into their private lives. Legislative proposals addressing such topics as Spam, telemarketing, and junk mail continue to be filed at all levels of government. Ironically, persons seeking privacy from telemarketing by calls and junk mail have to sign a list to be ignored.⁷⁸ For businesses, which rarely endorse additional governmental involvement, the cost to lobby against these proposals is high.

The price tag to challenge the legality of some of the proposals that actually become law is even more costly. As recent unsuccessful challenges to the GLBA and a Washington state anti-Spam law will attest, it is also difficult to predict the outcome of a case.⁷⁹ Furthermore, negative press is another ramification to businesses that ignores public demand to exercise greater control over their private information and private space. The author of the adage, who boasted, "there is no such thing as bad press," was never the subject of an investigative report on the nightly news.

Even potentially more of a drain on the bottom line is the realization by some enterprising companies that the public desire to be left alone can form the basis of new business opportunities.⁸⁰ The business of protecting the privacy rights of the public is a growing industry.⁸¹ New devices such as anti-telemarketing telephone

⁷⁸ Illinois Telephone Solicitation Act, 815 ILL. COMP. STAT. § 413/30 (1999), amended by 815 ILL. COMP. STAT. ANN. §413/16 (Jan. 1, 2003), available at <http://www.legis.state.il.us/legislation/legisnet92/status/920HB0369.html> (last visited Mar. 14, 2004). See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 67 Fed. Reg. 62667-01 (Oct. 8, 2002) (to be codified at 47 C.F.R. pt. 64); Telemarketing Sales Rule, 67 Fed. Reg. 4492-01 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310).

⁷⁹ See *Trans Union LLC v. FTC*, 295 F.3d 42, 53 (D.C. Cir. 2002); *State of Washington v. Heckel*, 24 P.3d 404, 413 (Wash. 2001).

⁸⁰ See Enterprise Solutions, Privacy Technology, at <http://www.zeroknowledge.com> (last visited Mar. 14, 2004); Privacy Unlimited, at <http://www.privacy-solutions.com> (last visited Mar. 14, 2004); Online Privacy Alliance, at <http://www.privacyalliance.org> (last visited Mar. 14, 2004).

⁸¹ *Whole New Privacy Department Will Have to be Created by Companies*, KIPLINGER PERSONAL FINANCE, Fed. 2003, vol. 57, p. 26. It is estimated that tens of billions of dollars in e-commerce growth has been forgone as a result of consumer privacy concerns. A. CAVOUKIAN, ET AL., PRIVACY PAYOFF: HOW SUCCESSFUL BUSINESSES BUILD CUSTOMER TRUST (Toronto, McGraw Hill Rerson, 2002). The FTC reported that Americans reported losses of \$437 million in 2003 from identify theft and fraud, up 37 percent from 2002. See Reuters, *U.S. Tallies Consumer Fraud Loss at \$437 Million*, L.A. TIMES, Jan. 23, 2004, Pt. A., at 20.

equipment⁸² and privacy protection software⁸³ have hit the market in recent years. This new industry will compete head on with companies seeking to seize, slice, and dice even more personal information to get that message or product out to the public at any cost. Consumers need businesses to continue collecting information to develop new products and improve or discard old ones. Businesses also need to be able to seek new and creative methods to sell their products to the public. To accommodate public concerns regarding actual or perceived privacy rights, businesses must adopt a credible privacy protection policy.

C. Business Strategy: The Privacy Protection Policy

A privacy protection policy should be easily accessible and in clear understandable language. Once created, the policy must be strictly followed. The failure to follow a privacy policy can result in legal liability involving many legal doctrines, such as: (1) breach of contract; (2) consumer fraud; and (3) unjust enrichment, to name a few.

Microsoft's recent experience provides a good model of a bad example. Microsoft's various Passport programs included strict privacy and data security guarantees. Unfortunately, for the users of those programs, and ultimately for Microsoft, those representations were not followed. As a result of complaints filed by privacy protection advocates, the Federal Trade Commission ("FTC") commenced an investigation.⁸⁴ The FTC and Microsoft reached a settlement, imposing dramatic new obligations on Microsoft along with the prospect of years of oversight by the federal government.⁸⁵ It

Identify theft led the list of complaints to the FTC for the fourth year in a row. Drew Clark, *Id Theft Tops Complaint List E-auctions Creep Ahead*, NAT'L J. TECH. DAILY, Jan. 22, 2004.

⁸² Telephone screening services, also known as "Caller ID," are available through most telecommunications companies. See <http://www.junkbusters.com/telemarketing.html> (last visited Mar. 14, 2004) (discussing how to reduce the number of junk phone calls received).

⁸³ For a listing of some products, see <http://www.epic.org/privacy/tools.html> (last visited Mar. 14, 2004).

⁸⁴ See Complaint, *In re Microsoft Corp.* (FTC, 2002) (File No. 012 3240), available at <http://www.ftc.gov/os/2002/08/microsoftcmp.pdf> (last visited Mar. 18, 2004).

⁸⁵ Press Release, FTC, Microsoft Settles FTC Charges Alleging False Security and Privacy Promises (Aug. 8, 2002), available at <http://www.ftc.gov/opa/2002/08/Microsoft.htm> (last visited Mar. 14, 2004).

is probably safe to assume that Microsoft would have preferred to avoid all of the controversy, the additional negative press, and of course, the unwanted interaction with the government.

