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Erratum

Page 217, paragraph 3, line 1. For *Levine v. Neilson* read *Levin v. Neilson*, Page 229, footnote 87. For *Compton v. O'Neil CO.* read *Ortwein v. Schwab*.

Warranty Sales Law in Ohio

*Alphonse M. Squillante**

A warranty gives a buyer of goods a basic guarantee regarding the title and quality of the goods purchased. In this Article, the author examines Ohio law regarding the creation and nature of both title and quality warranties. The power of a seller to disclaim warranties and to limit available remedies for a breach of warranty are then discussed. The author also analyzes the cumulation of warranties and the benefits of a buyer's warranty which may accrue to third parties. Finally, the impact of the Magnuson-Moss Warranty Act is discussed.

INTRODUCTION

A STUDY OF the historical development of the law of warranties provides an insight into the manner in which the common law forms of action, to meet the demands of a constantly changing society, evolved and expanded into our modern Anglo-American legal system.¹ The accuracy of the comment that "the seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract,"² is readily apparent when one considers that a breach of warranty, an action originally sounding in tort as deceit, is now generally considered to be within the domain of contract law.

The difficulty in distinguishing, or even recognizing, the nature of the warranty has produced a divergence of scholarly opinions. Because of an imperfect understanding of the nature of the obligation imposed by a warranty and uncertainty about its origin and the nature of its cause of action, the warranty has meandered through the law, not quite sure of its parentage. Even today actions other than on the contract may lie for breach of warranty.

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1. The scope of this Article and the author's treatment of the subject elsewhere dictate against a discussion of the common law origins of warranties. For such a discussion, see generally 2 A. SQUILLANTE & J. FONSECA, *WILLISTON ON SALES* §§ 15-1 to 15-23 (4th ed. 1974). See also W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (4th ed. 1936) and T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956).

2. W. PROSSER, *THE LAW OF TORTS* 634 (4th ed. 1971); Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414 (1929).

These may include actions in deceit, negligence,³ strict liability, and even product liability.⁴

Faced with this array of potential theories of liability, the practitioner should be aware that there are occasions when the plaintiff may legitimately choose to bring a cause of action either in tort or in contract. When there is such a choice, however, the selection must be made with due deliberation because it may have important consequences.⁵ With the similarities and overlapping of the tort and contract remedies in mind, the following discussion will focus on the contract aspects of warranty under the Uniform Commercial Code as enacted in the Ohio Revised Code.

Generally, parties to a sales transaction view warranties as contractual obligations. Obviously, the seller may expressly promise to answer for the quality of the goods which are sold. Furthermore, when a promise is made to induce the buyer to buy and the buyer gives good consideration in return for that promise and inducement, the parties have entered into a contract of sale. The above statement does not, however, exhaust all the possibilities by which express warranties may be created by the promisor in a contract. In addition to those resulting from the specific words "I warrant," an express warranty may arise from certain representations made by the seller to the buyer concerning some aspect, trait, or quality of the goods. A statement by the seller which operates as an express warranty need not create a contract to be enforceable;⁶ a statement that induces the buyer to buy the goods and to enter into a sale or contract for sale is an express warranty.⁷ It is also possible for a warranty to be implied when the seller makes no express representations or promises about the goods. An implied warranty arises when the law imposes an obligation upon the seller.⁸

A "warranty" is defined as a statement of fact respecting the quality or character of goods sold, made by the seller to induce the

3. See Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929); Williston, *What Constitutes an Express Warranty in the Law of Sales* 21 HARV. L. REV. 555 (1908).

4. See W. PROSSER, *supra* note 2, at 651.

5. For example, proof requirements, the Statute of Limitations, damages recoverable, and the survival of actions, are all dependent upon whether the action is brought in contract or tort. See 2 A. SQUILLANTE & J. FONSECA, *supra* note 1, at 337-40; W. PROSSER, *supra* note 2, at 641-82.

6. At common law, however, such a requirement was necessary. Williston, *Representation and Warranty in Sales*, 27 HARV. L. REV. 1, 2 (1913).

7. *Herbert v. Standard Oil Co.*, 138 Ohio St. 376, 35 N.E.2d 437 (1941).

8. *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

sale, and relied on by the buyer;⁹ or “a promise or agreement by the seller that the article sold has certain qualities or that the seller has a good title thereto.”¹⁰ The warranty can determine what the buyer has bought, including the actual physical object and any ordinary expectations of the purchaser. Generally, warranty law attempts to “ameliorate the harsh doctrine of *caveat emptor*, and, in some measure, to impose a similar obligation on the seller to beware.”¹¹

To this end the Ohio Revised Code provides for two types of warranties: warranty of title¹² and warranty of quality.¹³ Regarding warranty of title, the Code¹⁴ provides that the seller warrants that the title which is passed to the buyer shall be good and that the transfer is rightful. Furthermore, there is a warranty that there are no security interests, liens, or encumbrances against the title which is transferred to the buyer. The warranty of title includes a warranty against infringement. Moreover, the ability of the seller to retain self-protection either by modification or exclusion of the title warranty depends on whether the transaction complies with the requirements of Uniform Commercial Code section 2-312(2). The Code divides warranties of quality into express warranties and implied warranties.¹⁵ Express warranties include all express affirmations of fact or promise made by the seller. The implied warranty applies only to merchantability and fitness of the goods for a particular purpose. The distinction between an express warranty and an implied warranty lies in interpretation because, while these two warranties are not mutually exclusive,¹⁶ there seems to be little point for a court to impose by operation of law an implied warranty where an express warranty already exists.¹⁷

This Article first examines the provisions of the Ohio Revised Code pertaining to warranty of title, and compares these provi-

9. *Hercules Powder Co. v. Rich*, 3 F.2d 12 (8th Cir.), cert. denied, 268 U.S. 692 (1924).

10. *Chanin v. Chevrolet Motor Co.*, 15 F. Supp. 57, 58 (D.C. Ill. 1935), aff'd, 89 F.2d 889 (7th Cir. 1936).

11. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 372, 161 A.2d 69, 77 (1960).

12. OHIO REV. CODE ANN. § 1302.25 (Page 1979).

13. *Id.* §§ 1302.26-28.

14. The terms “Code” and “the Code,” for the purposes of this article, refer to the Ohio Revised Code Annotated, not to the Uniform Commercial Code unless so designated.

15. In the Code, § 1302.26 concerns itself with express warranty, § 1302.27 speaks of the implied warranty of merchantability, and § 1302.28 provides for the implied warranty of fitness for a particular purpose.

16. *Q. Vandenburg & Sons, N.V. v. Siter*, 204 Pa. Super. Ct. 392, 204 A.2d 494 (1964).

17. *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E. 583 (1965).

sions with prior law. Next, the Code provisions relating to the quality of goods—both express and implied warranties—are discussed. This Article then analyzes the statutory provisions regarding the seller's power to disclaim warranties and to limit remedies available upon breach of warranty. Next, the Article examines provisions relating to the cumulative effect of warranties and the requirement of privity. A final section discusses the Magnuson-Moss Warranty Act.

I. WARRANTIES OF TITLE

A warranty of title enables the buyer to treat the goods in whatever manner he or she pleases because such a right has been conferred by operation of law.¹⁸ A buyer who has received a warranty of title is assured that no adverse party has a superior claim or right which could interfere with the title to the goods. An exception to this general proposition is when the buyer knows that superior title existed at the time of the sale. The Code addresses warranty of title in two sections. Section 1302.26 protects the buyer when the seller expressly warrants that the title is good. In the absence of such an express affirmation, section 1302.25¹⁹ provides for a warranty of title and explains how it can be modified or excluded.

18. The definition of title best suited to a discussion concerning warranties is "the foundation of ownership; the basis of a person's right or the extent of his interest. The means whereby an owner is enabled to maintain or assert his possession and enjoyment." *BALLENTINE'S LAW DICTIONARY* 1279 (3d ed. 1969); *see also* 63 AM. JUR. 2d *Property* § 43 (2d ed. 1965).

19. OHIO REV. CODE ANN. § 1302.25 (Page 1979) provides:

Warranty of Title and against infringement; buyer's obligation against infringement.

- (A) Subject to division (B) of this section there is in a contract for sale a warranty by the seller that:
- (1) The title conveyed shall be good, and its transfer rightful; and
 - (2) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
- (B) A warranty under division (A) of this section will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
- (C) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

A. *Changes in Prior Law*

Although the warranty provisions of the Uniform Sales Act and the Code are nearly identical, the Code has clarified and expanded some aspects of the warranty of title. The Code makes it clear that an implied warranty of title extends to goods regardless of whether the seller has possession at the time the agreement is made. Statutes based on the Uniform Sales Act required the seller to have possession of the goods at the time of contracting for a warranty of title to exist.²⁰ Because of the hardships such a rule caused, the Code abolished this requirement.²¹

Under prior law, the seller impliedly gave the buyer a warranty of title.²² The Code, however, provides that in a contract for sale the seller gives the buyer a warranty of title that arises whenever a contract is made between the parties.²³ Even if the parties did not intend to create such a warranty at the time of agreement, it exists *sua sponte* within every contract. This type of express warranty should be distinguished from those express warranties which result from the "dickering" of the parties at the time a contract is created. The automatic inclusion of the warranty of title in a sales contract is designed to protect those who agree to a general disclaimer of implied warranties, but would not understand that the disclaimer would also abolish an implied warranty of title. Because parties are so apt to ignore or take for granted the warranty of title, the Code requires that any disclaimer of it be direct and obvious.

The scope of the title warranty under the Code differs from its scope under the Uniform Sales Act. The Uniform Sales Act distinguished a "sale," which meant a present right to sell, from a "contract to sell," which meant a future right to sell. "Since property could pass in advance of the time of delivery if the parties so intended, there were instances in which the title warranty could be breached even though the seller was not obligated to deliver [the goods] until a future date."²⁴ The Code makes no such distinction between a sale and a contract for sale,²⁵ and requires that the

20. See, e.g., OHIO REV. CODE ANN. § 1315.14(A) (Page 1952) (repealed 1962).

21. OHIO REV. CODE ANN. § 1302.25, Official Comment 1 (Page 1979).

22. OHIO REV. CODE ANN. § 1315.14 (Page 1952) (repealed 1962).

23. 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-312:3 (2d ed. 1970). These warranties are called "ipso facto" express warranties and are distinguished from "contractual warranties" which arise because the parties intended them to. *Id.*

24. R. NORDSTROM, THE LAW OF SALES 182 (1970).

25. OHIO REV. CODE ANN. § 1302.01(11) (Page 1979).

seller must complete performance by delivering both the goods and good title. Consequently, under the Code the warranty of title for goods to be delivered in the future is identical to that in which the goods will be delivered presently.

In contrast to other warranty laws, the Code also reduces the time in which to bring an action for breach of warranty of title.²⁶ Prior to the Code, a buyer could wait until "quiet possession"²⁷ of the goods was disturbed before the statute of limitations began to run. The present rule states that the limitation period commences at the completion of the seller's performance.²⁸ Although the doctrine of quiet possession is specifically abolished under the Code,²⁹ evidence of a disturbance of quiet possession may establish that the seller has breached the warranty of title.³⁰

Proof of the disturbance of quiet possession, however, is not conclusive of whether the seller breached the warranty of title because such a disturbance may not have occurred as a result of the seller's action. Whereas under prior law a disturbance of quiet possession was actionable, the Code allows a seller to prove that a disturbance was not his or her fault. To collect damages the buyer must show a disturbance of quiet possession and the seller's liability for the disturbance.

The changes in prior law made by the Code are subtle, yet significant enough to make pre-Code judicial interpretations of dubious weight. To facilitate understanding of present law, the next section contains a more detailed look at the warranty of title provided by the Ohio Revised Code.

B. *Warranty of Title Under the Ohio Revised Code*

Section 1302.24(A)(1) provides that the title which the seller conveys to the buyer shall be good title rightfully transferred. Since neither "good title" nor "rightful transfer" are clearly defined by the Code, problems will sometimes arise as to when there has been a breach of warranty with respect to title or delivery. It

26. See OHIO REV. CODE ANN. § 1302.25 (Page 1979) and accompanying Official Comments.

27. OHIO REV. CODE ANN. § 1315.01-.76 (Page 1952) (repealed 1962).

28. OHIO REV. CODE ANN. § 1302.98 (Page 1979).

29. OHIO REV. CODE ANN. § 1315.14 (Page 1952) is the same as that of the UNIFORM SALES ACT § 13. It would appear that prior Ohio case law reached the same result as the current Code. See *Kwiatkowski v. Hoislbauer*, 13 Ohio App. 202 (1920).

30. OHIO REV. CODE ANN. § 1302.25, Official Comment 1 (Page 1979).

should be noted, however, that the seller does not warrant against illegitimate claims. As one commentator noted:

[T]he Code [drafters] tried to separate the spurious [as distinguished from the rightful] claim by limiting the warranty to a *good* title and a *rightful* transfer. The title is good and the transfer rightful even though an unfounded claim is presented. The title ought not be considered good and the transfer ought not to be rightful if the third party's claim is colorable. This leaves an area for judicial discretion. . . .³¹

The fact that the Code specifically includes the phrases "good title" and "rightful transfer" should indicate that these two terms are not meant to be synonymous. Indeed, the drafters of the Code must have contemplated the situation where the seller had good title to transfer but, because of some third party arrangement, was unable to make a rightful transfer of those goods without breaching the warranty of title.³² In such a situation it has been suggested that the buyer would be able to treat the seller's warranty of title as having been breached, cancel the contract of sale, and bring suit to recover the purchase price of the goods with an allowance for damages, thereby leaving both the seller and the third party to litigate their rights on the agreement.³³

Another important consideration when analyzing the claims of third parties and their effect on a buyer's title is whether that person has purchased the particular goods as a "buyer in the ordinary course of business." The buyer's status is especially significant because of the provisions of section 1302.44, which states that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."³⁴ If the criteria of "entrustment," "merchant dealing in goods of that kind," and "ordinary course of business" are met, the buyer will be protected.

The case of *Levine v. Neilson*,³⁵ illustrates the operation of the

31. R. NORDSTROM, *supra* note 24, at 187.

32. *Id.* at 184.

33. *Id.*

34. OHIO REV. CODE ANN. § 1301.01 (I) (Page 1979) defines a buyer in ordinary course of business as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker." This definition takes on added weight when coupled with §§ 1302.25 and 1302.44.

35. 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973). *Accord*, *Carnegie Fin. Corp. v. Akron Nat'l Bank & Trust Co.*, 49 Ohio App. 2d 321, 361 N.E.2d 504 (1976).

buyer in ordinary course concept. Plaintiff purchased a new car from defendant, an automobile dealer. The cars that the dealer offered for sale were "floor-planned"³⁶ by a third party who was also a defendant in the action. Because of inept financial planning by the dealer and ensuing financial disputes between the dealer and his financier, the plaintiff-buyer was never given title to the car for which she had paid. In holding that the plaintiff had title to the car, the court stated:

[A] seller warrants that he will convey good title free from any security interest or other lien or encumbrance of which the buyer is without knowledge when the contract of sale is made. Absent express contractual language, or circumstances under which the buyer knows or should have known that only a limited warranty was intended (but only to the extent that such a warranty can be limited), a floor-planner is bound by the warranty given, having clothed the dealer with the apparent capacity to sell the car and warrant title to it.

A dealer having authority to expose floor-planned cars for sale in the ordinary course of business binds his mortgagee to deliver title to any car so sold, when payment is made to the dealer and whether or not the dealer remits the proceeds to the mortgagee, unless the *buyer* knows or should have known of the financing arrangements, or unless the contract of sale can and does expressly limit the warranty given.³⁷

In addition to protecting a buyer in the ordinary course, section 1302.25(A)(2) provides that the goods which the seller delivers to any buyer must be free from any security interests, liens, or encumbrances which are unknown to the buyer at the time the contract is made.³⁸ Nonetheless, there is no reason why a buyer cannot agree to buy goods subject to any security interest, lien, or encumbrance. Such limitations would probably be reflected accordingly in the purchase price of those goods. In such a case, however, it is essential that the buyer's knowledge of such encumbrance be actual rather than constructive.³⁹ For example, an encumbrance filed on the public record will not give the buyer actual knowledge⁴⁰ of its existence and therefore is not effective.

36. Floor-planning is an arrangement whereby a third party "[finances the dealer's] new and used car inventory, extending credit on demand cognovit notes under a security agreement between [the third party] and [the seller], and holding the certificates of title or manufacturer's or importer's certificates of ownership for the cars financed." *Levin v. Neilson*, 37 Ohio App. 2d 29, 31-32, 306 N.E.2d 173, 178 (1973).

37. *Id.* at 33-34, 306 N.E.2d at 179 (citations omitted).

38. *Id.*

39. OHIO REV. CODE ANN. § 1302.25, Official Comment 1 (Page 1979).

40. Knowledge is best defined in § 1302.01(Y). This definition appears to reinforce

This warranty requires only that the goods be delivered to the buyer unencumbered. Thus, the seller is not in default on the warranty if a limitation which renders the title incomplete was terminated prior to the delivery of those goods to the buyer. It is essential only that when the goods are delivered to the buyer, they have no limitation upon the title.

In addition to requiring a warranty of freedom from encumbrances, the Code includes a separate provision⁴¹ which declares that any claim of infringement on a patent or a trademark clouds the buyer's title if the seller is a merchant who regularly deals in goods of the kind which are the subject matter of the contract. This warranty is not limited to claims of infringement, but extends "to the rightful claim of any third person by way of infringement or the like."⁴² Therefore, it would not be necessary to show that the buyer has been prevented from using these goods. Proof of "eviction" is merely one of several ways of establishing that a breach has occurred.⁴³ The warranty against infringement does not apply when the surrounding circumstances clearly indicate that such a risk was passed to the buyer. One such circumstance is a transaction where the seller specially produced goods conforming to the buyer's specifications. In this latter case, the Code forces the buyer who offers the specifications to indemnify the seller against any claim which may be brought against the seller arising out of the manufacture of the conforming goods.

C. *Disclaimers*

Although the Code provides that every sales contract includes a warranty of title, it also allows the warranty to be limited or excluded. This provision demonstrates a recognition of certain instances where the seller might not want to give (and the buyer could not expect) a warranty that the title is free and clear. Consequently, the Code incorporates two methods of excluding warranties of title.⁴⁴

The first and simplest way to disclaim a title warranty is by specific language. A buyer who agrees to a general disclaimer is

Comment 1 to § 1302.25 which states the "knowledge" referred to in Subsection (A)(2) is actual knowledge as distinct from "notice."

41. OHIO REV. CODE ANN. § 1302.25(C) (Page 1979). This provision is new to Ohio law.

42. *Id.*

43. *Id.* Official Comment 4.

44. OHIO REV. CODE ANN. § 1302.25(B) (Page 1979).

probably not thinking in terms of giving up any expectations of free and clear title; rather attention is focused on the good's physical qualities. Statements like "as is" would be inadequate to disclaim the title warranty since such language refers to the physical condition of the goods which are the subject matter of the sale.⁴⁵ Consequently, the exclusion of a title warranty must be specific and obvious, and it is likely that the absence of such a warranty would have an effect upon the buyer's desire to purchase the goods.

The second way to disclaim a title warranty is under circumstances which would give the purchaser reason to know that the seller did not personally claim the title or that the seller was purporting to sell only rightful title in his or her own, or a third party's, interest.⁴⁶ An obvious example of this disclaimer is the quitclaim deed, in which the seller makes a simple sales contract stating, "I sell only those rights which I may possess." Presumably, the goods are then purchased with this understanding and the price between the parties is set accordingly. While the Code's comments specifically include certain categories of sellers within this provision,⁴⁷ in other cases it will be left to the trier of fact to ascertain whether the circumstances come within the operation of this section.

Problems with a disclaimer can arise when there has been a mutual mistake between buyer and seller. Should the true owner claim goods which were thought to belong to another, the buyer would be left with no remedy if these provisions were strictly construed. One solution would allow rescission of the contract based upon mutual mistake and thus would permit the buyer to recover the purchase price paid without permitting recovery of any damages for the possible appreciation in value of the goods over the purchase price of those goods.⁴⁸

It is clear that the ability of a seller to disclaim a title warranty

45. *Id.*, Official Comment 6, states that the warranty of title is not subject to § 1302.29 governing disclaimers of express and implied warranties.

46. OHIO REV. CODE ANN. § 1302.25 (Page 1979).

47. OHIO REV. CODE ANN. § 1302.25, Official Comment 6, provides:

Division (B) recognizes that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This division does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

48. R. NORDSTROM, *supra* note 24, at 191.

is not unlimited. The limits are designed to protect buyers from a seller's overreaching, and to contribute to the creation of an effective market mechanism which may result in the lowering of sales prices when the goods do not have a title warranty.

D. *Breach of a Warranty of Title*

Once a buyer has a title warranty, the focus of the inquiry turns to the events surrounding breach of the warranty. The occurrence of a breach must be proved by the party asserting that the breach has occurred. Generally, this means that once the goods are accepted, the burden of proof falls upon the buyer.⁴⁹ The mechanics of this proof burden raise several questions. What are the characteristics of a breach of warranty of title? Is it necessary that the buyer be both dispossessed of the goods and that the ownership of the goods be subject to an adverse claim? Is either sufficient, in the alternative, to create the situation where the buyer may claim a breach of warranty of title? The Code provides that neither dispossession of the goods by the true owner against the buyer nor the assertion of an adverse claim to those goods is essential to establish liability in the seller for a breach of warranty to title. Section 1302.25 mandates that every sales contract automatically include a warranty of title; consequently, the seller must deliver to the buyer a good title for the goods sold.

When the seller delivers less than perfect title, the Code seems to require that the warranty be treated as breached and allow recovery of only nominal damages. Absent evidence of greater damages, it would probably not be worthwhile for a buyer to commence such an action. A further problem arises regarding rightful rejection and revocation because, although the Code discusses default in general terms or more specifically refers to default in a tender of delivery or of quality,⁵⁰ there are often peculiar problems associated with a default in title which remain unanswered. For example, the Code allows rejection of the goods "if the goods or the tender of delivery fail in any respect to conform to the contract."⁵¹ What constitutes nonconformity when the defect is in the title? Is title an aspect of "goods" or of "tender"? It is possible to envision a situation where the quality of the goods and the tender of the delivery were both proper, yet the title defect

49. OHIO REV. CODE ANN. § 1302.65(D) (Page 1979).

50. OHIO REV. CODE ANN. §§ 1302.86-88 (Page 1979).

51. *Id.* § 1302.60.

made the goods worthless. Since the Code does not specify when goods can be rejected or the agreement can be revoked due to a faulty title, the impression is created that any such defect equals "nonconformity." Thus, under these circumstances a buyer should be able to reject the goods or revoke an acceptance. Some courts have also treated faulty title as a failure of consideration and have allowed recovery on that basis.⁵²

Moreover, once a breach is established, good faith is never a valid defense. The warranties established by section 1302.25 are absolute; the fact that the seller had no knowledge of an outstanding encumbrance at the time of the sale does not excuse liability.⁵³ Furthermore, when a seller breaches a warranty of title, the buyer has several courses of action. The buyer may always reject the goods in question or revoke the agreement. A rejection⁵⁴ occurs when the buyer discovers the defect in title prior to delivery and does not accept the goods. A revocation,⁵⁵ on the other hand, is the proper means of disavowing goods that have already been accepted. A revocation is permitted where there has been difficulty in discovering the defect or where the buyer justifiably assumed that the defect would be cured. In any case, the buyer has the same rights and duties when revoking acceptance as there would have been in rejecting the tendered goods.⁵⁶

In addition to providing remedies for nonconforming goods, the Code also protects the buyer against infringement of patent and trademark.⁵⁷ Specific provisions of the Code establish when a breach of this warranty occurs,⁵⁸ but it must be noted that there are certain procedural requirements a buyer must meet to maintain a suit for damages. For example, if a third party brings suit against the buyer for infringement, the buyer must notify or, as it is more commonly denoted, "vouch-in" the seller of the litigation within a reasonable time after receiving such notice.⁵⁹ If the buyer fails to do so, the seller will not be bound by the outcome of

52. See, e.g., *America Container Corp. v. Hanley Trucking Corp.*, 111 N.J. Super. 322, 268 A.2d 313 (1970).

53. See *Kruger v. Bibi*, 3 U.C.C. REP. 1132 (Sup. Ct. N.Y. 1967).

54. OHIO REV. CODE ANN. § 1302.60 (Page 1979).

55. *Id.* § 1302.66.

