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Major Problems With Article 2A: Unfairness, "Cutting Off” Consumer Defenses, Unfiled Interests, and Uneven Adoption

by Donald B. King*

Article 2A on leases represents a major addition to the Uniform Commercial Code ("U.C.C."). Proposed for adoption throughout the United States, some states have already adopted the article. Because of the provision’s impact, we must view it carefully and correct major flaws.

In the past, courts dealt with the field of leasing through analogy to principles of sales law. However, this treatment lead to the uneven application of the law, and a new codified law on leases is certainly desirable. For their hard work and initiative, the drafters of Article 2A deserve praise; however, they are not above criticism. The drafters must resolve several major difficulties with the article before its adoption throughout the United States. In those states that have already enacted it, some clarification and amendment may be in order.

This Article explores the major problems of Article 2A. Within each area of criticism, some solutions, additions to the comments, amendments, or special legislation are suggested. This Article does not explain

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or survey various provisions of Article 2A, because others have already done so.²

I. UNFAIR LEASES

_Caveat emptor or buyer beware: From the sixteenth century to the twentieth and back again._

Many leases are standard form contracts. Indeed, an individually written or typed lease is rare, and sometimes even then printed form contracts are used. In situations involving consumers, the lease is almost always in standard form. The same is true for leases used by small businessmen.

One problem with standard form contracts or leases is that they are often one-sided.³ The party who drafted them almost always drafted them heavily in its own favor. Karl Llewellyn, the Chief Reporter of the U.C.C. and noted commercial law scholar, pointed out that lawyers drafting standard form contracts often made them extremely one-sided. Indeed, according to Llewellyn, these lawyers often took advantage of the other party by securing every favorable term possible—even more terms than the businessman client himself would want.⁴

The fine print, which consumers who are buying or leasing goods rarely read, creates another problem with the standard form contract. Consumers can hardly be said to have a duty to read the fine print in many standard form contracts, considering how difficult it is to see. The print can be so fine that it requires a magnifying glass. Often the print is light and blends into an endless sea of words. Even if those clauses were read, many consumers and small businessmen would find it difficult to understand the “legalese” or the hidden legal impact of such clauses.

In standard form contracts or leases, no real negotiation about the printed clauses takes place. One party simply presents the other with a standard form. The other party must either buy or lease the goods under the contract terms or forego the transaction. He probably cannot get better terms elsewhere, because all standard form contracts usually contain

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similar terms favoring the stronger party. Thus, no real negotiation or choice exists in these contract or lease situations.

Unconscionability is one major attack on the unfair contract. Under Article 2 of the U.C.C., unconscionability has become a major weapon in the hands of consumers and small businessmen. In a number of cases, the courts recognized the realities involved in standard form contracting. For example, regarding the monopolistic use of one-sided clauses, the court in *Henningsen v. Bloomfield Motors, Inc.* pointed out what little choice the consumer has since most companies have these clauses in their standard form contracts. One-sided clauses are also found in leasing. In this regard, no significant difference between contracts and leases exists.

Further, while *Henningsen* dealt with a contract for the sale of a car, more and more buyers are leasing cars. Many companies and financial institutions encourage leases as a way of saving money and gaining tax advantages. Those engaged in financing sometimes advocate leasing in their literature. Since the drafting of the U.C.C., leasing “has grown explosively and now represents a sizeable sector of our economy.”

Some courts have analyzed the one-sidedness of standard form leases. The courts point out both the unfairness of particular clauses and their cumulative effect. In *Hertz Commercial Leasing Corp. v. Dynatron, Inc.*, the court pointed out that even a “minor and insignificant breach of the lease” would, if the written lease terms were enforced, “permit[...]


8. Id. at 87.


10. 427 A.2d 872 (Conn. 1980).
the [lessor] . . . to recover damages far in excess of the fair value of such a minor (or even moderate) breach.'”

The court in *Henningsen* also pointed out that in reality consumers are never shown the particular fine print clauses in the contracts. Usually, the seller does not specifically call the one-sided disclaimer clause to the attention of the buyer. Further, most persons do not understand fully the legal consequences of the term.

The drafters of Article 2A recognized the doctrine of unconscionability and provided for it in section 2A-108. If the court finds a “lease contract or any clause of a lease contract to have been unconscionable at the time it was made,” the court may enforce the lease without the unconscionable clause or limit the clause so as to avoid any unconscionable result. Indeed, paragraph 1 sets forth this basic principle and “is taken almost verbatim from the provisions of Section 2-302(1),” which regulates sales contracts. As the drafters further noted, the basic purpose of this section is to apply the concept of unconscionability to leases.

