

# The Right of Withdrawal in Consumer Contracts: a comparative analysis of American and European law

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### *Abstract*<sup>1</sup>

*The aim of this paper is to compare the regulation of the right of withdrawal in US and European Law. Both coincide in granting the right of withdrawal to a special category of individuals, namely consumers, due to the situation of information asymmetry in which they find themselves vis-à-vis traders. In addition, the consumer can invoke this right when concluding particularly complex contracts (e.g., consumer credit contracts) or in those cases in which he is subject to pressure or the so-called “surprise factor” at the time of entering into the contract (e.g., door-to-door sales). However, beyond these coincidences, the European and US rights of withdrawal differ greatly in several aspects. To begin with, the European Union has been very generous and flexible when regulating this concept, while in the USA the legislation is quite a bit more restricted and limited. Hence, retail “return policies”, designed to offer consumers the option of returning merchandise for predetermined reasons within a stipulated period, play a vital role in understanding consumer withdrawal rights in the USA. These differences and many other issues will be addressed here with a view to determining whether US law might be used as a model to improve the regulation of the right of withdrawal in the EU.*

*Keywords:* Right of withdrawal, Return policies, contracts, consumers, consumer protection law, US Law, Comparative law, European Directives.

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## *Summary*

1. Introduction
2. Theoretical Foundations of Consumer Protection in the United States
  - 2.1. Law and Economics
  - 2.2. Behavioral Economics and the Psychology of Contract Withdrawal
3. Legal Rules governing Consumer Contracts in the United States.
  - 3.1. Contract Law
    - a) Contracts for Services: The Common Law of Contracts for Services
      - General U.S. Rules on Contract Formation
      - Conditions and The Doctrine of Common Law Satisfaction
    - b) Contracts for the Sale of Goods: The Uniform Commercial Code
      - UCC Right to Reject Nonconforming Goods
      - UCC Right to Revoke Accepted Nonconforming Goods
    - c) Software, e-Commerce, and the Evolving Law of Consumer Contracts
  - 3.2. Federal Statutes
    - a) Door-to-door Sales
    - b) Consumer Credit and Finance
      - The Process of Rescission under TILA
      - The Remedies of Rescissions at Law and Rescissions in Equity
    - c) Remittance Transfers
  - 3.3. State Statutes
    - a) Sale of Goods
    - b) Services
    - c) Membership Contracts
4. The Market Default: Return Policies in the United States
  - 4.1. Signaling Theory and Endowment Effect (monetary and money back guarantees, MBGs)
  - 4.2. Consumer Risk Theory (monetary and money back guarantees)
  - 4.3. Construal Level Theory (time deadlines)
5. The right of withdrawal for consumers in European Contract Law.
  - 5.1.1. Origin and Basis of the Right of Withdrawal in the European Union.
  - 5.2. The Confusing State of the Acquis Communautaire on the Right of Withdrawal
  - 5.3. The Duty to Inform the Consumer Regarding the Right of Withdrawal
  - 5.4. Exercise of the Right of Withdrawal: Requirements and Withdrawal Period
  - 5.5. Effects of Withdrawal
    - a) Termination of Contractual Relationship
    - b) Duty of Restitution
    - c) Consumer Responsibility for Use of Goods
      - a) That it results from the handling of the goods other than as necessary to establish the nature, characteristics or functioning thereof.
      - b) That the merchant has provided to the consumer all the information regarding his right of withdrawal.

- 5.6. Ancillary Contracts
- 6. Conclusions
- 7. Appendix
  - 7.1. Appendix A. Notice of Cancellation (USA)
  - 7.2. Appendix B
  - 7.3. Appendix C. Model instructions on withdrawal (UE)
  - 7.4. Appendix D. Model withdrawal form (UE)
- 8. Table of cases
- 9. Bibliography

## 1. Introduction

After purchasing a product or service, some customers may realize that they neither want nor need what they just purchased. Some experience buyer's remorse. Others discover that they have paid an unreasonable price for an inferior product. Even when the purchase is as promised and conforming to expectations, consumers may experience the need to undo or withdraw from the sales contract, thereby returning what they purchased.

European law gives consumers the right to withdraw from certain consumer contracts made by phone, mail, internet, or door-to-door *for any reason*, for fourteen days after receipt of the goods or service<sup>2</sup>. Such a mandatory, generic right of withdrawal does not exist in the United States, where a patchwork of contract and federal and state statutes govern withdrawal rights in varied, but limited, contexts. Generally, unless they have agreed to do so in a contract, sellers in the United States have no legal obligation to take back conforming goods from dissatisfied buyers.

Indeed, American law has focused on another route for protecting consumers: the power of the market coupled with pre-contractual disclosures and caveat emptor. In order to help consumers make efficient and informed decisions, U.S. law favors requiring *ex ante* disclosures, leaving to the parties the freedom to negotiate the right to cancel the contract or return the goods. This strict model leaves the consumer open to the burden of unwelcome post-purchase surprises.

This article examines the slim traces of a consumer right of withdrawal in the United States. As we will see, U.S. law offers some context-specific consumer protection (in the form of "cooling off" periods, for example) in federal and state statutes, especially in instances of high-pressure sales. "Cooling off periods" refer to a given time period post-contract when the consumer has the right to withdraw. Where these limited laws do not apply, many U.S. retailers offer contracts providing for refunds, money-back guarantees, and lax return policies to make the consumers feel at ease. On the other hand, this paper also examines the more elaborated and complex right of withdrawal for consumers in European Contract Law, a right that has been granted to European consumers through a set of complex

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<sup>2</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance ((Official Journal L 304, 22-11-2011, p. 64), regulating the right of withdrawal for distance and off-premises contracts. *See* Recitals (9) and (20) for distance contracts, and (21) for off-premises contracts. *Idem* Art. 9 (1) of the Directive "Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14". *Idem*.

Directives enacted by the European Union, with the aim of comparing the flaws and benefits of both systems.

## 2. *Theoretical Foundations of Consumer Protection in the United States*

The acknowledgement of a generic right to withdraw from a consumer contract or return otherwise-conforming goods has been problematic and, in some areas, inadvertent. Proponents of cooling-off periods, for example, cite the benefits to consumer, as the rule protects them from unscrupulous sellers, high-pressure tactics, and their own irrational impulses. Some law and economics scholars have studied the rules as “efficiency-enhancing devices<sup>3</sup>”. Opponents of withdrawal rights have made strong arguments that these are “contrary to fundamental business concepts<sup>4</sup>”, “designed to undermine the foundation of the law of contracts<sup>5</sup>”, and that they would make contracts “a mere illusion<sup>6</sup>” “inviting bad faith practices<sup>7</sup>”. This section outlines the various arguments and theoretical foundations of this controversial right.

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<sup>3</sup> See REKAITI & VAN DEN BERGH (2000, pp. 371, 375).

<sup>4</sup> See SOVERN (2014, pp. 333, 374) (citing statement of Robert O. Lockman, Vice President, Marketing, The West Bend Company: “Cooling-off legislation is contrary to fundamental business concepts that have been in existence for hundreds of years. . . I am concerned about how it would change the law of contracts and traditional sales practices, but I am equally, if not more, concerned about how it would change consumer attitudes and how it would invite dilution of the individual’s responsibility for his business acts and decisions”).

<sup>5</sup> *Idem*, p. 124 (statement of William J. Halliday, Jr., Secretary and General Counsel, Amway Corp., arguing about the sanctity of the law of contracts and the solemnity of the signature: “Other critics of the cooling-off concept state that the right to cancel will undercut the principle that ‘a man’s word is his bond,’ and will ‘be unfortunate for the American way of life.’”).

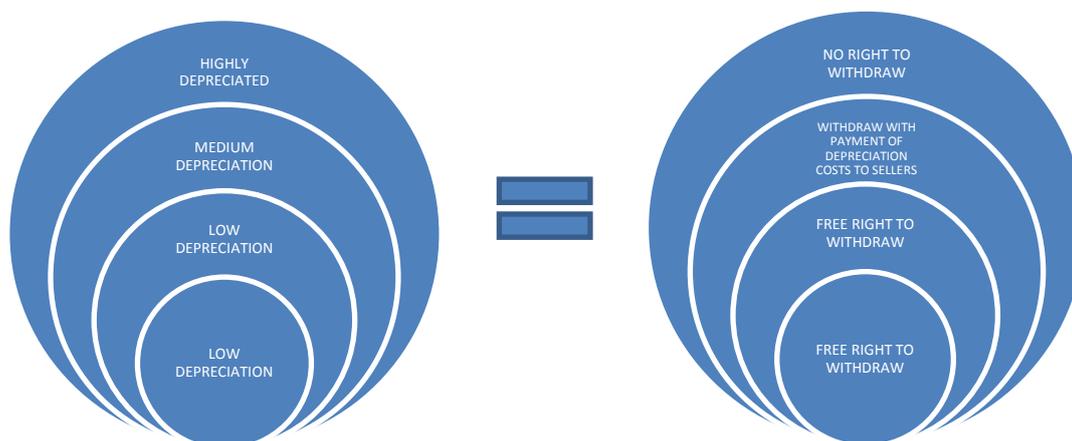
<sup>6</sup> *Idem*, p. 126 (citing testimony of David Yoho, President, Surfa-Shield Institute: “[Cooling-off periods would make] the contract, which was once considered a man’s word, his bond and seal, . . . a mere illusion. It is no longer binding and it means very little, and our Government . . . encourages unilateral breach of covenant and with that gives the right of protection and enforcement to one party of the transaction and sometimes criminal sanction to the other party [...] Finally, in my humble belief, the signing of a contract is still the giving of my word. I wonder how much we change the societal structure of our country when we tell a man, ‘Give me your word, but it does not really mean anything because you can change it later if you want to.’”).

<sup>7</sup> *Idem*, p. 128 (citing statement of Robert O. Lockman, Vice President, Marketing, The West Bend Company: “[W]e permit the consumer to cancel his order at any time for any reason before shipment is made and it takes us anywhere from 4 to 6 weeks to make shipment [...] if cancellations were invited or encouraged by cooling-off legislation, we believe the cancellation rate would be much higher and could become burdensome. We believe that the proposed legislation would invite bad-faith contracts, that is to say, orders signed by a purchaser with the full intention of canceling the order the next day”).

## 2.1. Law and Economics

The right to withdraw fundamentally seeks to improve the bargaining position of consumers vis-à-vis irrational behaviors and asymmetric information<sup>8</sup>. In this sense, it has been said that consumers suffer “temporary *madness*” when purchasing goods or services and the existence of a “right to withdraw” protects them from their own irrationality. Economists have addressed issues of situational monopolies and information asymmetries as well<sup>9</sup>.

American scholars Ben-Shahar and Posner have recently examined the withdrawal right through the lens of contract breach. The model of breach of contract found in Ben-Shahar/Posner analogizes the right to withdraw to a breach of contract along with the duty to pay reliance damages (corresponding to the payment of depreciation costs to the seller), and/or a breach of contract along with the duty to pay zero damages<sup>10</sup> (if there is no depreciation cost).



The model states that the passage of time has an important effect on a transaction: buyers gain information about how much they value goods while the goods depreciate in their hands. According to the Ben-Shahar/Posner model, if goods depreciate slowly, buyers will

<sup>8</sup> See REKAITI & VAN DEN BERGH (2000, pp. 371, 375).

<sup>9</sup> *Idem*.

<sup>10</sup> BEN-SHAHAR & POSNER (2011, pp. 115, 118). The authors propose a model and conclude that American law is excessively strict and European law excessively generous. The model supports the right not on the basis of consumer protection, but in theories where optimal contracts and economics show that it makes “economic sense” to withdraw at the time when the consumer more efficiently gives value to a product, e.g., after inspecting it or using it at home if it is a piece of furniture, or in instances when the product does not depreciate rapidly. Its supports for recognition of the right as a default rule includes the recognition of seller’s recovery of the cost of depreciation. The authors oppose the extension of the right to business sales, as those are typically cases where buyers and sellers are well informed of inventories and transaction details.

have a free right to withdraw. One can represent the days in circles, like in the figures above, which reflect that the more remote from the bottom the longer the period of time. A valid justification for the right to withdraw under the model will suggest that, in some cases, buyers will withdraw and pay the depreciation cost to the seller. Lastly, if depreciation is slow and buyers gain information quickly, then the right to withdraw will extend only for days after the sale.

The authors conclude that having a fixed period of time leads to inefficient outcomes when “the depreciation cost exceeds the allocative value that more information affords the buyer” and “the longer the free right of withdrawal period, the greater the potential inefficiency”<sup>11</sup>. Hence, the recognition of the right is important in “distance contracts involving goods that are complex” and do not rapidly depreciate<sup>12</sup>.

## 2.2. Behavioral Economics and the Psychology of Contract Withdrawal

The work of economist Richard H. Thaler and psychologists Daniel Kahneman and Amos Tversky provide theoretical foundations to the understanding of why consumers make decisions to withdraw. Behavioral economics is based on extensive research demonstrating that consumers often do not act rationally.

Several well-established decision biases such as the *endowment effect* and *cognitive dissonance* influence the decision to keep or return a purchase<sup>13</sup>. The endowment effect, also known as the mere ownership effect, suggests that people attribute more value to things just because they are the owners, and they want the goods even when they have possessed them for a brief period of time<sup>14</sup>. In this sense, consumers are less inclined to return products because they have the tendency to stay with the *status quo* (consumer inertia). On the other hand, cognitive dissonance suggests that once consumers make a purchase decision, they have the tendency to discard the notion that the decision was erroneous<sup>15</sup>.

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<sup>11</sup> *Idem*, p. 122.

<sup>12</sup> *Idem*, p. 144. (concluding that when buyers need time to learn about complex goods, when the value can be ascertained only at home (such as furniture), and when goods do not rapidly depreciate or the loss can be rapidly compensated the right is justified.)

<sup>13</sup> For endowment and inertia effects, see also BECHER & ZARSKY (2011, pp. 63, 77-81). The authors also covered behavioral, cognitive, and economic approaches to open door policies and its pros and cons.

<sup>14</sup> KNETSCH (2000, pp. 1277, 1278). Product ownership depends more on cognitive perception than physical possession. See WOOD (2001, pp. 157, 167).