56. For a list of remedies available under the Code, see OHIO REV. CODE ANN. § 1302.85-92 (Page 1979).

57. OHIO REV. CODE ANN. § 1302.25(C) (Page 1979).

58. *Id.* § 1302.65.

59. *Id.* § 1302.65(C)(2). See Comment, *Sales Law—The "Vouching in" Provision of the Uniform Commercial Code*, 36 CONN. B.J. 288 (1962).

the litigation.⁶⁰ The rationale for this requirement is that the seller's rights are prejudiced if the opportunity to participate in an action is denied.⁶¹ Obviously, where the action is for a breach of warranty of title, a seller who has not been "vouched-in" does not have the opportunity to present a case and prove that his or her title is paramount to that of the third party who sued the buyer. If, however, the seller is notified of the suit, but fails to join it, then he or she will be bound by any determination of common fact.⁶²

If the action is one pursuant to section 1302.25 and the buyer does not demand that the seller come in to defend, the seller may intervene and take control of the litigation.⁶³ The buyer, however, will not be barred from obtaining remedies unless the seller bears the expense of the litigation and agrees to satisfy all judgments, or unless the buyer refuses to yield the litigation to the seller.⁶⁴

A different situation is presented when a third party sues the seller for infringement, and the goods had been made according to the buyer's specification.⁶⁵ In this situation, the seller must notify the buyer within a reasonable time after receiving notice of the pending litigation. Failure to give notice, or undue delay, may bar the seller's remedy against the buyer.⁶⁶ Also, if the seller asks the buyer to come in and defend and the buyer declines, the buyer will be bound by the outcome of the suit. The buyer will also be liable for the expenses incurred by the seller in defending the suit.⁶⁷

It should be noted that compliance with these procedural requirements is relatively easy. Once that compliance has been accomplished, the plaintiff must present evidence of the breach of the warranty. Finally, the question of damages must be faced.

E. Damages

The aggrieved party's damage award is, of course, a question for the trier of fact. The Code, however, sets forth the damages available to the aggrieved party. At minimum, the successful party will receive the price paid for the goods. Additionally, the

60. OHIO REV. CODE ANN. § 1302.65(C)(2) (Page 1979).

61. *See* Jones v. Linebaugh, 34 Mich. App. 305, 191 N.W.2d 142 (1971).

62. OHIO REV. CODE ANN. § 1302.65(E)(1) (1979).

63. *Id.* § 1302.65(E)(2).

64. *Id.*

65. *Id.* § 1302.65(F) (Page 1979).

66. *Id.* §§ 1302.65(C)(2), .65(F).

67. *Id.* §§ 1302.65(E)(2), .65(F).

aggrieved party may be awarded incidental and consequential damages. Yet, the buyer who recovers damages in a suit for an anticipated breach of warranty of title can expect that the recovery will be diminished by whatever expenses have been saved due to the default of the seller.⁶⁸

In a breach of warranty of title action the Code clearly provides that a plaintiff may recover damages based upon the difference in value between the goods as accepted and the goods as warranted.⁶⁹ Where the warranty of title is defective because of some form of encumbrance, the buyer may be compensated by removal of the encumbrance and reimbursement of costs incurred in securing its removal.⁷⁰

The case of *Gaito v. Hoffman*⁷¹ illustrates this principle. In that case, plaintiff purchased an automobile from the defendant for \$1,460 and, after receiving the registration from the defendant, reregistered the automobile and paid the proper fees and taxes in full. Shortly thereafter, the plaintiff received a notice from the lending institution stating that \$1,200 was due on the automobile and unless payment was made, the car would be repossessed. The plaintiff paid the \$1,200 and sued the defendant for \$1,200 in damages caused by the breach of warranty of title. The plaintiff argued that his warranty included title free of any lien or encumbrance. Because the defendant had not specifically excluded or modified this warranty, the court held that the sale was unconditional, making the encumbrance on the motor vehicle a breach of warranty. The court determined that the measure of damages for the breach of warranty was the amount paid by the plaintiff to maintain quiet possession of the automobile. In addition to allowing recovery of the \$1,200, the court held that the plaintiff was entitled to legal fees resulting from the court action.⁷²

The warranty of title provided by the Ohio Revised Code gives a buyer certain rights regarding his or her ability to know that goods bought may be used in any way the buyer wishes. Changes from prior law have abolished some arbitrary distinctions which formerly existed, but have also imposed certain procedural requirements in some situations. Although the title warranty is

68. *Id.* § 1302.87(A).

69. *Id.* § 1302.88(B).

70. *Seymour v. W.S. Boyd Sales Co.*, 257 N.C. 603, 127 S.E.2d 265 (1962).

71. 5 U.C.C. REP. 1056 (Sup. Ct. N.Y. 1968).

72. *Id.* at 1058. The assessment of damages for legal fees was expected to be the determination of the reasonable value of the plaintiff's attorney's fees. *Id.* at 1059.

often overlooked, the Code provides that it is present in every contract of sale. The Code also provides for a second type of warranty—a warranty of quality—which will be examined in the next section of this Article.

II. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, AND SAMPLE

In addition to the warranty of title, the Uniform Commercial Code provides for warranties that deal with the general or specific quality of the goods sold. The important elements of such a warranty are that the seller must express it as a statement of fact and must specifically represent it as a quality of the goods which the buyer is induced to purchase.⁷³

A. *Creation of an Express Warranty*

Although the express warranty provision under the Code is substantially the same as that under the Uniform Sales Act,⁷⁴ there are important differences. Perhaps the most significant change in the Code provisions was the elimination of the requirement that the buyer must rely on the seller's representations. In-

73. This discussion does not take into account warranties that are implied by law. These will be treated in a later section.

74. The Code addresses express warranties in § 1302.26 which states:

(A) Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(B) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

OHIO REV. CODE ANN. § 1302.26 (Page 1979). The section in the Uniform Sales Act addressing express warranties was found at OHIO REV. CODE ANN. § 1315.13 (Page 1952) (repealed 1962), which states:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

stead, the Code substitutes the requirement that an express warranty must be made as a "part of the basis of the bargain." Under the "reliance" test, there was a temptation to give the language greater meaning than it was entitled to. The reliance test also placed on the buyer the burden of establishing reliance. Under the Code, however, the essential ingredient for the creation of an express warranty is that the seller's affirmation, promise, description, sample, or model become "part of the basis of the bargain."⁷⁵ Unfortunately, the Code does not define "basis of the bargain." Moreover, it is not apparent what constitutes a "basis," nor how significant a part it must play in the creation of an express warranty. The Code gives only a general impression of what is meant by that phrase, leaving it to the courts to arrive at a case-by-case definition. Given the extreme variance of the factual situations present in the cases, a hard and fast definition might prove to be inadequate. In essence, the most important factor is whether the seller's statements were regarded by the buyer as part of the reason for purchasing the goods.

As a result of this new emphasis, the term "bargain" assumes a meaning different from that which surrounded pre-Code contracts. As one author noted, a "bargain" cannot be said to have occurred at a fixed point in time nor is a bargain inflexible as to its contents; rather, a "bargain" is a relationship between the parties to the transaction which is commercial in nature and focuses upon a particular product.⁷⁶ This commercial relationship terminates only when the bargain has been struck between the parties to the transaction and there is nothing left for either party to perform on that bargain. Therefore, "bargain" might include the stream of activity in the creation of a contract commencing with the initial negotiations between the parties, advancing through the offer and acceptance, and terminating when all the rights, duties, and obligations on both sides have been performed. Hence, a bargain is neither delineated by the words of acceptance nor limited to the precise moment that such words are uttered. The sole concern of the parties is whether the seller's language, or the exhibition of samples or models, is to be regarded as part of the basis of the bargain.⁷⁷

As a result of the basis of the bargain test, the Code has almost eliminated the requirement of reliance by the buyer on the seller's

75. OHIO REV. CODE ANN. § 1302.26(A).

76. R. NORDSTROM, *supra* note 24, at 206.

77. OHIO REV. CODE ANN. § 1302.26, Official Comment 7 (Page 1979).

statements. "In actual practice affirmations of fact made by the seller about the goods during the bargain are regarded as part of the description of those goods; hence, no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."⁷⁸ The element of reliance, however, may still be important in showing that an affirmation or description was part of the basis of the bargain.

Notwithstanding the significance of "basis of the bargain" on the creation of a warranty, if the buyer has actual knowledge that a statement made by the seller is false, the buyer cannot claim to have relied upon the seller's statement and is precluded from establishing that a warranty arose between the parties concerning the subject matter of the sale. It is clear that a statement the buyer knows to be false cannot be the basis of the bargain.⁷⁹ Of course, where the seller has made a false statement, the possibility still remains that the buyer will have a cause of action for fraud, deceit or misrepresentation. One court stated:

There is a definite distinction between a fraudulent representation and a warranty. A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or element of the contract. On the other hand, to constitute an express warranty, the statement must be part of the contract.⁸⁰

In those situations where the seller has made a representation after the confirmation of the sale, it would appear that the buyer could not have relied on the seller's statement, nor could it have been the basis of the bargain. It may be possible, however, that a statement made after an agreement, although not a warranty, may be binding as a modification to the original contract. Since no consideration is required for the modification of the sales contract,⁸¹ it is merely a question of the intention of the parties whether a statement made after the sale is "agreed" upon as a term of the contract and thereby becomes a "warranty." In other words, the time at which the statement or promise relating to the

78. *Id.*, Official Comment 3.

79. *City Mach. & Mfg. Co. v. A. & A. Mach. Corp.*, 4 U.C.C. REP. 461 (E.D.N.Y. 1967).

80. *A. A. Baxter Corp. v. Colt Indus., Inc.*, 10 Cal. App. 3d 144, 154, 88 Cal. Rptr. 842, 848 (1970), *citing* *Griswold v. Morrison*, 53 Cal. App. 93, 99, 200 P. 62, 65 (1921).

81. OHIO REV. CODE ANN. § 1302.12(A) (Page 1979) provides: "An agreement modifying a contract within sections 1302.01 to 1302.98 inclusive, of the Revised Code, needs no consideration to the binding."

goods is made is immaterial so long as it is done before the agreement of the parties is fully performed.

At first glance, this result may seem inconsistent with the basis of the bargain criterion of an express warranty. If the conduct relied upon to create the warranty precedes the transaction or is contemporaneous with the transaction, it is apparent that it can become part of the "agreement"⁸² made by the parties. If the conduct creating the alleged warranty occurs afterwards, it is clearly not a part of the basis of the bargain as originally made, but may take effect as a modification of the original bargain.⁸³ That is to say, "when the express warranty is made following the original agreement of the parties, the requirement that the warranty be a part of the basis of the bargain is satisfied by viewing the original agreement as modified by the express warranty. . . ."⁸⁴

In summary, section 1302.26 deals with the seller's affirmation of fact, the description of the goods, sale by sample or model, and any other part of the transaction between the buyer and the seller which results in the creation of a contract. The seller need not have any specific intention during the making of the transaction to create a warranty,⁸⁵ so long as any of the factors governing the creation of the contract are made part of the basis of the bargain by the parties to that transaction.

B. *Affirmation of Fact or Promise*

The Code purposely treats both affirmations of fact and promises made by the seller to the buyer as equivalent concepts.⁸⁶ By using this approach, the Code avoids the recurring problem of determining whether an action is more appropriately founded in tort or in contract. Cases are replete with entangled, arbitrary classifications that too often dispense little justice. Thus, the Code rejects any attempt to distinguish between tortious or contractual

82. *Id.* Section 1302.01 Official Comment 3 discusses "agreement" as "intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and any agreement permitted under the provisions of this Act to displace a stated rule of law." The agreement (§ 1301.01(C)) is the bargain of the parties, while the contract (§ 1301.01(K)) is the total legal obligation of the parties that results from the agreement.

83. *Id.* § 1302.12(A).

84. 1 R. ANDERSON, *supra* note 23, § 2-313:10.

85. OHIO REV. CODE ANN. § 1302.26(B). Prior Ohio law was in accord; *see* Compton v. M. O'Neil Co., 101 Ohio App. 378, 139 N.E.2d 635 (1955).

86. OHIO REV. CODE ANN. § 1302.26(A)(1) (Page 1979).

liability insofar as a definition of an affirmation of fact or promise is concerned.

The important problem which arises under this section concerns the distinction between an affirmation of fact or promise and mere sales talk or puffing. Over the years, the definition of express warranties has become more inclusive. Early on, the courts interpreted warranties strictly and often considered the language of the seller as mere puffing. Under the Uniform Sales Act, and now under the Uniform Commercial Code, however, there is a trend toward considering the seller's statements as an expression of a warranty. Despite this trend, there remain limitations upon what an express warranty includes. These restraints are clearly set forth in section 1302.26(B) which provides that neither the formal words of "guarantee" or "warranty," nor the seller's specific intent to create an express warranty are necessary for the creation of an express warranty.⁸⁷ However, almost as if to retract the statement, the Code continues: "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion of commendation of the goods does not create a warranty."⁸⁸ The language of section 1302.26(B) is remarkably similar to that of the Uniform Sales Act section 12 which provided: "[N]o affirmation of the value of the good, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."⁸⁹

By substituting the word "merely" for the word "only" as used in the Uniform Sales Act, the drafters of the Code apparently attempted to delimit the scope of the seller's puffing. Thus, "an affirmation merely of the value of goods" would not create a warranty under the Code. In this respect, the Code adopts pre-Code law.⁹⁰ Given the statutory mandate to construe the Code liberally,⁹¹ it seems possible that courts will eventually create an exception to the Code's language and make the seller's statement of value part of the basis of the bargain.

The Code term "commendation," however, will create many problems. For example, a pharmacist who sells a packaged drug

87. Prior law in accord; *see* *Compton v. O'Neil Co.*, 101 Ohio App. 378, 139 N.E.2d 635 (1955) (technical or particular words or forms of expression are not necessary to create an express warranty, and the word "warrant" or "warranty" need not be used. A warranty need not be in writing or made in specific terms).

88. OHIO REV. CODE ANN. § 1302.26(B) (Page 1979).

89. OHIO REV. CODE ANN. § 1315.13 (Page 1952) (repealed 1962).

90. 67 AM. JUR. 2d *Sales* §§ 555-556 (1973).

91. OHIO REV. CODE ANN. § 1301.02 (Page 1979).

and makes an affirmation of fact concerning the item has created an express warranty.⁹² It is impossible to isolate any strict criteria which will help to distinguish value, opinion, or commendation from an affirmation of fact or promise made by the seller to the buyer. Consequently, a determination must be made on a case-by-case basis as to which words constitute a warranty and which do not. On the one hand, words such as "very nice" and "very natural" when used in reference to hair dye have been held to constitute insufficient evidence of an express warranty.⁹³ A similar result was reached where a distributor of clothes dryers commented that "we think" the parts "might" solve your problem.⁹⁴ Likewise, neither a statement that a trailer was built to "last a lifetime and be in perfect condition,"⁹⁵ nor a manufacturer's pamphlet stating that the prescribed contraceptive pills were "virtually" 100 percent effective⁹⁶ created an express warranty.

On the other hand, a manufacturer of aluminum folding chairs, who stated in an advertisement that the chairs were "designed and constructed to match all competition. Priced to build traffic, big volume sales and profit. A 'regular-size' chair—smart in appearance, sturdily constructed with all the important Shott features which make it lightweight, durable, roomy and comfortable," was held liable for breach of express warranty when one of his chairs collapsed under the weight of a 180 pound man.⁹⁷ Similarly, an Ohio Municipal Court in *Society Nat'l Bank v. Pemberton*,⁹⁸ concluded that an express warranty was created when a motor vehicle salesman "unequivocally and specifically" told the plaintiff-buyer that a used truck was "just right for plowing snow," was a one-owner vehicle, and was in good shape after

92. *Jacobs Pharmacy Co. v. Gipson*, 116 Ga. App. 760, 159 S.E.2d 171 (1967).

93. *Carpenter v. Alberto Culver Co.*, 28 Mich. App. 399, 399-400, 184 N.W.2d 547, 547-48 (1970).

94. *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 247, 472 P.2d 816, 818 (1970).

95. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 393, 186 S.E.2d 161, 166 (1972) (the language used by the seller, "if used in negotiating a sale, is ordinarily regarded as an expression of opinion in 'the puffing of his wares'").

96. *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98, 100 (S.D. W. Va. 1971) (construing "virtually" to mean almost entirely effective and not absolutely effective).

97. *United Pac. Ins. Co. v. Balcrank, Inc.*, 175 Ohio St. 267, 268, 193 N.E.2d 920, 922 (1963).

98. 63 Ohio Misc. 26, 28 (1979) *aff'd* No. 9502 (9th Dist. Ct. App. Oh., 1980). The court noted that these statements "clearly" went beyond puffing or "mere 'sales talk'." Furthermore, the statements provided a sufficient basis on which to find the creation of an express warranty. *Id.*

having been serviced and inspected by a mechanic who specialized in the servicing of used trucks for resale.

As indicated by the preceding examples, the seller's puffing is permissible so long as it is merely an expression of opinion.⁹⁹ The rationale is that a seller must be permitted a certain amount of flexibility to sell goods. The critical question remaining is just what amount of flexibility does the seller have? Unfortunately, the degree of permissible puffing is not clear and therefore must be established on a case-by-case basis.¹⁰⁰

Puffing need not always take the form of opinion and could include representations made in advertisements or brochures. Because the promises or affirmations of sellers have been disseminated into the stream of commerce by the mass media, and consumers have been led to believe the promises or affirmations of various manufacturers, those promises should be treated as warranties made by the producers of the merchandise. In *Inglis v. American Motors*,¹⁰¹ the court dealt with the problem of seller's advertisements. The court stated:

Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer. . . . Under these circumstances, it is highly unrealistic to limit purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.¹⁰²

While a concrete list of cases which clearly distinguishes between permissible and impermissible puffing does not exist, the continued applicability of the "benefit of the bargain" test should not be overlooked. As stated in section 1302.26, Comment 8, "the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?"¹⁰³ This statement is closely interwoven with

99. In *Schwartz v. Gross*, 93 Ohio App. 445, 114 N.E.2d 103 (1952), the court was of the opinion that it is the seller's privilege to "puff" his goods so long as the salesmanship remains within the range of "dealer's talk" and mere expression of opinion. The court was interpreting OHIO REV. CODE § 1315 (1952).

100. See also 1 R. ANDERSON, *supra* note 23, § 2-313:41.

101. 30 Ohio Op. 2d 181, 197 N.E.2d 921, *aff'd*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1964).

102. *Id.* at 184, 197 N.E.2d at 925 (quoting *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399 (1962)).

103. OHIO REV. CODE ANN. § 1302.26, Official Comment 8 (Page 1979).

the court's interpretation as to what constitutes the buyer's reasonable expectations and must be regarded as the ultimate point of inquiry.

C. Descriptions

Although section 14 of the Uniform Sales Act provided that descriptions created implied warranties protecting the buyer,¹⁰⁴ the Uniform Commercial Code made a description of goods an express warranty, stating "any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."¹⁰⁵ By making a description an express warranty, the Code avoids problems which arose under the Uniform Sales Act. The Code makes it unnecessary for the trier of fact to distinguish between a set of promises or affirmations of fact and a description by the seller. Most importantly, it changes the pre-Code practice of permitting an effective disclaimer of an implied warranty of description. Thus, if the seller disclaims all implied warranties, under the Code such a disclaimer cannot have any effect upon the express warranties, regardless of whether the express warranty came by way of description or affirmation of fact.¹⁰⁶

The express warranty which arises from a description of the goods is of great importance because parties almost always include a description of the goods which are to be the subject matter of the contract. Since the warranty is express, a seller will not be able to disclaim it through the use of a general disclaimer of implied warranties. In cases where a seller attempts to disclaim both implied and express warranties,¹⁰⁷ the Code protects the reasonable or justified expectations of the consumer,¹⁰⁸ and refuses to give the disclaimer effect to the extent that it is inconsistent with the express warranty.¹⁰⁹ As one author stated:

104. OHIO REV. CODE ANN. § 1315.15 (Page 1952) (repealed 1962); see also Phillips v. Sharp, 44 Ohio App. 311, 185 N.E. 562 (1932).

105. OHIO REV. CODE ANN. § 1302.26(A)(2) (Page 1979).

106. See R. NORDSTROM, *supra* note 24, at 220-21.

107. The formula, JP = DW, may very well illustrate this trend away from caveat emptor: judicial protection (JP) of the buyer is equal to the seller's disclaimers of warranties (DW) in order to give effect to the buyer's reasonable expectations in the transaction.

108. See OHIO REV. CODE ANN. §§ 1301.01(S), .15 (Page 1979). These sections seem to indicate that good faith, fair dealing, and honesty in fact are the Code's *raison d'être*.

109. See, e.g., Society Nat'l Bank v. Pemberton, 63 Ohio Misc. 26, 29 (1979), aff'd No. 9502 (9th Dist. Ct. App. Oh. 1980). The court stated that the "disclaimer provisions in the sales contract and warranty document are hopelessly inconsistent with [the salesman's] oral express warranties." Therefore, the "latter must predominate." *Id.*

The buyer can quite properly assume that any disclaimer in the writing does not mean that the buyer will not receive the goods which he ordered. It is reasonable for him to believe that he is entitled to the described goods, and that the seller cannot perform his agreement by shipping something different—even though there is a disclaimer of express warranties. The Code protects this justified expectation of the buyer.¹¹⁰

It is important to note that section 1302.26(A)(1) of the Code speaks of an affirmation of fact or promise as a statement made by the “seller to the buyer,” while in section 1302.26(A)(2) the Code does not by its terms require that the statement be made by the seller to the buyer. Thus, to fall within the scope of section 1302.26(A)(2) a buyer need only describe the goods to be purchased. The result is the same whether the description is as detailed as a blueprint or a specification, or as informal as an order to deliver the same goods that have always been delivered.¹¹¹ Where the blueprints or specifications are submitted by the buyer, however, the seller is not always liable for the ultimate use or non-use of the goods. One such instance where no liability attached involved holiday boxes for liquor which proved unusable because of faulty specifications supplied to the seller by the buyer.¹¹² Even though this exception to the description as express warranty rule exists, buyers will find that the often overlooked description warranty is an important means of obtaining goods of bargained-for quality.