The Article 2A section on unconscionability goes beyond Article 2 and recognizes that unconscionable means may have induced the consumer to enter into a lease. In this sense, the article recognizes not only the “illness of unconscionability,” reflected in the contract, but some of its causes as well. The provision realistically perceives that a lease, appearing on its face to be valid, may have been induced by unconscionable conduct and, therefore, should not be enforced. Under such circumstances, the injustice of enforcement is self-evident. Unconscionable conduct, in the collection of any claim arising from the lease contract, is barred. This part of the Article 2A section is based on the Uniform Consumer Credit Act, which also recognizes that unconscionable conduct should not be rewarded. Indeed, unconscionable conduct in the formation of the lease or its enforcement could be recognized as a tort that would give way to punitive damages in appropriate circumstances.

11. *Id.* at 878.
12. 161 A.2d at 92.
13. *Id.*
14. *Id.*
16. *Id.* § 2A-108 cmt.
17. *Id.*
18. *Id.*
19. *Id.* § 2A-108(2).
22. *Id.* § 2A-108(3); see also King, *The Tort of Unconscionability*, supra note 5.
In paragraph 3 of the section on unconscionability, the drafters seem to encourage an attack on unfair and unconscionable lease terms by providing that if one prevails on the unconscionability claim, he or she shall also prevail as to attorney fees.\(^3\) Without this provision, many attorneys might never take an unconscionability case because the amounts involved are often not great enough to justify participation on their part. By assuring attorney fees, paragraph 3 makes it practical for lawyers to attack the unfair contract or lease clauses.

Unfortunately, paragraph 4(b) of the same section destroys the possibility of attacks on unfair clauses by placing the risk of huge attorney fees for the other side on the consumer.\(^4\) This paragraph deals the “death blow” to unconscionability claims. Indeed, it makes the other three sections virtually meaningless. While paragraph 4(b) may seem logical to some on the surface, its impact is disastrous.

Paragraph 4(b) provides that if a judge deems any unconscionability claim to be groundless, then attorney fees may be assessed against the party raising it.\(^5\) “Groundless” is so nebulous and uncertain that it makes it risky for consumers to assert unconscionability. The term is not defined in either the text or comments, and what is “groundless” to one person may not seem so to another. For example, one might view the lease clause as harsh, one-sided, and unconscionable, while another might justify it on the basis of the lessor’s need to discipline lessees or to avert any possible risks; one might view the unread and hidden standard form lease clause as “unfair surprise,” while another might say, consumers have a duty to read the entire contract.

If an attorney asserts a new theory of unconscionability, a judge unfortunately might find it to be groundless. As pointed out in the American Law Institute (“A.L.I.”) discussion, would the judges have held the assertion by Brandeis and Warren of the right of privacy as a new theory groundless?\(^6\) Some judges might have! Yet this theory eventually became a major part of the law.

The doctrine of unconscionability has only been used in the last several decades and may still undergo considerable development. In this regard, a number of theories are likely to be asserted and accepted by the courts in the coming years. Also, unconscionability could be recognized in an increasing number of situations. Nevertheless, in this period of uncertainty and development, some courts will hesitate to find unconscionability. Many judges may be conservative and see the unconscionability claim as

\(^4\) Id. § 2A-108(4)(b).
\(^5\) Id.
\(^6\) Donald B. King, Discussion of Uniform Commercial Code, Article 2A, 64 A.L.I. Proc. 452 (1987) [hereinafter “Donald B. King”].
"groundless." In a fair number of unknown cases, paragraph 4 will indeed be evoked against the party raising unconscionability with a most serious impact.

On the floor of the A.L.I., this writer pointed out:

What consumer will risk his car, his house, his entire financial savings to bring an action based on unconscionability when, indeed, he may be held liable under this Section?