<sup>15</sup> For more literature explaining: 1) the decisions on complex social issues, see LORD, ROSS & LEPPER (1979, p. 2098); 2) the correctness of the decisions, see ROSENFELD, KENNEDY & GIACALONE (2001, p. 663); 3) the example of predictions, see BROWNSTEIN, READ & SIMON (2004, p. 891).

The work of scholars Shmuel I. Becher & Tal Z. Zarsky<sup>16</sup>, advocate that a consumer who is given an “unqualified” right to return merchandise is given an “open door”. The scholars argue that such “open doors” make business sense and lead to efficient outcomes because they acknowledge the human tendency to procrastinate<sup>17</sup>, and ultimately they give consumers *ex post* a right to rescind an *ex ante* decision<sup>18</sup>.

### ***3. Legal Rules governing Consumer Contracts in the United States.***

In the United States, there are three bodies of contract law: one for the sale of goods, one for services, and one for international goods transactions. Consumer contracts are primarily governed by the Uniform Commercial Code (UCC). The UCC is a model contract law drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). With minor exception, the legislatures of all fifty states have adopted the UCC, making it the dominant contract law governing the sale of goods<sup>19</sup>. The UCC covers both consumer sales and sales by established businesses and both online and in-person sales. In contrast, contracts involving services are governed by the common law of contracts, which although firmly established, may differ from state to state since it is not uniformly codified and thus reliant on judge-made law in its applicable jurisdiction.

International commercial transactions are covered by the Convention on the International Sale of Goods (CISG), a treaty the United States signed, ratified, and as a self-executing treaty, is now part of its domestic legislation. However, the CISG expressly excludes its application to consumer contracts<sup>20</sup>.

This section touches upon the fundamentals of two of the three bodies of U.S. contract law – the common law, the UCC—with an eye toward its withdrawal or rescission provisions. There is also a patchwork of consumer protection rules in federal, state, and local statutes. The section concludes with a survey of the most important and relevant of these rules.

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<sup>16</sup> BECHER & ZARSKY (2011, p. 64).

<sup>17</sup> *Idem*.

<sup>18</sup> *Idem* (citing BEN-SHAHAR & POSNER (2011)).

<sup>19</sup> Louisiana has not adopted UCC art. 2.

<sup>20</sup> CISG, Art. 2(a).

### 3.1. Contract Law

#### a) Contracts for Services: The Common Law of Contracts for Services

##### - General U.S. Rules on Contract Formation

It is well settled U.S. contract law that contracts must be the product of mutual assent. The assent is achieved after a valid offer is followed by a valid acceptance. Traditionally, the approach to contract formation required “meeting of the minds”. The modern approach favors an objective standard and theory of construing assent from the parties’ outward manifestation and objective acts<sup>21</sup>. The first of the two elements in the equation is the offer. A valid offer requires communication, intent to be bound to a contract, and definiteness. It exists as long as it was communicated as intended, i.e., not the product of coincidence, with proper authorization, and usually in words unless the conduct of the parties manifested the communication<sup>22</sup>. If the offer is followed by a valid acceptance, then the contract is formed.

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<sup>21</sup> For the objective theory of contract formation, *see* BARNES (2008, p. 1119).

<sup>22</sup> In addition, offers must be definite. Traditionally, the requirement of definiteness meant that the offer included all the essential elements such as price, quantity, time and place of delivery. This requirement was later relaxed under the UCC “gap filler” provisions, which also allowed the history and usage of trade to fill in the blanks of otherwise-indefinite contracts. For which is said that it is very easy now to enter into a contract for the sale of goods. Generally, offers are valid until they are accepted, effectively revoked, rejected, and when no time is specified by the offeror for its acceptance, for a reasonable period of time. The offer expires if the object subject matter of the offer is destroyed, and if either or both parties die or become incompetent. Arguably the powers of cancellation, revocation and rejection include in their scope the “content” and “nature” of modern withdrawal rights -at least in broad terms. At common law, the offer is said to be irrevocable if the offeree supports it with valid and good consideration (one that is legally sufficient -the promisee suffered a legal detriment and/or the promisor received a legal benefit- and bargained-for the exchange of promises) to keep it open for a period of time stated and agreed to by the offeror. Under the UCC, consideration is not required for an offer to become irrevocable. A merchant’s firm offer becomes irrevocable when a merchant makes an offer and, in a signed writing, promises to keep it open for a period of time not to exceed 90 days. The offer should be made with the intent to enter into a valid contract, which means that the offeror has the willingness to celebrate the contract and conclude the deal without further negotiations if the offeree accepts. As such, generally speaking there is no valid intent in offers made as jokes, where the offer was the product of excited utterances, in preliminary negotiations, offers made by auctioneers, and general advertisements, these last two are considered invitations to offers under the American rule. Acceptances should be communicated to the offeror, unless conduct speaks for itself, and in some recognized cases where silence is a valid form of acceptance. Generally, it is effective when it is sent (mailbox rule), but there are exceptions to this rule such as when the acceptance is following a prior rejection, in instantaneous forms of communications, when the offeror indicates otherwise, and when the means of acceptance are unreasonable. All other communications, such as rejections and revocations of contracts when goods tendered are nonconforming -and arguably withdrawals - are effective when received by the other party. It is beyond the scope of this article to cover all U.S. rules of offer and acceptance.

An interesting note is when boilerplate language is contradictory -the case of variant acceptances and the well-known UCC battle of the forms. Perhaps no rules are more at the epicenter of the juridical nature of consumer withdrawals rights than these rules. For example, is the inclusion of a different term a withdrawal? How the common law and the UCC treat those different terms? How about additional terms?

At common law, new or different terms are treated as counteroffers, i.e., a rejection of the original offer and a new offer with the new term following the “mirror image rule”. Under the mirror image rule acceptances must be the mirror of the terms of the offer or no contract is formed. On the other hand, under the UCC courts have wrestled with how to decide issues where additional boilerplate terms are included in an acceptance. The Code treats those additional terms as *iuris tantum* presumptions of agreed to inclusions, i.e., they are incorporated automatically, with exceptions, as long as both parties are merchants. If they are not, as “mere proposals”. When terms are different, the rule in most states is that different terms cancel each other out.

Hence, an offer followed by its acceptance creates the assent needed to have a valid contract. The right to withdraw is therefore temporarily situated after the contract was formed.

#### - Conditions and The Doctrine of Common Law Satisfaction

Conditional contracts also provide some protection for consumers. One example of an express conditional contract is a contract subject to the satisfaction of the promisor. In the United States, courts distinguish personal satisfaction and satisfaction of third parties, and subjective satisfaction contracts from objective satisfaction contracts<sup>23</sup>.

Under the subjective approach, consumers can escape liability if they are, in good faith, dissatisfied<sup>24</sup>. Under the objective satisfaction approach, consumers are not liable if a reasonable person would have been dissatisfied. The right to withdraw is different in the sense that it is exercisable regardless of these common law developments and doctrinal prerequisites for excusing liability under the grounds of dissatisfaction.

#### b) Contracts for the Sale of Goods: The Uniform Commercial Code

In general, consumer contracts have similar requirements than common law contracts, such as mutual assent, consideration, capacity, legality, absence of invalidating conducts, and

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<sup>23</sup> If at issue is the personal taste the judicial applicable standard most likely will be subjective, and if it is the mechanical fitness or functionality of a commercial product most likely objective.

<sup>24</sup> See *Silvestri v. Optus Software, Inc.*, 175 N.J. 113, 814 A.2d 602 (2003).

some fall within the Statute of Frauds and must be in writing, thus, need to be evidenced by a record and signed by the party to be charged<sup>25</sup>.

The UCC is a comprehensive code with its own systematic, and U.S. courts have struggled to give meaning to its somewhat broad provisions. The UCC covers sale of goods, *including* sales to consumers<sup>26</sup>. It excludes services and real estate sales and, in mixed transactions of goods and services, its rules govern where the primary purpose of the transaction is the sale of goods. Neither the common law nor UCC provide a default right of withdrawal or a “cooling off” period<sup>27</sup>. However, the UCC offers consumers an automatic remedy when the goods tendered are nonconforming.

#### - UCC Right to Reject Nonconforming Goods

Some have argued that the UCC’s “perfect tender rule” mirrors the right to withdraw, and that in its rules regarding revocations of nonconforming deliveries a reader can find similarities<sup>28</sup>.

The US consumer does not have an “unfettered right to reject delivery”. The perfect tender rule refers to the right the buyer has to reject the whole<sup>29</sup> or partial delivery of shipments<sup>30</sup>, *if the quantity, quality, or the manner of delivery* fails to conform to the specifications of the contract. It must be exercised within a reasonable time after tender, and by seasonable notification to the seller<sup>31</sup>. If inspection was not agreed to as a contractual right, consumers have the right to inspect the goods at a reasonable time and place, and in a reasonable manner<sup>32</sup>, then after determining that the quantity, quality, or the manner of delivery was not as specified in the contract, consumers may reject the tender.

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<sup>25</sup> When the value of goods is \$500 or more, UCC §2-201(1). For an explanation of these essential elements see MARTÍNEZ EVORA (2015, pp. 15-17).

<sup>26</sup> *See, exempli gratia.*, UCC § 9-102(a)(23) (AM. LAW INST. & UNIF. LAW COMM’N 2001) (defining consumer goods as “goods that are used or bought for use primarily for personal, family, or household purposes”).

<sup>27</sup> *See* BEN-SHAHAR & POSNER (2011). In addition, after comparing EU directive 2011/83/UE with the US legal system, the article found that there is no right to withdraw in the United States, specifically in the Uniform Commercial Code or in the common law of contracts, but that expressions of the right are found in federal and state statutes. *Idem*, p. 145.

<sup>28</sup> *Idem*.

<sup>29</sup> §2.601 (a).

<sup>30</sup> §2.601 (c).

<sup>31</sup> UCC §2.602(1) (Am. Law Inst. & Unif. Law Comm’n, 2001).

<sup>32</sup> UCC §2-513(1).

What constitutes *reasonable time*? Under this rule, it depends on the case at hand, and on the “nature, purpose, and circumstances of the action<sup>33</sup>”. *Seasonable* notification to the seller is notification within the time agreed to by the parties and, in the absence of agreement, within a reasonable time<sup>34</sup>. Further, official comment 1 of this rule makes clear that partial acceptance of a “commercial unit” (and consequently the rejection of the rest) does not preclude the right to reject the rest, if rejections are made in good faith and guided by commercial reasonableness.

Lastly, consumers are relieved of any duties upon rejection under the UCC, with the exception of UCC § 2-602(2), which imposes the duty on consumers to hold the goods with reasonable care until disposition by sellers<sup>35</sup>. The right to reject improper delivery (UCC § 2-601) is limited to the nonconforming delivery of goods<sup>36</sup> and, in that respect is different and narrower than the European counterpart.

#### - UCC Right to Revoke Accepted Nonconforming Goods

Buyers under the UCC can also revoke accepted goods if later found nonconforming the whole, the lot or the commercial unit accepted<sup>37</sup>. This post-acceptance right of revocation is granted assuming that the non-conformity “would be cured and has not been seasonably cured<sup>38</sup>” and acceptance was induced by seller’s assurances found in the contract or resting in the circumstances at the time of delivery<sup>39</sup> or the discovery of the non-conformity was difficult<sup>40</sup>. Revocation must occur within a reasonable time and the buyer must notify the seller.

Revocation is also allowed when the non-conformity causes a “substantial impairment of value to the buyer<sup>41</sup>”, Official comment 1 explains that prior rules used the term “rescission”, but changed it to revocation to avoid ambiguous applications to other existing rules dealing with the transfer of title and cancellations of executed and executory portions of contracts<sup>42</sup>.

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<sup>33</sup> UCC §1-205(a).

<sup>34</sup> UCC §1-205(b).

<sup>35</sup> UCC §2-602(2) cmt 2 (Am. Law Inst. & Unif. Law Comm’n, 2001).

<sup>36</sup> The buyer does not have an “unfettered right to reject delivery”. See UCC §§ 2.601(a) & 2.601 (c) (AM. LAW INST. & UNIF. LAW COMM’N 2001).

<sup>37</sup> UCC § 2-608(1).

<sup>38</sup> UCC § 2-608(1)(a).

<sup>39</sup> *Idem* at official comment 3.

<sup>40</sup> UCC § 2-608(1)(b).

<sup>41</sup> UCC § 2-608, official comment 2.

<sup>42</sup> UCC § 2-608 cmt (Am. Law Inst. & Unif. Law Comm’n 2001).

The rule for revocations operates with the assumption of nonconforming delivery of goods, just like the right to reject nonconforming delivery of goods, which is a limited manifestation of the right to withdraw and differs from the European definition given in the directive.

c) Software, e-Commerce, and the Evolving Law of Consumer Contracts

In the late 1990s, with the advent of mass software and internet sales, the question of contract formation was put to the test in the courts of the United States. Of all the cases, the most important, groundbreaking, and controversial was *ProCD v. Zeidenberg*, which effectively set the path for software license jurisprudence<sup>43</sup>.

Mark Zeidenberg, a graduate student pursuing a Ph.D. in computer science, purchased a CD-ROM telephone directory from ProCD, Inc. in 1995<sup>44</sup>. The directory, which cost millions of dollars to produce, compiled over 95,000,000 residential and commercial listings from approximately 3,000 publicly available telephone books<sup>45</sup>. The listings included full names, street addresses, telephone numbers, zip codes, and industry codes where appropriate<sup>46</sup>.

Each CD-ROM disc came with a Single User License Agreement, which informed the user that the software was copyrighted and that copying the software is authorized only for noncommercial purposes and uses. These terms were “shrink-wrapped”, meaning that they were packaged inside the box with the CD-ROM and were not available for the buyer to examine prior to the sale<sup>47</sup>. Reminders of the License Agreement also appeared on the computer screen before a user could access the listings<sup>48</sup>.

In May 1995, Zeidenberg formed a company whose purpose was to resell the information in the ProCD database. Zeidenberg’s one-man company’s upload permitted searches based only on name or standard industrial code, while the original ProCD software allowed for searches based on name, address, telephone number, or any combination of the above; however, Zeidenberg’s corporation charged less for their service than ProCD charged its

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<sup>43</sup> *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, (W.D. Wisc. 1996).

<sup>44</sup> *Idem*, pp. 643–644.

<sup>45</sup> *Idem*.

<sup>46</sup> *Idem*.