D. *Sale or Sample*

In addition to express warranties by description, any sample or model made part of the basis of the bargain creates an express

110. R. NORDSTROM, *supra* note 24, at 221.

111. OHIO REV. CODE ANN. § 1302.26, Official Comment 5, discusses the “description” section:

Division (A)(2) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

See, e.g., Farmers Union Coop. Gin v. Smith, 9 U.C.C. REP. 823 (Ct. App. Okla. 1971) (written description on seed bags created an express warranty); Klein v. Asgrow Seed Co., 246 Cal App. 2d 87, 54 Cal. Rptr. 609 (1966) (description of seed type known in the trade and to the parties).

112. Standard Packaging Corp. v. Continental Distilling Corp., 259 F. Supp. 919 (E.D. Pa. 1966), *aff'd*, 378 F.2d 505 (3d Cir. 1967).

warranty that all of the goods will conform to the sample or model.¹¹³ As with the preceding discussion of description, it is unnecessary that the sample or model be offered to the buyer by the seller to create an express warranty. Because samples or models do not create implied warranties as they did under the Uniform Sales Act section 114, the Code avoids the problem with general disclaimers of implied warranties which arose under the Uniform Sales Act when they were considered to be an implied warranty.¹¹⁴ Although it is unnecessary to make a distinction between a sample and a model for the purposes of section 1302.26(A)(3), the Comments indicate that a sample and a model are not the same.¹¹⁵ The distinction is of little practical importance, however, because the remedies would be the same in the event of a breach of warranty.

In order for this warranty to arise, the sample or model must be a part of the basis of the bargain. This prerequisite means that

113. OHIO REV. CODE ANN. § 1302.26(A)(3) (Page 1979).

114. OHIO REV. CODE ANN. § 1315.17 (Page 1952) (repealed 1962) provided:

In the case of a contract to sell or a sale by sample:

(A) There is an implied warranty that the bulk shall correspond with the sample in quality.

(B) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except as otherwise provided in sections 1315.01 to 1315.76, inclusive, of the Revised Code.

(C) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

115. OHIO REV. CODE ANN. § 1302.26(A)(e), Comment 6, provides:

The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

the buyer can reasonably expect, and does reasonably believe, that the items to be delivered will conform to the sample or the model. For example, even though a model is smaller than the actual size of the goods, this fact does not prevent the creation of a warranty that the goods will conform to the buyer's reasonable expectation of size.

There is no hard and fast rule as to what constitutes conformity. Whether a buyer's expectations that the goods will conform precisely to the sample is a question of fact. It is perhaps more likely that a sample will create an expectation that the goods will conform only in a general sense rather than conform exactly to the sample offered.¹¹⁶ In *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*,¹¹⁷ the jury determined whether the value of the whole contract was substantially impaired when the delivery of food to a restaurant at the New York World's Fair was not in conformity with the sample that had been provided.¹¹⁸

Since a seller and buyer do not ordinarily enter into a contract based entirely on either a sample or model, affirmations of fact, promises, or descriptions made by the seller to the buyer are also relevant in determining whether a warranty has been created. Not surprisingly, inconsistencies among these different representations may arise. To resolve these conflicts, the drafters of the Code included section 1302.30, which provides that whenever reasonable, the warranties created by the different representations are to be construed as consistent with each other and as cumulative in effect. When the different representations cannot reasonably be construed as being consistent with one another, then section 1302.30 provides that "the intention of the parties shall determine which warranty is dominant." Section 1302.30 also establishes three rules which are applicable in ascertaining the parties' intentions.¹¹⁹

Once a sample or model becomes part of the basis of the bar-

116. *Helson's Premiums & Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E.2d 428 (1970) (finding an express warranty in the seller's assurance to the buyer that a different model of radio was as good as or, "if anything," better than those previously requested).

117. 101 N.J. Super. 61, 243 A.2d 253 (1968).

118. Note that whenever there is a nonconformity, the seller must be given the appropriate notice of nonconformity and an opportunity to cure the defect. OHIO REV. CODE ANN. § 1302.52 (Page 1979).

119. First, any exact or technical specification displaces an inconsistent sample or model or general language of description. Second, a sample from an existing bulk displaces inconsistent general language of description. Third, express warranties are dominant over all implied warranties except for the implied warranty of fitness for a particular purpose. OHIO REV. CODE ANN. § 1302.30 (Page 1979).

gain and an express warranty arises, partially conforming goods can cause problems. Section 1302.26(A)(1) states that an affirmation of fact or promise which creates an express warranty means that the "goods shall conform to the affirmation or promise." Subsection (2) states that any description of the goods which creates an express warranty is a warranty that the "goods shall conform to the description." Subsection (3), however, provides that any sample or model creates an express warranty that the "*whole* of the goods shall conform to the sample or model." The other subsections clearly do not insist that all of the goods in a shipment conform to the goods ordered. Obviously, if one were to construe the provisions of subsection (c) strictly, then one tomato appearing in a shipment of catsup would constitute a sufficient nonconformity for the buyer to reject the entire shipload of catsup. Such a strict construction would push these terms to their most absurd conclusion. A nonconformity that affects the entire shipload of goods presents the easy situation, but it is unclear when the mere dissimilarity between the model or sample shown and the goods delivered creates an outright breach as opposed to an inconsequential nonconformity.

One way to resolve some of these problems would be to employ sections 1302.27¹²⁰ and 1302.28¹²¹ wherever there is a partially conforming shipment. In one instance, a court held that something more than conformity to the sample—"fitness for the purpose intended and merchantability"—is required.¹²² The court reasoned that when the seller submits a sample to the buyer to induce the purchase of the goods and it forms a part of the basis of the bargain, the seller's actions create both an express warranty that the goods will conform to the sample, and an implied warranty of merchantability and fitness for a particular purpose.¹²³ No matter what type of bargaining the parties to the transaction engage in, so long as it culminates in the creation of a contract, these warranties exist. Another possible solution bypasses the question of implied warranties altogether and construes the sample as including not only a warranty that the physical features of the goods delivered will conform to those of the sample or model, but also a warranty that the goods delivered will operate in the same manner as the sample or model.

120. Warranty of Merchantability.

121. Warranty of Fitness for Particular Purpose.

122. *Loomis Bros. Corp. v. Queen*, 46 Del. Co. 79, 17 Pa. D. & C.2d 482 (1958).

123. *Id.* at 80, 17 Pa. D. & C.2d at 484.

The express warranty by sample or model will usually be of little utility to ordinary consumers. Such a warranty does exist, however, and like the issues concerning the effect of a buyer's inspection of the goods—to be explored in the next section—it merits discussion.

E. Inspection

Other warranty questions involving nonconformity can arise when a buyer inspects the goods and subsequently buys them. Do the seller's representations concerning the goods sold to the buyer become part of the basis of the bargain? Has the buyer's inspection of the goods prior to the purchase acted as a waiver of the warranty created by the seller's affirmation of fact, promise, description, sample or model? Perhaps the best answer to these questions can be formulated from a careful analysis of the transaction which resulted in the buyer's inspection and subsequent purchase of the goods.

The Code provides that an implied warranty will be negated when the buyer ought to have discovered the defect complained about.¹²⁴ There is, however, no express reference made in the Code regarding the effect of a buyer's inspection or examination on express warranties. Therefore, regardless of whether the buyer inspects or examines the goods, there is no automatic exclusion of express warranties.¹²⁵ This rationale was affirmed in *General Electric Co. v. United States Dynamics, Inc.*¹²⁶ where the court held that an express warranty imposes liability upon the seller, and that liability cannot be offset merely by the inspection of the goods by the buyer.¹²⁷ Similarly, where an action is based upon an express warranty, the mere failure by the buyer to inspect the product or to discover a defect does not ordinarily bar a cause of action against the seller.¹²⁸ Even after a demonstration, an express warranty will be included as part of the basis of the bargain so long as

124. See OHIO REV. CODE ANN. § 1302.29(C)(2) (Page 1979) (an examination of the goods or failure to examine the goods precludes the creation of an implied warranty with respect to defects discovered or defects that ought to have been discovered).

125. See, e.g., *Union Pipe & Mach., Ltd. v. Luria Steel & Trading Corp.*, 225 F.2d 829 (6th Cir. 1955). For more detailed suggestions regarding this problem, see generally R. NORDSTROM, *supra* note 24, at 226-27.

126. 403 F.2d 933 (1st Cir. 1968).

127. *Id.* at 935.

128. *Bracknett v. Johnson*, 29 Conn. Supp. 104, 273 A.2d 499 (1970) (buyer sued the retailer for breach of warranty when he received personal injuries while attempting to correct a defect in his snowblower).

the defect is not actually discovered during that inspection.¹²⁹

Yet, where the buyer has performed a thorough inspection, has a working knowledge of the product to be purchased, and is actually aware of the defects prior to the purchase, a seller's statement that the goods are in "good condition" does not create an express warranty.¹³⁰ Similarly, no warranty based on affirmations, promises, descriptions, or samples will arise where the buyer has examined the goods prior to their delivery and has relied solely upon his or her own skill and judgment in making the examination. In this situation, any patent defects which should have been obvious to the buyer, but which actually went unnoticed would effect an exclusion of implied warranties.¹³¹

F. *Proving the Existence of an Express Warranty*

The Code provisions creating these warranties are of little value, unless the buyer can prove that those statements were made in a particular case. A situation will often arise where the seller will deny making an express warranty prior to the sale. When such a problem does arise, it will usually involve any combination of the following concepts: statute of frauds; parol evidence rule; a determination of whether a seller's promise, affirmation of fact, sample, model, or description was in fact a basis of the bargain; statute of limitations; lack of privity; or contributory negligence. The statute of frauds should present no practical problem in this particular type of case, since all that need be shown is that there is some writing which sets forth the quantity of goods bought and sold and that the writing is sufficient to indicate that the parties to the transaction had entered into a contract of sale.¹³²

The greatest obstacle for the buyer seeking to prove that a warranty existed prior to the making of the sale, is the parol evidence rule. This rule provides that if a writing is intended by the parties as their full, final expression of agreement, the terms of that contract cannot be contradicted, modified, altered or changed by evidence of any prior or contemporaneous oral agreement between

129. *Capital Equip. Enterprises, Inc. v. North Pier Terminal Co.*, 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969) (used crane failed to work as warranted after it performed acceptably in a demonstration). A contrary result would occur when there is a thorough and complete inspection of those goods at the time of the demonstration.

130. *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (1971) (oral agreement did not create a warranty where the purchaser had a working knowledge of the goods).

131. *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W. Va. 818, 156 S.E.2d 1 (1967).

132. OHIO REV. CODE ANN. § 1302.04 (Page 1979).

the parties.¹³³ The rule, however, does permit the admission into evidence of any fact which may explain or supplement the terms of the contract.¹³⁴ Thus, information such as custom or usage of the trade and consistent terms are admissible unless the writing literally was intended as the complete and exclusive agreement between the parties. Following these principles, a recent case held that where the parties to the contract agreed to a written notation concerning a "30 day warranty," evidence of that warranty was not inconsistent with the contract when the total contract was considered. Therefore, parol evidence was admissible to explain the term.¹³⁵

Despite the buyer's problems in satisfying the parol evidence rule, courts are often reluctant to construe the rule in a manner which would leave the buyer without remedy by effectively eliminating the cause of action. In an effort to do justice, courts will engage in judicial gymnastics which permit them to determine whether the writing was the full and final expression of both parties. Usually, though, the courts do not adequately explain how they reach these holdings.¹³⁶

As in most factual determinations, no single aspect of the contract will determine the final intention of the parties. Conscionability¹³⁷ and good faith¹³⁸ are two additional factors which are useful in determining whether a warranty was given. Obviously, if the contract is a product of fraud, oppression, lack of knowledge, or any other circumstances which would tend to indicate that the buyer did not assent to the clause or the contract, it cannot be considered to be a full and final expression of the intent of both the parties to the transaction. Therefore, evidence of this sort can be admitted to prove or disprove the warranty. "In short, under the Code the finality of a writing cannot be determined solely by looking at the writing; the background of the negotiations and of the execution of the document is relevant evidence to

133. *KLPR TV, Inc. v. Visual Elec. Corp.*, 327 F. Supp. 315 (W.D. Ark. 1971), *aff'd in part and rev'd in part on other grounds*, 465 F.2d 1382 (8th Cir. 1972). See also OHIO REV. CODE ANN. § 1302.05 (Page 1979).

134. OHIO REV. CODE ANN. § 1302.05 (Page 1979). See *Centennial Ins. Co. of N.Y. v. Vic Tanny Int'l, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975) (the court allowed a written express warranty to be supplemented and explained by oral express warranty since the writing between the parties was not intended as a final expression of their agreement).

135. *Leveridge v. Notaras*, 433 P.2d 935 (Okla. 1967).

136. See, e.g., *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

137. OHIO REV. CODE ANN. § 1302.15 (Page 1979).

138. *Id.* § 1301.09. See also *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974), regarding the interplay between good faith and the parol evidence rule.

determine the parties' intention."¹³⁹ In some cases, parol evidence might be admissible to indicate the existence of an implied warranty, while the same evidence could not be used to indicate the existence of an express warranty.¹⁴⁰

The fundamental test for the existence of an express warranty is constant; there must be evidence that the seller's representations constitute a part of the basis of the bargain. Thus, a court must consider the foundation of the agreement between the parties and scrutinize the writing itself. When a breach of warranty is pleaded as an affirmative defense, the defendant must prove by a preponderance of the evidence that a warranty exists and that a breach occurred.¹⁴¹ The fact that a seller of goods performs with honesty in fact and made statements concerning the goods without knowledge of the falsity of these statements does not constitute a defense if an express warranty has been made and breached.

Express warranties regarding the quality of goods are important weapons in the buyer's arsenal. Such warranties are not, however, the totality of the Code's protection of buyers. The next section of the Article discusses the implied warranties provided for by the Ohio Revised Code—warranties that are often of greater and more widespread utility to ordinary consumers.

III. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE

As mentioned in previous sections, legal rules have developed to counterbalance the doctrine of caveat emptor. The duties imposed on sellers by these rules are based on either express representations made by the seller to the buyer or on obligations which arise by operation of law. This latter form of protection is called an implied warranty.

Regardless of what the affirmative intention of the parties to the transaction may be, a warranty implied by operation of law automatically becomes part of the contract at the time the contract

139. R. NORDSTROM, *supra* note 24, at 216.

140. *See, e.g., In re Reaves Soundcraft Corp.*, 2 U.C.C. Rep. 210 (Armed Servs. Bd. of Contract App. 1946).

141. *Radio Corp. of Am. v. Smith*, 109 Ill. App. 2d 91, 248 N.E.2d 310 (1969) (abstract of the decision). In order for the buyer to recover against the seller he must show that the seller's representations of fact, in which the goods producing the injury were described, formed the basis of the bargain. The buyer must show action on that representation, that the product was defective at the time of the sale, that the defect made the product unreasonably dangerous, and that the defect produced the injury. *See also Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967).

is created.¹⁴² The doctrine of implied warranty is intended to promote the highest possible standards of business conduct by encouraging business transactions in which parties may find mutual benefit through their negotiations and agreements.¹⁴³ The implied warranty is most effective when liberally construed on behalf of the buyer¹⁴⁴ and administered consistently in a manner fair to all parties to the transaction.¹⁴⁵ As contemplated by Article 2 of the Uniform Commercial Code, implied warranties impose a minimum standard on contracts for the sale of goods.¹⁴⁶

A. *Distinctions Between Express and Implied Warranties*

A useful starting point in the analysis of implied warranties is a comparison to express warranties. As Comment 1 to section 1302.26 indicates, express warranties rest upon the "dickered" aspects of the transaction between the parties and become part of the basis of the bargain. Implied warranties, however, are based upon common factual situations or conditions which give rise to the creation of a warranty regardless of the particular language existing between the parties. Because in most cases neither the express warranty nor the implied warranty produces a better result for the purchaser, neither should automatically be considered as superior to the other. If an express warranty is found, however, there will usually be no need to establish the existence of an implied warranty. The remedies for the buyer, whether the action is based on an implied warranty or on an express warranty, will be the same. Both the implied and express warranty can co-exist within the same contract, even though an express warranty may appear to be all-inclusive.¹⁴⁷

Given this close similarity, a question arises as to why the dis-

142. *Moosbrugger v. McGraw-Edison Co.*, 284 Minn. 143, 155-56, 170 N.W.2d 72, 80 (1969).

143. *Asbestos Prods., Inc. v. Ryan Landscape Supply Co.*, 282 Minn. 178, 180, 163 N.W.2d 767, 769 (1968).

144. *Dougall v. Brown Bay Boat Works & Sales, Inc.*, 287 Minn. 290, 178 N.W.2d 217 (1970) (defective motorboat breached the implied warranty of merchantability).

145. *Jacobson v. Broadway Motors, Inc.*, 430 S.W.2d 602 (Mo. App. 1968).

146. *Elliott v. Lachance*, 109 N.H. 481, 256 A.2d 153 (1969).

147. OHIO REV. CODE ANN. § 1302.30 (Page 1979) provides in part: "Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant." See also *Safeway Stores, Inc. v. L.D. Schreiber Cheese Co.*, 326 F. Supp. 504 (W.D. Mo. 1971), *rev'd on other grounds sub nom.* *L.D. Schreiber Cheese Co. v. Standard Milk Co.*, 457 F.2d 962 (8th Cir. 1972) (Missouri law permits coexistence of implied and express warranties).

distinction between express and implied warranties exists. The distinction in terminology may well have arisen as a result of some historical accident in common law forms of pleading several centuries ago.¹⁴⁸ Regardless of how it arose, in light of section 1302.29, there appears to be good reason to retain the distinction. Significantly, express warranties arise out of some specific conduct on the part of the seller, while implied warranties arise automatically because of the seller's status as a merchant or because of the seller's actual knowledge about the buyer's particular needs. One author has summarized the situation and stated:

In short, the [Uniform Commercial Code] rests on the assumption that implied warranties are less apt to create specific impressions in the mind of the reasonable buyer than are express warranties where, for example, the seller has asserted a fact about the goods he is selling. Once this assumption is made, the next step comes easily. The disclaimer of the implied warranty does not call for language as specific as does the attempted disclaimer of the express warranty. The [Uniform Commercial Code] takes the step because it allows implied warranties to be disclaimed with comparatively little difficulty, but makes it extremely difficult to disclaim express warranties.¹⁴⁹

In short, the distinction persists because some of the consequences attendant to the two types of warranties are different. The next section explores the legal ramifications of one type of implied warranty—the implied warranty of merchantability.

B. *Implied Warranty of Merchantability*

An implied warranty of merchantability is a concept imposed by law which relates to the overall quality of the goods sold rather than their conformity to any specific purpose for which they were intended.¹⁵⁰ The warranty is not a mandate of absolute perfection in a product; since consumers do not reasonably expect perfection in a product, the law does not automatically require it. In essence, the term "merchantable" means that the goods will conform to ordinary standards and are of the average grade, quality, and value of like goods which are generally sold in the stream of commerce.¹⁵¹

148. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW*, 275-78 (1969).

149. R. NORDSTROM, *supra* note 24, at 230.

150. *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W. Va. 818, 156 S.E.2d 7 (1967); *see* W. VA. CODE § 46-2-314, Official Comment 7 (1980).

151. *McAfee v. City of Garnett*, 205 Kan. 269, 274, 469 P.2d 295, 300 (1970).

1. *Limitation on the Application of Section 1302.27*

Section 1302.27¹⁵² of the Code defines the implied warranty of merchantability and outlines three restrictions on its scope and operation. Taken in the order they appear in section 1302.27(A), the three restrictions are: the power, by negative implication, to exclude or modify the warranty; the requirement that the seller be a merchant; and the requirement that the contract be for the sale of goods.

The first limitation involves a power to disclaim as noted, or modify the implied warranty. Unlike an express warranty,¹⁵³ the implied warranty of merchantability may be excluded or modified by agreement of the parties.¹⁵⁴ Section 1302.27(B) establishes the minimum level of quality that the goods must have to remain merchantable. If a higher standard of merchantability is desired by the parties, then it should be formalized in the written contract. Although the terms of section 1302.27 seem to allow a complete disclaimer of the warranty of merchantability, the general requirement of good faith is a limit on the seller's power to dictate contract terms.¹⁵⁵

A second limitation placed upon the application of section 1302.27 deals with the definition of "merchant." Section 1302.01(A)(5) defines merchant, and distinguishes between two

152. OHIO REV. CODE ANN. § 1302.27 (Page 1979) provides:

Implied Warranty; Merchantability; Usage of Trade

(A) Unless excluded or modified as provided in § 1302.29 of the Revised Code, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(B) Goods to be merchantable must be at least such as:

(1) pass without objection in the trade under the contract description; and
(2) in the case of fungible goods are of fair average quality within the description; and

(3) are fit for the ordinary purposes for which such goods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unit and among all units involved; and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

(C) Unless excluded or modified as provided in section 1302.29 of the Revised Code, other implied warranties may arise from course of dealing or usage of trade.

153. *Id.* § 1302.26.

154. *Id.* §§ 1302.29(A), (D).

155. For discussion of disclaimers of warranties, see notes 230-314 *infra* and accompanying text.

types of merchants: goods merchants and skills merchants.¹⁵⁶ This concept of merchant is rooted in the law and is based upon the professional status of the person who has specialized knowledge regarding the goods which are sold (goods merchant) or the business practices surrounding such a sale (skills merchant).¹⁵⁷ Section 1302.27, however, has restricted the meaning of merchant to a much smaller group than that defined in section 1302.01(A)(5). Not everyone engaged in business, or with special knowledge or skill regarding the goods, is a merchant. Section 1302.27 applies only to goods merchants; a merchant making an isolated sale of goods different from the goods he or she normally deals with or a nonmerchant making any isolated sale of goods is not subject to the implied warranty of merchantability.¹⁵⁸ It should be noted that a seller need not sell a particular kind of goods. If the seller ordinarily sells a general line of merchandise manufactured by the manufacturer of those particular goods, then the merchantability warranty applies.¹⁵⁹

The third limitation placed on the application of this section is that it applies only to a contract for the sale of goods. Although the preceding statement is generally regarded as black letter law, it has been suggested that this exclusion is unduly restrictive. This suggestion is supported by the Code's mandate regarding liberal construction, and its whole philosophy which calls for the trier of fact to adjust the Code to new commercial situations.¹⁶⁰ Section 1302.02 states that Article 2 applies to transactions for goods, and further, such a transaction has a far broader application in commerce than merely as a satellite of the law of sales.¹⁶¹ As noted

156. OHIO REV. CODE ANN. § 1302.01(A)(5) (Page 1979) provides:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

157. OHIO REV. CODE ANN. § 1302.01, Official Comment 4 (Page 1979). It is the specialized knowledge about either the goods or the business practices, or both, which establish a person as a merchant.

158. *Id.* Official Comment 3.

159. *Mutual Serv. of Highland Park, Inc. v. S.O.S. Plumbing & Sewage Co.*, 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968) (though seller did not usually sell the particular hammer and bit that was involved in the litigation, he did sell a general line of merchandise produced by that manufacturer, and this status was sufficient to find that the sale created a warranty of merchantability).