It makes no difference that his claim may have some grounds. He runs the risk of losing his home, his auto, his savings, and having to pay for the expenses of the attorney of the other side. No consumer will bring an action under this Section; rather, he will hesitate to ever develop further grounds of unconscionability. It is a virtual death knell. When I first read this Section I thought it applied primarily to businesses. However, it is clear that it is directed against the consumer by the Comments that refer to groundless consumer actions. It seems to be that this Section, if it is to be kept, must exempt the consumer from this tremendous obstacle that he would encounter.27

Acknowledging that this position might be meritorious, the Reporter, Mr. DeKoven, assured members of the A.L.I. that serious thought would be given to the matter, and that it would be reconsidered:

MR. DEKOVEN: Professor King, I had the opportunity to think about the point that you raised because you were kind enough to send me your comment, not only in advance, but typewritten so that I could read it and understand it. And I have to say that in the process of developing the draft, no one ever raised the issue, at least not that I am aware, or ever discussed it with me. I think that you present a compelling argument, and what I intend to do is to discuss the issue further with our Advisers on the subject, hoping that we can respond in a meaningful way to your excellent point, and I thank you.28

Under these circumstances, the drafters of Article 2A must acknowledge that they did not have the approval of the A.L.I. to include paragraph 4(b). Had a vote been taken on the matter at that time, the A.L.I. probably would have rejected that paragraph. This highly unusual procedure, however, allowed the provision to remain in the draft. No serious reconsideration of this matter regarding either changes or additions to the text or to the comments appears to have been made.

Attorneys in private practice and legal aid will readily attest that this type of provision, permitting the seller's attorney fees to be assessed against the consumer, will have a tremendous deterrent effect on attacking unfair leases. Certainly, every attorney must inform his client of the

27. Id.
28. Id. at 452-53.
potential risk of having to pay attorney fees for the other side. Once an attorney highlights this particular risk, most clients will not want to raise the issue or continue with it. The client must be informed not just generally, but specifically, that he could lose his car, his belongings, and even his home to pay attorney fees for the other side. Even if the attorney tells the client that the risk is slight (perhaps only one in twenty, or one in fifty, or even one in one hundred), what client would risk this much simply to attack an unfair lease? Once informed, the client may feel it is better to keep his belongings and simply let the lease involving several hundred dollars go.

In truth, the attorney must also tell his client that he cannot guarantee a judge will not invoke this clause. The attorney must acknowledge that because some judges are conservative and arbitrary, the result is uncertain. The consumer's risk is magnified by the fact that some judges will make erroneous decisions. As this writer noted on the floor of the A.L.I.:

I once said that the cases decided under the U.C.C. were decided about one third wrong, about one third right for the wrong reasons, and about one third right for the right reasons. I'm afraid the same thing may be true here. There is that chance of the one-third wrong decision that would go against the consumer. No consumer can afford this death knell or the cost of appealing the litigation.30

What is the solution to this very serious problem that impels raising unconscionability against unfair contracts? Several possibilities exist through both case law and legislation.

Under one solution, judges can find that this provision deprives persons from asserting their legal rights in court, thus depriving them of their constitutional rights to due process. Yet, some courts will simply say it deprives the individual only of raising frivolous claims. These courts ignore the impact of this clause on preventing legitimate claims. However, many courts will deal only with the logic of the wording per se and not with its true impact.

A second case law approach may be more successful. The attorney attacking the unfair contract or unfair lease clause need not raise unconscionability. Rather, he can assert that no real consent to the unfair standard form contract or lease clause exists and that, therefore, it is ineffective. The attorney can assert that the parties did not agree on that particular matter and, hence, the clause is not valid. The contract or lease includes only those terms that were actually discussed and agreed upon. Legal authorities who recognize the realities of standard form contracts support this theory.30 Even Karl Llewellyn recognized that many clauses

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29. Id. at 452.
30. See King, supra note 3, at 140, 152, 158-59.
exist to which no assent is ever reached. The court should not allow one party to impose such terms upon the other without consent. In recent times, several commentators have pointed this out, some arguing that the court must find some reasonableness before enforcing the clause.

In a recent article, this writer asserted that the courts should not enforce "unagreed upon" terms in standard forms. Other legal authorities and courts may continue this line of reasoning, freeing the law of the tyranny of the standard form contract. Until recently, those drafting standard form contracts had the support of courts who used artificial and unrealistic rationale. A misunderstanding of what the law should be arose. Under this writer's theory, the court should enforce only those clauses agreed upon. Using this theory, the plaintiff can avoid the danger of paragraph 4 of Article 2A. Moreover, it could not ever be said that to raise the point that one should not be held to a clause that one has not actually agreed upon is "groundless."