<sup>47</sup> The “shrinkwrap license” gets its name from the fact that retail software packages are covered in plastic or cellophane “shrinkwrap”, and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer “end user license”. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

<sup>48</sup> *Idem*, p. 1452.

commercial customers<sup>49</sup>. ProCD discovered this activity and demanded that Zeidenberg discontinue his actions immediately.

ProCD secured an injunction against Zeidenberg's activities in late 1995, at which point Zeidenberg's database was receiving approximately 20,000 "hits" per day on the internet<sup>50</sup>. Zeidenberg argued that the noncommercial use restriction was not valid because it was not disclosed to him prior to his acceptance, which occurred when he paid for the product at the store<sup>51</sup>.

The Seventh Circuit Court of Appeals disagreed. It held that Zeidenberg was given notice of the licensing restriction because acceptance of the contract took place, not when he paid for the product, but only later – when he opened the box, had an opportunity to read the license terms, and used the software rather than returning it. Zeidenberg could not use the software until after he had opened the box and discovered the license, which he had a duty to read<sup>52</sup>. Thus, according to the court, ProCD "extended an opportunity to reject the offer if a buyer should find the license terms unsatisfactory<sup>53</sup>". Buyer inspected the package, tried out the software and did not reject the goods. So, the terms were not additional terms after the contract was celebrated that the buyer could reject by returning the goods. It was, as some scholars have also argued, an "extended right to reject an offer" rather than a right to withdraw<sup>54</sup>.

Some argue that generally in shrink wrap licenses when buyers use the product they have impliedly accepted the contract<sup>55</sup> however, in *ProCD*, buyers had "an additional time to reject the offer *for any reason*", and return the merchandise free of charge. Nevertheless, the difference with the right to withdraw as defined in the European directive is that it presupposes the existence of a valid contract, and there was none in *ProCD*<sup>56</sup>.

Since this momentous case, numerous courts have upheld the enforceability of such licenses, which are often referred to as "shrinkwrap licenses" because the buyer can only

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<sup>49</sup> *Idem*, p. 1450.

<sup>50</sup> A hit occurs each time a new screen is displayed on a user's computer screen during a search of the database. Each search tends to generate multiple hits.

<sup>51</sup> BEN-SHAHAR & POSNER (2011, pp. 115, 118).

<sup>52</sup> *Idem*, p. 140.

<sup>53</sup> *Idem*, p. 1452–1453 (supporting *ex cathedra* the idea of acceptance of goods with the right to reject after inspection in UCC §2-606(1)(b), UCC §2-602(1).

<sup>54</sup> BEN-SHAHAR & POSNER (2011, pp. 115, 118).

<sup>55</sup> *Bowers v. Baystate Technologies*, 320 F.3d 1317 (Fed. Cir. 2003) (following the line of *ProCD v. Zeidenberg*).

<sup>56</sup> *ProCD*, 86 F.3d at 1452–1455.

examine their terms after they unpackage the box containing the product. Courts have generally rejected the argument that they are unenforceable as contracts of adhesion and have extended this rationale to the electronic variation of shrinkwrap - clickwrap<sup>57</sup>. Clickwrap agreements are those formed on the internet by clicking "I accept" - the basis of online commerce<sup>58</sup>.

In summary, *ProCD* and its progeny made it easier for parties to enter into contracts online and in various forms by reading the rules of contract assent expansively. While this line of cases did not address withdrawal rights, it is important to note that its analysis of contract formation impacts the consumer's rights.

### 3.2. Federal Statutes

The Federal Trade Commission is an agency of the United States government charged with protecting consumers and policing anti-competitive practices. The Code of Federal Regulations (CFR) was passed by the Federal Trade Commission (FTC) to protect consumers from deceptive and misleading sales practices.

The FTC is a leader in codifying the first consumer withdrawal rights in U.S. law, the "Cooling-Off Rule". As we will see below, it also has oversight over consumer credit and finance and other areas of consumer protection.

#### a) Door-to-door Sales

"Door-to-door" sales are those that take place when a traveling salesman solicits buyers at their home or other location. Because of the perceived need to protect people from high-pressure tactics in their homes, the FTC established the first consumer contract withdrawal

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<sup>57</sup> See *Hill v. Gateway2000, Inc.*, 105 F.3d 1147, 1149 (7<sup>th</sup> Cir. 1997) (holding that contract terms inside a box of software were binding on consumer who subsequently used it); see also *Mudd-Lyman Sales and Serv. Corp v. UPS, Inc.*, 236 F.Supp. 907 (N.D. Ill. 2002) (ruling that plaintiff has accepted terms of license by breaking shrinkwrap seal and by its on-screen acceptance of terms of software license agreement); see also *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568 (Supreme Court of Washington, 2000) (the licensing agreement set forth in the software packaging and instruction manuals was part of a valid contract).

<sup>58</sup> See *DeJohn v. TV Corp. Int'l.*, 245 F.Supp.2d 913 (C.D. Ill. 2003) (holding that clickwrap agreement was enforceable and not an adhesion contract because user expressly indicated that he read, understood, and agreed to terms when he clicked box on Web site); see also *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203-04 (Ct of App. Tx 2001) ("by the very nature of the electronic format of the contract, [the plaintiff] had to scroll through that portion of the contract containing the forum selection clause before he accepted its terms...and that parties to a contract are not excused from the consequences resulting from failure to read the contract").

rights in the 1960s<sup>59</sup>. Under this rule, known as the “Cooling-Off Rule<sup>60</sup>”, consumers who have purchased goods or services from a door-to-door salesperson may unilaterally cancel the purchase within three days for any or no reason.

The main impetus for this law is a concern with high pressure tactics and deception in home sale environments, specifically in five areas:

- (1) deception by salesmen in getting inside the door,
- (2) high pressure sales tactics,
- (3) misrepresentation as to the quality, price, or characteristics of the product,
- (4) high prices for low-quality merchandise, and
- (5) the nuisance created by the visit to the home by the uninvited salesmen<sup>61</sup>.

If the sale was conducted at buyer’s residence, the consumer may cancel the purchase of a product valued at \$25.00 or more; if the sale was conducted at another temporary or transient location (such as a trade show), the minimum is \$130.00<sup>62</sup>.

The rule requires sellers to give buyers a duplicate of their receipt and a written notice of their right to cancel<sup>63</sup>, and must inform the buyer orally of the right at the time of purchase. (See Appendix A for a sample cancellation notice). In order to cancel the contracts, customers must send in a copy of the receipt<sup>64</sup>. A seller after receiving the notice of

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<sup>59</sup> 16 C.F.R. Part 429.

<sup>60</sup> This rule was promulgated by the Commission in 1972 to address unfair and deceptive practices in sales conducted at locations other than the place of business of the seller (door-to-door sales). 16 C.F.R. Part 429, *see* OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Federal Register (2015), “Cooling-Off Rule Summary”, Vol. 80, No. 6.

<sup>61</sup> Changes to the cooling off rule became effective on March 3, 2015. *See* <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-approves-changes-cooling-rule>. Last time visited January 3, 2018. The Commission concludes that the record supports retaining the \$25 exclusionary limit for door-to-door sales made within consumers' homes. The record reflects significant concern among the majority of commenters about high-pressure sales tactics and deception occurring during in-home solicitations. These concerns echo many of the same in-home sales concerns expressed by the Commission when it promulgated the Rule in 1972.

<sup>62</sup> The rule was amended in January 2015 to increase the price of sales at transient locations to \$130.00, it kept the \$25.00 limit for in-home sales.

<sup>63</sup> §429.1(b).

<sup>64</sup> Comment available at <https://www.ftc.gov/policy/public-comments/comment-563691-00036%C2%A0>. Last time visited January 7, 2018. The Direct Selling Association (DSA) “is the national trade association for companies that manufacture and distribute goods and services sold directly to consumers through an independent, entrepreneurial salesforce. More than 18 million Americans are involved in direct selling in every state, congressional district and community in the United States”. Available at <http://www.dsa.org/about/association>. Last time visited January 7, 2018.

cancellation must, within ten business days, refund all payments made under the contract, return any property traded in, cancel negotiable instruments received, and notify the buyer whether the seller intends to repossess or to abandon delivered goods in consumer's possession<sup>65</sup>.

The rule specifically exempts the following areas: sales of goods or services not primarily intended for personal, family or household purposes; sales made entirely online, or by mail or telephone; sales that are the result of prior negotiations at the seller's permanent place of business where the goods are sold regularly; sales needed to meet an emergency; sales made as part of the homeowner/buyer's request for the seller to do repairs or maintenance on his or her personal property; sales of real estate, insurance, or securities; sales of automobiles or other motor vehicles sold at temporary locations if the seller has at least one permanent place of business; and sales of arts or crafts sold at fairs<sup>66</sup>. Door-to-door contracts may also be governed by state statutes, which can give more protections than (but never contradict) the FTC rule.

Since the early cooling off periods were codified in the United States, scholars have studied the effects of these rules on consumers, mostly concluding that they have little consumer protective effect. A 1968 U.C.L.A. empirical study of the impact of cooling off rules on the direct sales industry argued that, while better than a one-day period, a three-day cooling off period is "not likely to have a major effect on consumers or dealers<sup>67</sup>". Another empirical study found that despite the existence of a statutory cooling off period, retailers who disclosed return policies orally as well as in writing demonstrated higher rescission rates than those who only notified buyers in writing<sup>68</sup>. In sum, these statistics cast some doubt on whether cooling-off periods are an effective consumer protection device and on whether consumers even know about them<sup>69</sup>.

#### b) Consumer Credit and Finance

The Truth in Lending Act (TILA) of 1968 is a federal law designed to protect consumers, by requiring disclosures about credit terms and costs<sup>70</sup>. The law standardizes the manner in which costs associated with borrowing are calculated and reported. TILA also gives

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<sup>65</sup> §429.1(g).

<sup>66</sup> See consumer information available at <http://www.consumer.ftc.gov/articles/0176-buyers-remorse-when-ftcs-cooling-rule-may-help>. Last time visited January 3, 2018.

<sup>67</sup> BRYSON & DUNHAM (1969, pp. 618, 628). In the Yale study, Legal Aid lawyers reported that they did not have any clients seeking advice regarding the issue. *Idem*, pp. 628-630.

<sup>68</sup> See SOVERN (2014, pp. 333, 374).

<sup>69</sup> *Idem*, p. 362.

<sup>70</sup> 15 U.S.C. ch. 41 § 1601.

consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes.

As part of the bundle of substantive protections introduced by TILA in the late 1960s, § 1635(a) granted a right to borrowers to rescind certain financial transactions<sup>71</sup>, specifically “second and lesser priority mortgages on the home<sup>72</sup>”. This right in plain terms refers to a non-judicial action to cancel non-purchase money mortgages, such as home equity loans and loans to refinance residential dwellings, as long as borrowers are using different creditors in the refinancing process. Scholarship examining the history and regulatory frameworks of this right has been abundant in recent years<sup>73</sup>.

The right was limited by subsequent amendments to the original text, and currently does not apply to some cases. It is narrowed to credit transactions of personal nature<sup>74</sup> in which

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<sup>71</sup> “Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section”. TILA §1635(a) Disclosure of obligor's right to rescind.

<sup>72</sup> See MILLER & LACKEY (2004) in *The Consumer Credit Protection Act*, Chapter 2, Substantive Rules, available at <http://apps.americanbar.org/buslaw/newsletter/0024/materials/book.pdf> . Last time visited January 5, 2018.

<sup>73</sup> See, *exempli gratia*, SCHLUSSEL (2014, p. 362) (arguing in favor of the written-notice approach); GRIFFITH (2015, p. 163); SABET (2010, p. 183). Reviewing the right to rescission as a defense to foreclosures. KNIGHT (2013, p. 148); CAULDER (2014, p. 1925); GREEN JR. (2015, p. 503); FERRANTELLI JR. (2014, p. 695); POUNDERS (2010, p. 189) (discussing the Ninth Circuit's decision in *King v. California*, 784 F.2d 910 (9th Cir. 1986), and whether refinancing cuts off rescission rights with respect to the refinanced loan.); MILLAR (2012, p. 40); AYER (2011, p. 261); WALLANT (2009, p. 1501); WILSON III (2011, p. 52); GUNTALI (2013, p. 433); SICKLER (2015, p. 463). Explaining the judicial hostility in the federal judiciary's interest in regulating consumer litigation behavior, perhaps as a lesson and deterrence to many consumers and their lawyers complaints; a paradigm shift in agency deference doctrine, including the reconsideration of *Seminole Rock/Auer* deference; and the disagreement with Congress's liberalization of common law rescission by statute. *Id.* at 464; GODFREY (2013, p. 547).

<sup>74</sup> Regulation Z, § 226.1(c) (2013).

a security interest is or will be “retained or acquired in a property used as the consumer’s principal dwelling<sup>75</sup>”. TILA and Regulation Z expressly exclude the following transactions:

- (1) a *residential mortgage transaction* as defined in section 1602(w) of this title;
- (2) a transaction which constitutes a *refinancing or consolidation* (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit *by the same creditor* secured by an interest in the same property;
- (3) a transaction in which an agency of a State is the creditor; or
- (4) *advances under a preexisting open-end credit*<sup>76</sup> plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan<sup>77</sup>.

The obligor has the right to rescind “until midnight of the third business day following the consummation of the transaction (closing date) or the delivery of the information and rescission forms required under this section, together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so<sup>78</sup>”. The elements formulated in this provision have been the subject of litigation.

As the oldest substantive rule in the body of rules comprised by TILA<sup>79</sup> where it applies, is an *unconditional* right to cancel the loan for three days following the consummation of the transaction (closing day), and also a *conditional* right after the three days if the seller fails to

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<sup>75</sup> TILA § 1635(a). Regulation Z, § 226.23(f)(1). Therefore, vacation homes and investment properties are excluded.

<sup>76</sup> Regulation Z, implementing TILA, distinguishes open-end and close-end transactions. Examples of close-end transactions are retail installment sales, home mortgages, and loans to purchase a car. Open-end transactions examples are credit cards, home equity lines of credit, and revolving charge accounts. Most close-end transactions require TILA disclosures at closing or before. *See* MILLER & LACKEY (2004, p. 19).

<sup>77</sup> TILA §1635(e). For a comparison with the list in Regulation Z, *see* § 226.23(f) implementing TILA, Exempt transactions. The right to rescind does not apply to the following: (1) A residential mortgage transaction. (2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation. (3) A transaction in which a state agency is a creditor. (4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 226.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer. (5) A renewal of optional insurance premiums that is not considered a refinancing under § 226.20(a)(5).