160. R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE U.C.C. § 7.01(2)(b) (1972).

161. *See, e.g., Hertz Commercial Leasing Corp. v. Transportation Credit Clearing*

previously, warranty provisions have on occasion been extended to encompass areas far wider than sale transactions.¹⁶² Even if a contract is not controlled by the Code, the Code provides persuasive authority useful to any court in its determination when a commercial transaction is involved.¹⁶³

Ohio courts have tended to adopt this view, and have applied sales law to traditionally nonsales transactions. In *Public Finance Corp. v. Furnitureland, Inc.*¹⁶⁴ the court found that a security agreement which was sold, although not a sale of goods as defined by section 1302.01(A)(8) was within the meaning of section 1302.27. The court reasoned that any merchant of goods who, in the regular course of business, assigned to another a security agreement on goods sold for a valuable consideration, gave an implied warranty that the agreement was merchantable. Moreover, the court stated "Section 1302.27 of the Revised Code codified what the law always had been with reference to the sale of any commercial item."¹⁶⁵

In *Lonzrick v. Republic Steel Corp.*,¹⁶⁶ plaintiff, a laborer at a construction site, was injured when newly installed steel roof joists fell on him. The defendant manufactured and sold the joists and, therefore, gave an implied warranty of fitness for the ordinary purpose and use of the steel joists. Although the action was brought as a products liability case, the court did not restrict the plaintiff to negligence theory, but allowed him to proceed on the theory of implied warranty, notwithstanding the fact that there was no contractual relationship between plaintiff and defendant.

Even if the application of section 1302.26 is strictly construed, such construction would not prevent the trier of fact from applying this reasoning to analogous situations. Moreover, the Code does not expressly prohibit the extension of section 1302.26 to any

House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (1970). The trial court noted:

In view of the great volume of commercial transactions which are entered into by the device of a lease, rather than a sale, it would be anomalous if this large body of commercial transactions were subject to different rules of law than other commercial transactions which tend to the identical economic result.

59 Misc. 2d at 229, 298 N.Y.S.2d at 395.

162. See notes 24-25 *supra* and accompanying text.

163. *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967).

164. 17 Ohio App. 2d 213, 245 N.E.2d 740 (1969) (when a merchant of goods in the regular course of business assigns a security agreement to a finance company for a valuable consideration, there is an implied warranty of merchantability).

165. *Id.* at 215, 245 N.E.2d at 742.

166. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

hybrid situation—which would include a lease-sale, a bailment-sale, or a service-sale. As one court has stated, “There is no good reason for restricting such warranties to sales.”¹⁶⁷ It seems clear that an implied warranty of merchantability may be applied to many transactions beyond the mere sale of goods. Thus, the substantive meaning of “merchantable” becomes critical.

An Ohio court of appeals in *A.T.S. Laboratories, Inc. v. Cessna Aircraft Co.* recently expanded the scope of the implied warranty of merchantability to include the third party purchase of used goods.¹⁶⁸ The defendant sold an airplane to Freedom Field, Inc. who, in turn, sold the airplane a year later to the plaintiff. After experiencing difficulty with the airplane, plaintiff sued the defendant for breach of an implied warranty of merchantability. The court of appeals held that the defendant was liable for breach of warranty so long as the airplane manufactured by the defendant contained a latent defect that was undiscovered by the original purchasers, and there was no substantial change from the condition in which it was originally sold.¹⁶⁹

2. *Meaning of Merchantability*

Section 1302.27(B) provides a list of minimum qualities which the goods must possess to be merchantable.¹⁷⁰ Comment 6 of section 1302.27 states:

Division (B) does not purport to exhaust the meaning of “merchantable” nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is “must be at least such as . . . , and the intention is to leave open other possible attributes of merchantability.”¹⁷¹

Therefore, section 1302.27(B) establishes only the minimum criteria for merchantability. To a large extent, course of dealing, usage of the trade, or obligations imposed by law will also determine what is merchantable. Section 1302.27 seeks to protect the buyer’s expectations that the goods will be at least of a “fair average” quality and not totally worthless.¹⁷² Fitness for ordinary purposes

167. *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 446, 212 A.2d 769, 775 (1965).

168. 59 Ohio App. 2d 15 (1978).

169. *Id.* at 20, 22.

170. OHIO REV. CODE ANN. § 1302.27(B) (Page 1979). For the text of the statute, see note 152 *supra*.

171. OHIO REV. CODE ANN. § 1302.27, Official Comment 6 (Page 1979).

172. OHIO REV. CODE ANN. § 1302.27(B)(2) (Page 1979).

is merely the threshold quality which the Code demands. Part of the obligation placed on the manufacturer or the retailer is that the goods must be honestly resalable in the normal course of business. This obligation of merchantability extends even to the ultimate consumer, since any goods which are manufactured are likely to be used by more than a single person.¹⁷³

The first of the six standards concerning the merchantability of goods found in section 1302.27 is that the goods must pass without objection in the trade. The goods delivered must be of a quality comparable to those generally accepted in a certain line of trade under the description or any other designation of the goods stated in the agreement of the parties.¹⁷⁴ It is clear that difficulties are inevitable in any attempt to establish criteria for judging which goods pass without objection in the trade. The drafters of the Code make it clear that section 1302.27(B)(1) and (2) are to be read together and used in an "average" quality standard which is neither the worst nor the best, but rather a middle of the line quality.¹⁷⁵ Individual products in the bulk may fluctuate in quality, but the average must meet the minimum standard of passing without objection in the trade. Any determination of what is a fair average quality is a question of fact and thus should include consideration of factors such as the actual price charged for the goods and the existing market price at the time of the transaction between the buyer and seller.

The second minimum standard of merchantability established by the Code refers to fungible goods.¹⁷⁶ Under the Code's definition of fungible goods,¹⁷⁷ each unit of those goods must be consistent with any other unit of such goods delivered to the buyer. An understanding of what is meant by the requirement that fungible goods be of "fair average" quality is aided by placing it within the

173. *Id.*, Official Comment 8.

174. *Id.*, Official Comment 2.

175. *Id.*

176. OHIO REV. CODE ANN. § 1302.27(B)(2) (Page 1979).

177. *Id.* § 1301.01(Q) defines fungible:

"Fungible" with respect to goods or securities means goods or securities of which any unit is by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible are fungible for the purposes of chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., and 1309. of the Revised Code to the extent that under a particular agreement or document unlike units are treated as equivalents.

See generally Comment, *Confusion of Fungible and Non-Fungible Goods*, 17 BAYLOR L. REV. 80 (1965).

context of a "commercial unit."¹⁷⁸ Again, it must be noted that fair average goods are of middle quality and, when read together with the requirement of section 1302.27(B)(1),¹⁷⁹ must be able to pass without objection. Of course, some fluctuation in the quality of the goods is permitted; however, goods comprised wholly, or nearly so, of the worst quality do not deserve the designation of "fair average." Where doubt arises as to the quality intended by the parties, price may act as a guideline to indicate the nature and the scope of the seller's obligations to the buyer.¹⁸⁰ A buyer usually will not pay a full price for goods which have a known defect or do not conform to the agreement of the parties.¹⁸¹

The third essential requirement of the implied warranty of merchantability is that the product must be "fit for the ordinary purposes for which such goods are used."¹⁸² What constitutes "ordinary purpose" is a decision left to the trier of fact. Courts have found, for example, that an implied warranty of merchantability attached to the marketing and sale of a highly caustic liquid home drain cleaner which caused an injury to a child,¹⁸³ to the sale of a mobile home which did not contain the normal amount of wall insulation,¹⁸⁴ to the sale of reconditioned lockers which turned out to have duplicate keys and locks,¹⁸⁵ to the sale of an insecticide

178. OHIO REV. CODE ANN. § 1302.01(A)(10) (Page 1979) defines commercial unit:

"Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

See also *Abbett v. Thompson*, 263 N.E.2d 733, 735 (Ind. App. 1970), *aff'd*, 290 N.E.2d 468 (1972).

179. See notes 174-75 *supra* and accompanying text.

180. OHIO REV. CODE ANN. § 1302.27, Official Comment 7 (Page 1979). See also *George A. Moore & Co. v. Mathieu*, 13 F.2d 747, 748 (9th Cir. 1926), *cert. denied*, 273 U.S. 733 (1926).

181. See, e.g., *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W. Va. 818, 156 S.E.2d 1 (1967).

182. OHIO REV. CODE ANN. § 1302.27(B)(3) (Page 1979).

183. *Drayton v. Jiffie Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio), *aff'd with remittitur*, 413 F. Supp. 834 (N.D. Ohio 1976).

184. *Potter v. Dangler Mobile Homes*, 61 Ohio Misc. 14 (1977). See also *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972) (an implied warranty of merchantability attached to the sale of a defective trailer which was to be used as a residence).

185. *Towel Mach. Serv. Corp. v. American Uniform Rental, Inc.*, 7 U.C.C. REP. 162 (Sup. Ct. N.Y. 1970) ("A locker bank with locks is inherently a security device and that security was obviously impaired with duplications in the locks").

which caused both injury and death to the plaintiff's livestock,¹⁸⁶ and to the sale of defective shoes.¹⁸⁷ In each instance, the goods were held unfit for their ordinary purposes.¹⁸⁸

Notwithstanding the courts' interpretation of fitness for ordinary purpose, where the manufacturer produces a product which functions properly in the purpose for which that product was designed, if the finished product is available to the purchaser without any latent defects, and if the operation of that product produces no danger or peril to the purchaser or any user of those goods, then the seller or manufacturer faces no liability based on the implied warranty of merchantability. A manufacturer is under no duty to make a product accident-proof, foolproof, or immune from normal wear and tear; it is a normal business expectation that machinery will deteriorate during ordinary usage. It seems obvious that the manufacturer is under no duty to guard against any injury which may arise from defects which are manifest even to those least aware of the uses of such goods, so long as there are no *latent* defects. Also, the manufacturer is not an insurer for an injury which the consumer has sustained through misuse of the product. If the buyer discovers the defect and still uses the goods or fails to examine the goods before use, such conduct is unreasonable and should preclude recovery based on warranty.¹⁸⁹ Continued use of a good which has a known defect can be regarded as an intervening cause which prevents breach of warranty claims for resulting injuries.¹⁹⁰

186. *Holowka v. York Farm Bureau Coop. Ass'n*, 2 U.C.C. REP. 445 (Ct. Common Pleas Pa. 1963) (rejecting defendant's argument that regardless of what happened to the livestock there was no violation of § 2-314(2)(c) as long as the insecticide cured the weevil condition).

187. *Chairaluce v. Stanley Warner Management Corp.*, 236 F. Supp. 385 (D. Conn. 1964) (plaintiff alleged a breach of express and implied warranties when a defective heel on her new shoes caused her to fall and injure herself).

188. Likewise, courts have determined that the seller gives an implied warranty in a variety of situations: *Greco v. Buccioni Eng'r Co.*, 407 F.2d 87 (3d Cir. 1969) (component parts of a machine will not fail); *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967) (metal rivet studs should not split where their purpose is to fasten); *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967) (marine engines should not smoke excessively while running); *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1969) (hair lotion will not burn the scalp); *Nederastek v. Endicott-Johnson Shoe Co.*, 415 Pa. 136, 202 A.2d 72 (1964) (shoes will not harm the feet); *Allen v. Savage Arms Corp.*, 52 Luzerne Legal Register Reps. 159 (Pa. 1961) (shotgun shells will not explode prematurely).

189. OHIO REV. CODE ANN. § 1302.29, Official Comment 8 (Page 1979). See also *Jones v. White Motor Corp.*, 61 Ohio App. 2d 162, 173 (1978).

190. *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317 (6th Cir. 1971). In *Jones v. White Motor Corp.*, 61 Ohio App. 2d 162, 173 (1978), the court noted that such continued use constitutes contributory negligence and will preclude a recovery.

The fourth element of merchantability mandates that any agreement between the parties to the transaction which calls for a supply of goods of an even kind, quality, and quantity creates an expectation that those goods will conform to the order which was placed.¹⁹¹ Official Comment 9 of section 1302.27 cautions that frequently usage of trade permits "substantial variations both with and without an allowance or an obligation to replace varying units."¹⁹² In *Wakerman Leather Co. v. Irvin B. Foster Sportswear Co.*,¹⁹³ the court held that where the buyer had received a conforming shipment which complied with government specifications concerning those goods and had failed to reject them within a reasonable time or within a time agreed upon between the parties, then those goods were clearly considered merchantable within the meaning of section 1302.27. The fact that the purchaser, upon closer inspection of the goods, determined that he could not actually use the goods in the manner which he had originally expected to use them, was held not to be determinative of the merchantability of those goods.¹⁹⁴

Since warranty liability does not require proof of fault, a purchaser of goods is entitled to the benefit of an implied warranty when the goods prove to be defective, despite the fact that the seller could not have discovered, prevented, or cured the particular defect in the goods.¹⁹⁵ The implied warranty of merchantability protects a buyer of goods from bearing the burden of the resultant loss when the goods, although not violating any express guarantee or promise by the seller, do not conform to the normal commercial standards for those particular goods. The purpose of an implied warranty of merchantability is to hold the seller responsible for the quality of goods sold to a purchaser. The Code does not require evidence that the defects could or should have been discovered by the seller, but only that the goods were or were not of a merchantable quality when delivered to the buyer.

The fifth element of merchantability concerns the adequacy of the packaging and labeling of the goods. Some problems may arise in the interpretation of this requirement. Section

191. OHIO REV. CODE ANN. § 1302.27(B)(4) (Page 1979).

192. *Id.*, Official Comment 9.

193. 34 A.D.2d 594, 308 N.Y.S.2d 103 (1970).

194. *Id.* at 595, 30 N.Y.S.2d at 105.

195. *E.g.*, *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967) (two thousand one-day-old chicks bought from seller developed avian leukosis (bird cancer), resulting in the destruction of the entire flock).

1302.27(B)(5) may require only that the packaging be "adequate," or that the goods conform to any higher standard of care imposed by the contract between the parties. If strictly construed, this section implies that the standards are established solely by the words of the agreement. Such an interpretation, however, would then preclude the use of this section where there has been no specific agreement concerning the adequacy of the container, package, or label of the goods. Perhaps a better interpretation of section 1302.27(B)(5) would be to require, in the absence of a specific agreement between the parties, that the container or label be reasonable for the goods.¹⁹⁶

The final element of section 1302.27(B) requires that merchantable goods must also conform with any promises or affirmations of fact which are made by the seller on the container or label of the goods. As previously discussed,¹⁹⁷ promises or affirmations of fact made on a label can constitute an express warranty. Section 1302.27 includes a label as an implied warranty. Unless there is an effective disclaimer, it makes no difference whether the warranty arises from a label which is described as an express warranty or as an implied warranty. To disclaim an implied warranty, the seller must comply with section 1302.29(B).¹⁹⁸ Comment 10 of section 1302.27 distinguishes between the requirements that goods be adequately contained and that goods conform to statements on the container. The latter applies to any label or container which makes representations even though the original contract, either by its express terms or perhaps by usage of trade, did not require labeling with any specific representations. The general obligation of good faith is also relevant to this clause because an unsuspecting buyer should not be placed in the position of reselling or using goods which were delivered under false representations. Comment 10 also indicates that consideration for the representations is not necessary.¹⁹⁹

196. It might also be argued that the containers themselves are "goods" and must be merchantable in their own right. *See, e.g.,* *Hadley v. Hillcrest Dairy, Inc.*, 341 Mass. 624, 171 N.E.2d 293 (1961). For a more complete discussion of this argument, see generally Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1956).

197. *See* notes 85-103 *supra* and accompanying text.

198. OHIO REV. CODE ANN. § 1302.29(B) (Page 1976) requires oral disclaimers to mention merchantability specifically, and written disclaimers to mention merchantability and be conspicuous; disclaimers of implied warranties of fitness must be in writing and conspicuous. For a discussion of disclaimer of warranties, see notes 230-97 *infra* and accompanying text.

199. OHIO REV. CODE ANN. § 1302.27, Official Comment 10 (Page 1979).

There are, however, some exceptions to this rule. For example, a warranty of merchantability attaching to a label does not generally extend to instruction manuals. When instructions are furnished a manufacturer might warrant fitness for that particular purpose.²⁰⁰ If instructions are so poorly written as to create inconsistencies and ambiguities, the manufacturer or seller of the goods may have breached the duty to instruct and warn the purchaser concerning the installation, operation, or maintenance of the goods. Liability should be imposed only where the breach of duty to instruct and warn the purchaser was the proximate cause of the injury.²⁰¹

Merchantability, as a Code concept, casts a wide net which extends the protection of implied warranties to the sale of food. For the purposes of section 1302.27(A), "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."²⁰² The sale of food may fall within an implied warranty as either a warranty of merchantability,²⁰³ or perhaps a warranty of fitness for a particular purpose, when the seller knows of the buyer's intended use of the food.²⁰⁴ Additionally, it is possible that a sale of food could come within the scope of an express warranty where there is a sale by a sample or model.²⁰⁵

The sale of food provision in section 1302.27(A) has two limitations. First, it apparently refers only to a single status seller; that is, for the buyer to be able to recover for an injury sustained because of bad food, he or she must show that the food seller was a merchant with respect to that food. Frequently, it is extremely difficult to ascertain whether a server of food to be consumed on or off the premises is, in fact, a merchant with respect to the food sold. For example, would a church sponsoring a fund-raising supper come within this definition when one of its members, a profes-

200. *See, e.g.,* *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968) (where a gas company provides an instruction manual for the proper installation of a heater, an implied warranty of fitness for a particular purpose arises).

201. *Breitman v. General Motors Corp.*, 65 Misc. 2d 689, 318 N.Y.S.2d 1003 (1971). *See Seley v. G.O. Searle & Co.*, 15 Ohio Op. 3d 338 (1980) for a discussion on duty to warn.

202. OHIO REV. CODE ANN. § 1302.27(A) (Page 1979). Ohio's pre-Code law is in accord with the Code. *See Yochem v. Gloria, Inc.*, 134 Ohio St. 427, 17 N.E.2d 731 (1938).

203. OHIO REV. CODE ANN. § 1302.27 (Page 1979). *See also* *Levy v. Paul*, 207 Va. 100, 147 S.E.2d 722 (1966).

204. OHIO REV. CODE ANN. § 1302.28 (Page 1979). *See also* *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 241 A.2d 619 (1968).

205. *See, e.g.,* *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (1968). *See also* notes 116-18 *supra* and accompanying text.

sional caterer, volunteered the catering services for that particular dinner? In *Wentzel v. Berliner*²⁰⁶ the court held that no warranty of fitness of the food was created by the professional caterer because he did not have the standing of a merchant at the time he performed his volunteer services.

A second limitation on the applicability of the implied warranty of merchantability is the type of harm to the consumer which is actionable. It seems reasonable in transactions involving a sale of food that an implied warranty should arise on sale, whether or not the food poses danger to the physical well-being of the purchaser. Section 1302.27 seems consistent with this view. Consequently, for courts to insist that inedible food is merchantable so long as it does not harm the physical well-being of the consumer runs the risk of being inconsistent with the other applications to goods contained in section 1302.27. The court in *Martel v. Duffy Mott Corp.*²⁰⁷ observed:

More and more of the food sold to the public comes in cans, frozen, prepared, and even precooked ready to eat. Whole meals can be bought all prepared, ready or almost ready to go on the table. We do not think it a sensible use of the time of the profession or of the bench to construct a body of law as to which foods are of such importance that loss of enjoyment is compensable and those which, as a matter of law, are not of that rank. We think it sounder to permit a plaintiff who can convince a jury that the food product he consumed was inedible and in consequence he no longer enjoys eating it, to recover damages, including damages for loss of enjoyment, if he can additionally convince the jury that a true loss was suffered and that it should add a dollar amount therefor. In some cases loss of enjoyment may be real and substantial, an injury not to be made light of.²⁰⁸

It should be clear from the preceding discussion that the pervasiveness of the implied warranty of merchantability is an important component of the protection afforded buyers by the Ohio Revised Code. The other implied warranty provided by the Code, which is subject to more limitations and hence is of less widespread utility, will be discussed in the next section.

C. *Implied Warranty of Fitness for a Particular Purpose*

The implied warranty of merchantability applies to goods

206. 204 So. 2d 905 (Fla. Dist. Ct. App. 1967), *cert. denied*, 212 So. 2d 871 (Fla. 1968).

207. 15 Mich. App. 67, 166 N.W.2d 541 (1968).

208. *Id.* at 74, 166 N.W.2d at 545.

which create an expectation in the buyer that the goods will be usable for their ordinary purposes. Section 1302.28, on the other hand, applies to goods which are purchased for a particular purpose that the seller is or should be aware of prior to the sale of the goods to the buyer. This section contemplates that the buyer will have a specific use for the goods peculiar to the nature of his or her need and that the goods will suit those needs. The warranty of merchantability clearly does not require such specificity or particularity. The Code acknowledges the distinction with the following example: "shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains."²⁰⁹

It should be realized, however, that both of these warranties, as well as an express warranty, often overlap. An attempt to assign a particular bailiwick to each of these warranties would undermine the intention of the Code, and lead to unnecessary attempts by the trier of fact to make distinctions where no distinctions should be made. It has been observed that "the particular purpose for which a product is used can also be one of the general or ordinary uses of the product."²¹⁰

The warranty of fitness for a particular purpose was designed to deal with certain specific situations. Such a warranty arises as a matter of law when the proper factual circumstances surrounding the transaction exist. The warranty is not contractual because it does not become part of the basis of the bargain,²¹¹ rather it might be denominated an automatic warranty or, as one commentator has stated, an "ipso facto" warranty.²¹²

The first fact relevant to the existence of the implied warranty of fitness for a particular purpose is that the seller, at the time of contracting, must have reason to know of any particular purpose for which the buyer intends to use the goods.²¹³ Under prior law, it was the buyer's duty to inform the seller about the particular purposes for which the goods were to be used.²¹⁴ The Code, however, requires only that the seller have reason to know of the buyer's particular purpose. The seller's knowledge is ascertained

209. OHIO REV. CODE ANN. § 1302.28, Official Comment 2 (Page 1979).

210. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 503 (1968). *See also* Annot., 13 A.L.R.3d 1057 (1967).

211. *See* notes 75-80 *supra* and accompanying text.

212. 1 R. ANDERSON, *supra* note 23, § 2-315:3.

213. *See* OHIO REV. CODE ANN. § 1302.28 (Page 1979).

214. OHIO REV. CODE ANN. § 1315.16(A) (Page 1952) (repealed 1962).

at the "time of contracting;" therefore any knowledge acquired by the seller subsequent to the creation of the contract cannot be used to provide the basis for an implied warranty of fitness for a particular purpose.

The second relevant fact for the creation of the warranty is that the buyer must have actually relied on the seller's skill and judgment in the selection of the goods. The requirement that the seller need not have actual knowledge of the buyer's reliance is similar to the requirement that the seller only have reason to know of the buyer's particular needs. It is sufficient that the seller has reason to know that the buyer is relying on the seller's skill and judgment. However, the buyer must have actually relied upon the seller's skill and judgment,²¹⁵ and failure to prove this reliance will bar any recovery. For instance, where the buyer makes his or her own selection of the goods, the element of reliance will be missing.

Section 15(4) of the Uniform Sales Act provided that "in the case of a contract to sell, or a sale of, a specified article under its patent or other trade name, there is no implied warranty of its fitness for any particular purpose."²¹⁶ This provision sometimes caused serious injustice²¹⁷ and invited disputes regarding exactly what constituted a patent or trade name.²¹⁸ The Code has effectively eliminated the patent or trade name exception by considering its existence as only one factor in ascertaining whether the buyer actually relied on the seller's knowledge.²¹⁹ The presence of

215. OHIO REV. CODE ANN. § 1302.28, Official Comment 1 (Page 1979). For the Code's definition of notice, see *id.* §§ 1301.01(Y), (AA).