Businesses that adopt a credible privacy policy granting the consumer the right to exercise privacy controls may be surprised at the public response. Many consumers would willingly allow their purchases to be tracked if given the choice. Offering discounts to encourage consumer consent has aided this strategy.⁸⁶ Others market the benefits to obtaining and retaining customer information. A recent advertising campaign, which stated, "No shirt. No shoes. No service. No receipt is no problem. We can store your purchasing information automatically for refunds, exchanges and repairs," attracted a lot of amusement and attention.⁸⁷ Did consumers truly understand that their personal data could be sold to others and used by the retailer for other purposes? Nevertheless, creative approaches to the privacy issue can work so long as the solution is honest, uncomplicated, and understandable.

III. Consumer Myth: The Right to Return Goods

The right to return goods and receive full refunds represents a very popular "addition" to the Bill of Rights. Many retail stores in the U.S. have even encouraged returns from consumers as part of a marketing strategy.⁸⁸ Many stores have return counters or return desks. Stores also thoughtfully offer to include gift receipts in gift boxes. Stores like Nordstrom have even incorporated a liberal return policy into their corporate culture and marketing strategy.⁸⁹

⁸⁶ A Roper survey revealed that 85 percent of consumers want their favorite store to track their purchases so they will be entitled to discounts or free samples. Murray Forester, *The Roper Starch Report: An Age of Choice*, DISCOUNT STORE NEWS, Apr. 17, 2000, available at <http://web.ask.com/web?q=Roper+Starch+Report&o=0&qsrc=0> (last visited Mar. 14, 2004). See also Margaret Webb Pressler, *Playing the Loyalty Game: More retailers Offer Frequent-Buyer Plans to attract, Keep Customers*, WASH. POST, May 30, 1998, at C01, available at 1998 WL 11583223.

⁸⁷ See generally <http://www.hdtv.net/coupons.cfm?merchant=circuitcity> (last visited Mar. 14, 2004).

⁸⁸ Susan Reda, *Getting a Handle on Returns*, at <http://www.stores.org/archives/dec 98cover.asp> (Dec. 1998).

⁸⁹ ROBERT SPECTOR & PATRICK D. MCCARTHY, *THE NORDSTROM WAY: THE INSIDE STORY OF AMERICA'S #1 CUSTOMER SERVICE COMPANY* 97 (John Wiley & Sons, Inc., 1995), available at http://www.robertspector.com/NordWay_extract.html (last visited Mar. 14, 2004).

While U.S. consumers expect and U.S. businesses adopt liberal return policies, the rest of the world does not necessarily follow suit.⁹⁰ Outside of the U.S., the sale of goods is considered to be a final sale, not a loan.⁹¹ Contrast the experiences of a consumer in the U.K. and a consumer in the U.S. on December 26th, the day after Christmas. In the U.K., December 26th is known as Boxing Day, an official holiday when one brings gifts to friends.⁹² In the U.S., December 26th is an unofficial holiday when friends bring their gifts back to the stores.

The right to return, however, is not an absolute legal right. Some retailers are requiring that goods be returned within a certain period of time of purchase, include the original packaging, and be accompanied by a receipt.⁹³ Returns are expensive to businesses, not only in direct costs, such as the cost of a missed sale, but also indirectly in areas such as labor and storage.⁹⁴

Consumer reaction to such limitations can pose a challenge to businesses.⁹⁵ From a legal point of view, it is important to understand that there are circumstances in which the customer is right. A brief review of the legal basis of the right to return can assist in the development of responses to this issue.

⁹⁰ In the U.K., for example, some stores may only refund the cost of gifts to the original purchaser's accounts. See Sarah Sandland, *Return to Vendor: How easy is it to exchange those unwanted Christmas gifts?*, SUNDAY TELEGRAPH, Dec. 21, 2003, at 12, available at 2003 WL 69069361.

⁹¹ *Dreaded pressies*, THE MIRROR, Dec. 24, 2003, at 4, available at 2003 WL 70626885.

⁹² One version of the origin of Boxing Day is that servants were required to work on Christmas in England long ago. They were given leave to visit their families on December 26. Each servant was given a box with gifts and a bonus. The holiday has continued. See <http://www.web-holidays.com/boxing> (last visited Mar. 14, 2004).

⁹³ Sheryl Harris, *Some Stores Making Gift Returns Less Happy*, AKRON BEACON J., Jan. 4, 1998.

⁹⁴ See National Retail Federation of Stores, *Poll underscores importance of Return Policies*, <http://www.stores.org/archives/dec98sidebar-1.html> (last visited Mar. 14, 2004).

⁹⁵ Focus Group Results Presentation, *Return Policies from the Consumer Point of View*, CENTER FOR LOGISTICS MANAGEMENT, UNIVERSITY OF NEVADA RENO (2000), available at <http://www.rlec.org> (last visited Mar. 14, 2004).

A. The Right to Return and the Bill of Rights

Students of the law should not be distressed when the right to return cannot be found in the Bill of Rights—it is not there. However, advocates for such a right can indirectly point to circumstances where the right to have a sale enforced by a court of law has been denied or modified on constitutional grounds. In *Shelley v. Kraemer*,⁹⁶ for example, the U.S. Supreme Court enjoined the enforcement of two real estate contracts containing race-based restrictive covenants.⁹⁷ The Court ultimately reversed two state supreme court decisions that upheld such provisions.⁹⁸

Similarly, the Supreme Court has also prohibited the enforcement of state laws permitting pre-judgment garnishment and attachment of property.⁹⁹ These laws permitted private parties to use government officials to implement such “creditors’ rights.”¹⁰⁰ The Court ruled that the laws, which authorized the use of state action prior to the adjudication of the rights of the parties, violated the Due Process Clause of the Constitution.¹⁰¹ Notwithstanding the examples detailed above, in which a constitutional analysis was used to block efforts to enforce contracts between seemingly private parties, it is unusual for such challenges to succeed.