<sup>78</sup> *Idem*.

<sup>79</sup> *Idem*, p. 22.

satisfy TILA disclosures, i.e., fails to deliver material disclosures to the borrower related to finance charges, annual percentage rates of interest, and to inform the borrower of the right to rescind<sup>80</sup>. Thus, failing to satisfy the disclosures meant until 1974 that the borrower could exercise the right beyond the three-day period.

However, before Congress enacted the restriction period, “courts assumed that enforcement of a right of rescission, traditionally a remedy in equity, could be barred by laches in appropriate circumstances<sup>81</sup>”. This unrestrained extension was limited in 1974 with the passing of § 1635(f) to “three years after the date of consummation of the transaction”, regardless of whether or not disclosures were given to borrowers<sup>82</sup>.

As a conditional right, the right to rescind is different in nature to the European right to withdraw<sup>83</sup>. It is construed beyond the three-day period as a remedial measure for seller’s failure to provide mandatory TILA disclosures.

#### - The Process of Rescission under TILA

To trigger the extension, borrowers are required to notify lenders in writing of the rescission<sup>84</sup>. In *Jesinoski v. Countrywide Home Loans, Inc.*<sup>85</sup>, the court held that a borrower exercising his right to rescind under TILA need only provide written notice to his lender within the three-year period, the statute does not require borrowers to file suit within that three-year period<sup>86</sup>.

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<sup>80</sup> See *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015) (overruling previous precedent in the Eighth Circuit, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 727-728 (8th Cir. 2013), requiring borrowers to file suit within three years of the consummation of the transaction and holding that the statute extinguished the right to rescind barring relief after the three years.).

<sup>81</sup> See ALAQILI (2013, pp. 711, 715) (arguing that the equitable doctrine of laches adequately fills in the time gap created by the minority viewpoint (then the written-notice approach).) “In other words, if notice is proper, then how much time must pass after the borrower provides notice before a disagreeing lender can foreclose on the principal dwelling because the borrower has slept on her rights? The equitable doctrine of laches, would provide an appropriate defense to defendants that would heavily, yet justly, restrict the amount of time borrowers have to litigate through a standard of prejudice”. *Idem*, p. 740.

<sup>82</sup> §1635(f).

<sup>83</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights excludes in Article 3 (Scope of the Directive), (3)(d) contracts for financial services. However, financial services are regulated by Directive 2002/65/EC.

<sup>84</sup> Regulation Z, § 226.23(a).

<sup>85</sup> 135 S. Ct. 790 (2015).

<sup>86</sup> *Jesinoski*, 135 S. Ct. 790. Before *Jesinoski* there was a split in the federal circuits. The majority applied the Supreme Court’s decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998). *Exempli gratia*, the Third and Fourth Circuits held that written notice was sufficient, while the First, Sixth, Eighth, Ninth, and Tenth held that TILA required the filing of lawsuit. The Eighth Circuit in *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013), and the Ninth Circuit in *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325, 1327-29

In that case a couple, Larry and Cheryle Jesinoski, refinanced the mortgage on their primary home borrowing \$611,000.00 from Countrywide Home Loans, Inc. They were not given the required TILA disclosures, specifically the two copies of the Notice of Right to Cancel<sup>87</sup>. On February 23, 2010, the Jesinoskis sent written notice of rescission but Countrywide took no action within the 20 days stated in TILA. On February 24, 2011, four years and one day after the consummation of the transaction, the Jesinoskis filed suit in federal court.

The district court held that TILA required a borrower seeking rescission to file a lawsuit within three years of the transaction's consummation. The Eighth Circuit affirmed this position. The Supreme Court granted certiorari and held that a borrower exercising his right to rescind under TILA "need only provide written notice to his lender within the three-year period<sup>88</sup>". Notification in writing to the creditor is, therefore, the requirement under TILA and not the filing of a lawsuit<sup>89</sup>.

Furthermore, TILA §1635(f) permits written notices to the lender within the three years as the Congressional intent is to make rescissions a private mechanism of resolution, allowing borrowers to file lawsuits at a later time (in *Jesinoski* four years and one day after the consummation of the transaction)<sup>90</sup>.

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(9th Cir. 2012). The Tenth Circuit agreed that timely notice was insufficient to prolong the right to sue for rescission in *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1177-87 (10th Cir. 2012) (holding that mere notice of rescission is not enough to preserve the statutory right beyond three years). On the other hand, the Fourth Circuit held that written notice of rescission preserves the right to litigate rescission beyond three years in *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 278 (4th Cir. 2012). The Third Circuit held that mere invocation without more, however, will not preserve the right beyond the three-year period in *Williams v. Wells Fargo Home Mortgage, Inc.*, 410 F. Appx. 495, 498 (3d Cir. 2011); *but see Sherzer v. Homestar Mortgage Servs.*, 707 F.3d 255, 267 (3d Cir. 2013) (holding in favor of the Sherzers citing the statutory language of § 1635(a), providing that a borrower exercises his right of rescission when he sends notice to the creditor). There the court noted that *Beach* simply did not answer the question of how a borrower rescinds a loan.

<sup>87</sup> The Consumer Financial Protection Bureau website informs consumers that the three-day clock does not start until all three of the following events have happened (1) signature of the promissory note (2) receipt of the TILA disclosures, usually in the Closing Disclosure, and (3) receipt of the two copies of the notice explaining the right to rescind (two copies for each borrower). See <http://www.consumerfinance.gov/askcfpb/186/can-i-change-my-mind-after-i-sign-the-loan-closing-documents-for-my-second-mortgage-or-refinance-what-is-the-right-of-rescission.html>. Last time visited January 6, 2018.

<sup>88</sup> *Jesinoski*, 135 S. Ct. 790.

<sup>89</sup> See PRODANOVIC (2015, pp. 141, 159) (concluding that the Supreme Court applied the plain meaning of the statute to rule in favor of the Jesinoskis, although the court could also have decided the case on the grounds of legislative history, regulatory interpretation and public policy considerations).

<sup>90</sup> (f) Time limit for exercise of right: "An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other

- The Remedies of Rescissions at Law and Rescissions in Equity

Some examples of remedies at law include compensatory, liquidated, incidental, consequential, and punitive damages. The goal of compensatory damages is to bridge the gap between reality (contract breach) and parties' expectations (what they would have gotten). Indeed, it is to place the nonbreaching party in the position that he would have been in had the contract been performed.

But in some cases parties can request courts to use their equity powers, for example, in cases of specific performance and injunctions. By rescinding a transaction, parties are restored to the *status quo ante*. One way of achieving that result is by returning the consideration given. Traditionally, notice and other requirements were needed in equity and, in rescissions at law, were conditions precedent<sup>91</sup>.

In *Jesinoski*, the court explained that there is no distinction in the statute between disputed and undisputed rescissions<sup>92</sup>, and that the statutory rescission under TILA is not a codified rescission in equity, where the court decrees the rescission rather than a rescission at law, where the rescinding party returns, as a condition precedent, what she received before the rescission could be effected. The court further explained that TILA disclaims the condition

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disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later".

<sup>91</sup> See *KOFORD* (1948, p. 606). At p. 607 (also explaining that rescissions and damages are alternative and inconsistent remedies in California, at footnote 1, and that modern courts have both legal and equity powers).

<sup>92</sup> The lender argued that TILA §1635 (f) was a statute of repose<sup>92</sup> and, consequently, barred borrower's right to rescind after three years. It also argued that allowing suits after the expiration of the three years created uncertainty, high risk of flood of litigation cases to clear titles and ultimately clouded titles. In the case lender also rejected the deference to CFPB's opinion argument. The *Jesinoskis*, on the other hand, argued that Congress intended to protect consumers when it passed TILA §1635, not to burden them by requiring as a prerequisite the filing of a lawsuit. They reasoned that if Congress would have wanted the statute to be a statute of repose requiring the filing of suit, Congress would have written so explicitly. See for the difference between statutes of limitation and repose *HICKS* (1985, pp. 627, 629). Conversely, Congress intended rescission to be a non-judicial process. Further, the *Jesinoskis* alleged that rescission by notice does not cloud title in the mortgage markets because lenders are afforded 20 days after borrowers' notification to object and argue that material disclosures were in fact made. They also argued that high deference should be given to the opinion of the CFPB (successor of the FRB), and that the Bureau's opinion is dispositive. The CFPB accepted the FRB's "written notice approach" of TILA.

precedent required in rescissions at law<sup>93</sup> but in doing so does not impliedly codified the rescission in equity<sup>94</sup>.

With respect to the right to withdraw, it is worth noting that arguably the fundamental distinction with the common law rescissions is that the latter are remedies for breaches of contract, while the right to withdraw is temporarily situated and structured as a pre-remedy protection.

### c) Remittance Transfers

U.S. consumers also have a statutory right to cancel a “remittance transfer”<sup>95</sup> and get their money back within 30 minutes of payment<sup>96</sup>. The right includes transmittals made by individuals, thrifts, broker-dealers, credit unions, and banks transferring funds through wire transfers, automated clearing house (ACH) transactions, or other methods and the transfers are of more than \$15, made by a U.S. consumer and to a foreign person or company<sup>97</sup>.

The provider must honor the right as long as (1) [ t]he request to cancel enables the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled; and (2) [t]he transferred funds have not been picked up by the designated recipient or deposited into an account of the designated recipient. The process in §1005.31 requires a remittance transfer provider to include an abbreviated notice of the sender’s right to cancel a remittance transfer on the receipt or combined disclosure given under § 1005.31(b)(2) or (3).

In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the right to cancel a remittance transfer using language that is set forth in Model Form A-36 of Appendix A to this part or substantially

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<sup>93</sup> Jesinoski, 135 S. Ct. at 793.; §1635(b) “When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. [...]”

<sup>94</sup> *Idem*, p. 5.

<sup>95</sup> A remittance transfer is an electronic transfer of money from a consumer in the United States to a person or business in a foreign country. See 12 CFR §1005.34. See [http://files.consumerfinance.gov/f/201305\\_cfpb\\_remittance-transfer-rule\\_summary.pdf](http://files.consumerfinance.gov/f/201305_cfpb_remittance-transfer-rule_summary.pdf). Last time visited January 18, 2018.

<sup>96</sup> See 12 CFR §1005.34, establishing the procedures for cancellation and refund of remittance transfers.

<sup>97</sup> *Idem*. The rule does not apply to financial institutions providing 100 or less remittance transfers per year.

similar language<sup>98</sup>; and as long as the cancellation request is received by the provider no later than 30 minutes after the sender makes payment.

### 3.3. State Statutes

In addition to the area-specific federal statutes granting consumers a right to undo a contract, many states have their own laws amplifying consumer's rights in the areas of sale of goods, services and membership contracts. In the interest of time and space, this section briefly describes their structure and Appendix B sets out a chart with examples from a variety of states.

#### a) Sale of Goods

New York has a right to rescind purchases of merchandise under the New York Code, General Business, § 218-a, Disclosure of refund policies. Noncompliance with the statute makes sellers liable for up to 30 days<sup>99</sup>. Sellers can opt out of the statute by complying with the requirements of posting the return policy and stating so<sup>100</sup>, however statistics show that they often adopt the right to rescind.

Similarly, California has a seven-day right to rescind purchases of merchandise (return) under the California Civil Code, § 1723, classified as an obligation imposed by law<sup>101</sup>. Like in New York, sellers can also opt out of the statute in California by posting conspicuously

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<sup>98</sup> *Idem*.

<sup>99</sup> See NEW YORK GEN. BUS. § 218-a(3) "Enforcement. Any retail mercantile establishment which violates any provision of this section shall be liable, for a period of up to thirty days from the date of purchase, to the buyer for a cash refund or a credit, at the buyer's option, provided that the merchandise has not been used or damaged by the buyer and the buyer can verify the date of the purchase with a receipt or any other purchase verification method utilized by the retail merchant".

<sup>100</sup> NEW YORK GEN. BUS. § 218-a "Disclosure of refund policies. 1. Every retail mercantile establishment shall conspicuously post, in the following manner, its refund policy as to all goods, wares or merchandise offered to the public for sale . . . 2. The sign, required by subdivision one of this section to be posted in every retail mercantile establishment, shall (a) state whether or not it is the policy of such establishment to give refunds and, if so, under what conditions . . ."

<sup>101</sup> CAL. CIV. CODE § 1723 (a) "Every retail seller which sells goods to the public in this state that has a policy as to any of those goods of not giving full cash or credit refunds, or of not allowing equal exchanges, or any combination thereof, for at least seven days following purchase of the goods if they are returned and proof of their purchase is presented, shall conspicuously display that policy either on signs posted at each cash register and sales counter, at each public entrance, on tags attached to each item sold under that policy, or on the retail seller's order forms, if any. This display shall state the store's policy, including, but not limited to, whether cash refund, store credit, or exchanges will be given for the full amount of the purchase price; the applicable time period; the types of merchandise which are covered by the policy; and any other conditions which govern the refund, credit, or exchange of merchandise".

the return policy<sup>102</sup>. California has also a similar FTC three-day cooling-off rule in door-to-door sales<sup>103</sup>. In addition, examples of goods sold where the right to rescind exist are home solicitation sales - three *business* day cancellation period (Civ. Code § 1689.6); internet sales (when order has not been filled) - 30 day cancellation period (B&P 17538(a)); mail/telephone sales (when order has not been filled) - 30 day cancellation period (B&P 17538(a), 16 CFR Part 435); and seminar sales -- three *business* day cancellation period (Civ. Code § 1689.20)<sup>104</sup>.

#### b) Services

For consumer contracts involving services, the list include credit repair services - five day cancellation period (Civ. Code § 1789.16); dance studio services - indefinite cancellation period (Civ. Code § 1812.54(b)); dating services - three *business* day cancellation period (Civ. Code § 1694.1); dental services contracts - three *business* day cancellation period (Civ. Code § 1689.3); in the case of an electric service contract - three *business* day cancellation period (PUC 395); employment counseling services - three *business* day cancellation period (Civ. Code § 1812.511(a)(6)); funeral Contracts (pre-need) - indefinite cancellation period (B&P 7737); home improvements contracts - three *business* day cancellation period if a security interest results or may result (12 CFR 226.23); home Loans - three *business* day cancellation period (12 CFR 226.23); mortgage foreclosure consultant services - three *business* day cancellation period (Civ. Code § 2945.3(e)); personal emergency response unit - seven *business* day cancellation period (Civ. Code § 1689.6(b)); private child support collectors - 15 *business* day cancellation period (Fam. Code § 5613(a)). Service contracts for: used cars, home appliances, and home electronic products - 30 day cancellation period (Civ. Code § 1794.41(a)(4)(A)); for new motor vehicles - 60 day cancellation period (Civ. Code § 1794.41(a)(4)(A)); for any type of goods, pro-rata refund less cancellation fee - indefinite cancellation period (Civ. Code § 1794.41(a)(4)(B)). In the case of weight-loss services - three *business* day cancellation period (Civ. Code § 1694.6(a))<sup>105</sup>.