216. OHIO REV. CODE ANN. § 1315.16(D) (Page 1952) (repealed 1962).

217. *See, e.g.*, Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931) (because the plaintiff requested a loaf of bread by its trade name, there was no breach of warranty of fitness for a particular purpose when a pin was found in the bread. Nevertheless, the court found a breach of warranty of merchantability because the seller was considered to be a "merchant with respect to goods of that kind").

218. *See, e.g.*, Craig v. Williams, 97 F. Supp. 725 (D. N.J. 1951) (there was no implied warranty of fitness for a particular purpose because the dolly (Nelson Trailer Dolly) was sold and purchased under a trade name). *But see* Odell v. Frueh, 146 Cal. App. 2d 504, 304 P.2d 45 (1956) (to preclude an implied warranty because the "Ashford Process" was sold under its trade name would constitute a misinterpretation of the statute).

219. *See, e.g.*, Tufts v. Schmuck, 8 Ohio N.P. 461, 11 Ohio Dec. 564 (1901). *See* OHIO REV. CODE ANN. § 1302.28, Official Comment 5 (Page 1979), which provides:

The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Chapter. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the

a patent or trade name sale "may indicate no reliance at all, if it is coupled with other factors, including an awareness by the seller of the use to be made of the product, there could still be reliance by the buyer and the creation of a warranty."²²⁰

To establish the requisite reliance, the buyer must also demonstrate that the seller possesses a peculiar knowledge or skill. The buyer cannot rely upon the seller's skill and judgment even though the seller knows of the buyer's intended use, if the seller's skill, knowledge, and judgment are inferior to the buyer's. In this case, an implied warranty of fitness for a particular purpose could not arise.²²¹

To maintain an action for a breach of the warranty of fitness for a particular purpose, the buyer must prove that there was a defect in the goods which led to the alleged damages. In other words, the goods must be unfit for the particular purpose as evidenced by a comparison between the goods as delivered and the goods which were selected to satisfy the buyer's particular purpose.²²²

If a buyer can prove the elements of this warranty, there may be recovery against the seller even if the requirements of an express warranty or an implied warranty of merchantability are not present. Problems do arise, however, when the delivered goods are both merchantable and conforming, but nevertheless do not perform in the particular manner which the buyer reasonably expected. A warranty of fitness for a particular purpose can impose liability where no such basis exists in the other warranties. Therefore, while all warranty actions require a careful scrutiny of the facts, special attention must be given to factual situations in cases involving the implied warranty of fitness for a particular purpose.²²³

As noted in the preceding section, there are three restrictions on the application of the implied warranty of merchantability: it may be excluded or modified by the parties,²²⁴ it applies only

issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate non-reliance if the article has been recommended by the seller as adequate for the buyer's purposes.

220. R. DUESENBERG & L. KING, *supra* note 160, at § 7-26 to 7-27.

221. Prince v. LeVan, 486 P.2d 959 (Alas. 1971). See also R. Clinton Constr. Co. v. Bryant & Reeves, Inc., 442 F. Supp. 838 (N.D. Miss. 1977).

222. Catania v. Brown, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967).

223. Janssen v. Hook, 1 Ill. App. 3d 318, 272 N.E.2d 385 (1971).

224. OHIO REV. CODE ANN. § 1302.29 (Page 1979).

where the seller is a "merchant with respect to goods of that kind,"²²⁵ and it applies only to a "contract for a sale of goods."²²⁶ The first and third restrictions are also applicable to the implied warranty of fitness for a particular purpose. However, the second restriction on the implied warranty of merchantability is not applicable to the warranty of fitness for a particular purpose because this section refers only to a "seller,"²²⁷ and not to a "merchant with respect to goods of that kind."²²⁸ Therefore, if the buyer proves both the seller's knowledge and reliance on that knowledge, then any seller of those goods will be subject to the provisions of the implied warranty. It must also be noted that the implied warranty of fitness for a particular purpose may be applicable to the sale of secondhand goods.²²⁹

The sections of the Ohio Revised Code that set forth the implied warranties of merchantability and of fitness for a particular purpose have been shown to be effective protections for buyers in assuring the quality of goods bought. The Code, however, also provides sellers with some weaponry. Perhaps the most important right given to sellers is the power to exclude or modify warranties.

225. *Id.* § 1302.27.

226. *Id.* For a definition of a contract for a sale, see *id.* § 1302.01(A)(11).

227. *Id.* § 1302.28. For a definition of seller, see *id.* § 1302.01(A)(4).

228. For a definition of merchant, see *id.* § 1302.01(A)(5). See also notes 156-60 *supra* and accompanying text.

229. See, e.g., *Brown v. Hall*, 221 So.2d 454 (Fla. 1969) (although implied warranties of fitness can attach in transactions involving secondhand goods, the liability of the original seller is limited to the second buyer).

In *General Motors Corp. v. Halco Instruments, Inc.*, 124 Ga. App. 630, 635, 185 S.E.2d 619, 622 (1971), the court held that "when goods are sold by an original purchaser to a third party as used or second-hand goods, there is, of course, no implied warranty with respect to the manufacturer or original seller." Furthermore, the court noted that "even with respect to the original purchaser or second seller, absent special circumstances, the rule is that there is no implied warranty as to the condition, fitness or quality of the article." *Id.* The court in *Halco* clearly equated "secondhand" with "as is." While this result will occur in some situations, the court lost sight of the fact that the holding must relate to the facts of a particular case.

Even when a manufacturer sells secondhand goods, the implied warranty subsequently created is not of the same scope as an implied warranty created by the sale of new goods. The resulting warranty, however, should require that the goods were originally merchantable, and, if the buyer relies on the seller's judgment, then it should be implied that the goods must still be reasonably fit for the purpose for which they were intended. Notice that under the Uniform Sales Act there was no exclusion of secondhand goods from the general provision as to warranty. In *Listman Mill Co. v. Miller*, 131 Wis. 393, 111 N.W. 496 (1907), the court held that where a manufacturer sells goods which are normally a waste product, an implied warranty as to the condition, fitness, or quality is not created. But, if a manufacturer sells a "by-product" as one of the goods generally manufactured, it appears to be immaterial whether the production of these goods was the main purpose of the business.

The next section of this Article examines the nature and scope of this power.

IV. EXCLUSION OR MODIFICATION OF WARRANTIES

A. *Generally*

Contract law holds sacred the right of the parties to enter into legal agreements. The parties are free to fashion the terms of their bargain in any way which protects their interests. The courts then will honor the legal obligations created by the contract. For example, when the buyer dickers over the qualities that certain goods should possess or when the seller makes certain affirmations about those goods, an express warranty that the goods will have the agreed qualities is created, and the courts will enforce that warranty in favor of the buyer. If the buyer and seller do not specifically mention the quality of the goods sold, the law will imply a warranty that the goods will meet at least the reasonable expectations of the buyer.²³⁰

Similarly, the parties are free to agree that no warranties, express or implied, will attach to the goods sold.

Parties to an agreement ought to be free to provide that the buyer is purchasing goods without any warranties, express or implied—that he is purchasing the goods in whatever condition they now may happen to be, and without any promises (or only certain specified but limited promises) from the seller as to the quality of those goods.²³¹

To protect the integrity of the freedom to contract, however, there must be certain limitations on the exercise of this power to exclude warranties. Often the seller who has a superior bargaining position can impose certain conditions on the helpless buyer. Two types of protection are available to prevent buyers who are in weak bargaining positions from being forced to accept unfavorable contract terms. First, the Ohio Revised Code contains provisions which govern the exclusion or modification of warranties,²³²

230. R. NORDSTROM, *supra* note 24, at 267.

231. *Id.*

232. OHIO REV. CODE ANN. § 1302.29 (Page 1979) provides:

Exclusion or Modification of Warranties

(A) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of Section 1302.05 of the Revised Code on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable.

(B) Subject to division (C) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention

the limitation of remedies,²³³ the cumulative effect of warranties,²³⁴ and the rules regarding third party beneficiaries of warranties.²³⁵ Second, Congress has provided statutory protection for consumer purchases through the enactment of the Magnuson-Moss Warranty-Federal Trade Improvement Act.²³⁶

B. Section 1302.29

Section 1302.29 of the Code generally attempts to protect the buyer from being unfairly surprised or oppressed by a seller's attempt to omit or disclaim either the seller's legal obligations or liability for a breach of warranty.²³⁷ Official Comment 1 defines the parameters of the section by noting that

[section 1302.29] is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.²³⁸

A seller is not permitted to avoid liability for breach of a warranty by a disclaimer inconsistent with express warranties or by failing

merchantability and in case of a writing must be conspicuous and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states for example, that "There are no warranties which extend beyond the description on the face hereof."

(C) Notwithstanding division (B) of this section:

- (1) unless the circumstances indicate otherwise all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (2) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- (3) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(D) Remedies for breach of warranty can be limited in accordance with the provisions of sections 1302.92 and 1302.93 of the Revised Code on liquidation or limitation of damages and on contractual modification of remedy.

233. *Id.*

234. OHIO REV. CODE ANN. § 1302.30 (Page 1979).

235. *Id.* § 1302.31.

236. 15 U.S.C. §§ 2301-12 (1976).

237. *See* First Nat'l Bank v. Husted, 57 Ill. App. 2d 227, 235, 205 N.E.2d 780, 784 (1965).

238. OHIO REV. CODE ANN. § 1302.29, Official Comment 1 (Page 1979).

to notify the buyer of any disclaimers of implied warranties which normally attach to any contract for sale.

Obviously, the primary objective of section 1302.29 is to protect the buyer from inadvertently relinquishing contract rights due to a fine print waiver.²³⁹ A disclaimer of warranty is an affirmative defense to a breach of warranty action. Consequently, for a disclaimer to be effective the seller must plead and prove its existence.²⁴⁰ As a general rule, any competent party to a transaction may make any lawful contract. However, where the purchaser of an automobile, for example, takes delivery of that automobile, he or she expects that during the negotiations the parties came to some sort of an agreement regarding the body style, the kind of automobile, and its price, equipment, accessories, safety, dependability, and freedom from defects. Although at least one court has held that a buyer may not waive the right to a car of merchantable quality,²⁴¹ the language of the Code seems to allow a buyer to do exactly that. A buyer in this case is not entirely helpless, however. As discussed previously, an express warranty is created by a description of the goods.²⁴² Thus, a buyer in this case retains the right to receive goods which may be described as an automobile. Even though the buyer expects to receive a new automobile, he or she may disclaim all the warranties ordinarily imposed by law. As one court aptly concluded:

Parties to an agreement may make any contract that comports with general law, and if a "seller positively and expressly refuses to give any warranty, and the contract is not induced by fraud, no warranty of any kind can be implied by law." But to come within these principles, the burden is upon the dealer to show with particularity just what the buyer is waiving, that is, which particular defects or condition the purchaser of a brand new automobile explicitly waives.²⁴³

Similarly, other courts have held that words of disclaimer must

239. For an exhaustive analysis of warranty disclaimers, see generally Duesenberg, *The Manufacturer's Last Stand: The Disclaimer*, 20 BUS. LAW. 159 (1964); HAWLAND, *Limitation of Warranty Under the Uniform Commercial Code*, 11 HOW. L.J. 28 (1965); Note, *Warranty Disclaimer and Limitation of Remedy for Breach of Warranty Under the Uniform Commercial Code*, 43 B.U.L. REV. 396 (1963).

In order to understand the historical underpinnings of the warranty of quality, see Kessler, *The Protection of the Consumer Under Modern Sales Law, Part I*, 74 YALE L.J. 262 (1964).

240. *Greenspun v. American Adhesives, Inc.*, 320 F. Supp. 442, 444 (E.D. Pa. 1970); see also R. ANDERSON, *supra* note 23, at § 2-316:4.

241. *Berg v. Stromme*, 79 Wash. 2d 184, 187, 484 P.2d 380, 382 (1971).

242. See OHIO REV. CODE ANN. § 1302.26 (Page 1979).

243. 79 Wash. 2d at 194-95, 484 P.2d at 385-86.

be carefully scrutinized and must not be favored where their effect is to limit the rights, duties, and obligations between the parties to the transaction.²⁴⁴ Regardless of the terms to which the parties agreed in the contract, unless there is an express departure from the normal expectations of the buyer, the presumption is that the seller intended to deliver goods of merchantable quality and the buyer expected to receive such goods. In fact, one court stated: "If there is any ambiguity in the contract or if the exculpatory provision thereof is susceptible of two interpretations, the contract will be construed most strongly against the party who prepared it."²⁴⁵ If the seller intends to limit liability in a breach of warranty situation to the payment of money, the cost of replacing a defective part, or the correction of any defect in material or workmanship, then the language in the contract must clearly reveal these intentions.

Note, however, that despite the decline of the doctrine of caveat emptor in contract law, the seller is not without rights under the Code:

The seller is protected under this Chapter against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This Chapter treats the limitations or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under division (D) the question of limitation of remedy is governed by the sections referred to rather than by this section.²⁴⁶

Generally, the Code permits limitation of warranties either by disclaimer, by modification, or by the buyer's waiver. Any limitation which the buyer and seller agree upon establishes the outer limits of protection; that is, the seller is not bound to perform beyond the parameters which the parties themselves established.²⁴⁷

C. *Application of Section 1302.29*

An effective disclaimer must be an integral part of the contract, that is, without its inclusion the seller would not have sold

244. See generally, Annot., 13 A.L.R.3d 1057 (1967).

245. Henry v. W.S. Reichenback & Son, Inc., 32 Lehigh L.J. 524, 45 Pa. D. & C.2d 171 (1968).

246. OHIO REV. CODE ANN. § 1302.29, Official Comment 2 (Page 1979).

247. John Deere Co. v. Tenberg, 445 S.W.2d 40, 43 (Tex. Civ. App. 1969).

the goods at the price obtained for them. To sustain the burden of proving the existence of the disclaimer, the seller must establish that the disclaimer was part of the basis of the bargain upon which the buyer and the seller agreed. For the disclaimer provisions to be effective, the seller must demonstrate that they are not unconscionable²⁴⁸ and that they reflect both the seller's intent to disclaim liability and the buyer's acquiescence. If the seller cannot sustain this burden of proof, then the claim of immunity from liability will fail.²⁴⁹

The aspect of section 1302.29 that should be noted initially is that it prohibits the exclusion of express warranties.²⁵⁰ The Code provides that words relating to the creation and limitation of express warranties are to be construed consistently with each other, but where consistent construction is not possible, then words of limitation are inoperative. Subsection (B) does allow the exclusion of the implied warranties provided by the Code, but requires that certain steps be followed.

A disclaimer delivered after the consummation of the sale is ineffective. The statutory obligation created by the Code is so demanding that any attempt to limit liability must occur at the time the contract is made and not at some later time. Unless the seller can demonstrate the buyer's acceptance of a written warranty subsequent to the consummation of the sale, the subsequent warranty is not a substitute or an amendment of the original rights owed to the buyer by the seller.²⁵¹ To be effective, the terms of any limitation or disclaimer of the warranty must be brought to the attention of the buyer and explained in some detail.²⁵²

One of the initial requisites for the creation of an effective disclaimer, as set forth in section 1302.29, is the language which must be included for the disclaimer to be effective. The disclaimer must be conspicuous so that the buyer is aware of having assumed the risk of the quality of the purchased goods.²⁵³ Statements made in

248. OHIO REV. CODE ANN. § 1302.15 (Page 1979).

249. *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1224 (3d Cir. 1970).

250. OHIO REV. CODE ANN. § 1302.29 (Page 1979). *Accord*, *Society Nat'l Bank v. Pemberton*, 63 Ohio Misc. 26, 29 (1979), *aff'd* No. 9502 (9th Dist. Ct. App. Oh. 1980). *See* note 109 *supra* and accompanying text.

251. *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969) (manufacturer's standard warranty was delivered to the buyer several days after the sale, but was not effective because the seller failed to demonstrate that the buyer had accepted the warranty).

252. Support for this statement rests in the Code's doctrine of unconscionability; *see* OHIO REV. CODE ANN. § 1302.15 (Page 1979) and accompanying Official Comment.

253. Section 1302.29(B) calls for conspicuousness in any attempted disclaimer of implied warranties. Conspicuous is defined in § 1301.01(J):

a manual or warranty book²⁵⁴ as well as statements in a separate writing²⁵⁵ can create a disclaimer provided they fulfill all the essential requirements of section 1302.29. Subsection (B) sets forth the statutory requirements. A disclaimer of the implied warranty of merchantability must mention the word merchantability and, if in writing, must be conspicuous.²⁵⁶ A disclaimer of the implied warranty of fitness for a particular purpose must both be in writing and be conspicuous.²⁵⁷

As a general rule, it is permissible for the parties to disclaim either one portion of the sales contract, or one remedy, or both. This disclaimer, however, cannot be so ubiquitous that it operates to terminate all of the warranties or remedies available to the buyer. As a general proposition, disclaimers must satisfy three criteria. First, a disclaimer must state with great particularity what it excludes or modifies; failure to do so will result in judicial invalidation of that disclaimer.²⁵⁸ Second, there can be no disclaimer without notice. No disqualifications, exclusions, limitations, or modifications of the Code's implied warranties are effective absent the consumer's notification of such a disclaimer.²⁵⁹ Finally, to verify the lack of oppression and surprise and to assure enforceability, the disclaimer, regardless of its form, must be supported by factual evidence indicative of its commercial reasonableness and fairness.²⁶⁰

The case of *Wilson Trading Co. v. David Ferguson, Ltd.*²⁶¹ illustrates the operation of multiple warranties in the same contract.

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type of color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

254. *Dougall v. Brown Bay Boat Works & Sales, Inc.*, 287 Minn. 290, 178 N.W.2d 217 (1970).

255. *In re Drexel Dynamics Corp.*, 3 U.C.C. REP. 802 (Armed Servs. Bd. of Contracts App. 1966).

256. OHIO REV. CODE ANN. § 1302.29(B) (Page 1979).

257. *Id.*

258. *E.g.*, *Berg v. Stromme*, 1 Wash. App. 916, 465 P.2d 181 (1970).

259. *Minikes v. Admiral Corp.*, 48 Misc. 2d 1012, 1013, 266 N.Y.S.2d 461, 462 (1966). Perhaps a partial explanation for this general rule is that these implied warranties are arguably within the consuming public's expectation of the quality of goods available for its purchase.

260. *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 242, 298 N.Y.S.2d 538, 539-40 (1969).

261. 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968) (time limitation was ineffective and manifestly unreasonable).

In *Wilson*, the parties expressly agreed to create an unlimited express warranty of merchantability in one clause of the contract, while in a separate clause they indirectly modified the express warranty without mentioning the word "merchantability." The court held that the language of the unlimited express warranty of merchantability prevailed over the time limitation created by the separate indirect modifying clause.²⁶² The court reasoned that the parties to a contract could not create an express unlimited warranty and an express time limitation on a warranty without creating irreconcilable ambiguity. As the court correctly concluded, the ambiguity's resolution required one warranty taking precedence over the other. The court's rationale appears to be supported by the Official Comment to section 1302.93:

[The] parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Chapter, they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Chapter in an unconscionable manner is subject to deletion and in that event the remedies made available by this Chapter are applicable as if the stricken clause had never existed. . . . [W]here an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Chapter.²⁶³

Thus, although the Code provides for the disclaimer of implied warranties, the seller's power to do so is not unlimited.

D. *Disclaimer of Implied Warranties*

Sections 1302.29(B) and (C) outline the procedures established for the effective exclusion or modification of implied warranties. Although there are different guidelines for the disclaimer of a warranty of merchantability and a warranty of fitness for a particular purpose, the procedures of sections 1302.29(B) and (C) apply generally to both warranties. It must be kept in mind, however, that a disclaimer of one will not be a disclaimer of the other be-

262. *Id.* at 405, 297 N.Y.S.2d at 114, 244 N.E.2d at 689.

263. OHIO REV. CODE ANN. § 1302.93, Official Comment 1 (Page 1979). *See also* Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

cause both may exist independently.²⁶⁴

There are three basic ways that a disclaimer of an implied warranty can occur; first, by the terms of the agreement itself; second, by the buyer's examination of the goods; and third, by course of dealing, course of performance, or usage of trade.

1. *Disclaimers in the Agreement*

The terms of the agreement control the presence or absence of an effective disclaimer. Coupled with the conduct of the parties, the terms of the agreement set the tone for the enforceability of a disclaimer. Generally, language which tends to inform the purchaser of any limitation, modification, or exclusion of the seller's liability is enforceable and effective so long as the seller performs according to the agreed upon terms of the contract.²⁶⁵

For a disclaimer in the agreement to be valid, certain criteria must be met. First, there must be either written or oral evidence of an agreement between the parties. Second, the transaction must qualify as an Article 2 transaction. Third, the seller must qualify as an Article 2 merchant.²⁶⁶ In *Ford Motor Co. v. Pittman*,²⁶⁷ a manufacturer of an automobile admitted that the company neither sold directly nor serviced the vehicle which was ultimately purchased by the consumer.²⁶⁸ Instead, the company sold its automobiles through dealerships. The court held that for the company to be permitted to create an enforceable and effective disclaimer, it must show that it was a seller within the Code's definition, that the contract of sale was one that was enforceable under the Code, and finally, that the contract provisions containing the disclaimers were part of the contract between it and the dealer and not merely one item among many given to the buyer when the automobile was purchased.²⁶⁹

Courts generally abhor disclaimers of implied warranties and

264. The problem of contradictory provisions would arise, for example, if the seller made an express warranty regarding quality, but at the same time stated the goods were sold "as is." See, e.g., *Society Nat'l Bank v. Pemberton*, 63 O. Misc. 26 (1979), *aff'd* No. 9502 (9th Dist. Ct. App. Oh. 1980) (express warranty not disclaimed in an "as is" sale).

265. *Willis v. West Kentucky Feeder Pig Co.*, 132 Ill. App. 2d 266, 265 N.E.2d 899 (1971) (the seller's invoice contained language which would exclude warranties if not followed by the buyer. Because the buyer failed to meet certain conditions precedent to recovery, his action for breach of warranty was unsuccessful).

266. OHIO REV. CODE ANN. §§ 1302.02, .01(A)(4) (Page 1979).

267. 227 So. 2d 246 (Dist. Ct. App. Fla. 1969).

268. *Id.* at 249.

269. *Id.*

strictly construe such disclaimers against the party seeking to assert them.²⁷⁰ As noted earlier, the language of section 1302.29(B) provides that any exclusion or modification of an implied warranty of merchantability must specifically mention merchantability, and if the disclaimer is in writing it must be conspicuous. Exclusionary language neither written nor conspicuous will not be enforced. Whether the exclusionary language is conspicuous is a question of law,²⁷¹ but whether the language itself is exclusionary is a question of fact for determination by the trier of fact.²⁷²

As a general rule of construction, the Code establishes that certain phrases are sufficient to inform the buyer of a valid disclaimer.²⁷³ Such phrases include "as is," "with all faults," or any language of similar import which should reasonably indicate and focus the buyer's attention upon the seller's disclaimer of implied warranty.²⁷⁴ In *Chamberlain v. Bob Matick Chevrolet, Inc.*,²⁷⁵ the court focused upon the buyer's awareness as a threshold standard for a valid disclaimer. The court held that there was a valid disclaimer where a seven-year-old automobile was sold "as is" with no guarantee. The court reasoned that the buyer was clearly aware that the car was not a new car and that she would have to bear the responsibility for repairs under the terms of the contract.²⁷⁶ In *First National Bank v. Husted*,²⁷⁷ the court noted that effective disclaimer language is not confined to the phrase "as is." Consequently, the court held that a contract for the sale of an automobile on a retail installment basis, which stated that the purchaser bought the car "in its present condition," was sufficient to

270. See, e.g., *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965) (although the contract for the sale of air conditioners was created prior to the enactment of the UCC, the seller's attempted disclaimer of implied warranties was ineffective).