B. The Right to Return and the Common Law

The right to return at common law was generally expressed as “voiding a contract” or “rescission.”¹⁰² Suits to rescind or void a

⁹⁶ 334 U.S. 1, 23 (1948).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Sniadach v. Family Ins. Co.*, 395 U.S. 337, 350 (1969) (garnishment); *Fuentes v. Shevin*, 407 U.S. 67, 102 (1972) (repossession); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 956 (1982) (attachment).

¹⁰⁰ In *Lugar*, for example, a state clerk issued the attachment writ, and the county sheriff executed the writ. *See Lugar*, 457 U.S. at 924.

¹⁰¹ *Sniadach*, 395 U.S. at 350; *Fuentes*, 407 U.S. at 102; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974). *See also Lugar*, 457 U.S. at 956 (The United States Supreme Court ruled that damages could be assessed in favor of a private party who was subjected to pre-judgment attachment of his property under 42 U.S.C. § 1983.).

¹⁰² *Beach v. Great W. Bank*, 692 So. 2d 146, 149 n.5 (Fla. 1997), (citing BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS § 833 (Enlarged ed. 1887), for the proposition that common law rescission must first involve tender of the

contract were generally brought in courts of equity, while actions for damages were initiated in courts of law.¹⁰³ Until the latter half of the twentieth century, very definite distinctions between actions and relief could be obtained through cases filed in courts of law and courts of equity, though not both at the same time.¹⁰⁴ The plaintiff was required to elect a remedy.¹⁰⁵

In actions for rescission, the chancellor was asked to declare the contract unenforceable.¹⁰⁶ The rationale would generally be based upon a claimed procedural defect in the contract. Such defects would include but not be limited to: (1) lack of capacity; (2) inadequate consideration; (3) illegality; (4) failure of a condition covered by the contract to take place; (5) misrepresentation or fraud; and (6) other problems in the formation of a contract.¹⁰⁷ Courts of equity could also rescind a contract due to substantive problems, such as unconscionability.¹⁰⁸ Whether relief was sought due to alleged procedural defects or substantive problems, the reluctance of courts to grant such petitions can be amply demonstrated.

For example, while a California court ruled that a contract executed by a minor could be disaffirmed because the minor lacked the legal capacity to enter into the contract,¹⁰⁹ a Florida court refused to grant rescission to a married woman who also claimed she lacked the necessary capacity to enter into a contract.¹¹⁰ The court in *Knott v. Smith* noted that the married woman sought rescission while failing to offer to return the consideration received under the contract.¹¹¹ In

property received before the contract is void.).

¹⁰³ See *Maumell Co. v. Eskola*, 865 S.W.2d 272, 273-74 (Ark. 1993) (rescission in equity). To undo the contract at law, the return of the property effectuates the rescission and the court merely grants restitution. See *Digicorp v. Ameritech Corp.*, 662 N.W.2d 652, 668 (Wis. 2003) (option to rescind and void contract, or affirm contract and sue for damages).

¹⁰⁴ *Digicorp*, 662 N.W.2d at 668.

¹⁰⁵ *Id.*

¹⁰⁶ See *Waskey v. Thomas*, 235 S.E.2d 346, 348 (Va. 1977) (granting rescission voiding several contracts).

¹⁰⁷ See *CALAMARI & PERILLO ON CONTRACTS* (West 1970).

¹⁰⁸ *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

¹⁰⁹ *Maier v. Harbor Center Land Co.*, 182 P. 345, 347 (Cal. Dist. Ct. App. 1919).

¹¹⁰ *Knott v. Smith*, 84 So. 660, 661 (Fla. 1920).

¹¹¹ *Id.* at 663.

Eibel v. Von Fell, a New Jersey case, the buyers of so-called "New Homes" could not void the contract because the court found that they had prior knowledge of the defects in the homes and thus had ratified the contract.¹¹²

Another attempt to rescind a contract was thwarted by the Kansas Supreme Court in *Missouri River Ft. S & G.R. Co. v. Commissioner of Miami County*.¹¹³ The court in *Missouri River* ruled that, absent proof of fraud or collusion between a public body authorized to act on behalf of the population and a private party, the mere inadequacy of consideration was not sufficient to prevail.¹¹⁴ The lack of corporate seals on the contract instrument, sufficient to void the contract, was not enough to find rescission because the court could always order the parties to affix their seals.¹¹⁵ Similarly, a Wisconsin seller of a diamond worth \$1,000 seeking rescission of the \$1 sales contract was also denied relief.¹¹⁶ The Wisconsin supreme court was also not sympathetic to attempts to rescind a contract with a corporation unlicensed in Wisconsin where no attempt had been made to return the payments received under the contract.¹¹⁷

These cases illustrate the reluctance of judges and chancellors in many different states and circumstances to rescind contracts between private parties. The freedom of contract is still alive and well. Rescission has been possible under extreme circumstances where fraud could be demonstrated,¹¹⁸ or where the nature of the agreement was so one-sided as to shock the conscience.¹¹⁹

¹¹² *Eibel v. Von Fell*, 38 A. 201, 202 (N.J. 1897).