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<sup>102</sup> *Idem*.

<sup>103</sup> See also other states such as Montana, MONT. CODE ANN. § 30-14-504 (West 2013); Kansas, KAN. STAT. ANN. § 50-640 (West 2013); South Carolina, S.C. CODE ANN. § 37-2-502 (2012); District of Columbia, D.C. CODE § 28-3811 (2012); Oklahoma, OKLA. STAT. Ann. tit. 14A, § 2-502 (West 2013); Arkansas, ARK. CODE ANN. § 4-89-108 (West 2013); North Carolina, N.C. GEN. STAT. ANN. § 25A-39 (West 2013); New York, N.Y. PERS. PROP. LAW §§ 425-431 (2012); and Massachusetts, MASS. GEN. LAWS ANN. ch. 93, § 48 (West 2013).

<sup>104</sup> See the complete list published by the California Consumer Agency available at [http://www.dca.ca.gov/publications/legal\\_guides/k-6.shtml](http://www.dca.ca.gov/publications/legal_guides/k-6.shtml). Last time visited January 18, 2018. Other states also have similar provisions such as cooling off periods in Michigan, MICH. COMP. LAWS § 445.1202 (2012); cooling-off period statutes in dance studio contracts in New York, N.Y. GEN. BUS. LAW § 394-b; prepaid entertainment in Ohio, OHIO REV. CODE ANN. § 1345.43 (West 2012).

<sup>105</sup> *Idem*.

### c) Membership Contracts

Membership contracts include service contracts that are often long-term and billed in installments. Some examples are for fitness clubs and dating or buying clubs.

For membership camping contracts if the buyer visits the site - three business day cancellation period (Civ. Code § 1812.303(a)); if the buyer does not visit the site - 10 business day cancellation period (Civ. Code § 1812.304(a))<sup>106</sup>. Some states follow the federal mandates contemplated in FTC and other federal statutes. Some provide extended membership cancellation periods. In Georgia, for example, the Georgia Fair Business Practices Act (FBPA) allows a longer cancellation or cooling-off period for campground or marine memberships (up to 5:00 PM of the seventh day after a contract is signed, a separate Notice to the Buyer, describing the cancellation procedure, must be furnished at the time of purchase; and any money paid by the buyer must be returned within 30 days), and health spa or fitness center memberships (up to 12:00 midnight of the seventh day after a contract is signed)<sup>107</sup>.

## 4. *The Market Default: Return Policies in the United States*

Lacking a legally-recognized general right of withdrawal, a *de facto* market-driven practice has evolved in the United States: almost all stores offer some form of return policies with varying factors such as time, money, effort, scope, and exchange<sup>108</sup>.

Return policies are designed in retail to provide consumers the option to return merchandise within a period of time for pre-determined reasons. These policies may run parallel to statutory rescission rights but, in essence, are quite different from the European right to withdraw. They are used to increase consumer demand, rather than specifically to protect consumers<sup>109</sup>.

Volumes of business scholarship has examined the effects of return policies on consumer behavior. Many studies indicate that lenient return policies positively affect product purchases<sup>110</sup>. One recent study examined two policies: the first offered 100 % money back

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<sup>106</sup> *Idem*.

<sup>107</sup> See communication from the Georgia Department of Law, Consumer Protection Unit, available at <http://consumer.georgia.gov/consumer-topics/canceling-a-contract>. Last time visited January 18, 2018.

<sup>108</sup> See, *exempli gratia*, the survey results for 2015 and the Holiday Return Policies, available at Consumer World <http://www.consumerworld.org/pages/returns.htm> where major retail stores offered free return shipping on internet purchases.

<sup>109</sup> See JANAKIRAMAN, SYRDAL & FRELING (2015).

<sup>110</sup> SUWELACK, HOGREVE & HOYER (2011, p. 462) (showing that money-back guarantees (MBGs) stimulate emotional responses and demonstrated by examining eight search and experience goods that

within 30 days' deadline to return, and the other offered 80 % money back within 60 days' deadline to return. These researchers concluded that consumers are more likely to purchase and return goods when stores had more lenient return policies<sup>111</sup>.

But leniency comes in various forms. Researchers classified return policies by factors such as time leniency, monetary leniency, effort leniency, scope leniency, and exchange leniency. They concluded that monetary leniency (e.g., full refund policies rather than strict policies of partial refunds) and effort leniency (e.g., whether the merchant makes it difficult to return by requiring original receipts, original packaging) positively influence purchase. Those factors that reduce return rates are time leniency (the longer the more lenient), and exchange leniency (e.g., more lenient are those offering cash refunds rather than a store credit or a product exchange). Scope leniency (e.g., what can be returned such as "on sale products", if the policy is strict then they can't be returned), on the other hand, influences people to return goods.

#### **4.1. Signaling Theory and Endowment Effect (monetary and money back guarantees, MBGs)**

*In Remote Purchase Environments: The Influence of Return Policy Leniency on Two-Stage Decision Processes*, Stacy Wood analyzed remote purchases and the effect of return policies on consumer choice and satisfaction<sup>112</sup>. The author found that consumer behavior is consistent with the results under the signaling theory in the decision process of ordering, i.e., the first step in a remote purchase by catalog<sup>113</sup>. It also examined consumer behavior after ordering and determined that this is best explained by the endowment effect. Remote purchases are substantially different from "bricks-and-mortar store sales"<sup>114</sup>. The purchase decision in remote sales is understood as a two-step process: the ordering process and, once the good is received, the decision to keep it or return it. In remote sales the two-step process is separated by time and the consumer can't examine the product before it is received.

The author suggested that the endowment effect makes consumers feel products they own are more valuable, suggesting that the retailer can send false signals, e.g., a consumer may purchase a product by catalog with a lenient return policy thinking that the signal of

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MBGs positively affect consumers' willingness to purchase). The study found that for experience goods [an experience product has characteristics such as quality and price that are difficult to observe prior to consumption. Search products, in contrast, have characteristics easily evaluated before consumption], MBGs should be designed with stricter return conditions as compared to MBGs for search goods. *Id.*

<sup>111</sup> *Idem*, p. 2.

<sup>112</sup> WOOD (2001, p. 157).

<sup>113</sup> Which may very well be extended to online purchases.

<sup>114</sup> *Idem*, p. 158.

quality is better. The experiment was with Canadian candy bars and it showed that, in reality, consumers have high quality expectations and there is less amount of conflict in the ordering stage where there are lenient return policies. In the second stage, consumer also showed higher commitment and the tendency to not correct false signals due to the endowment effect, i.e., consumers tend to keep the merchandises they possess. In sum, “with lenient return policies the signal of quality may augment commitment in counterforce to the potential decreases in commitment afforded by a liberal return policy”<sup>115</sup>.

#### 4.2. Consumer Risk Theory (monetary and money back guarantees)

This theory suggests that return policies reduce the financial and product risks consumers feel prior to the purchase<sup>116</sup>. In *Consumer Acceptance of the Internet as a Channel of Distribution*, the authors studied two non-store retailing channels and compared them with two store retailing channels and, among other things, evaluated the importance of the return policy as a consumer relief and ultimate decision to purchase a product. The results of the experiment confirmed that money-back guarantee is the most important risk reliever<sup>117</sup>.

#### 4.3. Construal Level Theory (time deadlines)

The farther removed an object is from direct experience, the higher the level of construal of that object. This level of mental construal affects prediction, preference, and action<sup>118</sup>. “Construal and distance CLT contends that people use increasingly higher levels of construal to represent an object as the psychological distance from the object increases<sup>119</sup>”. Building on this theory Narayan Janakiraman and Lisa Ordóñez in *Effect of Effort and Deadlines on Consumer Product Returns* examined that individuals with lenient return policies focus on the benefits of the purchase rather than the costs of purchase<sup>120</sup>. Thus, higher return effort is likely to increase higher perceived effort when under shorter deadlines rather than under longer deadlines<sup>121</sup>. That is the case, the authors argue,

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<sup>115</sup> *Idem*, p. 159.

<sup>116</sup> VAN DEN POEL & LEUNIS (1999, p. 249).

<sup>117</sup> *Idem*.

<sup>118</sup> For more, see TROPE & LIBERMAN (2010, p. 440)

<sup>119</sup> *Idem*, p. 441. Examples “by moving from representing an object as a ‘cellular phone’ to representing it as ‘a communication device,’ we omit information about size; moving from representing an activity as ‘playing ball’ to representing it as ‘having fun,’ we omit the ball. Concrete representations typically lend themselves to multiple abstractions”. *Id.*

<sup>120</sup> JANAKIRAMAN & ORDÓÑEZ (2012, p. 260).

<sup>121</sup> *Idem*, p. 262.

because under this theory the perceived time to an event affects individual decisions by altering the mental representation of the events and, the greater the temporal distance, the more likely these events will be represented using higher-order constructs such as the abstract and non-contextualized features of products<sup>122</sup>.

## 5. *The right of withdrawal for consumers in European Contract Law.*

### 5.1. Origin and Basis of the Right of Withdrawal in the European Union.

Consumer protection has become one of the most important and significant identifying signs of European Union policies. As indicated in a document prepared by the European Commission, “the 493 million EU consumers are central to the three main challenges facing the EU: growth, jobs and the need to re-connect with our citizens... Confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency<sup>123</sup>”. Thus, the consumer is considered to be a key player in an efficient economy (*homo oeconomicus*), whereas consumer involvement in the market will drive economic growth and consequent creation of jobs.

That being said, how can the consumer be incentivized to participate in exchanges of goods and services that take place within the European Union? One possible response would require the implementation of efficient measures protecting consumer interests that translate into a correlative boost to consumer confidence. In this regard, the Treaty on the Functioning of the European Union clearly establishes that, regarding the consumer, the Union “will take as a base a high level of protection” (art. 114)<sup>124</sup>. And article 38 (consumer protection) of the Charter of Fundamental Rights of the European Union similarly states that “Union policies shall ensure a high level of consumer protection<sup>125</sup>”. Therefore, it is quite clear that ensuring a high level of consumer protection is a priority objective of European Union policies.

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<sup>122</sup> *Idem*.

<sup>123</sup> “They are the lifeblood of the economy as their consumption represents 58% of EU GDP”, EU Consumer Policy strategy (2007-2013), Empowering consumers, enhancing their welfare, effectively protecting them, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee*, COM(2007) 99 final.

<sup>124</sup> Art. 169 states: “In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests”, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

<sup>125</sup> *Charter of Fundamental Rights of the European Union* (2012/C 326/02), Official Journal of the European Union, 26/10/2012 (C 326/391).

Safeguarding consumer interests can be carried out in very different ways: providing clear and complete information in the pre-contractual phase, prohibiting unfair terms to the detriment of consumer rights, granting special warranty periods for the products acquired, and establishing a complete system of remedies in the case of breach. One of the most typical measures of European Union legislation has been to acknowledge the consumer a right of withdrawal<sup>126</sup> *ad nutum*<sup>127</sup>, understood as the power to terminate a contract unilaterally and without cause during a legally established period<sup>128</sup>.

The right of withdrawal is intended, first and foremost, to overcome the imbalance -legal and economic -in which consumers find themselves vis-à-vis merchants in the marketplace<sup>129</sup>. To that end, the “contract conservation principle” or binding effect of the contract is sacrificed upon acknowledging the consumer's power to break the *vinculum iuris* without justification of such conduct<sup>130</sup> (such as breach of contract, existence of fraudulent behavior) or financial compensation to the other party<sup>131</sup>.

Although this right seriously affects one of the essential pillars of the general theory of contracts (*pacta sunt servanda*)<sup>132</sup>, the European lawmaker does not generally grant any consumer the right to withdraw, but rather only to those consumers in a position of particular weakness for three possible reasons<sup>133</sup>:

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<sup>126</sup> “The right of withdrawal is one of the three characteristic elements of modern contract law along with the duty to inform and the (semi-) mandatory nature of such provisions”, MANKOWSKI (2012, p. 1476).

<sup>127</sup> “The party exercising the right need not give reasons; he merely decides to do so”, SCHULZE & MORGAN (2013, p. 294).

<sup>128</sup> The first text regulating the right of withdrawal in Europe is the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, (Official Journal L 372, 31-12-1985, p. 31-33).

<sup>129</sup> However, the right to withdraw is not necessarily restricted to the field of consumer protection. For example, in article 35 (1) of the Life Assurance Directive 2002/83/EC the right of withdrawal is available irrespective of whether the entitled party is a consumer.

<sup>130</sup> Art. 9.1 Directive 2011/83/UE.

<sup>131</sup> “The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason”, Art. 6.1. *Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC* (Official Journal L 271, 9.10.2002, p. 16-24).

<sup>132</sup> The right of withdrawal “limits necessarily the *pacta sunt servanda* principle”, EHMANN & SUTSCHET (2006, p. 174).

<sup>133</sup> *Vide*, TWIGG-FLESNER & SCHULZE (2010, p. 145).

- i) The complexity of the contract, such as occurs, for example, in consumer credit contracts<sup>134</sup>.
- ii) The execution of the contract under the so-called “surprise factor”<sup>135</sup>. This happens in cases of contracts negotiated away from business premises<sup>136</sup> or in timeshare contracts<sup>137</sup>, in which a contract may have been entered into hurriedly, under pressure (aggressive sales techniques), without due reflection or with lack of information<sup>138</sup>. It is sought in this way to protect the particularly weak and vulnerable consumer from the merchant.
- iii) The impossibility of trying and knowing the product firsthand, which occurs, for example, in distance sales<sup>139</sup> and distance contracting of financial services<sup>140</sup>. Ultimately, in these cases what is really intended by the European lawmaker is to incentivize the development of the EU internal market<sup>141</sup>, promoting consumer participation in international transactions through the acknowledgment of a unilateral and *ad nutum* right to terminate a contract<sup>142</sup>.

