

**LEGISLATION AND REGULATION 7**  
**Professor Rakoff**  
**Fall 2016**  
**Handout 14**

You are a Deputy General Counsel at the National Consumer Protection Agency (NCPA). Your governing statute empowers the NCPA to remove “deceptive and unfair practices” from the consumer marketplace either by establishing rules or by deciding cases. The act does not specify a rulemaking process; any adjudication must be through a “hearing on the record” to produce a cease-and-desist order. The Administrator of the NCPA wants your advice on how to proceed with what she calls the “not my law” problem.

Briefly, the standard version of the Uniform Commercial Code authorizes businesses to exclude the implied warranty of merchantability that would otherwise accompany the goods they sell, and many manufacturers and distributors of home appliances, computers, and electrical equipment try to do just that. In a few states, however, the legislature has modified this portion of the U.C.C. to prohibit such an exclusion as regards a consumer sale, and in a few other states there are high court opinions finding such exclusions unconscionable when used in ordinary consumer settings. A few years ago the NCPA growled about companies’ using ordinary disclaimer language in these states, but the companies argued that it was unreasonable to expect them to have different documentation, state by state, for what were, after all, nationally sold products.

At that time, Universal Consumer Products, Inc., proposed to solve the problem by using language in its documents that would disclaim the warranty of merchantability and then go on to say to the buyer that “your state law may give you additional rights.” The NCPA’s General Counsel agreed not to go after the company’s documents if they were in that form, and wrote a letter to Universal Consumer to that effect. The letter has been widely circulated among company counsel, and many firms have followed Universal Consumer’s lead.

Consumer advocates have recently been complaining to the NCPA’s staff that this compromise is not working. The staff has done some initial testing, and now agrees. The agency’s studies show that the overwhelming majority of consumers, asked to read the commonly used language, think that the possible “state law . . . additional rights” must refer to special situations – like the rights of those who are physically handicapped – and could not refer to the rights of ordinary consumers. Even in states with clear statutes prohibiting the waiver of the warranty, over 80% of consumers who read the form think that the waiver “probably applies” to them.

The Administrator thinks the agency ought to do something, and asks your advice on how to proceed. Should the NCPA hold a rulemaking? Should it bring a proceeding against one of the companies using the common language? If so, how should it decide which company to proceed against?

What are the important differences in proceeding one way or another, and what do you ultimately advise?