¹¹³ *Missouri River Ft. S. & G.R. Co. v. Comm'r of Miami Co.*, 12 Kan. 482 (1874).

¹¹⁴ *Id.* at *4.

¹¹⁵ *Id.*

¹¹⁶ *Wood v. Boyton*, 25 N.W. 42, 44 (Wis. 1885).

¹¹⁷ *Duluth Music Co. v. Clancy*, 120 N.W. 854, 856 (Wis. 1909).

¹¹⁸ PROSSER AND KEETON ON TORTS § 105 (5th ed. 1984).

¹¹⁹ *Am. Home Improvement Co. v. MacIver*, 201 A.2d 886, 888-89 (N.H. 1964) (unconscionable provisions in long printed contracts need not be enforced); *Jackson v. Seymour*, 71 S.E.2d 181, 184-86 (Va. 1952) (where inadequacy of price shocks the conscience, it is indicative of fraud; when fraud occurs, contract can be rescinded); *Henningesen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 97 (N.J. 1960) (disclaimer of implied warranty of merchantability violates public policy and is void where defective steering system resulted in accident for car having only 461 miles on it).

C. The Right to Return Based on the Uniform Commercial Code

Enactment of the Uniform Commercial Code (“UCC” or “Code”)¹²⁰ significantly altered the right to rescission.¹²¹ While not precisely codifying a right to return, or in legal parlance, the right to rescission, the UCC contains numerous provisions that could be used to justify rescission of a contract, and in some cases, allow a contract to be revoked as well as allow a party’s request for damages.¹²² A brief overview illustrates this point.

The guiding mission of the UCC promotes the principle of freedom of contract.¹²³ However, such a right is not absolute. The Code also incorporates absolute conditions on this freedom, such as good faith and reasonableness.¹²⁴ The UCC was crafted to simplify, clarify, and modernize the existing law as well as to encourage the continued expansion of commercial law through existing practices.¹²⁵ Flexibility in construing the Code’s substantive provisions, also known as “liberal construction,” was underscored.¹²⁶ Even the remedies provided by the Code are required to be liberally construed.¹²⁷

The UCC eliminates the distinction between relief obtainable at law and at equity. Under the UCC, a buyer’s ability to return goods has been enhanced, but still does not create an unlimited right. It should also be noted that the requirements of reasonableness and good faith extend to the buyers of goods in addition to the sellers of goods.¹²⁸

¹²⁰ See U.C.C. § 2-608 (2001) (Official Comment 1). The UCC has been adopted by the legislatures of all states except Louisiana. See *Mathis v. Exxon Corp.*, 302 F.3d 448, 455 n.6 (5th Cir. 2002) (citing *Pennzoil Col. v. F.E.R.C.*, 789 F.2d 1128, 1142 (5th Cir. 1986)).

¹²¹ U.C.C. § 1-102 (2001).

¹²² See U.C.C. §§ 1-101, 2-719(3), 2-714 (2001).

¹²³ U.C.C. § 1-102(2) (2001) (The UCC’s underlying purpose is to promote expansion of commercial practices, modernize, and make laws uniform).

¹²⁴ U.C.C. § 1-102(3) (2001).

¹²⁵ U.C.C. § 1-102(2) (2001).

¹²⁶ U.C.C. § 1-102(1) (2001).

¹²⁷ U.C.C. § 1-106 (2001).

¹²⁸ Section 1-203 of the UCC requires the buyer to exercise good faith and imposes an obligation of good faith on the performance or enforcement of every contract. U.C.C. § 1-203. See also *Glenn Distrib. Corp. v. Carlisle Plastics*, 297

The UCC provisions governing warranties, unconscionable contract provisions, and contract breaches have facilitated the return of goods under certain circumstances. While sellers may attempt to include waivers of such warranties in their contracts, the Code places limitations on such provisions.¹²⁹ The UCC warranty provisions define express and implied warranties. Express warranties are created by a seller's conduct during the process of making the sale.¹³⁰ Oral statements or visual representations regarding the attributes or qualities of a product can create express warranties.¹³¹ Likewise, an express warranty can be created by the appearance of the product, a sample of the product, or even a picture or brochure associated with the product.¹³² For example, a certificate of mileage, displayed on a used car at the time of sale, was held to create an express warranty.¹³³ Express warranties cannot be waived.¹³⁴

Unlike express warranties, the two types of implied warranties included in the Code might be waived by the buyer.¹³⁵ The first implied warranty, the implied warranty of merchantability, extends to purchases of goods from business people who generally sell that type of product.¹³⁶ The second type of implied warranty, the implied warranty of fitness, is created when a seller, not necessarily a business person, is aware of the buyer's purpose in making the purchase.¹³⁷ The implied warranty of fitness is broader, but more difficult to prove than the implied warranty of merchantability.¹³⁸ As

F.3d 294, 302 (3d Cir. 2002) (discussing reasonableness in the context of cover).

¹²⁹ For example, waivers of rights to object to the commercial reasonableness of disposition of collateral are invalid under the UCC. *See Tropical Jewelers v. NationsBank N.A.*, 781 So. 2d 381, 384 (Fla. Dist. Ct. App. 2000) (discussing Article 9 of the UCC).

¹³⁰ U.C.C. § 2-313 (2001).

¹³¹ *Id.*

¹³² U.C.C. § 2-313 (1)(c) (2001).