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<sup>134</sup> Art. 14.1 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (Official Journal L 133, 22.5.2008, p. 66-92).

<sup>135</sup> “Concerning off-premises contracts, the consumer should have the right of withdrawal because of the potential surprise element and/or psychological pressure”. Paragraph 37 of the *Directive 2011/83/ UE on consumer rights*.

<sup>136</sup> See, VÁZQUEZ-PASTOR JIMÉNEZ (2014, pp. 507-562).

<sup>137</sup> “In order to provide consumers with the opportunity of fully understanding their rights and obligations under the contract, they should be allowed a period during which they may withdraw from the contract without having to justify the withdrawal and without bearing any cost”, Paragraph 11 of the *Directive 2008/122/EC, of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts* (Official Journal, L 33, 3.2.2009, p. 10-30).

<sup>138</sup> The decision of the Appellate Court of Madrid of September 17, 2007 (AC 2007, 2035) makes reference to those cases in which the initiative to contract is assumed by the merchant with surprise techniques, when not aggressive, eliminating in some way the possibility of the consumer's being able to decide in an unhurried fashion, after a well-considered and comparative judgment in relation to other offers existing on the market.

<sup>139</sup> “Since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal”. Paragraph 37 of the *Directive 2011/83/ UE on consumer rights*.

<sup>140</sup> Art. 6. Directive 2002/65/EC, of 23 September 2002, concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (Official Journal L 271/16, 09-10-2002, p.1).

<sup>141</sup> Confer the preamble to the *Directive 2002/83/EC of the European Parliament and of the Council, of 5 November 2002, concerning life assurance* (Official Journal L 345, 19-12-2002, p. 1 - 51).

<sup>142</sup> “In any case, for distance contracts the right of withdrawal seems to be aimed at enticing the buyer to engage in cross-border transactions”, *Vide*, LOOS (2007, p. 6).

The election of these -or other -scenarios is first and foremost an issue that falls within the scope of legal policy and ethics. In all scenarios granting the consumer a cooling-off period, during which he may obtain supplementary information and reflect calmly about the contract he has entered into, the consumer retains the right to terminate the contract should he regret his decision. The cooling-off period, therefore, is ultimately a way of rectifying a decision made hastily and without sufficient reflection<sup>143</sup>.

Therefore, it may be said that the general philosophy of this institution stems from acknowledgment that the formal freedom to enter into a contract does not coincide, in certain cases, with the material or real freedom of the consumer to enter into a contract<sup>144</sup>, due to the imbalance that exists at the time to access information, as well as comprehend, compare and reflect on the offer received. Thus, from a dogmatic point of view, the right of withdrawal is linked to a defective formation of the consumer's will, which is offset with the power, which may not be waived<sup>145</sup>, to terminate the contract.

## 5.2. The Confusing State of the *Acquis Communautaire* on the Right of Withdrawal

Within the set of Directives that constitute the *acquis communautaire* on the matter of contracts and consumers, we can find several references to withdrawal. Although all acknowledge the consumer's right to terminate the contract in a unilateral fashion, there exist, however, very notable differences that give rise to a worrisome lack of consistency in the European legal system<sup>146</sup>.

The discrepancies in terminology are very striking: *right of cancellation* or *right of renounce*<sup>147</sup>, *right to cancel* or *cancellation period*<sup>148</sup> and *right of withdrawal*<sup>149</sup>. It is obvious that variations in the nomenclature used introduce a significant degree of legal uncertainty in European Law, so much so that, on occasions, it is not clear to what the lawmaker is referring.

Very significant differences can also be noted regarding the legal regime of the right of withdrawal. Both the period to exercise the right of withdrawal as well as the *dies a quo* varies in each Directive: "not less than seven days from receipt by the consumer of the

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<sup>143</sup> "The right of withdrawal is usually meant to protect a consumer from making rash decisions", *idem*, p. 6.

<sup>144</sup> CANARIS (2000, p. 344).

<sup>145</sup> Art. 6 Directive 85/577/EEC: "The consumer may not waive the rights conferred on him by this Directive" (mandatory law clause).

<sup>146</sup> *Vide*, BÜßER (2001, p. 67).

<sup>147</sup> Arts. 4 and 5 Council Directive 85/577/EEC.

<sup>148</sup> Art. 35 Directive 2002/83/EC.

<sup>149</sup> Art. 6. Directive 2002/65/EC.

notice<sup>150</sup>”, “within 10 calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract<sup>151</sup>”, “at least seven working days<sup>152</sup>”, “a period of 14 calendar days<sup>153</sup>” and “a period of between 14 and 30 days<sup>154</sup>”. The same occurs with other issues related to the exercise of the right of withdrawal, such as the obligation to inform regarding the existence of said right, the formal requirements, and the effects arising from withdrawal<sup>155</sup>.

The diversity among the Directives, coupled with the divergences that typically arise at the time of the incorporation thereof in the internal legislation of each of the States of the European Union<sup>156</sup>, has resulted in great legal uncertainty which translates into increased transaction costs in cross-border operations.

For all these reasons, the last Directive regulating the right of withdrawal in consumer contracts (Directive 2011/83/UE, on consumer rights)<sup>157</sup>, introduce the concept of “full harmonisation<sup>158</sup>” (moving away from the classic “minimum harmonization approach”), implying that “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive” (art. 4). Therefore, the full harmonization of the right of withdrawal should contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market<sup>159</sup>.

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<sup>150</sup> Art. 5 Directive 85/577/EEC.

<sup>151</sup> Art. 5.1 Directive 94/47/EC, of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (Official Journal L 280, 29/10/1994 p. 0083 – 0087).

<sup>152</sup> Art. 6 Directive 97/7/EC, of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (Official Journal 144, 4.6.1997, p. 19–27).

<sup>153</sup> Art. 6.1. Directive 2002/65/EC; art. 14.1 Directive 2008/48/EC; art. 6.1 Directive 2008/122/EC.

<sup>154</sup> Art. 35 Directive 2002/83/EC.

<sup>155</sup> *Vide*, a comparative analysis of the main Directives in, SCHULTE-NÖLKE (2007, pp. 702-706).

<sup>156</sup> With regard to the implementation in Germany of the EC Directives regulating the right of withdrawal (*Widerrufsrecht*), *vide*, MARKESINIS, UNBERATH & JOHNSTON (2006, p. 270).

<sup>157</sup> The most recent Directive on consumer contracts (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010) only establishes that Member States should have flexibility to provide a sufficient time either as a period of reflection before the credit agreement is concluded, a period of withdrawal after the conclusion of the credit agreement or a combination of the two.

<sup>158</sup> MICKLITZ (2009, pp. 47-83). FAURE (2008, p. 433). EBERS (2010).

<sup>159</sup> STEENNOT (2013, p. 119).

However, it must also be kept in mind that the Directive 2011/83/EU only applies to distance and off-premises contracts. Therefore, rules governing the right of withdrawal in consumer financial services (Directive 2002/65/EC), life assurance (Directive 2002/83/EC) and consumer credit contracts (Directive 2008/48/EC) are still valid. In other words, there is no full harmonization of the right of withdrawal.

On the other hand, the *Draft Common Frame of Reference* (DCFR, hereinafter)<sup>160</sup> also regulates the right of withdrawal<sup>161</sup> (Chapter 5, Book II), and states clearly its mandatory nature: “The parties may not, to the detriment of the entitled party, exclude the application of the rules in this Chapter or derogate from or vary their effects<sup>162</sup> (art. II.-5:101 (2): *Scope and mandatory nature*). However, withdrawal rights are granted only in certain cases, as in contracts negotiated away from business premises (art. II.- 5:201 DCFR)<sup>163</sup> and in timeshare contracts (art. II.- 5:202 DCFR)<sup>164</sup>.

To conclude, it can be asserted that the most modern policy regulations on the right of withdrawal are set forth in Directive 2011/83/EU and, in subsidiary fashion, in the DCFR. In the next section we will present a study of how both texts regulate the consumer's right of withdrawal, which will sketch the contours of the right of withdrawal in the European Union.

### 5.3. The Duty to Inform the Consumer Regarding the Right of Withdrawal

In order for the consumer to be able to exercise his right of withdrawal, it is indispensable that he previously be aware of its existence. Therefore, both art. 6 of Directive 2011/83/EU

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<sup>160</sup> The DCFR is a text of "soft law" drafted in 2009 by the "Joint Network on European Private Law" and supported by the European Commission. Although is not "hard law" strictly speaking, it will be taken into account throughout this work for its important academic value. *Vide*, EIDENMÜLLER *et al.* (2008, pp. 659-708). DIÉGUEZ OLIVA (2009).

<sup>161</sup> In order to reach a coherent terminology, the DCFR model rules have opted for the uniform use of the term "withdrawal".

<sup>162</sup> Because the main purpose of the general rules on withdrawal rights is to protect the entitled party, the rules of Chapter 5 (Section 1 and Section 2) may not be amended to the disadvantage of the protected party by any agreement between the parties. But the parties to the contract are allowed to facilitate the exercise of the withdrawal and to extend its effects by deviating from the rules of this Chapter, as long as this operates in favour of the entitled party. VON BAR (2011). Art. II.- 5:101 (2) DCFR. Comment C.

<sup>163</sup> "II.-5:201: Contracts negotiated away from business premises: (1) A consumer is entitled to withdraw from a contract under which a business supplies goods, other assets or services, including financial services, to the consumer, or is granted a personal security by the consumer, if the consumer's offer or acceptance was expressed away from the business premises".

<sup>164</sup> Additionally, if a business, when initiating real time distance communication with a consumer, has failed to comply with the duty to provide at the outset explicit information on its name and the commercial purpose of the contact, the consumer is granted with a right to withdraw (II.- 3:104: *Information duties in real time distance communication*; II.- 3:105: *Formation by electronic means*).

as well as arts. II-3:101 and II-5:104 DCFR bind the merchant to inform the consumer, prior to entering into the contract (pre-contractual duty to inform), about the possibility (or lack thereof) of withdrawing from the contract, period, or procedure, as well as the name and address of the person to whom withdrawal must be communicated. Moreover, said information -which is incorporated in the contract *ex art. 6.5 of Directive 2011/83/EU*<sup>165</sup>- should be clear and comprehensible to the average consumer<sup>166</sup>, avoiding the existence of ambiguities or obscure phrases that might tend to prevent him from exercising his right. It must also be presented in a way that is plain and readily perceptible, not hidden among a large number of informative data<sup>167</sup>. And finally, the information shall be provided at least in the same language as that in which the contract was made<sup>168</sup>.

With regard to the means of providing this information, Annex I to Directive 2011/83/EU includes a model consumer information document regarding withdrawal, along with some useful instructions for its proper compliance (see Appendix C)<sup>169</sup>. In any case, the burden of proof relating to compliance with information requirements shall always lie with the merchant (art. 6.9 of Directive 2011/83/EU).

But what happens if the merchant breaches his duty to inform regarding the right of withdrawal? Originally, article 5.1 of repealed Directive 94/47/EC granted the consumer the right to terminate the contract, which seemed like too radical a measure<sup>170</sup>. For that reason, currently both art. 10 of Directive 2011/83/EU and art. II 5:103 (4) DCFR establish that if the merchant has not provided the consumer with information on the right of withdrawal, the period to exercise said right shall expire 12 months from the end of the initial withdrawal period<sup>171</sup>. As can be seen, the penalty arising from breach is a broadening of the right to withdraw during one year, reckoned as of the time that the

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<sup>165</sup> "The information referred to in paragraph 1 shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise".

<sup>166</sup> "Average consumer who is reasonably well-informed and reasonably observant and circumspect". *European Court of Justice, Case 210/96 (Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt)*, 1998, ECR, 4657.

<sup>167</sup> "Designed to catch the eye of the consumer", LOOS (2007, p. 30).

<sup>168</sup> The European Directives do not solve in a clear manner the question of the language in which the information is to be provided.

<sup>169</sup> Article II.- 5:104 DCFR makes reference to "textual form on a durable medium".

<sup>170</sup> Art. 5.1. "the purchaser shall have the right [...] if the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, at the time of both parties' signing the contract or of both parties' signing a binding preliminary contract, to cancel the contract within three months thereof. If the information in question is provided within those three months, the purchaser's withdrawal period provided for in the first indent, shall then start".

<sup>171</sup> Notwithstanding, the *dies quo* in the DCFR is "the time of conclusion of the contract" (art. II 5:103 (4) DCFR).

initial period of 14 days expired<sup>172</sup>. Of course, it seems to us much more logical and wise to divert the consequences of breach of the duty to inform towards the broadening of the periods to exercise than towards the system of remedies arising from breach of contract, since in this way the merchant is incentivized to correctly fulfil his duty to inform the consumer.

Although it seems reasonable that the consumer be informed at all times as to his rights, and very particularly regarding his right of withdrawal, a criticism must be made of this legal conformation of the duty to inform: Is the pre-contractual phase the most appropriate time to provide information regarding the right of withdrawal? As has been quite rightly pointed out, for most consumers, the details concerning the right of withdrawal are of interest only after the conclusion of the contract, when the seller confirms the contract or when the buyer receives the goods<sup>173</sup>. Indeed, in the phase immediately prior to the conclusion of the contract, the consumer needs proper information regarding the essential elements of the contract (object, price, means of payment) that will allow him to appropriately decide what he wishes to do, but the possibility of exercising the right of withdrawal does not seem to be a determining factor for the future acquirer of a good or service to decide to contract<sup>174</sup>. Therefore, we understand that it would be functionally more appropriate for this duty to inform regarding the right of withdrawal to crystallize once the parties have concluded the contract.

#### 5.4. Exercise of the Right of Withdrawal: Requirements and Withdrawal Period

The procedure to carry out the right of withdrawal is a fundamental issue for the consumer, whereas the requirements imposed by the lawmaker for the correct exercise thereof shall condition the actual efficacy of such right. Now, in that respect, the analysis of European regulations must be focused on two fundamental elements: formal requirements and the period to withdraw.

As to the former, article 11 of Directive 2011/83/EU proves to be quite flexible, and allows the consumer to withdraw in different ways:

- (a) use the model withdrawal form as set out in Annex I (B); or

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<sup>172</sup> In this case the exercise of the right of withdrawal is not free, because depends upon the breach of the information duties, *vide*, DOMÍGUEZ LUELMO (2013, p. 210).