However, this provision of Article 2A should be amended before it is enacted in any other state. The proposed amendment would simply delete paragraph 4(b) of this section dealing with unconscionability. Thus, the death blow to unconscionability actions or defenses would never occur in that jurisdiction. Indeed, Oregon and Florida have already enacted Article 2A without paragraph 4. However, the best solution for other states would be to enact it without the offensive part, paragraph 4(b).

For the states that have already enacted Article 2A, the solution is almost as simple. In those states, an amendment to Article 2A repealing paragraph 4(b) is required. Again, once it is deleted the "death blow" to unconscionability would no longer exist.

One other solution would be simply to leave Article 2A as is, but to enact a statute for consumer protection that would override paragraph 4, for example:

**CONSUMER PROTECTION AGAINST OPPOSITION ATTORNEY FEES**

In regard to claims of unconscionability, no attorney fees will be allowed against any consumer raising any claim of unconscionability or making any attack on unfair contracts.

In this form, this statute would protect consumers, but it may not protect small businessmen. However, the statute could be modified to read "party" instead of "consumer," or a separate statute could be passed to

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32. See King, supra note 3, at 155.
33. Id. at 156.
34. Id. at 141-51.
protect small businessmen as well. The more simple solution is, however, to amend Article 2A by deleting paragraph 4(b).

In addition, the Commissioners should amend their proposal of Article 2A-108 by deleting paragraph 4(b). They have that power and do make amendments through their joint Permanent Editorial Board. If they are unwilling to make such an amendment, they should at least add further explanation to the comments to U.C.C. section 2A-108:

**ADDITION TO COMMENTS**

Paragraph 4(b) should not be used to discourage the bringing of unconscionability claims in good faith, and such claims may be brought even though the theory on which they are raised is novel. Further rejection by some courts of similar claims in the past should in no way prevent asserting the issue for reconsideration and change. To minimize any assessment of costs against the party raising the unconscionability issue, an assertion that an opponent's claim of unconscionability is in bad faith and groundless must be made immediately, and a hearing held on that issue without delay.

II. CUTTING OFF CONSUMER DEFENSES

*From the 1600s through most of the 1900s, when consumer defenses were “cut-off” by legal doctrines, to the consumer protection in the 1970s and 1980s barring this result, and back again.*

Difficulty rests in the uncertainty Article 2A creates with respect to whether consumer defenses against the goods will be preserved against the financier of the transaction. An amendment is desirable to make this clear.

A short excursion into commercial and consumer law history is useful to understand this point. In the 1600s, the commercial law “holder in due course” doctrine was being assimilated into the common law.\(^36\) The basic doctrine became entrenched despite various debates on whether a subjective or objective standard of good faith was required of the holder in due course of commercial paper signed by the buyer of the goods.\(^37\) Under the doctrine, the holder in due course could “cut off” any defenses of the buyer related to such matters as the quality of the goods or representations made about them. Normally, when only a seller and buyer were involved and payments were made over a period of time, if the goods were defective, the buyer could raise this as a defense and cease making pay-

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ments. However, if the seller had sold the promissory note signed by the buyer to a bank or financing institution, then the bank, as a "holder in due course," could force the buyer to continue making monthly payments without regard to the defense that the goods were defective. The U.C.C. adopted and retained this doctrine.\textsuperscript{38} The buyer's "personal defenses" were "cut off" by holders in due course.\textsuperscript{39}

Not long after the Pennsylvania legislature enacted the U.C.C. in the 1950s, serious consumer problems became apparent. Some courts allowed consumer defenses to be cut off, while others found some "fraud in fact" or "real fraud" in the consumer's signing of the promissory notes that allowed the consumer some protection.\textsuperscript{40} Even in the early 1960s, this writer advocated amendments to the U.C.C. for legislation to protect the consumer.\textsuperscript{41}

In the 1970s and 1980s, a number of states enacted statutes designed to prevent the "holder in due course" doctrine from applying to consumer sales.\textsuperscript{42} The Federal Trade Commission ("FTC") drafted a similar rule.\textsuperscript{43} Federal law also preserved the consumer's right to raise defenses and cease making any payments on credit card purchases.\textsuperscript{44} The drafters of Article 2A attempted to make clear that consumer protection laws, current and future, are not affected by enactment of Article 2A.\textsuperscript{45}

Consumer protection in the finance lease situation requires clarification. Article 2A provides that the finance lessor shall not be responsible for implied warranties on the goods.\textsuperscript{46} The comments point out that "the lessee looks almost entirely to the supplier for representations, covenants and warranties."\textsuperscript{47} The finance lessor "remain[s] outside the selection, manufacture and supply of the goods."\textsuperscript{48} This is "the rationale for releasing the lessor from most of its traditional liability."\textsuperscript{49}