¹³³ *Rogers v. Crest Motors, Inc.*, 516 P.2d 445 (Colo. Ct. App. 1973).

¹³⁴ U.C.C. § 2-313 (2001) (Official Comments 1, 4); U.C.C. § 2-316(1) (2001).

¹³⁵ U.C.C. § 2-316 (2001).

¹³⁶ U.C.C. § 2-314 (2001).

¹³⁷ U.C.C. § 2-315 (2001).

¹³⁸ *Compare* U.C.C. § 2-315 (implied warranties of fitness for a particular purpose) *with* U.C.C. § 2-314 (implied warranty of merchantability). Substantial evidence is required to prove implied warranty of fitness for a particular purpose.

indicated, the seller does not have to engage in business. However, if the seller is aware of the buyer's reason for buying certain goods, a warranty of fitness may be breached even if the goods, which may be perfectly acceptable goods, still do not conform to the buyer's specified reason for the purchase.¹³⁹

These warranties, if not waived, may assist consumers in returning goods that may be defective or otherwise not meet their expectations. Even where such warranties have been waived, the unconscionability provision of the Code may provide relief to buyers under circumstances in which the goods are neither defective nor fail to conform to their expectations.¹⁴⁰ Such provisions have enabled parties and the courts to reform in whole or in part contracts that are patently unfair or oppressive to one party. For example, in *Williams v. Walker-Thomas Furniture, Inc.*,¹⁴¹ a contract that provided the seller with a continuous security interest in everything the poorly educated consumer had ever purchased from the seller, was deemed unconscionable.¹⁴² The implied warranty of fitness for a particular purpose requires reliance.¹⁴³

In spite of the innovation of this provision, its applicability to the everyday consumer is somewhat limited.¹⁴⁴ Short of filing a lawsuit seeking an order rescinding the contract, consumers are generally unlikely to persuade sellers to accept the return of some goods for a refund using such a rationale.

It is more likely that an assertion that the contract or one of the warranties created under the contract have been breached would yield greater success. In such instances, the Code authorizes numerous remedies, including revocation of acceptance.¹⁴⁵ Unlike common law, the Code allows buyers to accept part of the delivery

Doe v. Miles, Inc., No. ED 75100, 2000 WL 667383, *7 (Mo. Ct. App. 2000).

¹³⁹ U.C.C. § 2-3-15 (Official Comment 2).

¹⁴⁰ U.C.C. §§ 2-302, 2-719 (2001). For example, the New York Supreme Court held that the sale of a \$300 freezer for \$1,234.80, including credit charges, insurance and sales tax, unconscionable. *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266-68 (N.Y. Sup. Ct. 1969).

¹⁴¹ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

¹⁴² *Id.* at 449.

¹⁴³ U.C.C. § 2-315.

¹⁴⁴ See U.C.C. § 2-302 (2001) (Official Comments).

¹⁴⁵ See, e.g. U.C.C. §§ 2-711, 2-601, 2-608 (2001).

and reject the rest.¹⁴⁶ Buyers are no longer required to elect to bring an action in equity or in law.

While the UCC has incorporated greater flexibility into commerce and commercial transactions, an unlimited right to return has still not been created. On the contrary, there must still be a reasonable basis to justify a return. Indeed, the lack of such a reasonable basis may prove very costly to the buyer.¹⁴⁷

It should also be briefly noted that other statutes also facilitate the rescission of contracts. For example, many states have enacted consumer protection statutes known as "Little FTC Acts,"¹⁴⁸ based upon Section 5 of the Federal Trade Commission Act ("FTCA").¹⁴⁹ Unlike the requirement for proving the tort of fraud at common law, such statutes do not require proof that the seller intended to defraud the victim.¹⁵⁰ Reliance on the seller's misrepresentations has been deemed sufficient to prove that such statutes have been violated.¹⁵¹ Those statutes frequently provide for a private right of action to seek damages as well as equitable remedies under certain circumstances.¹⁵² Governmental entities may seek equitable remedies, including restitution and revocation.¹⁵³ However, those laws, like the UCC, do not create unlimited rights. Reasonable facts justifying the revocation of the contract must still be alleged and

¹⁴⁶ U.C.C. § 2-601 (2001); *Young v. Roberts*, No. 87-1407-C, 1989 WL 149060, *2 (D. Kan. Nov. 1, 1989) (election of remedies doctrine doesn't bar other applicable UCC remedies).

¹⁴⁷ U.C.C. §§ 2-707, 2-708, 2-709, 2-710 (2001).

¹⁴⁸ *Cel Tech Communications, Inc. v. Los Angeles Cellular*, 973 P.2d 527, 550 n.2 (Cal. 1999).

¹⁴⁹ All 50 states have adopted a version of the Little FTC Acts. *See, e.g.*, 815 ILL. COMP. STAT. § 505/1 (West 2004).

¹⁵⁰ *See Falcon Assoc., Inc. v. Cox*, 699 N.E.2d 203 (Ill. App. Ct. 1998); *Rubin v. Marshall Field & Co.*, 597 N.E.2d 688 (Ill. App. Ct. 1992); *Warren v. LeMay*, 491 N.E.2d 464 (Ill. App. Ct. 1986); *American Buyers Club, Inc. v. Honecker*, 361 N.E.2d 1370 (Ill. App. Ct. 1977).

¹⁵¹ *Hoke v. Beck*, 587 N.E.2d 4 (Ill. App. Ct. 1992).