271. *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 540, 226 N.E.2d 228, 231 (1967). See also note 253 *supra*.

272. *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972).

273. OHIO REV. CODE ANN. § 1302.29(C) (Page 1979).

274. OHIO REV. CODE ANN. § 1302.29(C)(1) (Page 1979). Official Comment 7 for this section notes:

Paragraph (1) of division (C) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (1) are in fact merely a particularization of paragraph (3) which provides for exclusion or modification of implied warranties by usage of trade.

275. 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967).

276. *Id.* at 695-96, 239 A.2d at 47-48.

277. 57 Ill. App. 2d 227, 205 N.E.2d 780 (1965).

exclude any implied warranties.²⁷⁸ Unlike *Husted*, the court in *Hull-Dobbs, Inc. v. Mallicoat*²⁷⁹ held that the language "accepted in its present condition" was not synonymous with "as is" or "with all faults," and therefore, could not effectively exclude an implied warranty of merchantability. Instead of triggering the buyer's awareness that the seller had disclaimed all implied warranties, the court reasoned that the language triggered only awareness regarding acceptance.²⁸⁰

Whether or not words of disclaimer meet the requirements of section 1302.29(c)(1) depends upon a variety of elements. It is essential that the following be considered: (1) whether there is common understanding attached to the meaning of such words; (2) whether the words of disclaimer sufficiently focus the buyer's attention on the limitations, exclusions, or modifications of the warranties upon which they are intended to operate; and (3) whether the language of the disclaimer is sufficiently clear and obvious to the buyer. It should be noted that if both of the parties to the transaction fully comprehend the significance of a disclaimer approved through arm's length bargaining, then the price charged probably reflects the impact of the disclaimer. Thus, the disclaimer should not operate to oppress the buyer, but instead, should be made in good faith between parties situated in relatively equivalent bargaining positions.

The test for "common understanding" is relatively concise. Merely because the buyer does not actually comprehend the effect of the disclaimer will not negate it so long as the meaning of the disclaimer would have been clear to most buyers. If, however, the seller has reason to know that this particular buyer does not understand the effect of the disclaimer, then it is unenforceable. Additionally, the Code requires the seller to operate in good faith. Failure to take steps to ensure that the buyer fully understands the effect of the disclaimer is probably not good faith. This situation occurred in *Klein v. Asgrow Seed Co.*,²⁸¹ where the buyer entered into a contract for the sale of tomato seeds, and the ultimate delivery did not comply with the initial description of the seed. The court determined that the misrepresentations of the manufacturer were deliberate and held that in light of the manufacturer's knowledge that the goods delivered included "rogues," the dis-

278. *Id.* at 236, 205 N.E.2d at 784-85.

279. 57 Tenn. App. 100, 415 S.W.2d 344 (1966).

280. *Id.* at 105, 415 S.W.2d at 346-47.

281. 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

claimer of liability was ineffective.²⁸²

The statutory interdependence of subsections (B) and (C) of section 1302.29 produces some difficulty. The subsections are interrelated in light of subsection (B)'s indication that it is subject to subsection (C), and from subsection (C)'s reference back to subsection (B) indicated by its commencing with the words "notwithstanding division (B)."

Section 1302.29(B) requires all written exclusionary language to be conspicuous for it to constitute an enforceable negation of implied warranties. In view of this requirement, it appears that in order for "as is" or "with all faults" to negate implied warranties pursuant to section 1302.29(C), these phrases must at least meet the test of conspicuousness espoused in subsection (B).²⁸³ The interdependence of these two subsections is manifested by the intention of the Code to focus the buyer's attention on the fact that the seller is excluding implied warranties. The purpose of this section of the Code is to prevent unfair surprise and oppression, and that purpose is accomplished only if the exclusionary language is conspicuously set forth in the contract. One commentator interprets subsection (C) as follows:

While the subsection does not explicitly so provide, it would seem that these phrases and expressions would have to be stated conspicuously to become effective disclaimers. Such a requirement is consistent with the general rule that the disclaimer must "call" the risk to "the buyer's attention" and "make . . . plain that there is no implied warranty."²⁸⁴

Because a clause in the contract simply entitled "WARRANTIES" may suggest to the buyer that the seller made warranties on the goods rather than a disclaimer, all statements disclaiming warranties must relate directly to the language of exclusion and not be ambiguously couched in language associated with the inclusion of a warranty.²⁸⁵

2. *Buyer's Examination of, or Refusal to Examine, Goods*

Section 1302.29(C)(2) establishes a second method for the disclaimer of an implied warranty. When the buyer examines the

282. *Id.* at 99-100, 54 Cal. Rptr. at 617-18.

283. See *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972).

284. 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 77 (1964).

285. It would be refreshing to read a contract with a disclaimer therein entitled: "DISCLAIMER OF WARRANTIES."

goods, or refuses to examine them, prior to the creation of the contract to sell, there is a disclaimer of all implied warranties regarding *patent* defects in those goods.²⁸⁶ Any *latent* defects in the goods, on the other hand, would remain covered by the implied warranties. The underlying premise is that the seller should not assume the risk of loss for those goods which the buyer has fully examined or for those goods which, had the buyer examined them, he or she would not have purchased. If the buyer, after a thorough examination which reveals defects in the goods, persists in using those goods and sustains losses and expenses, there should be no cause of action for breach of implied warranty.²⁸⁷

To exclude the implied warranties, the buyer must actually refuse an offer to examine the goods. Exclusion is ineffective if the buyer merely fails to take advantage of an opportunity to inspect the goods. Section 1302.29, Comment 8, notes that

it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal.²⁸⁸

The requirement of an actual refusal to examine is a recognition by the Code that the selling techniques in a commercial setting and the buyer's ignorance of the goods often effectively preclude the purchaser from making a meaningful examination of the goods. It is only after the seller has demanded that the buyer examine the goods, thereby warning the buyer of the possible loss of the implied warranties, that the seller can be said to have laid the foundation for successfully excluding the implied warranties from the contract.²⁸⁹

286. OHIO REV. CODE ANN. § 1302.29(C)(2) (Page 1979) states:

[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

287. 1 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 89 (4th ed. 1916).

288. OHIO REV. CODE ANN. § 1302.29, Official Comment 8 (Page 1979).

289. *Id.* The buyer must clearly be put on notice of having assumed the risk of loss for any defects found in the goods. This notice must be clear and unequivocal and is established only when the seller demands that the buyer make the necessary examination. The Code isolates several qualifications for this method of disclaiming warranties:

Application of the doctrine of 'caveat emptor' in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Chapter. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express warranty." In such cases the question is one of fact as to whether a

The concept of examination must be distinguished from the concept of inspection. An inspection helps the buyer decide whether the goods as delivered conform to the contract,²⁹⁰ whereas an examination is an element in determining whether the seller owes any obligations to the buyer.²⁹¹

When the Code calls for an examination, it does not require examination of specific goods. If the seller shows the buyer a sample or model, and the buyer decides to purchase those goods, that demonstration is sufficient to constitute an examination by sample or model and allows the seller to exclude the implied warranties. The goods must conform only to the sample or model. If there are no patent defects visible in either the sample or model, then the expectation of the buyer is that the goods which are delivered will be of equal quality. If, however, there are patent defects and the buyer does not notice or complain of them, the buyer cannot subsequently use those imperfections as a basis for a breach of warranty claim. Clearly, there are no implied warranties as to patent defects which the examination of that sample or model ought to have revealed to the buyer.

Until a seller fulfills a condition precedent imposed by the contractual obligation, a buyer's inspection regarding the fitness for use of the goods cannot be asserted against the buyer. For

warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by division (A) of the present section.

The particular buyer's skill and the normal method of examining goods and the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which did not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a non-professional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

Id.

290. OHIO REV. CODE ANN. §§ 1302.56--57 (Page 1979).

291. *Id.* OHIO REV. CODE ANN. § 1302.29, Official Comment 8, provides further guidance as to the distinction between an inspection and an examination:

[W]arranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examinations" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.

example, if a purchaser agreed to buy a mobile home and the seller promised to put it up on blocks, but failed to do so properly, then even though the buyer has examined the goods, a court should not allow the seller to make an effective disclaimer on the basis of the buyer's examination.

If the buyer has a skill equal to or greater than that of the seller regarding the subject matter of the sale, then the buyer must perform a more complete inspection than would a buyer in the ordinary course of business. The inspection must be made even if it entails added labor and inconvenience. The "professional" buyer's failure to behave in this manner may negate any implied warranties.²⁹²

As mentioned earlier, one court has held that the right to bring an action in implied warranty does not depend exclusively on a contractual relationship.²⁹³ The court carried this analysis to its next logical step in *Avenell v. Westinghouse Electric Corp.*,²⁹⁴ and stated in dicta that an express contractual disclaimer of implied warranties does not bar an implied warranty action in tort.²⁹⁵ Such a ruling, however, does not have universal application. The court limited its decision by stating that the application of implied warranty in tort to all products liability cases would render useless many, if not all, of the Uniform Commercial Code provisions covering products liability:

[W]henver the doctrine of implied warranty in tort is applicable, the provisions of the Uniform Commercial Code permitting the parties to contractually modify or exclude warranties, and to modify or limit remedies are of no avail. Stated another way, where implied warranty in tort applies, the parties are not free to determine by contract the quality of goods which the seller is bound to deliver or the remedies available to the buyer in the event that the goods do not measure up to the agreed quality. It is clear, then, that the doctrine of implied warranty in tort must be limited in its applicability. Otherwise, unlimited application of the doctrine would emasculate the Uniform Commercial Code provisions dealing with products liability.²⁹⁶

The court held that because the parties were both familiar with the subject of the sale, because they dealt at arm's length, and because the plaintiff was seeking purely consequential damages,

292. See, e.g., *Richards Mfg. Co. v. Gamel*, 5 Wash. App. 549, 489 P.2d 366 (1971).

293. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 230-36, 218 N.E.2d 185, 188-92 (1966). See note 166 *supra* and accompanying text.

294. 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

295. *Id.* at 156, 324 N.E.2d at 587.

296. *Id.* at 157-58, 324 N.E.2d at 588.

rather than damages for injury to person or property, the theory of implied warranty in tort was not available.²⁹⁷

3. *Disclaimer by Course of Dealing, Course of Performance, or Usage of Trade*

The third provision of section 1302.29 allows an implied warranty to "be excluded or modified by course of dealing or course of performance or usage of trade."²⁹⁸ In essence, this provision of the Code allows for the automatic incorporation of the parties past dealings or common industry understanding into the present contract to sell. The importance of the provision comes from the idea that the creation and disclaimer of implied warranties do not exist in a vacuum and triers of fact need all available information in determining the nature of the transaction. The practical effect of this provision is to allow conduct or understanding to be brought to bear on an imperfectly drafted disclaimer clause, and cause it to be given effect.²⁹⁹ It seems clear that where the buyer and seller have repeatedly dealt with each other on the basis of contracts which have contained a certain clause, then it is relatively safe to assume that the buyer will not be surprised by its operation. Some factors which will determine whether the course of dealing or course of performance are to be given effect are: the number of prior dealings, the arm's length nature of the transaction, the buyer's status as a businessperson, and the buyer's actual knowledge of the disclaimer.³⁰⁰ The adequacy of usage of trade will generally be easier for courts to determine, since objective evidence will usually be available. As a general rule, a disclaimer given effect by usage of trade operates to bind members of the trade or persons who know or should know about it.³⁰¹

*Allied Industrial Service Corp. v. Kasle Iron & Metals, Inc.*³⁰² is illustrative of the operation of section 1302.29(c)(3). The defendant hired the plaintiff to design a system to control the emission of pollutants from its scrap iron processing business. The plaintiff proposed a unique system and advised the defendant that it would be unable to warrant or guarantee that the installation of this unique system would solve the defendant's problem. When the

297. *Id.* at 158, 324 N.E.2d at 589.

298. OHIO REV. CODE ANN. § 1302.29(C)(3) (Page 1979).

299. *See, e.g.*, *Holcombe v. Cessna Aircraft Co.*, 439 F.2d 1150 (5th Cir. 1971).

300. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 454-57 (2d ed. 1980).

301. *See id.* at 457.

302. 620 Ohio App. 2d 144, 405 N.E.2d 307 (1977).

system failed to eliminate the discharge of the pollutants, the defendant terminated the contractual relationship and requested damages for the breach of implied warranties.³⁰³ The court held that the implied warranties of merchantability and of fitness for a particular purpose were excluded by the course of dealing between the parties. There was clearly a mutual understanding between the parties that no warranties or guarantees were intended to apply to the performance of the system after its installation.³⁰⁴

Although disclaimers of warranties are the most important of the seller's tools under the Code, they are by no means the only ones. The next section of this Article analyzes a second power given to sellers by the Ohio Revised Code—the power to limit the buyer's remedy for breach of warranty.

V. LIMITATION OF REMEDIES

If it were possible, the seller would be delighted to disclaim all warranties. It is equally obvious, however, that the seller must offer some warranty to the buyer to induce the making of the contract for sale. Consequently, the seller must compromise between a full protective warranty and no warranty. To strike this balance the seller often limits the buyer's remedies for breach of warranty. In essence, a disclaimer of warranties and a liquidated damage clause are two different ways of achieving the same result—protection of the seller from full liability for defective goods. For example, a limitation of remedy occurs when a seller includes a liquidated damages clause in the original contract between the parties.³⁰⁵ The purpose of a liquidated damages clause is to preclude a later judicial determination of the amount of damages owed by the seller because of a breach. Furthermore, the seller may not wish to be limited to a liquidated damages clause, in which case liability may be limited to repair or replacement of the defective goods.

Section 1302.93 regulates a seller's ability to limit the remedies available to a buyer upon delivery of nonconforming goods. This section of the Code permits the parties to agree mutually to remedies which are not provided for in other sections of the Code. For example, the amount of damages recoverable by the buyer may be

303. *Id.* at 145, 405 N.E.2d at 309. The instant suit arose as a result of the plaintiff suing for the balance due for services performed. The defendant then counterclaimed, requesting damages for breach of contract, breach of warranty and negligent performance.

304. *Id.* at 144, 147, 405 N.E.2d at 308, 310.

305. OHIO REV. CODE ANN. § 1302.92(A) (Page 1979).

limited or altered, perhaps being limited to the repair or replacement of nonconforming goods.³⁰⁶ Nevertheless, whenever remedies upon which the parties agree, fail in their "essential purpose," the limitations are invalid and the buyer may resort to all remedies provided for in the Code.³⁰⁷ Consequential damages may also be limited by the parties.³⁰⁸ However, any limitation of consequential damages for injury to the person resulting from a consumer good is unconscionable and thus unenforceable.³⁰⁹

The ability of the parties to vary remedies which may accrue to the nonbreaching party depends upon three provisions.³¹⁰ First, the variations must be found within the contract and must have been part of the basis of the bargain upon which the contract was created. At this juncture, the question of "conspicuousness" becomes relevant and the court must ascertain whether the purchaser was aware of the variation limiting the seller's liability. Second, the substitute remedies must not fail in their "essential purpose." "[W]here an apparently fair and reasonable clause, because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Chapter."³¹¹ Third, the variation found in the contract must not work an unconscionable result. Conscionability is imposed upon both the limitation and exclusion of consequential damages. Thus, a contract for consumer goods which excludes consequential damages for personal injury is *prima facie* unconscionable. On the other hand, a limitation precluding the recovery for a purely commercial loss is not unconscionable.

The Ohio Supreme Court in *Goddard v. General Motors Corp.*³¹² recently resolved the issue regarding a buyer's remedies when the seller has disclaimed consequential damages, but the

306. *Id.* § 1302.93(A)(1).

307. *Id.* § 1302.93(B). See notes 311-13 *infra* and accompanying text for a discussion of "failure of its essential purpose."

308. *Id.* § 1302.93(C). Official Comment 2 to § 1302.29 states:

This Chapter treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under division (D) the question of limitation of remedy is governed by the sections referred to [1302.92 and 1902.93] rather than by this section.

309. OHIO REV. CODE ANN. § 1302.92(C) (Page 1979).

310. See, e.g., R. NORDSTROM, *supra* note 23, at 276-79.

311. OHIO REV. CODE ANN. § 1302.92, Official Comment 1 (Page 1979).

312. 60 Ohio St. 2d 41, 396 N.E.2d 761 (1979).

remedy agreed upon failed of its essential purpose. The plaintiff in *Goddard* purchased an automobile which the defendant warranted for the standard period of twelve months or 12,000 miles. The warranty was limited to repair or replacement of any defective parts and expressly precluded recovery for any consequential damages. The new car was so riddled with defects, however, that the seller was unable to repair the vehicle. The court held that where the remedy agreed upon fails of its essential purpose, the buyer may resort to the remedies provided in the general provisions of the Code. Therefore, despite the disclaimer of consequential damages, the plaintiff was permitted to recover consequential damages pursuant to section 1302.88(C).³¹³

The most difficult issue to arise in cases of this nature is deciding the point at which the contractual remedies fail of their essential purpose. The resolution of the issue can be found by determining what the Code regards as the essential purpose of remedies. At base, the Code requires minimally adequate remedies. A contractual clause limiting the buyer's remedy to repair or replacement is an attempt by the seller to avoid paying for consequential damages caused by the breach. A repair or replacement clause will fail of its essential purpose when, as in *Goddard*, the repair or replacement of defective parts does not put the goods in warranted condition. Clearly, the remedy provided was not minimally adequate.

An additional point which must never be overlooked is that, regardless of the liability arrangements made between the buyer and the seller, the seller must provide the buyer with a minimally adequate remedy or face the possibility that the contract will be declared unconscionable.³¹⁴ The purpose of the remedies section of the Code is to insure that the parties to the contract have a remedy. Therefore, any clause in a contract which eliminates all

313. *Id.* at 47, 396 N.E.2d at 765.

The decision in *Goddard* neglects § 1302.93(C) which permits the exclusion of consequential damages unless it is unconscionable. The court avoided an analysis of whether the standard twelve-month car warranty's exclusion of consequential damages is conscionable and instead created an irrebutable presumption that is unconscionable. In fact, by permitting the plaintiff to recover consequential damages, the court has left serious doubt as to whether an exclusion of consequential damages will be sustained when the remedy fails of its essential purpose. This broad ruling will have serious ramifications on numerous commercial contracts for the sale of unique machinery and equipment because many times the purchaser will disclaim any right to recover consequential damages in order to receive a lower sales price. The issue of whether the *Goddard* decision is isolated to consumer purchases must be left to subsequent decisions for an ultimate resolution.

314. OHIO REV. CODE ANN. § 1302.92, Official Comment 1 (Page 1979).

remedies or limits them so as to work an unconscionable result will not be enforced.

VI. CUMULATION AND CONFLICT OF WARRANTIES

Section 1302.30 of the Ohio Revised Code mandates that all warranties, express or implied, are to be construed whenever possible as consistent with each other and as cumulative.³¹⁵ This basic concept is consistent with the underlying principles of the entire Code. It encourages, by liberal interpretation, the philosophy that all contracts must be performed. As part of that philosophy the Code provides that no warranty can be created except if the seller takes some affirmative action or fails to take some required action.³¹⁶ Therefore, all warranties must be treated cumulatively and consistently unless such treatment would produce an unreasonable result or would be impossible to enforce.³¹⁷

Where it is necessary to determine the intention of the parties, and where their intention concerning the priority of the warranties is not readily apparent, section 1302.30 provides the rules of construction which a court may use to determine which warranty takes precedence over another. Generally, the express warranty takes precedence over the implied warranty, with the exception that an implied warranty of fitness for a particular purpose is not so displaced. Corollaries to the general rule provide, first, that exact or technical specifications given for goods will displace inconsistent samples, models, or general language of description.³¹⁸ Second, a sample taken from a bulk in existence at the time it is offered for sale takes precedence over an inconsistent description given in general language.³¹⁹ In essence, the most precise and specific warranty is the one that is given effect.

315. OHIO REV. CODE ANN. § 1302.30 (Page 1979) provides:

Cumulation and conflict of warranties express or implied. Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention, the following rules apply:

(A) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(B) A sample from an existing bulk displaces inconsistent general language of description.

(C) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

316. OHIO REV. CODE ANN. §§ 1302.26-.28 (Page 1979).

317. *Id.* § 1302.28, Official Comment 2.

318. OHIO REV. CODE ANN. § 1302.30 (Page 1979).

319. *Id.*

The drafters of the Code anticipated that section 1302.30 would not come into operation until the trier of fact ascertained what the parties intended by their contractual terms. In *Bancroft v. San Francisco Tool Co.*,³²⁰ the court held that where a buyer had the power of approval over a set of specifications prepared by the seller in the building of an elevator, the buyer could not recover so long as the elevator conformed to those specifications. Conformity to specifications took precedence over any other warranty. While the decision presents an excellent example of the problems resolved by section 1302.30, the decision would have been inconsistent with the Code. The court determined that conformity to the specification was not the expectation of the buyer; rather, the purchaser expected that the elevator would work as an elevator should work. Since the intention of the party in that particular instance was to get an elevator that worked, it appears that the dominant warranty was perhaps an implied warranty of fitness for a particular purpose, or at least an implied warranty of merchantability.³²¹

The "intention" test might be criticized as being too subjective to permit the trier of fact to arrive at the meaning of the contract terms. It may even be urged that stricter rules of construction are necessary to preserve the sanctity of the contract. Nevertheless, it seems that, wherever possible, the court must initially determine the intention of the parties. The precise terms of the contract are reflected in the price and the performance of the contract, and the intention of the parties can best interpret these terms. The insistence upon a rigid rule of construction for terminology that the parties agreed to after they initially entered into the contract will often result in an interpretation of the contract which is inconsistent with the parties' original intention. Thus, despite its shortcomings, the "intention" test is defensible because there is no superior rule of interpretation.³²²

The rationale for the enforcement of these rules is that the intention of the parties controls the interpretation of the terms of the contract. The intention is ascertained by referring to factors which tend to reflect that party's intention in the terms of the contract. These are not absolute rules. They can be preempted by

320. 120 Cal. 228, 52 P. 496 (1898). See generally R. DUESENBERG & L. KING, *supra* note 160, at § 7-04.

321. See Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281 (1961).

322. See generally R. DUESENBERG & L. KING, *supra* note 160, at § 7-04.

showing that at the time of entering into the transaction, conditions were such that any construction described in this section is inconsistent or unreasonable.³²³ Therefore, extrinsic evidence is admissible to determine the intent of the parties. Obviously, it is possible even that the agreement between the parties can specifically provide for the method of interpreting any terms in issue when problems arise. Although this section establishes general rules of construction regarding the relative weight to be accorded to specifications, samples, or inconsistent warranties, the common law governing the interpretation or construction of written contracts is applicable to these sales contracts as well.³²⁴

The provisions of section 1302.30 apply only when an inconsistency exists among the warranties found in the contract. Furthermore, since it is essential that the seller act in good faith, it would seem to be bad faith for the seller to insert mutually exclusive warranties within a contract. There are a number of situations where section 1302.30 is inapplicable. For example, its application may prove unnecessary if the meaning of the contract terms are clear and concise or if there is a valid disclaimer of warranties found within that contract. Moreover, if there is only one warranty within the contract or if section 1302.05, the parol evidence rule, precludes the buyer from proving the existence of the alleged inconsistent warranty, then section 1302.30 need not be applied.