<sup>173</sup> “Indeed, it is difficult to see why a seller prepared to bear these costs him- or herself should be obliged to burden the consumer with information about the right of withdrawal, and thus unnecessarily distract him or her from deciding upon the conclusion of the contract”, EIDENMÜLLER *et al.* (2012, p. 325).

<sup>174</sup> Besides, it has been pointed out that “it is generally recognized that the marginal utility of information decreases with an increase in the amount of information, and can in fact become negative”, EIDENMÜLLER *et al.* (2008, p. 694).

- (b) make any other unequivocal statement setting out his decision to withdraw from the contract.
- (c) fill and submit either the model withdrawal form set out in Annex I (B) or any other unequivocal statement on the merchant's website. In those cases the merchant shall communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay.

Thus, the European lawmaker intends to facilitate the exercise of the consumer's right of withdrawal, providing him with different valid and effective avenues to convey to the merchant his decision to terminate the contract<sup>175</sup>.

As for the deadline, Directive 2011/83/EU puts an end to the time divergences to which we referred above<sup>176</sup> and establishes a uniform period of withdrawal of fourteen days (art. 9.1)<sup>177</sup>. With respect to the *dies a quo* of the calculation, article 9.2, in a certainly complex and very casuistic manner, sets out different moments depending on the type of contract concluded: services, sale and supply of water, gas or electricity<sup>178</sup>. In any case, article 11.2 of Directive 2011/83/EU determines that the consumer shall have exercised his right of withdrawal within the period legally provided "if the communication concerning the

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<sup>175</sup> Article II.-5:102 DCFR (Exercise of right to withdraw) stipulates that the right to withdraw is exercised by notice to the other party (and notice becomes effective when it reaches the addressee (I.-1:109 (Notice DCFR)).

<sup>176</sup> "By stipulating a fourteen day period, this rule mediates the great diversity of withdrawal periods to be found in Community law and in the Member States' laws, which vary between 7 and about 15 days (and in some specific cases even reach 30 days). Such a unification of the different withdrawal periods is desirable, because this would very much facilitate the conduct of business where withdrawal rights apply". VON BAR & CLIVE (2011). II.-5:103: Withdrawal period. Comment. B. On the other hand, the period has to be calculated in calendar days according to the Council Regulation (EEC, Euratom) n° 1182/71, of 3 June 1971, determining the rules applicable to periods, dates and time limits.

<sup>177</sup> Directives 2008/48/EC and 2008/122/EC also grant the consumer a period of 14 calendar days to withdraw.

<sup>178</sup> "2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days from: (a) in the case of service contracts, the day of the conclusion of the contract; (b) in the case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods or: (i) in the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good; (ii) in the case of delivery of a good consisting of multiple lots or pieces, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece; (iii) in the case of contracts for regular delivery of goods during defined period of time, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good; (c) in the case of contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium, the day of the conclusion of the contract".

exercise of the right of withdrawal is sent by the consumer before that period has expired” (dispatch theory). This rule clearly favors the interests of European consumers because they can exhaust the full period to decide whether or not to withdraw from the contract, regardless of their communication being received by the merchant once the fourteen days have expired.

## 5.5. Effects of Withdrawal

### a) Termination of Contractual Relationship

First, according to the general theory of contracts, any withdrawal entails as a principal and immediate effect the termination of the contractual relationship<sup>179</sup> and, consequently, of the parties' obligations that arise from the contract [art. 5:105 (1) DCFR]. That is, withdrawal frees the contracting parties from fulfillment of their obligations, insofar as it produces the effect of terminating future obligations arising from the contract (*ex nunc*)<sup>180</sup>. In this regard, article 12 of Directive 2011/83/EU specifies most clearly that the exercise of the right of withdrawal shall terminate the obligations of the parties to perform the contract or, as applicable, to conclude the contract when the consumer has made an offer<sup>181</sup>.

Now, since when are the effects of termination of the right of withdrawal produced on the contract? Although neither Directive 2011/83/EU nor the DCFR are sufficiently clear on this point, it may be concluded that the effects of withdrawal should operate as of the time that the merchant<sup>182</sup> receives the communication whereby the consumer notifies it of his exercise of the right of withdrawal (theory of receipt). In any case, it should be recalled that withdrawal lacks retroactive effects capable of affecting contract validity<sup>183</sup>.

### b) Duty of Restitution

In addition to terminating the contractual relationship, withdrawal binds both parties to reciprocally restore to each other the benefits they may have received as a consequence of performance of a contract that was effective until the consumer exercised his right of

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<sup>179</sup> *European Court of Justice*, 22.4.1999, case 423/97 (Travel Vac SL/ Anselm Sanchís), 1999 ECR, nos. 57-58.

<sup>180</sup> *Vide*, SCHULZE & MORGAN (2013, p. 330).

<sup>181</sup> As can be seen, the right of withdrawal does not only extend to the contract, but to the offer itself, EIDENMÜLLER (2011, pp. 9-14). Nevertheless, the inexactness of the rule bears mentioning, whereas ultimately the figure of the “withdrawal of offer” is nothing more than an imprecise and debatable variation of the “revocation of offer” whose effect extinguishes the offer itself, not the obligation to conclude the contract, SCHLECHTRIEM (2005, pp. 204-205).

<sup>182</sup> Note that the Directives use the term traders instead of merchants.

<sup>183</sup> SCHULZE (2012, p. 234).

withdrawal<sup>184</sup>. It is thus sought, in Shulze's words, "the restoration of the property status prior to the conclusion of the contract<sup>185</sup>". Consequently, the right of restoration affects both the merchant and the consumer.

Starting with the former, the merchant has the obligation of refunding any payment received from the consumer, utilizing therefore the same means of payment used for the initial transaction<sup>186</sup> (arts. 13.1 of Directive 2011/83/EU and II.- 5:105 (3) DCFR). It can be seen how the merchant's obligation to refund is not limited to payment of the goods or digital content supplied but extends as well to delivery costs<sup>187</sup> or to any other type of expense that the consumer may have actually borne. The refund must be made without undue delay and, in any case, prior to fourteen days having elapsed since the date on which it was informed of the consumer's decision to withdraw from the contract (art. 13.1 of Directive 2011/83/EU)<sup>188</sup>. In this way, the merchant may not delay without justification the material extinguishment of the contract to the detriment of the consumer.

In any case, the merchant's right to withhold the reimbursement in sales contracts when it has not received the goods that it, in turn, delivered to the consumer, is generally acknowledged. The exercise of such right of withholding clearly favors the interests of the merchant<sup>189</sup> and may only be enforced until such time as the goods are received, or until the consumer has presented proof of return thereof, depending on which condition is met first (arts. 13.3 of Directive 2011/83/EU).

For his part, the main obligation assumed by the consumer in the event of withdrawal is to return (via regular mail, courier or email in the event of digital content) or physically hand over the goods to the merchant or to a person so authorized (art. 14.1 of Directive 2011/83/EU). The return of the goods must be carried out without undue delay and, in any case, not later than fourteen days from the date on which he had communicated his decision to withdraw from the contract to the merchant (arts. 14.1 of Directive 2011/83/EU and 45.1 CESL)<sup>190</sup>.

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<sup>184</sup> "Performances that were performed under the contract now rendered ineffective are to be returned", MANKOWSKI (2012, p. 1478).

<sup>185</sup> SCHULZE (2012, p. 237).

<sup>186</sup> "This implies that reimbursement cannot take via vouchers (except where the original payment was done in the same way)", STEENNOT (2013, p. 134).

<sup>187</sup> STJUE de 15 abril 2010, Case C-511/08 *Heinrich Heine* (2010). *Vide*, ARROYO APARICIO (2010, pp. 41-96).

<sup>188</sup> However, article II.- 5:105 (3) DCFR lays down a period of 30 days.

<sup>189</sup> *Vide*, TONNER & FANGEROW (2012, pp. 72-73).

<sup>190</sup> Although the merchant does not have the obligation to pick up the goods itself, in the case of off-premises contracts where the goods were delivered to the consumer's home at the time of its execution, the

Now, what happens if the goods perish or suffer serious damage during transport, prior to coming into the merchant's possession? In principle, the consumer assumes, as a general rule, the risk of loss or destruction from the time that he acquires physical possession of the goods (art. 20 of Directive 2011/83/EU) and, consequently, if once the right of withdrawal has been exercised the goods have major damage that impede their return, the consumer would lose the price paid for them<sup>191</sup>.

Finally, there is a very important issue that affects the interests of the consumer and the feasibility of the right of withdrawal: Who should pay the costs related to the return? According to the classic *acquis communautaire*, the exercise of the right of withdrawal should be free of charge<sup>192</sup>. However, article 14.2 of Directive 2011/83/EU sets out that the consumer shall bear the direct costs of returning the goods (typically, shipping, packing or packaging expenses, etc.). Nevertheless, this obligation shall cease in two cases: one, when the merchant, in exercise of the autonomy to decide, has accepted to assume them; two, when it has failed to inform the consumer that the consumer has to bear said costs.

#### c) Consumer Responsibility for Use of Goods

The decision of the European Court of Justice of September 3, 2009, in the matter of *Messner* (C-489/07), clarified that the possibility of examining and trying free of charge the good is consubstantial with the right of withdrawal itself, since the functionality and efficacy of said right "would be impaired if the consumer were obliged to pay compensation simply as a result of having examined and tested the goods acquired under a distance contract<sup>193</sup>". Therefore, in principle the consumer can use the goods acquired without any fear of the merchant's demanding payment of compensation in the event of return. Nevertheless, it is foreseen that he will be liable for the diminished value<sup>194</sup> of such goods as occurs due to his inspection or testing thereof, provided that two conditions are met:

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merchant shall pick them up at its own expense when, due to the nature thereof, they cannot be returned via mail (art. 14.1.III of Directive 2011/83/EU).

<sup>191</sup> Although the meaning of "undue delay" is not apparent, the purpose of this requirement does contain an element of indirect protection: the consumer bears the risk whilst the goods remain in his physical possession, and therefore the longer the item remains in the consumer's possession, the higher the chances of damage or loss and thus the liability, SCHULZE (2012, p. 243).

<sup>192</sup> Art. 8.2. Directive 2008/122/CE: "Where the consumer exercises the right of withdrawal, the consumer shall neither bear any cost nor be liable for any value corresponding to the service which may have been performed before withdrawal".

<sup>193</sup> *Vide*, ROTT (2010, pp. 185-194). Likewise, cases Schulte C-350/03 and Crailsheimer C-229/04.

<sup>194</sup> "The use of goods bought at the doorstep or by distance selling may not only be a benefit for the consumer. It also turns new goods into second-hand goods, which in itself seriously impacts on the value of the goods", ROTT (2006, p. 1127).

- a) That it results from the handling of the goods other than as necessary to establish the nature, characteristics or functioning thereof<sup>195</sup>.
- b) That the merchant has provided to the consumer all the information regarding his right of withdrawal.

In the contrary case, the consumer shall in no case be liable for the diminished value of the goods vis-à-vis the merchant (art. 14.2 of Directive 2011/83/EU).

### 5.6. Ancillary Contracts

The European Directives have always shown a great concern regarding the efficacy of the right of withdrawal vis-à-vis ancillary contracts<sup>196</sup> with respect to which the withdrawal is made (for example, when a credit contract is concluded to finance the good itself, or a maintenance contract or an insurance contract)<sup>197</sup>. It is obvious that if these ancillary contracts remained in force, the exercise of the right of withdrawal would be partially useless for the consumer, to the extent that the same would continue to be linked to another binding legal relationship<sup>198</sup>.

At present, article 15.1 of Directive 2011/83/EU sets out that the exercise of the right of withdrawal will result in the automatic termination of any “ancillary contract”<sup>199</sup> for the consumer. The use of the term “automatic” implies that it is not necessary for the consumer to independently communicate the withdrawal to the merchant with whom he concluded the ancillary contract.

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<sup>195</sup> “In order to establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. Consequently, the consumer should handle and inspect the goods with due care during the withdrawal period. The obligations of the consumer in the event of withdrawal should not discourage the consumer from exercising his right of withdrawal”. Paragraph 47 Directive 2011/83/UE.

<sup>196</sup> The Spanish Supreme Court sentenced *Banco Santander*, among other entities, to return to the students of the network of English academies "Opening" the installments of loans paid since the closing of the company, as the loans were deemed to be ancillary contracts to finance educational courses [STS 4.02.2013 (RJ 2013, 1842)].

<sup>197</sup> Art. 7 Directive 94/47/CE, art. 6 (4) Directive 97/7/CE and art. 15 Directive 2008/48 UE.

<sup>198</sup> ZIMMERMANN (2008, p. 222).

<sup>199</sup> Art. II.-5:106: Linked contracts “1) If a consumer exercises a right of withdrawal from a contract for the supply of goods, other assets or services by a business, the effects of withdrawal extend to any linked contract”.

In addition, it should be pointed out that the termination of the ancillary contract will take place “without any costs” for the consumer. No type of specific penalty may be imposed (art. 15.1 of Directive 2011/83/EU). Nevertheless, termination generates the duty for both parties to return whatever they may have received by virtue of the ancillary contract (art. II.- 5:106 (3) DCFR). If the consumer had to return the goods he received, he will assume the direct costs of returning them, since the general regime provided for withdrawal applies (art. 14 of Directive 2011/83/EU).

## 6. Conclusions

The right of withdrawal implies above all the acknowledgment of a very relevant exception to the fundamental dogma of contract law: the duty to fulfill what is promised (*pacta sunt servanda*). For that reason, no legal system can grant the contracting parties the power to withdraw in a generalized and indiscriminate fashion, but rather on an extraordinary basis and only in cases that are sufficiently justified. Otherwise, the complete private contract system would be contingent upon the whim of the buyer of goods and services, which, in turn, would imperil the very functioning of the market.

Both U.S. and European law coincide in granting the right of withdrawal solely to a special category of individuals, namely consumers, due to the situation of informative asymmetry in which they find themselves vis-à-vis merchants. In addition, it is not a matter of a right that the consumer can invoke in any transaction, but only when concluding particularly complex contracts (e.g., consumer credit contracts) or in those in which he is subjected to pressure or the so-called “surprise factor” at the time of entering into the contract (e.g., door-to-door sales). In such cases, the consumer may overcome the potential problems he may have experienced in forming a decision by exercising a right to change one's mind with no need to allege any reason. And to ensure the efficacy of this right, it is established that merchants have the obligation of adequately informing consumers that they have the possibility of withdrawing.