¹⁵² *See American Buyers Club v. Hayes*, 361 N.E.2d 1383 (Ill. App. Ct. 1977); *Honecker*, 361 N.E.2d at 1370.

¹⁵³ *Allen v. Woodfield Chevrolet, Inc.*, 802 N.E.2d 752, 755 (Ill. 2003) (injunctive relief, restitution, and civil penalties); *People ex rel. Daley v. Datacom Systems Corp.*, 531 N.E.2d 839 (Ill. App. Ct. 1988) (revocation) (Caroline Shoenberger, *inter alia*, of counsel and argued).

demonstrated.¹⁵⁴ Unless the government is enforcing these laws,¹⁵⁵ an individual seeking equitable relief must still demonstrate that the requirements for obtaining such relief have been met.¹⁵⁶

D. Business Strategies to Cope with the Right to Return

The right to return goods, while not part of the Bill of Rights, does exist in a limited form. Nevertheless, consumer expectations far exceed the limitations imposed by law. Such expectations should not be ignored for commercial or human relations reasons. A business does not want to chase off customers, but recognizing an unlimited right to return goods can break the bank. Consequently, creating a strategy for coping is necessary.

The best coping strategies involve a minimum of three components: (1) creating a return policy that includes dates, times, places, and conditions; (2) training personnel to understand and implement the policy; and (3) communicating the policy to customers. Written policies are best but must be followed.

By creating a written policy, both the consumer and the seller know the rules. The consumer can then decide if he or she would like to engage in business with the seller. The seller would be bound under contract law and other consumer laws to adhere to the written policy. Businesses generally express concerns about creating written policies of any kind for just these reasons. Many businesses prefer the oral "I know it when I see it" policy. Oral policies, however, yield to confusion, misunderstanding, and angry customers. Worse yet is the possibility that a court or a human relations commission will decide the issue. On the other hand, written policies can be a business' best friend. Businesses can always make exceptions to the written policy so long as those exceptions are not based upon race, religion, gender, and other prohibited classifications.

The policy should also be comprehensive and clear, yet simple and understandable. At a minimum, the policy should contain the time period when items can be returned, where the items should be returned, and if original packaging or original price tags must be included. If a business were located in a multi-ethnic area, sensitivity

¹⁵⁴ *Freedman Oldsmobile Mazda Co. v. Pinson*, 580 S.W.2d 112 (Tex. Ct. App. 1979).

¹⁵⁵ *Village of Riverdale v. Allied Waste Transp., Inc.*, 777 N.E.2d 684 (Ill. App. Ct. 2002); *People ex rel. Hartigan v. Stianos*, 475 N.E.2d 1024 (Ill. App. Ct. 1985).

¹⁵⁶ *Nations Credit v. Pheanis*, 656 N.E.2d 998 (Ohio Ct. App. 1995).

to the dominant language of one's customers would always be appreciated. However, marketing folklore warns against misguided, but well-intended translations, such as the invitation to "take advantage" of the sales staff.¹⁵⁷ Therefore, the translation must be carefully executed.

Once a written policy has been drafted, training should be conducted for the employees. It is impressive to customers to be able to ask a question of any store employee, including employees who generally do not transact business with the public, and get a good answer. The shopping "experience" should not be a collection of mumbles and shrugs.

Finally, communication of the policy should be constant. Businesses should put the message on sales receipts, gift receipts, marketing brochures, and billing statements. This task can be done tastefully, and as a way to differentiate one business from another.

Finally, when a customer still insists on his or her right to return, notwithstanding the written policy, good communication of the policy, and the trained and helpful staff, businesses should designate an employee or employees trained to tactfully talk with the irate customer. These discussions should be private. The business is to sell, not to put on a show. Sometimes, graciousness resolves complaints.

IV. Consumer Myth: The Right to a Cooling-Off Period

The right to a cooling-off period is actually a corollary of the right to return. Generally associated with door-to-door or high-pressure sales with respect to a residence, a consumer is able under this perceived right to cancel a contract and receive a refund of any down payment. Like the right to return, there is a limited legal basis for the perception that a right exists. However, the perception, particularly with the sale of automobiles, is far more expansive than the law requires, and particularly in regard to automobiles, frequently wrong.

Regarding the purchase of an automobile, somewhere along the line, someone decided that a consumer could: (1) trade in a car; (2) sign a contract for a new one; (3) drive the car off the lot; and

¹⁵⁷ The classic marketing mistake was advertising a Chevrolet Nova in Spanish-speaking countries. The phrase "no va" means "doesn't go" in Spanish. See *Skipping Stones, Spanish Ole'*, at <http://www.skippingstones.org/canvas-vol154-page30.htm> (last visited Apr. 3, 2004).

then (4) cool off; (5) return the new car; and (6) receive a refund, complete with the old traded-in car. Chances are, however, that the moment the dealer received the traded-in car, it was sold for parts and immediately dismantled or just as quickly, sold to someone else.

Allowing someone the right to cancel a deal can amount to an elevated art of diplomacy. So prevalent is this myth that in the summer of 2002, a proposed ordinance was introduced into the Chicago City Council that sought to extend the non-existent, three-day cooling-off period for senior citizens to 30 days.¹⁵⁸ Still, a limited right to cancel a contract does exist. A cooling-off period is an important tool in instances when consumers are pressured into signing contracts or in cases of elderly consumers who may be easily influenced.