Although the Code permits cumulation of warranties, implied warranties cannot exist if the contract contains express warranties regarding the precise subject matter upon which the implied warranties are based.³²⁵ Unless specifically supplanted by an express warranty, implied warranties and express warranties may coexist, and each can be enforced independently if a breach occurs.³²⁶ Only a precise and complete specification as to the goods, expressly written into the contract and supplied by the buyer, will overcome any of the implied warranties.³²⁷

323. OHIO REV. CODE ANN. § 1301.30, Official Comment 3 (Page 1979).

324. *Id.* Comment 3 explicitly provides that the listing in this section is not exhaustive. Therefore, the common law rules of construction are clearly applicable to transactions within the meaning of this section.

325. *Kilmate-Pruf Paint & Varnish Co. v. Klein Corp.*, 1 N.C. App. 431, 161 S.E.2d 747 (1968).

326. *Safeway Stores, Inc. v. L.D. Schreiber Cheese Co.*, 326 F. Supp. 504, 510 n.17 (W.D. Mo.), *rev'd on other grounds*, 457 F.2d 962 (8th Cir. 1971).

327. *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W.D. Pa.), *aff'd in*

VII. THIRD PARTY BENEFICIARY OF WARRANTIES

The preceding discussions involved the nature of the particular warranty in issue and its effect, including the protection afforded to the purchaser of the goods and whatever rights existed in the seller or the buyer when a dispute arose over a transaction in goods. The threshold question involving the third party beneficiaries of either express or implied warranties is not the nature of the defect nor the imposition or avoidance of liability, but rather, one of to whom the liability extends.

Where the buyer purchases goods from the seller and is injured by a defect in the goods, before a recovery of damages from the seller will be permitted, the buyer must prove that a defect did exist, that a breach of warranty occurred, and that as consequence of that breach the buyer was injured. However, what if it is not the buyer who has been injured? Suppose it was his wife, child, or any member of his family, or someone in his employ, or even a guest? Do the various degrees of consanguinity make a difference as to whether the buyer or those other parties can recover?

The problem can become quite difficult. The point at which the injured party is too remote from the seller or the supplier of those defective goods to reasonably expect recovery from them must be determined. Both the courts and the triers of fact must attempt to establish a terminus beyond which the seller cannot reasonably be expected to compensate an injured party. Section 1302.31 of the Ohio Revised Code is designed to deal with these problems.

Historically, the determination as to when liability would cease to attach was based on whether the plaintiff's action was in tort or in contract.³²⁸ For example, if the plaintiff's cause of action was premised on a contractual transaction, recovery was effectively denied to any injured person not a party to the contract or not in privity of contract with the seller.³²⁹ Similarly, the majority view denied recovery for breach of warranty in tort unless there was privity between the plaintiff and the defendant.³³⁰ The rationale was that liability for the breach of warranty was created only when there was a contractual relationship between the plain-

part and vacated in part on other grounds, 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1968).

328. See notes 2-6 *supra* and accompanying text.

329. *Accord*, Annot., 75 A.L.R.2d 39; *contra*, W. PROSSER, *supra* note 2, at 676-78.

330. See, e.g., *Wright v. Staff Jennings, Inc.*, 241 Ore. 301, 405 P.2d 624 (1965).

tiff and defendant. *Welsh v. Ledyard*³³¹ illustrates this approach. A woman was injured by an electrical shock when she grasped the handle of an electric cooking appliance purchased by her husband. The court held that there was no implied warranty entitling the plaintiff to recovery because she was not in privity with the seller.³³²

The original impetus for expanded protection of the purchaser under the warranties of the Code was provided by the enactment of Uniform Commercial Code section 2-318 and the three alternatives provided by the 1966 amendments.³³³ Section 2-318 was not expected to be the definitive line regarding where the seller's liability would cease. In Official Comment 3, the drafters expressly invited further common law development, thus offering section 2-318 as a minimum level of protection.³³⁴ The purpose of section 2-318 "is to give to the buyer's family, household and guests, the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.'" ³³⁵ Implicit in this statement is the idea that any breach of warranty extends the benefits of the contractual warranty to the injured third party because the seller has warranted that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used.

Ohio adopted the original version of the Uniform Commercial Code rule on third party beneficiaries of warranties.³³⁶ The Comments to the Code section provided that beyond the expressly included beneficiaries—a natural person who is in the family or household of the buyer or a guest reasonably expected to use the goods—"the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the dis-

331. 167 Ohio St. 57 (1957).

332. *Id.* at 60.

333. It should be noted that Ohio has adopted the original section rather than the amendments. Compare OHIO REV. CODE ANN. § 1302.31 (Page 1979) with UNIFORM COMMERCIAL CODE § 2-318 (1978 VERSION).

334. U.C.C. § 2-318 (1978 version).

335. OHIO REV. CODE ANN. § 1302.31, Official Comment 2 (Page 1979).

336. OHIO REV. CODE ANN. § 1302.31 (Page 1979) provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

tributive chain."³³⁷ Moreover, the section does not supersede or in any way affect any right or remedy grounded in negligence.³³⁸

Some states recognized that the peculiar local emphasis of their jurisdictions required some adaptation or modification of the Uniform Commercial Code's original section. In a similar vein, the Permanent Editorial Board for the Uniform Commercial Code recognized the need for broader protection. Consequently, in 1966 the Editorial Board amended the 1962 section by supplementing the original section with two alternatives,³³⁹ and simultaneously, amended the comments. Comment 3 states that Alternative B is designed for those jurisdictions in which the case law had already developed further than the scope of the original section and for those jurisdictions that desired to expand this class of beneficiaries. Alternative C further expands the class of beneficiaries and is asserted to be consistent with recent decisions utilizing section 402A of the Restatement of Torts.³⁴⁰

Liability arising under section 1302.31 cannot be limited or excluded by the seller. This provision does not mean that the seller is precluded from disclaiming certain kinds of warranties as to *all* persons,³⁴¹ but it does mean that if a warranty exists, all persons within section 1302.31 are covered. For example, an injured bystander can maintain the same cause of action against the seller as

337. *Id.*, Official Comment 3.

338. *Id.*, Official Comment 2.

339. U.C.C. § 2-318:2 (1978) provides two alternatives:

ALTERNATIVE B.

A seller's warranty, whether express or implied extends to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty. The seller may not exclude or limit the operation of this section.

ALTERNATIVE C.

A seller's warranty, whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

340. RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

341. See OHIO REV. CODE ANN. § 1302.29 (Page 1979).

the original party to the contract. One way the seller can avoid liability is to limit liability as to *all* persons prior to the formation of the contract.³⁴²

A seller's liability may rest on reasonable foreseeability that the goods could possibly produce an injury. For example, in *Harris v. Great Atlantic & Pacific Tea Co.*,³⁴³ a minor was injured while trying to open a bottle of beer. The court held that it was reasonable for merchants to expect, or believe that it was possible, for a child to be injured by such defective goods. Addressing the seller's expectations, the court noted:

It was of no consequence that the bottle contained beer instead of milk, ginger ale, or one of the many kinds of beverages regularly purchased, used and consumed by members of families. There was nothing illegal, as argued by the defendant, in the plaintiff's handling of the bottle in his home. Bottled beer is part of the legal larder of many homes, and is frequently handled and sometimes consumed with parental approval, by children. It was to be expected by the seller, in usual circumstances, that a father retained the parental prerogative of having his son fetch him a cold bottle of beer.³⁴⁴

Harris is a good example of the broad liability courts have found for injury arising from defective products, once the requirement of privity was abolished. The popularity of Uniform Commercial Code section 2-318 is further evidenced by the application of its philosophy in areas other than warranty law.

Section 1302.31 is cumulative in its effect. Its purpose in the Code is to broaden the class of persons having the right to sue for an injury. This section does not, and will not, modify or restrict any other theory of liability which might already exist. Accordingly, such tort theories as negligence and strict liability are compatible with section 1302.31.

A breach of warranty action does not require the plaintiff to show negligence by the defendant. Since a breach of warranty action may be pursued jointly with any other theory, the barring of a warranty action because of lack of privity should not automatically result in the barring of another action brought on the theory of negligence. If the barring of one theory barred all other theories of relief, a manufacturer of goods might be able to sell defective goods and not be liable to the ultimate consumer for an injury caused by the defect. Unfortunately, too many jurisdictions

342. See discussion on disclaimer of warranties at notes 230-97 *supra*.

343. 4 UCC REP. 585 (Mass. App. Ct. 1962).

344. *Id.* at 587.

permit the warranty to run only to the retailer rather than directly to the injured party. In doing so, the jurisdictions ignore commercial reality and actually encourage multiple law suits in order for the consumer to receive compensation.

The Code provision on third party beneficiaries was never intended to be conclusive as to who was the proper party to bring a breach of warranty action.³⁴⁵ Nevertheless, many courts interpreted these words narrowly, and the original section remains the majority view.

Section 1302.31 extends the warranty protection to third parties who are *natural* persons. In *United States Fidelity & Guaranty Co. v. Truck & Concrete Equipment Co.*,³⁴⁶ the Ohio Supreme Court strictly construed the meaning of natural persons. Auto Fleet Co., a truck leasing company, purchased a defective truck from the defendant. The plaintiff, the insurer of the leasing company, settled with the lessee and under a subrogation clause brought an action against defendant for breach of implied warranty. The Court stated that section 1302.31 did not extend the benefit of the Code's four year statute of limitations to the plaintiff's subrogor since the subrogor was not a party to the contract for sale and the plaintiff was a corporation, not a natural person.³⁴⁷

Under section 1302.31 and the alternatives provided in the 1966 amendments to the Uniform Commercial Code, a member of the buyer's immediate family, or a person living within the household, should receive the benefits of warranties extended to the buyer. Problems do arise when the injured plaintiff has a more remote relationship to the immediate buyer or is not residing in the home of the buyer. In *Woodrich v. Smith Gas Services, Inc.*,³⁴⁸ an Illinois court permitted the injured wife of the purchaser of an automobile with a defective auto-start device to recover damages despite the lack of privity between the injured party and the seller. In this particular case, it did not seem to make any difference that it was the husband's employer who actually paid for the auto-start device.

A Pennsylvania trial court in *Miller v. Preitz*³⁴⁹ denied recovery in an action brought against the seller, the distributor, and the

345. See notes 329-39 *supra* and accompanying text.

346. 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970).

347. *Id.* at 249, 257 N.E.2d at 383.

348. 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967).

349. 2 U.C.C. REP. 88 (Common Pleas Ct. Pa. 1964).

manufacturer of a defective humidifier which caused the death of the buyer's young nephew. The trial court held that the nephew had to be in privity of contract with the defendant to recover. Furthermore, the court commented that the reference to "family or household" in Pennsylvania's counterpart to Ohio Revised Code section 1302.31 did not include nonmembers of the household and there was no intent on the part of the Pennsylvania legislature to extend such protection to all blood relatives of a purchaser of defective goods. The Pennsylvania Supreme Court on appeal held that the decedent *was* within the meaning of "family" of the purchaser and therefore an action could be maintained against the seller, notwithstanding a lack of privity.³⁵⁰

The court's discussion of the case indicated that the word "family" was not intended to restrict warranty coverage unduly. The proper standard for analysis is whether it is reasonable to expect that such person might use, consume, or be affected by the goods. This reasonable expectation approach is determined by considering all the circumstances which surround the purchase and the use of the goods. Obviously, when all the circumstances surrounding the purchase and use of the goods are considered, the geographical remoteness of the family relation will be evaluated. The Pennsylvania Supreme Court in *Miller* did not sustain the action against the more remote sellers, the distributor and the manufacturer, because the decedent had not been within the benefits of any implied warranty made by them. Thus it can be deduced that Pennsylvania has not completely abandoned all privity requirements in its implied warranties cases. Courts of other states have allowed individuals found to be within the statutory definition of family to sue for breach of warranty regardless of age³⁵¹ or marital status.³⁵²

Under section 1302.31 recovery is more likely for personal injuries than for nonpersonal injuries such as property damage. If there is only an economic loss suffered, the requirement of privity of contract still seems to be a necessity. The basis for this insistence is simple; section 1302.31 limits recovery to one "who is in-

350. *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

351. *See, e.g.*, *Allen v. Savage Arms Corp.*, 52 Luzerne Legal Register Reps. 159 (Pa. 1962) (minor son injured by defective shotgun and shells purchased by his father was within the "family" and was allowed to sue the retailer and manufacturer for breach of warranty).

352. *See, e.g.*, *Johnson v. Four River Motors Corp.*, 26 Mass. App. Dec. 184 (1967) (married stepdaughter).

jured in person" and economic injury is not considered such an injury.³⁵³

Numerous attempts to broaden the doctrine established in section 1302.21 have been initiated in other jurisdictions. In *Kenney v. Sears, Roebuck & Co.*,³⁵⁴ the purchaser received a written warranty of one year on the wiring and five years on all sealed parts of a new refrigerator. The warranty remedy was limited to repair or replacement of any defective parts. The refrigerator proved defective and set fire to the apartment building in which the purchaser lived. The owner of the building attempted to bring a breach of warranty action against the seller. The threshold issue for the court was whether Uniform Commercial Code section 2-318 applied to property damage. The court held that section 2-318 applied to personal injuries but not to injuries to real property.³⁵⁵ The court held that it made no difference that the owner of the apartment building and the purchaser of the refrigerator were mother and daughter.³⁵⁶

The Code requires that for a person to have a cause of action, he or she must be a guest in the home of the buyer. Therefore, it is obvious that a passenger injured in the purchaser's automobile is not covered under the various analogues to section 1302.21 because the automobile cannot be considered to be the purchaser's home.³⁵⁷ Similarly, recovery is not possible if the guest is injured in any public place, such as a restaurant.³⁵⁸

There is a point beyond which section 1302.31 does not extend as a contract principle. Section 1302.31 should not be applied to the injured user of a defective article who has received that article from a guest in the home of the buyer, unless, of course, the user is

353. *United States Fidelity & Guaranty Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 249, 257 N.E.2d 380, 383 (1970).

354. 355 Mass. 604, 246 N.E.2d 649 (1969).

355. *Id.* at 609, 246 N.E.2d at 653.

356. *Id.*, 246 N.E.2d at 653.

357. *See, e.g.*, *Thompson v. Reedman*, 199 F. Supp. 120, 121 (E.D. Pa. 1961). *But see* *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 675 (1964). In *Bobbin v. Dinger Chevrolet, Inc.*, 65 Schuykill Legal Rec. 121 (Common Pleas Ct. Pa. 1970), the purchaser of a defective automobile subsequently married his injured passenger; this passenger was not allowed to maintain a suit for breach of warranty against the defendant. The court commented that Pennsylvania law had not extended the warranty protection to include automobile passengers or others who do not fall within the range of "reasonable foreseeability."

358. *See Galenek v. Howard Johnson, Inc.*, 24 Mass. App. Dec. 134 (1962) (guest in restaurant for whom escort bought food could not recover under U.C.C. § 2-318). *But see* *Bronson v. Club Comanche, Inc.*, 286 F. Supp. 2123 (D.C. V.I. 1968) (restaurateur strictly liable for food served because "it is immaterial that the injured patron is not the person who paid for the meal").

also a guest in the home of the buyer.³⁵⁹ Relying on Alternative A in section 2-318, a Massachusetts court in *Galaned v. Howard Johnson, Inc.*,³⁶⁰ held that a girl who became sick from eating a hot dog purchased by her friend could not maintain an action for breach of warranty for fitness because she lacked privity of contract with the defendant. Although she was the buyer's guest, she was not a household guest nor a member of his family, and therefore she was not a third party beneficiary.

The general rule is that only the purchaser or someone who falls within one of the classifications in section 1302.31 can recover for an injury produced as a consequence of a breach of an implied warranty. Thus, where a lease rather than a sale relationship is the basis for the action, or where the injured person is a guest in the home of a donee of the buyer or is a mere bystander, recovery will generally be denied in an action against the seller for breach of implied warranty. Extensions of this rule have generally taken the form of a statutory enactment of either Alternative B or C, or of case development which has based the recovery on strict liability.³⁶¹ Section 1302.21 tends to deny recovery to third parties for breach of warranty when it appears that, due to the remoteness of the party injured, the seller would become an insurer against all liability. A finding of liability, however, may have merit since the seller put the goods, admittedly defective, into the channel of trade and induced the purchase of the goods. Furthermore, those in the seller chain probably could more easily bear the burden of economic injury caused by the defective goods.

Under section 1302.31 recovery is more likely for personal injuries than for nonpersonal injuries such as property damage. If there is only an economic loss suffered, the requirement of privity of contract still seems to be a necessity. The basis for this insistence is simple; section 1302.31 limits recovery to one "who is injured in person" and economic injury is not considered such an injury.

The provisions of the Ohio Revised Code, discussed in the previous pages, are not the totality of a buyer's warranty protection

359. *Wolovitz v. Falco Prods. Co.*, 1 U.C.C. REP. 135 (Common Pleas Ct. Pa. 1963). See generally, Annot., 17 A.L.R. 3d 1010.

360. 24 Mass. App. Dec. 134 (1962).

361. For a discussion of the idea that everything which is accomplished using a strict tort theory of recovery is also acceptable using Code warranties, see Shanker, *A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Code Sales Warranty*, 29 CASE W. RES. L. REV. 550 (1979).

against defective goods. Congress has also sought to enact some consumer protection legislation, and the next section of this Article discusses the most important of those enactments.

VIII. MAGNUSON-MOSS³⁶² WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

The provisions of the Ohio Revised Code addressing the creation and limitation of warranties have, to a certain extent, mitigated the harshness of the doctrine of caveat emptor. The Code provisions have supplied a set of ground rules to protect one party from the other's overreaching. These rules are particularly important between buyers and sellers who are familiar with the intricacies of commercial transactions and who possess the bargaining power to consummate their dealings at arm's length.

Even though the Code is intended to apply to *all* commercial transactions, its warranty provisions do not always afford the consumer the same degree of protection that they offer the experienced businessperson. For example, a manufacturer may fashion his or her own express warranty on the goods and provide that this warranty is given in lieu of all other warranties, express or implied. The ordinary inexperienced consumer may be deceived into believing that this provides an effective protection against any defects in the goods. In point of fact, however, the express statement operates as an effective disclaimer of the implied warranties of merchantability and fitness for a particular purpose.³⁶³ It has been observed that

when a consumer brings a defective product in for service under a present style warranty, he is invariably in for a rude shock—discovering that the “warranty” he has received at the time of purchase could be more accurately described as a limitation on the manufacturer's liability. The consumer's rights are usually diminished rather than increased by the common law courts as being what reasonable men would expect to believe the results of the purchase and sale of items in the marketplace would imply. Unfortunately, the present law allows a seller to renounce these implied warranties. Where this is done

362. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, §§ 201-206, 88 Stat. 2183 (1975) (amending 15 U.S.C. §§ 41 *et seq.* (1970)) (codified at 15 U.S.C. §§ 2301-2312 (1976)) (hereinafter referred to as the Magnuson-Moss Warranty Act or the Act). The Act was enacted on January 4, 1975, and took effect on July 4, 1975, pursuant to 15 U.S.C. § 2312(a). For rules, regulations, and interpretations under the Magnuson-Moss Warranty Act, see 16 C.F.R. §§ 705.1 (1980).

363. OHIO REV. CODE ANN. § 1302.29(B)(1) (Page 1979). See the discussion on disclaimer of implied warranties, notes 279-309 *supra* and accompanying text.

between merchants, this may be acceptable. But when it is forced on a consumer who lacks effective purchasing power to command better terms of sale it is outrageous.³⁶⁴

The Magnuson-Moss Warranty Act was enacted to ameliorate the consumer's unequal position resulting from the limited protection of the Uniform Commercial Code. Title I of the Magnuson-Moss Warranty Act establishes minimum disclosure requirements of the written warranty terms given in connection with the sale of consumer products. It also prescribes certain minimum content standards for those warranties. During the Congressional debates, Representative Moss, cosponsor of the Act, expressed the hope that

[o]ne of the most important effects of the legislation will be its ability to relieve consumer frustration by promoting understanding and by providing meaningful remedies. The bill should also foster intelligent consumer decisions by making warranties understandable. At the same time, warranty competition should be fostered, since consumers would be able to judge accurately the content and differences between warranties for competing consumer products.³⁶⁵

While this Article will focus on title I, brief mention should be made of title II. This essentially procedural section gives the Federal Trade Commission (FTC) authority to regulate unfair or deceptive practices in commerce.³⁶⁶ The section also expands the FTC's rulemaking and investigative authority, dispute resolution mechanisms and enforcement powers in the consumer warranty area.³⁶⁷

A. *Scope of the Act*

Unlike Article 2 of the Uniform Commercial Code, which is applicable to all "goods,"³⁶⁸ the Magnuson-Moss Warranty Act covers a more limited group of items referred to as "consumer products." The Act defines a consumer product as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or

364. 119 CONG. REC. 29,480 (1973).

365. *Id.*

366. 15 U.S.C. §§ 2309, 2311 (1976).

367. See generally Leete, *A Look at the Consumer Warranty Problem—The Federal Solution*, 6 U. TOL. L. REV. 351, 368-69 (1975).

368. See, e.g., OHIO REV. CODE ANN. § 1302.01(A)(8) (Page 1979), and accompanying Official Comments.

installed).³⁶⁹ Although the Magnuson-Moss Warranty Act is clearly narrower in scope than the Uniform Commercial Code, it appears to be sufficiently broad to include almost any product made and distributed in the commercial chain of consumer buying. The inclusion of fixtures within the definition of consumer products is important because, under the common law of real property, "fixtures such as hot water heaters and air conditioners when incorporated into a dwelling became part of the real property"³⁷⁰ and therefore were removed from coverage under commercial law. The Act, however, will continue to apply to such products so long as they are considered to be a consumer product. The Act specifically excludes from coverage the sale of seeds for planting,³⁷¹ whereas this type of sale would be included under Article 2 of the Uniform Commercial Code.³⁷²

The Magnuson-Moss Warranty Act extends its protection to a "consumer," who is defined as "a buyer (other than for purposes of resale) of any consumer product or any person to whom such product is transferred during the duration of an implied or written warranty (or service contract)."³⁷³ Although the Act is applicable to direct purchasers and transferees of direct purchasers, it does not displace prior state law regarding persons not in privity with the supplier and their ability to make claims as third party beneficiaries of the warranty.³⁷⁴ This coverage of the Act is both broader and narrower than the Code. It is broader because the Act includes service contracts for consumer goods³⁷⁵ whereas the Code directly applies only to transactions in goods.³⁷⁶ Second, it is narrower because the Act exclusively covers purchases of con-

369. 15 U.S.C. § 2301(1) (1976). See *Patron Aviation, Inc. v. Teledyne Indus.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980) (an airplane engine manufactured by an Alabama motor manufacturing corporation is *not* a consumer product; therefore, the Magnuson-Moss Warranty Act does not apply). ("It would stretch the greatest of imaginations to hold that an aircraft engine is normally used 'for personal, family or household purposes.'" *Id.* at 17, 267 S.E.2d at 278.

370. H.R. REP. NO. 1107, 93d Cong., 2d Sess. 35, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7717.

371. 15 U.S.C. § 2311(a)(2) (1976).