One may understand why the drafters did not want to place positive liability for damages due to loss or injury from defective goods on the finance lessor; however, whether the financier remains subject to the

\textsuperscript{38} See U.C.C. § 3-302 (1990).
\textsuperscript{39} Id. § 3-305.
\textsuperscript{40} For a discussion of these cases, see King, supra note 37, at 211-13.
\textsuperscript{41} Id. at 213-15.
\textsuperscript{43} 16 C.F.R. § 443.2 (1991).
\textsuperscript{45} U.C.C. § 2A-104(1)(c) cmt. 2 (1990).
\textsuperscript{46} Id. § 2A-212.
\textsuperscript{47} Id. § 2A-103 cmt. (g).
\textsuperscript{48} Id.
\textsuperscript{49} Id.
buyer's defense that the goods are defective with regard to making payments is unclear. Can the buyer cease to make payments on the basis that the goods are defective? If the consumer must still make payments, then his or her defenses have been cut off just as effectively as they were under the old "holder in due course" doctrine. Under the former circumstances, the financier of the transaction purchases commercial paper, while in the lease situation, the financier holds a different piece of paper, a lease, over the head of the consumer. If adequate consumer protection is to exist, the results should be the same.

This writer may be viewing this matter too technically. However, one can argue that most of the consumer protection statutes that abolish the cut off of defenses against holders in due course do not apply to the finance lease setting. Indeed, the legislatures drafted the statutes in a different context, making it difficult to read the finance lease setting into them. Further, the drafters of Article 2A decided as a matter of policy not to include consumer protection within its provisions. Indeed, the drafters considered provisions that would invalidate contractual clauses in consumer leases, but decided instead to leave this task to state law. It would be ironic if after all these years of struggle, protection could be subverted by a finance lease arrangement.

Of course, the drafters may have made it clear that consumer protection is to be preserved. In setting forth this policy, the drafters would not have intended to cut off consumer defenses regarding goods. Further, while providing that the financier shall not be responsible for warranties, the drafters did not say that a defense to payment by the buyer was barred against the finance lessor. Failure to make that statement supports the overall policy of preserving existing consumer protection.

Since the supplier's express and implied warranties extend to the consumer under section 2A-209, some argue that he or she should be able to withhold payments for breach of warranty. Withholding further payments against the supplier or ordinary lessor could be an integral part of the buyer's rights. The buyer's rights against the supplier should include the right to withhold payment, and this right should remain even in a finance lease.

Why leave the matter to even the slightest doubt or to the courts' interpretation? An amendment is in order, and it might read:

51. Id. at 970.
52. See supra note 45 and accompanying text.
54. Id. § 2A-209(1) & cmt. 1.
CONSUMER DEFENSES PRESERVED

No consumer shall be barred from raising any defense he or she has based on the quality or performance of the goods or based on the signing of legal documents against the finance lessor or any other party.

If a state has already adopted Article 2A or wants to cover this matter separately, it can pass a special consumer protection statute:

CONSUMER PROTECTION AGAINST DEPRIVING CONSUMERS OF THEIR DEFENSES BY FINANCE LEASING

No consumer shall be barred from raising against a finance lessor any defense to payment he or she might have concerning the goods or signing of legal documents. All rights preserved against holders in due course of commercial paper or contracts shall be applicable likewise to finance lessors.

The federal government could also enact a similar statute.

III. UNFILED "HIDDEN" INTERESTS

From the secret lien of the eighteenth century to court hostility and legislative filing requirements of the twentieth century and back again.

Article 2A does not require the lessor to file a lease to advise buyer's creditors of the lessor's interest in the goods. Hence, creditors may be misled by an unfiled or secret lease. Under the U.C.C., a "lease" must be filed if it is a security interest rather than a true lease. Considerable litigation has resulted from this provision. Adopting various tests, courts have found leases not to truly be leases. For example, the Supreme Court of Alaska moved from a multifactor to a single factor test even though different tests are used in other states. Since then, the U.C.C. definition of security interest has been amended, and it is quite likely that considerable litigation will center around this new amendment.