A. The Evolution of the Right to a Cooling-Off Period

First, to set the record straight, the most optimistic reading of the Constitution fails to reveal the basis for the so-called right to a cooling-off period. Nor is there a basis in common law, or in the UCC for a consumer to exercise such a right. As indicated earlier, it is very difficult to rescind a contract at common law or pursuant to the UCC, even when a claim of fraud is alleged.¹⁵⁹

However, there are circumstances, created by either legislation or through rules and regulations promulgated pursuant to a legislative grant of authority, under which a limited right to a cooling off period exists. Examples of statutes and regulations creating a right to cancel a contract for any reason within a short period of time can be found in: (1) the Federal Truth-in-Lending Act (“*TILA*”);¹⁶⁰ (2) the FTC Trade Regulation Rule Concerning a Cooling-off Period for Door-to-Door Sales (“*FTC Three-Day Cooling-Off Period Rule*”);¹⁶¹ (3) state consumer protection statutes such as the Illinois Consumer Fraud and Deceptive Business Practice Act (“*ICFA*” or “*Little FTC Act*”);¹⁶² and (4) other statutes conferring special protections on a segment of the public, such as the Illinois Public Insurance Adjusters

¹⁵⁸ The proposed ordinance was never set for hearing.

¹⁵⁹ Fraud is always an available cause of action under the UCC. *See, e.g.*, U.C.C. § 2-202 (2001) (Official Comments).

¹⁶⁰ 15 U.S.C. § 1601 (2003).

¹⁶¹ 16 C.F.R. § 429 (2004).

¹⁶² 815 ILL. COMP. STAT. § 505/1 (West 2004).

and Registered Firms Act (“IPIARFA”),¹⁶³ and the City of Chicago’s Immigration Assistance Ordinance.¹⁶⁴ Some of these statutes, such as the IPIARFA, even provide a consumer with more than three days to cool off.¹⁶⁵

Many of these laws and regulations have significant legal limitations or are very narrow in scope. For example, the duty to provide oral and written notices of a three-day right to rescind a contract under TILA¹⁶⁶ only arises when a security interest is taken by a creditor in the residence of a debtor.¹⁶⁷

Additionally, the FTC Three-Day Cooling-off Period Rule does *not* contain a private right of action.¹⁶⁸ Only the FTC can enforce the rule.¹⁶⁹ The rule itself requires sellers to provide notice and forms to consumers detailing their right to cancel contracts within three business days of execution when the contracts have been signed outside of the sellers’ place of business.¹⁷⁰ The scope of the rule has been interpreted to extend beyond those contracts signed in residences to also cover transactions executed in temporary business locations like motels.¹⁷¹

¹⁶³ 215 ILL. COMP. STAT. § 5/512.51 (West 2004).

¹⁶⁴ CHICAGO ILL. MUNICIPAL CODE, ch. 4-372 (2003).

¹⁶⁵ See 215 ILL. COMP. STAT. § 5/5 12.58 (West 2004) (Providing that notice must be given within 5 days of the event, and the consumer has 10 days to rescind).

¹⁶⁶ 15 U.S.C. § 1601 (West 2004).

¹⁶⁷ Federal Reserve System Truth in Lending Regulations, 12 C.F.R. § 226.1(b) (2003).

¹⁶⁸ See FTC Advisory Opinion (July 16, 1976). “Since there is no private right of action to enforce this FTC regulation, however, much of the litigation in this area is brought under state laws that also mandate cooling-off periods.” MARY DEE PRIDGEN, CONSUMER CREDIT AND THE LAW § 1.8, at *1 (Thompson West 1986).

¹⁶⁹ See, e.g., *Baum v. Great W. Cities, Inc.*, 703 F.2d 119 (10th Cir. 1985); see also *Fulton v. Hecht*, 580 F.2d 1243 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). “The whole issue may have become moot because so many state unfair and deceptive practices acts authorize private actions, often with treble damages and attorneys fees. Most of these states statutes also incorporate by reference the FTC law of unfair and deceptive practices, so that consumers have an effective remedy in state court for violations of the FTC Act. The need for a direct private action to enforce the FTC Act is no longer so urgent.” MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 12.41, 921-22 (West 2003).

¹⁷⁰ FTC Rule Concerning Cooling-Off Period for sales made at Homes or at certain other Locations, 16 C.F.R. § 429.1 (West 2004).

¹⁷¹ 16 C.F.R. §429.0 (covers hotels or motel rooms, convention centers,

Broader protection is afforded to the consumer under the ICFA or the Little FTC Act, modeled after the FTCA.¹⁷² Additionally, the Chicago Municipal Code broadly incorporates state and federal laws and rules.¹⁷³ The ICFA's provision relating to the three-day cooling-off period resembles the FTC Three-Day Cooling-Off Period Rule.¹⁷⁴ Unlike the FTC rule, the ICFA permits a private right of action authorizing the award of actual damages and other relief,¹⁷⁵ as well as very broad enforcement by the Illinois Attorney General and the States Attorneys Office for all 102 counties within Illinois.

The ICFA also differs from its federal counterpart in that it involves a sale of at least \$25 under a single contract or multiple contracts by a seller physically located in a consumer's residence.¹⁷⁶ There are numerous exceptions to this law, but none so abused as the provision permitting the waiver of this right under "emergency" situations.¹⁷⁷ The law fails to provide guidelines as to what can be regarded as an emergency, leading to a lot of unusual emergencies in Illinois.

