To: Bill Henning, Chair, Consumer Issues Subgroup, Ed Smith, Steve Harris and Juliet Moringiello
From: Mark Budnitz
Date: May 6, 2021
Re: Final Report of the Consumer Issues Subgroup

1. Remote Disablement

Should Remote Disablement Be Limited Or Prohibited?

The following explains why restricting remote disablement is problematic and prohibiting it would provide the certainty and clarity that consumers and secured creditors need.

The memo "Agenda, Consumer Issues Subgroup, May 3, 2021" (Agenda) suggests remote disablement "might be conditioned on notification to the debtor that would include information on how to avoid disablement." Agenda, at 1. If remote disablement is permitted in consumer transactions, the UCC should also require that consumers be provided notice clearly informing them *at the time of contracting* that the creditor or its agents may initiate remote disablement. Furthermore, the notice should describe the circumstances under which this may occur. And if the UCC is amended to prohibit disablement where it may endanger health and safety as well as cause a breach of the peace, the notice should identify and describe those restrictions so consumers can understand when they may apply. Providing examples would help consumers understand.

The Committee should consider whether the UCC should restrict use of remote disablement to nonpayment. However, even in that limited circumstance consumers may be deprived of the use of essential goods if the creditor resorts to remote disablement. Court decisions demonstrate that in many situations in which the creditor claims non-payment as the reason for repossession, the debtor has a good defense.[1] It is reasonable to assume the same holds true where the creditor employs remote disablement.

If remote disablement is permitted in consumer transactions, I agree it should be limited to situations that do not create a danger to health or safety. The Final Report memo dated Feb. 25, 2021 ("Final Report") includes Comment 7 noting that disabling "a vehicle while it is in a remote or dangerous location…could create a danger to health or safety."

Example: Husband is the debtor. Wife and three young children drive to the mountains in an adjoining state and go camping. Taking the car out of state may violate the security agreement even if there was never any failure to make a timely payment because the husband authorized

[1] Carolyn L. Carter, REPOSSESSIONS (9th ed. 2017) at 105-20 (discussing many cases in which there was wrongful acceleration of payment, waiver, estoppel, or non-UCC law providing grace periods, etc.)

automatic monthly electronic payments. Should taking the car out of state be grounds for remote disablement? Should remote disablement be limited to nonpayment?

Is notice of remote disablement sufficient? Assume the UCC is amended to require the security agreement provide notice of the creditor's right to disable remotely. Further, assume the debtor-husband actually read the notice a year ago when he signed the security agreement. The husband does not go camping with his family. It is highly unlikely his wife (or children!) read the notice in the security agreement describing the creditor's right to remote disablement. Therefore, unless the husband remembered the notice about remote disablement and warned his wife about the possibility of remote disablement (also unlikely), she would not have taken any precautions. As a result, disabling the vehicle may create a danger to health or safety, especially if there is a storm. The problem for the wife is that she may have no way to take her children to a safe location. (Cell phone connections can be problematic in the mountains.) The problem for the creditor is that there is no way to know who is in the car and whether remote disablement will create a danger to health or safety.

It is easy to imagine other equally compelling scenarios involving health and safety: Debtor drives his car to his job where he works security alone late at night at an office building in a deserted, high-crime neighborhood. Debtor stores life-saving perishable medicine for her child in a refrigerator that is collateral.

Perhaps remote disablement should be limited to where the collateral is at the debtor's residence. But assume the debtor lives in an isolated rural area; her spouse has a medical emergency late at night; she rushes to her car that is parked in the driveway; it is remotely disabled. She can't get her husband to the hospital in time to save him.

The Final Report suggests the UCC could just say "could potentially endanger the health or safety of an individual debtor … or a third party potentially affected thereby." Final Report, at 5. The UCC could leave it to the development of case law to apply that standard to specific situations. But that wouldn't bring clarity and certainty to consumers and creditors because arbitration clauses guarantee there will be little or no case law.[2] Moreover, what reported case law there is may well conflict from one jurisdiction to another.

Is there any objective, independently-collected data on remote disablement? I assume creditors will claim that restricting or prohibiting remote disablement will drive up the cost of credit and force them to deny credit to low income and high-risk consumers. In order to evaluate that claim and better consider what approach to take on remote disablement, it would be helpful to have answers to the following questions. How often do creditors actually utilize remote disablement? Is it used for collateral other than vehicles? Under what circumstances is it used – only for non-payment or also for other violations of the security agreement? How often is it used when the

[2] Creditors engaging in consumer transactions include arbitration clauses in security agreements. E.g., Reifenberger v. Autovest LLC, 2021 WL 212237 WL (D. Utah 2021)(sale of vehicle); Fuentes v. TMCSF, 26 Cal. App.5th 541, 545 (2018)(sale of motor cycle).

collateral is in a location other than the consumer's principal residence? New York, New Jersey, and Nevada have enacted laws requiring disclosures in the initial contract and prior to activating remote disablement. Are there any studies of the impact of those laws?

In light of the many problems, uncertainties and questions that remote disablement engenders, the most efficient way to provide clarity and certainty is to prohibit remote disablement in cases where the debtor is an individual, not a business.