One solution to this problem would be to require the filing of leases and security interests. Thus, whether it be a security or lease interest, a creditor could ascertain whether any "hidden interest" was present in the goods on which he was loaning credit. The U.C.C. could easily require the filing of leases and security interests. Indeed, Article 9 of the U.C.C.

55. Id. § 1-201(37) (1987).
57. Id. at 1235-36.
59. For others who advocate such filing, see Douglas G. Baird & Thomas H. Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 STAN. L. REV. 175, 190-94 (1983); Peter Coogan & Amelia H. Boss, Uniform Commercial Code Treatment for All Leases, in 1 COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UCC 1047 (1968); see
offers parties the option of filing leases. The Article 9 filing system is clearly designed to handle such filings, and in one province of Canada, legislation requires the filing of leases. Apparently, this requirement has had no adverse effects. Indeed, creditors in this province are much better informed with respect to any secret lease interests involved.

An amendment to Article 2A or to Article 9 requiring the filing of leases could readily effectuate this solution. Also, a separate piece of legislation could require the filing of leases within the existing code filing systems. A federal filing system for both lease interests and security interests may be developed someday.

The drafters of Article 2A did not think filing of leases was necessary for two reasons. First, the leasing industry is opposed to it; this reason is not sufficient when other parties may be hurt by the lack of filing. Second, the reporter viewed the current state filing systems as “very heavily overloaded.” The simple solution to this problem is to make those systems more efficient. With the use of computers, this should be no problem. Further, most states have not asserted or presented evidence of such overloading.

While the drafters of Article 2A did not envision a filing requirement for leases, the article does not prohibit it. As mentioned, an amendment to Article 2A or Article 9 could achieve this result. Since existing filing systems established by Article 9 could be used for leases, no problem of implementation exists.

IV. Uneven Adoption

From a group of colonies and then states with their own commercial laws in the eighteenth century to a national trade and economy in the twentieth century and back again.

Article 2A is being proposed on a state by state basis. During the article’s enactment, some states will choose Article 2A or modifications of it. Some states will not choose it at all. As a result, the law of leases will vary from state to state. Why should the rights of a lessor or lessee vary so


60. U.C.C. § 9-408 (1972).
61. See Cumming, supra note 59.
64. Id.
heavily based on state boundaries? Why should living on one side of a mountain range or river, which historically determined the state's boundaries, make a difference as to the rights of individuals engaged in trade across them? The commerce of today is part of a national trade network and economy. Ironically, Article 2A is being pursued at the state level rather than at the national level. This approach is, however, consistent with that generally taken with regard to the U.C.C.

The drafters, the A.L.I., and Uniform Laws Commissioners, should have learned the lessons of the past with regard to the adoption techniques. The U.C.C. was drafted between 1940 and 1949. Pennsylvania adopted it in 1952. Other states adopted it in the late 1950s and the early and mid-1960s. Thus, the U.C.C. was not enacted throughout the nation until twenty-five years after drafting began.66 During this period of adoption, commercial law was not uniform throughout the land. Sellers and buyers in one state had different rights than those in others. States used different legal tests and concepts to ascertain what those rights were. The implementation process ignored the fact that manufacturers in one state often sold their goods in another state. Indeed, these goods were often sold from one manufacturer to others who sold to still others in various states. Consumers should have certain basic rights regardless of where they happen to live.

In the years between the U.C.C.'s formulation and enactment, society changed markedly. New business practices developed, and credit cards became commonplace. The U.C.C. did not cover these changes. New methods of banking and electronic transfers also came into being and were not covered by the U.C.C. In addition, major social changes, such as the consumer protection movement of the 1960s, brought forward new demands for laws not embodied within the U.C.C. Strict liability in tort for defective products illustrates how case law sometimes moved the law ahead of the U.C.C.66 The lessons are clear: state by state enactment takes time, creates nonuniformity, and makes the law a less effective instrument for dealing with constantly occurring changes. Despite the lessons of the past, the A.L.I. and the Commissioners on Uniform State Laws continue state by state adoption for such matters as Article 2A on leasing and amendments to the U.C.C.67

As one very obvious solution to this problem, the U.C.C. could be enacted on the federal level so that national law could deal with commercial matters including leasing. Indeed, by trying to promote a uniform law on a state by state basis, the A.L.I. and the Commissioners indirectly ac-

66. Restatement (Second) of Torts § 402A (1965).
67. Amendments to Articles 3 and 4 are also proposed by the A.L.I. for state by state adoption, despite proposals on the floor for consideration of possible federal enactment.
knowledge this fact. State by state enactment reaches the same goal as federal enactment. The A.L.I. should have no problem formulating an appropriate plan since it can propose legislation on either a state or federal level. The Commissioners should find it implied in their powers to promote the best commercial law for each state, whether through federal or state action. Clearly, uniformity is desirable and practical; federal enactment promotes uniformity in state law. The state can act voluntarily by appointing commissions, drafting acts, and entrusting those acts to federal enactment.