Other statutes creating a cooling-off period have been enacted in Illinois, including, but not limited to: (1) the Illinois Job Referral and Job Listing Services Consumer Protection Act,¹⁷⁸ which seeks to protect job-hunters from employment referral agencies; and (2) the Illinois Public Insurance Adjusters and Registered Firms Act,¹⁷⁹ which involves non-attorneys whose service are offered to victims of a "loss-producing occurrence."¹⁸⁰ These statutes are narrowly drawn and address special situations that warrant additional legal protection. The Chicago Immigration Assistance Ordinance was also created to address the protection of immigrants from fraud by non-attorneys.¹⁸¹

fairgrounds, restaurants or sales at the buyer's workplace, or in dormitory lounges).

¹⁷² 815 ILL. COMP. STAT. § 505/1-12 (2003).

¹⁷³ CHICAGO ILL. MUNICIPAL CODE, ch. 2-24-060 (1998).

¹⁷⁴ See *supra* note 168 and accompanying text.

¹⁷⁵ 815 ILL. COMP. STAT. § 505/10a (2003).

¹⁷⁶ 815 ILL. COMP. STAT. § 505/2B (2003).

¹⁷⁷ 815 ILL. COMP. STAT. § 505/213(c) (2003).

¹⁷⁸ 815 ILL. COMP. STAT. § 630/8 (2003).

¹⁷⁹ 215 ILL. COMP. STAT. § 5/512.58 (2003).

¹⁸⁰ 215 ILL. COMP. STAT. § 5/512.58-61 (2003).

¹⁸¹ CHICAGO ILL. MUNICIPAL CODE, ch. 4-372-010, 030 (1998).

B. The Inability to Use the Cooling-Off Period as a Weapon Against Fraud

The real story behind the cooling-off period, when it does exist in the law, is that it is generally ineffective against fraud. Take, for example, a door-to-door salesman for a roofing company, after signing a contract containing the legal cancellation notice, obtains a \$300 down payment. Even if the resident exercises the right to the three-day cooling-off period, it's a challenge for the consumer to get back the deposit. When civil cases are filed, assuming appropriate service has been completed, the cost of collecting a judgment can exceed the amount of obtaining the actual judgment, not to mention the cost of the time spent pursuing the collection effort. Government intervention aided by news exposure may provide victims with assistance after the fact. However, criminal prosecutions are rare. Civil actions by the government also require substantial collection efforts.

Attempts to educate consumers on their right to a cooling-off period to avoid becoming victims of fraud have also been ineffective. Government agencies and advocacy groups have tried to educate consumers on their rights for years. Some consumer protection agencies have tried to simplify the message: avoid doing business with door-to-door salesmen and their modern day clones—the telemarketers and spammers.¹⁸² Unfortunately, when it comes to reaching out to consumers, the marketers are the pros, and the buyers are the amateurs. The tactic continues to produce a lot of revenue, much of it fraudulently obtained.¹⁸³ Statutory attempts to limit direct access to the public frequently run afoul of the First Amendment and do not withstand judicial scrutiny.¹⁸⁴

Where legitimate companies appropriately present a legally proper notice of the cooling-off period, the actual language in the notice is generally written in such a complicated manner that most

¹⁸² See <http://www.ci.chi.il.us/ConsumerServices/> (last visited Mar. 14, 2004).

¹⁸³ The FTC reports that \$400 million in consumer fraud was reported in 2002. Internet fraud represents 55% of the total complaints, phone fraud is among the most commonly reported. See Peter Lewis, *Seattle fraud score a shocker: metro area ranks No. 2 on FTC list of complaints filed*, SEATTLE TIMES, Jan 23, 2004, at B3.

¹⁸⁴ See, e.g., *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (declaring village ordinances requiring solicitors to obtain permits before engaging in door-to-door solicitation unconstitutional, in violation of First Amendment protections).

consumers rarely look at it. What consumer has the time to actually read through the notice, especially those heavy in legal jargon and presented with other documents?

C. Business Strategies to Cope with the Right to a Cooling-Off Period

In light of the limited existence of a cooling-off period and its minimal impact when it does exist, the question becomes: why should businesses have to cope with this consumer myth at all? They just have to provide the notice when required, as required, and sit tight. Where the right does not legally exist, they just make the sale and move on to the next one.

Unless a business is not dependant on return customers, after market follow up business or good will, a policy for accommodating the irate customer convinced of his or her non-existent right to a cooling-off period is essential. Some businesses have even found a way to improve sales by offering other forms of a cooling-off period, even when not legally required to do so. For example, a car dealership may allow a customer to return the newly purchased car¹⁸⁵ or take advantage of the recently popular twenty-four hour test drive.

Unlike the need to have a formal written policy regarding the right to return goods, a case-by-case accommodation of the cooling-off period myth may be more prudent, assuming again that the law does not require it. Decisions made on race, religion, sex, and other such bases are off limits. Bait and switch tactics should also be avoided. Each advertisement for the sale of an automobile, or any other good or service, should be the main course and not an appetizer.

V. Conclusion

The expectations of consumers regarding what they perceive as their “rights” differ in reality from the protections of the law. As discussed above, many of these perceptions have some basis in the law, but have exceeded legal parameters in the minds of the public and grown to mythical proportions. Other protections are unavailable outside costly litigation. Nevertheless, to retain public confidence and avoid unwanted government interference, litigation, and media attention, consumer expectations should still be addressed. More laws and bad press carry a price tag.

¹⁸⁵ See, e.g., <http://www.carmax.com> (last visited Mar. 14, 2004).