Restricting Remote Disablement Regardless Of Injury Should Be In The Text

The Final Report states in Comment 7: "A secured party is not authorized under this section to disable collateral in a way that creates such a danger, regardless of whether any injury occurs." Final Report, at 5, Appendix 1. The Final Report correctly amends 9-602 to add sub-section (7) to include the "endangering the health or safety" provision. However, the important statement "regardless of whether any injury occurs" is only in a comment. Comments are not the law. Courts can, and often do, ignore the comments.

2. The Definition of "Conspicuous" In High-Tech Consumer Environments

Sections A and B of the Agenda

Section A of the Agenda includes the suggestion that the comment might include the example of discovering a term by clicking a single link compared with having to click more than one link. I have no problem with the example. It is consistent with case law. See also the FTC's guidelines, ".com Disclosures: How To Make Effective Disclosures In Digital Advertising" (Mar. 2013) for several other examples, such as requiring the consumer to scroll down the page to get to the link.

However, the proposed comment uses an example that is becoming increasingly rare. Instead, many consumers seldom even use a mouse. Instead, they interact with the Web only via tablets and cell phones. They touch and tap; they don't click. At least one additional example where the consumer uses one of these devices would be useful.

The comment notes the differences between displaying terms on a 24-inch monitor compared to a cell phone. But consumers also enter into transactions by talking to Siri or Alexa speakers and in the near future will do so via wearables such as smartphones and eyeglasses.[3]

In addition, web design techniques such as "coercive choice architecture" and "dark patterns" can influence the conspicuousness of terms in a significant way.[4]

[3] I discuss these devices of the near future in "Touching, Tapping, and Talking: The Formation Of Contracts In Cyberspace," 43 Nova L. Rev. 235 (2019).

[4] I discuss coercive choice architecture and dark patterns in "The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream, 32 Loyola L. Rev. 369, 422-23 (2020).

Therefore, it may be prudent to acknowledge in the comments that there are technological advances we cannot even anticipate that may require future reexamination, and courts must keep this in mind. Most importantly, the comments should advise courts that they must not consider the examples in the comment as limiting the application of "conspicuous" in any way.

Section C of the Agenda

It is generally acknowledged that most people do not read the terms in online consumer agreements. But there is not agreement that "conspicuous" has no meaning and consequently no role to play. Many websites are designed to discourage consumers from reading online contracts by making them extremely long, and that requires consumers to scroll down page after page. That length causes many to stop reading before getting too far into the agreement. Furthermore, the agreements are written in legal jargon that only a lawyer well-versed in UCC and e-commerce law would fully understand.[5] It would be ironic and unjustified to forego the opportunity to adapt the "conspicuous" standard to emerging technology using the excuse that consumers don't read the terms when the reason for that conduct is that sellers adopted techniques to ensure consumers won't read them.

In addition, many economists believe that as long as there is an informed minority of consumers who critically read the terms, the risk of them responding in a manner that injures the seller's reputation will dissuade sellers from overreaching. A conspicuous requirement helps informed consumers to identify crucial terms that they regard as unfair or unconscionable. They may react by seeking legal help. A much easier response would be to publicize their concerns on social media. If their message goes viral, a company may regret having used those terms.[6]

Regarding "conspicuous" as having no meaning undermines consumers' ability to take measures to help ensure a fair online marketplace.

Section D of the Agenda

Section D suggests that the committee consider whether "a term can be conspicuous if it is not separately assented to or if it is explained in language that cannot be understood by an average consumer."

I support including separate assent. Because of the factors noted above (coercive choice architecture, dark patterns, requirements to scroll down and click on several links, etc.) I believe a term cannot be conspicuous in the online marketplace unless there is a separate assent. Based

[5] Uri Benoliel & Shmuel Becher, " The Duty To Read The Unreadable, 6 B.C. L. Rev. 2255 (2019).
[6] See Robert A. Hillman, & Jeffrey J. Rachlinsky, "Standard Form Contracting in the Electronic Age," 77 N.Y.U. L. Rev. 429, 441-45 (2002)(discussing the pros and cons of the informed minority theory, but not taking into account the possibility of consumers' unfavorable views going viral and influencing many consumers' purchase choices).

on my experience, I believe such a requirement merely codifies what many legitimate sellers are already doing. Requiring the consumer to separately assent by signing or initialing important terms increases the consumer's trust in the seller. It gives consumers confidence the seller wants them to read and consider those terms, as contrasted to those sellers who try to hide terms.

Requiring terms to be explained in understandable language is consistent with plain language statutes which many states have enacted. However, I would modify the phrase in the above-quoted passage from the Agenda to say a term is not conspicuous if it "cannot be understood by an average consumer *to whom the transaction is targeted*." For example, some websites sell products specifically targeted at elderly male consumers. Saying "in language that cannot be understood by an average consumer" seems to tell the court to consider consumers in general. That would include consumers who are young and old, men and women. Making it clear courts should consider the understanding of the consumers who are purchasing from the seller is more appropriate.