The law of leasing or other commercial laws should not be decided on a state by state basis. Those laws do not inherently reflect a strong state interest or command state enactment. Indeed, laws that regulate the flow of goods and commercial transactions over state lines should be considered national in character. The states have little interest in the massive number of goods flowing over their boundaries or even those that are part of a national economy. Because some states might feel the need for greater consumer protection than others, those states can enact special legislation to provide such protection. In any event, the basic national framework of the commercial law should be the same.

The federal government clearly has the power to enact a federal law on commercial matters including leasing through the interstate commerce clause. That clause covers both transactions that involve crossing state boundaries and those that have an indirect economic impact. Under relevant case law, localized activity, although only remotely and indirectly affecting interstate commerce, is enough to allow federal enactment.

The case involving a farmer who raised extra wheat locally for his own local use is a good illustration of the broad federal constitutional power. Similarly, the federal government regulated a family owned restaurant, Ollie's Barbecue, although it served food only to local customers. Though not enacted for commercial purposes, the civil rights statute is constitutional since it falls within the purview of the interstate commerce clause. Undoubtedly, laws on commercial activity such as leasing fall within the interstate commerce clause power; its inclusion is constitutionally justified more easily than in the examples above. Commercial activity is national in character. More importantly, federal power was designed to promote federal regulation of commercial activity. Federal and state courts generally have concurrent jurisdiction over issues of federal law, by implication of Article III of the United States Constitution, unless Con-

68. U.S. Const. art. I, § 8, cl. 3.
71. 379 U.S. at 248.
gress expressly states otherwise. Also by congressional act, federal court jurisdiction over U.C.C. issues could be negated, leaving it solely to the state courts if so desired.

V. CONCLUSION

Article 2A on leasing can provide greater justice and less uncertainty if a few simple amendments are made to the text and comments. Without these important changes, the law will regress to earlier fundamental problems.

Certainly everyone would agree that fairness in leases is a desirable goal. To achieve this goal, the section dealing with unconscionability will be most useful. However, that section should be amended by deleting paragraph 4(b), which makes possible the assessment of opposition attorney fees against the consumer. This formidable risk will deter many consumers from legitimately asserting unconscionability. In the meantime, courts may attack unfair leases by asserting that terms never actually agreed upon are not part of the lease contract.

With regard to the underlying transaction or the goods, consumer defenses should be preserved. A finance lessor holding the lease paper should be subject to the lessee withholding his payments until such a defense is resolved. The consumer's hard fight for rights that limit holders in due course of commercial paper should be applicable to holders of "lease paper" as well. The text or comments to Article 2A should make this point clear.

To solve these significant problems, a simple amendment to protect consumers could be made. It could read:

Uniform Consumer Protection Amendments
1. Paragraph 4(b) of Section 2A-108 on unconscionability is repealed. No opposition attorney fees may be assessed against consumers.
2. No consumer shall be barred from raising against a finance lessor any defense he has against any other party based on the goods or performance or signing of legal documents. All consumer rights preserved against holders in due course shall be equally preserved against finance lessors.

These amendments would preserve consumer victories won over many years. Failure to make such amendments may result in not only a reversal of those consumer victories won in battles over the years, but a rout and slaughter of consumers' rights.

With regard to the filing of leases, states should be aware that if they so desire, they may require it. Otherwise lease interests may be hidden from other creditors. Unfiled lease interests could become as detrimental as
unfiled security interests were to creditors before the enactment of Article 9 of the U.C.C.

Finally, everyone agrees that commercial law—including leasing—should be uniform. Sentimentality for states rights where no major state interest for localized law exists has compelled the painfully slow process of state by state enactment of the same law. A much more uniform and expeditious method would be to enact Article 2A on leasing, as well as other commercial law, on a federal basis. This would accomplish the same goal that the American Law Institute and the Commissioners on Uniform Laws seek. Both those groups and their supporters need to reconsider their functions and the methods of law reform to be used with regard to commercial and consumer law.