Beyond these commonalities, the European and U.S. rights of withdrawal differ in several aspects. To begin, the European Union has been very generous and flexible regulating this figure, while in the U.S. the legislation is quite a bit more restricted and limited. Thus, the European directives grant the consumer the right of withdrawal in scenarios not expressly contemplated in U.S. federal legislation. Moreover, the withdrawal period that has been finally established in the European Union is 14 days, while in the U.S. it is just 3 days, on average. Finally, it is established in U.S. Law that in order to exercise the right of withdrawal, products acquired door-to-door must have a minimum price (25 or 130 dollars), excluding from the scope of application of the rule those acquisitions of goods of scant value and relevance. On the contrary, none of the European directives make the right of withdrawal contingent upon the price of the goods purchased.

U.S. consumers do not have a comprehensive federal statute similar to the European Directive. The Uniform Commercial Code limits the right to rejections to improperly delivered and nonconforming goods. The common law to subjective and objective dissatisfactions as conditions to withdraw and, in consumer finance transactions, there is a right to rescind for three days, but beyond that period is construed as a remedial measure when sellers fail to provide TILA mandatory disclosures to buyers. TILA rescissions are non-judicial by nature and were drafted as a private mechanism to resolving disputes between consumers and merchants.

By the same token, in the U.S. it seems like the right to withdraw is often understood by judges -with the very few exceptions discussed-, as a remedy for breaches of contract and applied to cases at hand accordingly, while in the E.U. the right is not necessarily seen as a remedy-like protection, but a consumer statutory right.

In the constant search for purchase incentives in the U.S., business return policies have obliquely protected consumers rather than comprehensive statutory schemes. These return policies continue to play a vital role in understanding consumer withdrawal rights and consumer buying decision processes. There is a growing interest in monitoring return policies and their effect on purchasing decisions. In general, business scholarship has showed that lenient return policies have caused consumer purchases to increase. They have also concluded that monetary leniency and effort leniency positively influence purchases, and that time leniency and exchange leniency reduce return rates, while scope leniency, on the other hand, influence people to return goods.

Does this mean that the European consumer is better protected than the U.S. consumer? Apparently so, but the truth of the matter is that the extension of the mechanism of withdrawal ultimately affects the consumer negatively, whereas merchants tend to factor the costs related to the exercise of withdrawal into the final price of the product<sup>200</sup>. Even more so when, as we have seen, the exercise of the right of withdrawal is essentially free of charge and the merchant will generally assume the costs of depreciation of the products handed over. Thus, the imperative acknowledgment by the European lawmaker ultimately favors a very insignificant portion of consumers (whereas it is a right that is not exercised

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<sup>200</sup> “From the perspective of law & economics, any kind of consumer protection ultimately is paid by that same consumer in the form of an increase of the price”, LOOS (2007, p. 10).

on a mass basis<sup>201</sup>) while harming all alike. This paradoxical result does not seem to be acceptable<sup>202</sup>.

The right of withdrawal is currently being subjected to intense criticism by top European scholars. In this regard, the need to acknowledge the right of withdrawal in distance sales is being disputed; however, it is very doubtful that the buyers consent was formed inadequately in these cases<sup>203</sup>. Rather, as we saw previously, what is sought is to incentivize the development of cross-border exchanges in the E.U. One may legitimately wonder whether the acknowledgment of the consumer's right of withdrawal is not excessive to achieve that objective<sup>204</sup>. The inclusion of the right of withdrawal in timeshare contracts has also been criticized. In these cases, issues typically appear after a considerable period of time has elapsed since the signing of the contract, therefore the efficacy of the right in such cases is debatable<sup>205</sup>.

It would not come as a surprise if the European Commission itself made a public appeal regarding the need to review critically the *acquis communautaire*, particularly with respect to its effects on consumers and merchants<sup>206</sup>. Although the DCFR had the opportunity to carry out this task, it settled for maintaining the *statu quo* without introducing any modifications worth mentioning to the *acquis communautaire*. The challenge is still on the table, and U.S. Law can provide some particularly interesting guidelines, such as limiting the acknowledgment of the right of withdrawal to complex contracts (consumer credit contracts) or to those cases in which the vulnerability of the consumer is self-evident (door-to-door sales). Thought should also be given to the convenience of granting greater autonomy to merchants so that they freely set the right of withdrawal on a case-by-case basis, relying in this way on the informed decisions and choices that the consumer must make in a free market system.

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<sup>201</sup> "The probability that a right of withdrawal is actually exercised is- apart from distance contracts- very small and amounts to less than 5 per cent of all contracts. In the realm of distance contracts there are allegedly some areas where this total rises to 20-30 per cent", MANKOWSKI (2012, p. 1478). "Also, rights of withdrawal are in practice only rarely made use of and, consequently, serve their intended function only in exceptional cases", EIDENMÜLLER *et al.* (2008, p. 673).

<sup>202</sup> "As regards the right of withdrawal, for instance, the evidence that it provides any meaningful protection is, so far, less than conclusive", *idem*, p. 694.

<sup>203</sup> EIDENMÜLLER *et al.* (2012, pp. 326, 327).

<sup>204</sup> "To my mind, it is doubtful whether that goal justifies the choice for a far-reaching instrument such as the right of withdrawal", LOOS (2007, p. 10).

<sup>205</sup> MARTINEK (1997, p. 1397).

<sup>206</sup> Commission (EC) 'European contract Law and the Revision of the Acquis: the way forward' ('Way forward') COM(2004) 651 final, 11 October 2004.

## 7. Appendix

### 7.1. Appendix A. Notice of Cancellation (USA)

[enter date of transaction]

(Date)

You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to [*Name of seller*], at [*address of seller's place of business*] NOT LATER THAN MIDNIGHT OF [*date*].

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

## 7.2. Appendix B

Automobile Sales and Leases	There is <i>no statutory cancellation period</i> for automobile sales or leases.
Door-to-Door Sales	Three <i>business</i> day cancellation period (Civ. Code § 1689.6(a)).
Endless Chain Scheme <sup>207</sup>	Indefinite cancellation period when scheme is unlawful under Pen. Code § 327 (Civ. Code § 1689.2).
Funeral Contracts (pre-need)	Indefinite cancellation period (B&P 7737).
Home Equity Sale During Foreclosure	Five <i>business</i> day cancellation period (Civ. Code § 1695.4(a)).
Home Solicitation Sales	Three <i>business</i> day cancellation period (Civ. Code § 1689.6).
Internet Sales (when order has not been filled)	30 day cancellation period (B&P 17538(a)).
Mail/Telephone Sales (when order has not been filled)	30 day cancellation period (B&P 17538(a), 16 CFR Part 435).
Seminar Sales	Three <i>business</i> day cancellation period (Civ. Code § 1689.20).
Telephone Sales (when order has not been filled)	30 day cancellation period (B&P 17538(a), 16 CFR Part 435).
Water Treatment Devices	Three <i>business</i> day cancellation period (B&P 17577.3).

Services	
Credit Repair Services	Five day cancellation period (Civ. Code § 1789.16).
Dance Studio Services	Indefinite cancellation period (Civ. Code § 1812.54(b)).
Dating Services	Three <i>business</i> day cancellation period (Civ. Code § 1694.1).
Dental Services Contracts	Three <i>business</i> day cancellation period (Civ. Code § 1689.3).
Discount Buying Services <sup>208</sup>	Three day cancellation period (Civ. Code §

<sup>207</sup> An “endless chain” means “any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant”. CAL. PENAL CODE § 327.

<sup>208</sup> A discount buying organization is “any person or persons, corporation, unincorporated association, or other organization which provides its clients or members of any other discount buying organization with the ability to purchase goods or services at discount prices”. CAL. CIV. CODE § 1812.101.

	1812.118).
Electric Service Contract	Three <i>business</i> day cancellation period (PUC 395).
Employment Counseling Services <sup>209</sup>	Three <i>business</i> day cancellation period (Civ. Code § 1812.511(a)(6)).
Health Studio Services	Five <i>business</i> day cancellation period (Civ. Code § 1812.85(b)).
Home Improvements Contracts	Three <i>business</i> day cancellation period if a security interest results or may result (12 CFR 226.23)
Home Repair or Restoration Contracts Following a Disaster	Seven <i>business</i> day cancellation period (unless contract is automatically void) (Civ. Code § 1689.6(c)).
Immigration Consultant Services	Three day cancellation period (B&P 22442(f)).
<b>Insurance</b> (life under-\$10,000)	Between 10- and 30-day cancellation period as determined by insurer (Ins. Code § 10127.7).
<b>Insurance</b> (disability, seniors, life)	30-day cancellation period (Ins. Code 786).
<b>Insurance</b> (property)	Indefinite cancellation period (Ins. Code § 6010(a)).
Job Listing Services	Three <i>business</i> day cancellation period (Civ. Code § 1812.516(a)(6)).
Legal Document Assistant	24 hour cancellation period (B&P 6410(e)).
Mortgage Foreclosure Consultant Services	Three <i>business</i> day cancellation period (Civ. Code § 2945.3(e)).
Personal Emergency Response Unit	Seven <i>business</i> day cancellation period (Civ. Code § 1689.6(b)).
Private Child Support Collectors	15 <i>business</i> day cancellation period (Fam. Code § 5613(a)).
Real Estate Transfer	Delayed or materially amended Transfer Disclosure Statement -- three day (statement delivered personally) or five day (statement delivered by mail) cancellation period (Civ. Code § 1102.3(b)).
Service Contracts	<ul style="list-style-type: none"> <li>– For used cars, home appliances, and home electronic products -- 30 day cancellation period (Civ. Code § 1794.41(a)(4)(A)).</li> <li>– For new motor vehicles -- 60 day cancellation period (Civ. Code § 1794.41(a)(4)(A)).</li> <li>– For any type of goods, pro-rata refund less</li> </ul>

<sup>209</sup> "Employment counseling service" means "any person who offers, advertises, or represents it can or will provide any of the following services for a fee: career counseling, vocational guidance, aptitude testing, executive consulting, personnel consulting, career management, evaluation, or planning, or the development of résumés and other promotional materials relating to the preparation for employment". CAL. CIV. CODE § 1812.500.

	cancellation fee -- indefinite cancellation period (Civ. Code § 1794.41(a)(4)(B)).
Unlawful Detainer Assistants <sup>210</sup>	24 hour cancellation period (B&P 6410(e)).
Weight-loss Services	Three <i>business</i> day cancellation period (Civ. Code § 1694.6(a)).

Memberships	
Membership Camping Contracts	<ul style="list-style-type: none"> <li>– If buyer visits site -- three <i>business</i> day cancellation period (Civ. Code § 1812.303(a)).</li> <li>– If buyer does not visit site -- 10 <i>business</i> day cancellation period (Civ. Code § 1812.304(a)).</li> </ul>

The consumer may also have other cancellation rights. Almost any consumer contract entered into in a consumer's home (or somewhere other than the seller's place of business) can be canceled by sending a written notice of cancellation to the seller by midnight of the third business day after the consumer signed the contract. In order for this rule to apply, the contract must be for consumer goods costing \$25 or more. (Civ. Code §§ 1689-1689.12.)

### 7.3. Appendix C. Model instructions on withdrawal (UE)

Right of withdrawal. You have the right to withdraw from this contract within 14 days without giving any reason.

The withdrawal period will expire after 14 days from the day \_ \_ \_ \_ \_.

To exercise the right of withdrawal, you must inform us ( ) of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model withdrawal form, but it is not obligatory.

To meet the withdrawal deadline, it is sufficient for you to send your communication concerning your exercise of the right of withdrawal before the withdrawal period has expired.

Effects of withdrawal

If you withdraw from this contract, we shall reimburse to you all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from your choice of a type of delivery other than the least expensive type of standard delivery offered by us), without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to withdraw from this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement.

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<sup>210</sup> An unlawful detainer assistant is "any individual who for compensation renders assistance or advice in the prosecution or defense of an unlawful detainer claim or action, including any bankruptcy petition that may affect the unlawful detainer claim or action". CAL. CIV. CODE § 6400.

#### 7.4. Appendix D. Model withdrawal form (UE)

(complete and return this form only if you wish to withdraw from the contract)

– To [here the trader's name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:

– I/We (\*) hereby give notice that I/We (\*) withdraw from my/our (\*) contract of sale of the following goods (\*)/for the provision of the following service (\*),

– Ordered on (\*)/received on (\*),

– Name of consumer(s),

– Address of consumer(s),

– Signature of consumer(s) (only if this form is notified on paper),

– Date

#### 8. Table of cases

<i>Tribunal and date</i>	<i>Reference</i>	<i>Parties</i>
U.S. District Court for the Western District of Wisconsin, 04.01.1996	908 F. Supp. 640 (W.D. Wisc. 1996).	<i>ProCD, Inc. v. Matthew Zeidenberg</i>
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Appellate Court of Madrid, (AC 2007, 2035) 17.09.2007		-
European Court of Justice (Fourth Chamber), 15.04.2010	C-511/08	<i>Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV.</i>
U.S. Court of Appeals, Third Circuit, 08.02.2011	410 F. Appx. 495 (3d Cir. 2011)	<i>Paula Williams v. Wells Fargo Home Mortgage, Inc.</i>
U.S. Court of Appeals, Ninth Circuit, 08.02.2012	667 F.3d 1325 (9th Cir. 2012)	<i>Kathryn McOmie-Gray v. Bank of America Home Loans.</i>
U.S. Court of Appeals, Fourth Circuit, 03.05.2012	678 F.3d 271 (4th Cir. 2012)	<i>Rex T. Gilbert, Jr. v. Residential Funding LLC.</i>
U.S. Court of Appeals, Tenth Circuit, 11.06.2012	681 F.3d 1172 (10th Cir. 2012)	<i>Jean C. Rosenfield v. HSBC Bank, USA.</i>
U.S. Court of Appeals, Third Circuit, 05.02.2013	707 F.3d 255 (3d Cir. 2013)	<i>Daniel R. Sherzer v. Homestar Mortgage Service.</i>
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Supreme Court of the United States, 13.01.2015	135 S. Ct. 790 (2015)	<i>Larry D. Jesinoski et ux. v. Countrywide Home Loans, Inc., et al.</i>

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