372. See, e.g., OHIO REV. CODE ANN. § 1302.01(A)(8) (Page 1979).

373. 15 U.S.C. § 2301(3) (1976).

374. *Id.* See, e.g., *Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp.*, 264 S.E.2d 768 (N.C. App. 1980). Ohio law regarding third party beneficiaries is discussed *supra* at notes 328-42.

375. 15 U.S.C. § 2301(8) (1976) defines a service contract as "a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product."

376. See, e.g., OHIO REV. CODE ANN. § 1302.02 (Page 1979).

sumer goods, while the Code covers all goods.³⁷⁷

In order to be bound by the provisions of this Act, the seller of the consumer product must be a "warrantor." A warrantor is defined as "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty."³⁷⁸ A "supplier" refers to "any person engaged in the business of making a consumer product directly or indirectly available to consumers."³⁷⁹

During debate in the House of Representatives, an amendment to the Act was proposed that would limit the term "supplier" to "any manufacturer, producer, distributor or retailer of a consumer product" and restrict a warranty to "any undertaking by a supplier."³⁸⁰ The purpose of the amendment was to exclude newspaper publishers, broadcasters and magazine publishers from the Act's coverage and to retain the historical distinctions between mere conduits for the dissemination of advertising and individuals who personally guaranteed or warranted their products.³⁸¹

In response to this amendment, Rep. Moss, cosponsor of the Act, claimed that "it is not the intent of the committee nor was it at any stage during the consideration of this legislation, that the mere asking for the displaying of an advertisement in a newspaper or on radio or television station would confer jurisdiction upon the Federal Trade Commission."³⁸² While it is clear that the Act was never intended to cover certain advertisements, it does apply to the Good Housekeeping seal of approval, the Kosher seal, the union bug, and other similar seals. The comments by Rep. Moss make it clear that persons other than manufacturers or retailers who make representations based on the testing of samples of goods are bound by the provisions of the Act.

They are guarantors or warrantors of the product, and in many instances the housewife shopping depends more upon the seal of approval of Good Housekeeping magazine than she does upon the actual guarantee provided by the supplier. . . . We are not imposing here an unreasonable burden, but where a magazine undertakes a role other than that of advertising, where it undertakes the role of a warrantor of the product, then it should be willing to assume all of the responsibility imposed

377. See, e.g., OHIO REV. CODE ANN. § 1302.03(A)(1).

378. 15 U.S.C. § 2301(5) (1976).

379. *Id.* § 2301(4).

380. 120 CONG. REC. 31,731 (daily ed. Sept. 19, 1974) (remarks of Rep. Preyer).

381. *Id.* at 31,732.

382. *Id.* at 31,731-32 (remarks of Rep. Moss).

by this new section of the bill upon any other warrantor or guarantor of a product. I think that is a matter of elemental fairness. . . .³⁸³

Furthermore, the Act is not intended to apply to the isolated sale of a consumer product. It is intended to cover only individuals who regularly engage in making consumer products directly or indirectly available to consumers.³⁸⁴

Under the Act, the FTC has no authority to force a warrantor to create a warranty. This Act applies only when the warrantor has given the consumer a written warranty.³⁸⁵ A written warranty includes any written affirmation of fact or promise made by a supplier in connection with a sale of a consumer product which relates to the material of the product or its workmanship.³⁸⁶ If the written warranty affirms or promises that the material or the workmanship is defect-free or creates an expectation in the consumer that the consumer product will perform at a certain level over a fixed period of time, then the consumer can enforce the warranty under the Act.³⁸⁷ Additionally, a written warranty includes any written statement by a supplier of a consumer product to refund, repair, replace, or take any other action necessary to remedy the defect in the consumer product should it fail to comply with the specifications enumerated in the writing.³⁸⁸ Under the provisions of the Act, a written warranty covers not only the sales contract of consumer products, but also a contract to repair those products.

The supplier's affirmation regarding the quality of the consumer product, or an express statement providing remedial actions in the event of a defect, may or may not be considered an effective warranty. This uncertainty results from the difficulty of interpreting the language of the Act, which requires that the supplier's affirmation or promise "becomes part of the basis of the bargain between a supplier and a buyer."³⁸⁹ Whether a written affirmation, promise, or undertaking of the supplier becomes a part of the

383. *Id.* at 31,733.

384. H.R. REP. NO. 1107, *supra* note 370, at 35, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7717.

385. 15 U.S.C. § 2301(6) (1976). According to OHIO REV. CODE ANN. § 1302.26 (Page 1979), an express warranty need not be written. In fact, it can be created orally or by a description, model or sample. Apparently, such nonwritten express warranties are excluded from coverage under the Magnuson-Moss Warranty Act.

386. 15 U.S.C. § 2301(6)(A) (1976).

387. *Id.*

388. *Id.* § 2301(6)(B).

389. 15 U.S.C. § 2301 (1976).

basis of the bargain between the buyer and the supplier is a question of fact. Therefore, the trier of fact must look at the circumstances surrounding the transaction to ascertain whether the buyer expected the writing to be part of the basis of the bargain. One source that should prove helpful in analyzing this issue is the interpretation of "basis of the bargain" found in decisions construing that language in the Code.³⁹⁰

Since the Magnuson-Moss Warranty Act does not cover every conceivable circumstance in which a warranty or service contract could be given, subsection (a) of section 2311 "preserve[s] the authority of the [Federal Trade] Commission to promulgate rules and issue orders articulating the requirements of Section 5(a) of the Federal Trade Commission Act with respect to warranties and service contracts falling outside of the scope of title I."³⁹¹ The Magnuson-Moss Warranty Act does not operate to invalidate or restrict any right or remedy available to a consumer under either state or other federal laws.³⁹² Furthermore, except for sections 2308, 2304(a)(2) and (4) nothing contained in the Act will "affect the liability of or impose liability on, any person for personal injury" or "supersede any provision of State law regarding consequential damages for injury to the person or other injury."³⁹³ Yet, unless a state can demonstrate that its laws regarding written war-

390. See notes 74-80 *supra* and accompanying text for an analysis of the "basis of the bargain" test in the context of the Code.

391. H.R. REP. NO. 1107, *supra* note 370, at 43 [1974] U.S. CODE CONG. & AD. NEWS at 7725.

392. 15 U.S.C. § 2311(b)(1) (1976). See *MacKenzie v. Chrysler Corp.*, 607 F.2d 1162 (5th Cir. 1979) (a court may resort to state law in determining the applicable damages because the Act is "virtually silent" about the amount and type of damages which may be awarded for breach of an express limited warranty).

393. *Id.* § 2311(b)(2). The latter phrase clearly preserves the present rule. U.C.C. § 2-719(3) states that any limitation of consequential damages for injury from consumer goods is *prima facie* unconscionable. 15 U.S.C. § 2308 provides:

(a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration. For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purpose of this title and State law.

§ 2304(a)(2) provides:

ranties afford greater consumer protection and do not unduly burden interstate commerce, those state laws will be preempted by the Magnuson-Moss Warranty Act.³⁹⁴

B. Requirements for Disclosure of Warranty Provisions

As noted above, the Magnuson-Moss Warranty Act does not authorize the Federal Trade Commission to require a warranty in connection with the sale of a consumer product or to prescribe the duration of a written warranty.³⁹⁵ However, the Act does provide that if a supplier decides to give a warranty, that warranty must meet the requirements established by the FTC under its rulemaking powers.³⁹⁶

Section 2302 contains disclosure provisions as well as provisions which substantively regulate written warranties.³⁹⁷ The

[N]otwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

§ 2304(a)(4) provides:

[I]f the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

394. *Id.*, § 2311(c). *But see* MacKenzie v. Chrysler Corp., 607 F.2d 1162 (5th Cir. 1979) (failure of the court to give an instruction was harmless error because the plaintiff could not recover any more under the Act than was provided for under state law).

An example of a state statute which affords greater protection to the consumer and does not unduly burden interstate commerce is the Kentucky Consumer Protection Act, KY. REV. STAT. §§ 367.110-.300 (Supp. 1978). *See* Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. Ct. App. 1978) (plaintiff sued Ford Motor Co. alleging an unfair trade practice in violation of the Kentucky Consumer Protection Act), noted in 6 N. KY. L. REV. 403 (1979).

395. 15 U.S.C. § 2302(b)(2) (1976).

396. *Id.* § 2309.

397. Section 2302(a) provides that the following items, among others, may be required in a written warranty:

- (1) The clear identification of the names and addresses of the warrantors.
- (2) The identity of the party or parties to whom the warranty is extended.
- (3) The products or parts covered.
- (4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.
- (5) A statement of what the consumer must do and expenses he must bear.
- (6) Exceptions and exclusions from the terms of the warranty.
- (7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.
- (8) Information respecting the availability of any informal dispute settlement.

mandate of the Act regarding disclosure is important because without it the consumer is unprotected in the marketplace. The consumer who is not fully aware of the terms and conditions of the warranty will not have the capacity to make an intelligent evaluation of the goods purchased. Furthermore, without knowing of the terms and conditions of the warranty, the consumer cannot understand what duties are incurred with respect to the goods nor can the consumer know of any enforcement remedies which the Act provides to protect the consumer. As a consequence of the lack of knowledge, the consumer has paid part of the purchase price for protection which is not understood and which may not provide any benefit. Of course, the Act does empower the FTC to require any additional information from the warrantor which it deems necessary to assist the consumer in understanding the language of the warranty and which will further disclose the meaning that the warranty has.³⁹⁸

The FTC is responsible for prescribing rules governing the availability of the warranty at or prior to the time of the sale.³⁹⁹ By requiring the vendor to provide a warranty which can be read prior to the purchase of the consumer product, the buyer can compare products and select the most appropriate one. Prior to the Act, such written warranties were rare. Thus, the consumer had no opportunity to compare the products of two or more suppliers and select the one which offered the best warranty. Such devious schemes as warranty registration cards⁴⁰⁰ would often result in a buyer forfeiting, without knowing it, the right to warranties which

procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

398. *Id.* § 2302(a)(13). See also Guides Against Deceptive Advertising of Guarantees, 16 C.F.R. § 239 (1980).

399. 15 U.S.C. § 2302(b)(1)(A), (B) (1976).

400. A warranty registration card is usually a postcard found in the consumer product package which requests the consumer to fill it out and return it to the manufacturer. This leaves the impression on the consumer that unless the card is filled and returned to the seller, no warranty will exist. Often these cards contain modifications of the original agreement or even disclaimers of warranties that limit the rights of the consumer. Once the card

had been bargained for prior to the purchase. Under the Act,⁴⁰¹ the attempted modification or disclaimer of implied warranties by such a method would be prohibited. The Act requires that any consumer product which has a written warranty must disclose that warranty to the consumer prior to sale and no post-sale modifications or disclaimers will be effective.

The provisions of section 2302 apply only to written warranties on consumer products "actually costing" the consumer more than five dollars.⁴⁰² Any consumer product under five dollars escapes the reach of section 2302. It is unclear, however, what "actually costing" precisely means. Presumably, if the consumer wrote a check for more than five dollars, the Act would apply to that sale. A bit of legislative history, however, seems to indicate that "actually costing" was not meant to include sales taxes.⁴⁰³ A consumer product costing \$4.90 plus \$.20 in sales tax would not meet the disclosure requirements of the Act even though the consumer's total cost was \$5.10. On the other hand, when the consumer has purchased a "multiple packaged item" the total cost of which exceeds five dollars, even though if separately sold the items would sell for less than that, the "multiple packaged item" is within the contemplation of this section.⁴⁰⁴

Strangely, section 2303 applies only to "warranties which pertain to consumer products actually costing the consumer more than \$10 and which are not designated 'full (statement of duration) warranties.'" ⁴⁰⁵ This provision presents an apparent contradiction in jurisdictional amounts. Section 2302(e) provides that this Act applies to all consumer products actually costing more than five dollars.⁴⁰⁶ Section 2303(d) states that this Act applies to consumer products actually costing the consumer more than ten dollars.⁴⁰⁷ The distinction lies in the fact that section 2302 makes no attempt to designate the warranties either as "full" or "limited." Section 2302 of the Act applies to all written warranties whether they fall within section 2303's limitations. This distinc-

is signed and returned, the seller has evidence of the limitations to which the buyer has agreed. See generally U.C.C. § 2-312-16 (1972); 15 U.S.C. § 2308 (1976).

401. 15 U.S.C. § 2308 (1976).

402. *Id.* § 2302(e).

403. H.R. REP. NO. 1107, *supra* note 370, at 36, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7719.

404. 40 FED. REG. 25,722 (June 12, 1975).

405. 15 U.S.C. § 2303(d) (1976).

406. *Id.* § 2302(e) (1976).

407. *Id.* § 2303(d) (1976).

tion means that all warranties of consumer products costing more than five dollars must fully disclose all terms, but only limited warranties of consumer products costing more than ten dollars must state their designation as a limited warranty.

A warrantor may not condition a written or implied warranty on the warranted good being used in connection with any other good or service identifiable by a brand, trade, or corporate name, unless the tie-in good or service is provided without charge under the terms of the warranty. Also, the warrantor may not tie-in a good or service, unless the warrantor satisfies the FTC that its product will not function properly otherwise and that the tie-in arrangement is in the public interest.⁴⁰⁸

C. *Designation of Warranties and Minimum Standards*

Any warrantor who offers a written warranty on a consumer good which actually costs more than ten dollars must clearly and conspicuously designate the warranty as either a "full (statement of duration) warranty,"⁴⁰⁹ which must comply with the minimum Federal standards for a warranty,⁴¹⁰ or a "limited warranty,"⁴¹¹ which need not comply with all the Federal standards for a warranty.⁴¹²

408. *Id.* § 2302(c).

409. *Id.* § 2303(a)(1).

410. Section 2304(a) establishes the Federal minimum standards for a warranty. It provides:

In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

- (1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;
- (2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;
- (3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and
- (4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the product without charge.

411. 15 U.S.C. § 2303(a)(2) (1976).

412. For an example of a limited warranty which complies with the Magnuson-Moss

The duties of the warrantor under either a full warranty or a limited warranty extend to each consumer with respect to the warranted product.⁴¹³ The warrantor may impose no duties upon the consumer as a condition precedent to securing a remedy under a written warranty other than notification of the defect⁴¹⁴ and making the consumer good available to the warrantor free of encumbrances.⁴¹⁵ Although the warrantor need not compensate the consumer for incidental expenses incurred in securing the remedy (except if these are incurred because the remedy was not made in a reasonable time or stem from an unreasonable duty imposed on the consumer), the warrantor may not charge the consumer for any costs incurred in providing the remedy.⁴¹⁶ In *Pratt v. Winnebago Industries, Inc.*,⁴¹⁷ the court had an opportunity to determine what duties a warrantor may place upon a consumer's right to a remedy in the event of a defect. The consumer, who lived in Pennsylvania, purchased a Winnebago motor home from the warrantor, who operated a retail outlet in Cleveland, Ohio. After the sale, the consumer noticed several defects in the motor home, and he took it to a local representative for repairs. While the Winnebago was being repaired, the consumer decided he did not want it any more and notified the warrantor in Ohio that the Winnebago was defective and that he wanted a full refund of the purchase price. When the warrantor offered to repair the motor home instead of providing a refund, the consumer sued. The court held

Warranty Act, see *Ford Motor Co. v. Mayes*, 575 S.W.2d 480 (Ky. 1978). The 1976 warranty which Ford gave to all new car and truck purchases provided in part, as follows:

LIMITED WARRANTY

1976 NEW CAR AND LIGHT TRUCK

Ford warrants for 1976 model cars and light trucks sold by Ford that the Selling Dealer will repair or replace free any parts, except tires, found under normal use in the U.S. or Canada to be defective in factory materials or workmanship within the earliest of 12 months or 12,000 miles from either first use or retail delivery. THERE IS NO OTHER EXPRESS WARRANTY ON THIS VEHICLE. ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS IS LIMITED TO THE 12 MONTH/12,000 MILE DURATION OF THIS WRITTEN WARRANTY. NEITHER FORD NOR ANY OF ITS DEALERS SHALL HAVE ANY RESPONSIBILITY FOR LOSS OF USE OF THE VEHICLE, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS OR CONSEQUENTIAL DAMAGES.

Id. at 483. The Ford warranty was probably limited because it made repair or replacement the only remedies in the event of a defect, rather than including the remedy of refund as required in § 2304(a)(4).

413. 15 U.S.C. § 2304(b)(4) (1976).

414. *Id.* § 2304(b)(1).

415. *Id.* § 2304(b)(2).

416. *Id.* § 2304(d).

417. 463 F. Supp. 709 (W.D. Pa. 1979).

that the consumer was not entitled to both rescission of the sales contract and a refund of the purchase price by reasoning that the consumer was entitled to a refund under section 2304(a)(4) only if the product remained defective after a reasonable number of repair attempts.⁴¹⁸ The warrantor here had not had any opportunities to make repairs. Finally, the court allowed the warrantor to require the consumer to bring the motor home to Ohio for repairs, since the consumer should have expected such trips to be necessary for regular maintenance.⁴¹⁹

The supplier who issues a "full warranty" also assumes the duties of repair, replacement, or refund if the consumer product is defective. The supplier must also remedy the consumer product defect within a reasonable time and without charge to the consumer.⁴²⁰ The consumer, however, must allow the supplier to make a reasonable number of attempts to repair the goods. Nevertheless, the warrantor does not have a right to make an unlimited number of attempts to repair a defective consumer product. The number of attempts a warrantor can make will depend on the circumstances surrounding the transaction. If the product remains defective after reasonable attempts to repair, the consumer may elect to replace the goods or receive a refund.⁴²¹ The FTC, however, has the authority to establish rules as to how many repair attempts are reasonable under the circumstances.⁴²² The warrantor is not bound by the warranty if the consumer does not provide reasonable and necessary maintenance on the consumer product.⁴²³ Of course, the cost of litigating to determine what is reasonable and necessary may make it impossible for the consumer to complain, even though the burden of proof rests with the warrantor to show lack of reasonable and necessary care. The warrantor may designate a representative to perform his or her duties under a warranty; however, this designation will not make the representative a covearrantor or relieve the warrantor of the obligation to the consumer.⁴²⁴

418. *Id.* at 713-14.

419. *Id.* at 714.

420. 15 U.S.C. § 2304(a)(1) (1976).

421. *Id.* § 2301(10).

422. *Id.* § 2304(a)(4).

423. *Id.* § 2304(c). *See also id.* § 2301(a)(9), which defines reasonable and necessary maintenance as those duties which can reasonably be expected of the consumer and which keep the consumer product performing at the intended level of performance or reasonably close to that level.

424. 15 U.S.C. § 2307 (1976).

Finally, it must be noted that section 2305 provides that the two types of warranties are not mutually exclusive.⁴²⁵ Therefore, both full and limited warranties can arise on the same consumer product so long as each warranty is clearly and conspicuously displayed.

D. *Limitations on Disclaimer of Implied Warranties*

Section 2308 of the Magnuson-Moss Warranty Act⁴²⁶ and section 1302.29 of the Ohio Revised Code⁴²⁷ are parallel sections dealing with the disclaimer of the implied warranties of fitness for a particular purpose and merchantability. Manufacturers commonly give narrowly worded express warranties while disclaiming all implied warranties. The consumer is led to believe that the supplier is issuing an effective warranty for the consumer product sold. However, in reality, the manufacturer has effectively limited the consumer's rights and the manufacturer's liability in the event the goods are defective. The similarity between the two sections ends here. While section 1302.29 of the Ohio Revised Code permits the limitation of implied warranties whenever an express warranty is granted, under the Act no implied warranties may be disclaimed by a warrantor who enters into a service contract at the time of the sale or ninety days thereafter. In addition section 2308 precludes a disclaimer of implied warranties if the supplier has offered a written warranty to the consumer with respect to the consumer product.

When a supplier does not offer a written warranty and sells a consumer product "as is" or "with all faults," this language operates to limit liability under both the Code⁴²⁸ and the Act.⁴²⁹ Even though the Act requires the warrantor to give a warranty which is written in understandable language, one of the Act's shortcomings is its failure to protect the consumer fully from the impact of the words "as is" and "with all faults" when they appear in a warranty. Consumers often do not understand that these words mean that any claim of nonconformity is waived, and that the warrantor has escaped liability for any implied warranties of merchantability and fitness. The Act would have been better drafted had it taken

425. *Id.* § 2305 (1976).

426. *Id.* § 2308. See note 393 *supra*.

427. See notes 264-304 *supra* and accompanying text.

428. OHIO REV. CODE ANN. § 1302.29(C)(1) Page 1979).

429. 15 U.S.C. § 2308(a) (1976).

into account the impact of the words of art used by a supplier or warrantor in making a written warranty.

Implied warranties may be limited so long as the limitation is of reasonable duration, is conscionable, is set forth in clear and unmistakable language, and is prominently displayed in the text of the written warranty.⁴³⁰ Any other attempt to disclaim, modify, or limit implied warranties is ineffective.⁴³¹

E. Remedies

In the remedies section of the Magnuson-Moss Warranty Act, Congress explicitly states that "[The Act's] policy [is] to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."⁴³² Furthermore, the Act authorizes the FTC to establish minimum requirements for any informal dispute settlement procedures. These procedures provide for participation by independent or government entities.⁴³³ If a warrantor does establish an informal dispute settlement procedure which complies with the FTC rules, then the consumer must resort to this procedure prior to the commencement of an individual or class action.⁴³⁴

If no settlement procedure is available or a consumer is protected inadequately under the dispute settlement procedure, then an individual or class action suit may be brought in any proper forum.⁴³⁵ The consumer must satisfy three new jurisdictional requirements prior to bringing a class action in a district court: first, the amount in controversy of any individual claim must not be less than \$25; second, the amount in controversy in the aggregate must be more than \$50,000; third, the number of named plaintiffs in the class must be more than 100.⁴³⁶ The courts interpreting this section of the Act have strictly construed the jurisdictional requirements against the consumer class in an attempt to reduce the number of class actions brought in federal district courts. For example, in *Barr v. General Motors Corp.*,⁴³⁷ a consumer brought a

430. *Id.* § 2308(b).

431. *Id.* § 2308(c).

432. *Id.* § 2310(a)(1).

433. *Id.* § 2310(a)(2).

434. *Id.* § 2310(a)(3).

435. *Id.* § 2310(d)(1).

436. *Id.* § 2310(d)(3).

437. 80 F.R.D. 136 (S.D. Ohio 1978). *Accord*, *Watts v. Volkswagen Artiengesellschaft*, 488 F. Supp. 1233 (W.D. Ark. 1980). *See In re General Motors Corp. Engine Interchange*

class action on behalf of all persons who bought a 1977 Chevrolet automobile painted with inappropriate or defective paint. The consumer-plaintiff alleged that the potential class of plaintiffs was more than 100. The court dismissed the plaintiff's motion for certification of the class because the plaintiff's complaint did not contain 100 named plaintiffs pursuant to the jurisdictional prerequisite set forth in section 2310(d)(3)(c) of the Magnuson-Moss Warranty Act.

The Act empowers the Attorney General or the FTC to bring suit in a federal district court to enjoin any warrantor from making a deceptive warranty⁴³⁸ or to enjoin any person from failing to comply with the obligations imposed by the Act.⁴³⁹ If there is a likelihood of success in the action and it appears to be in the public interest, then the court may issue a preliminary restraining order or a temporary injunction without bond.⁴⁴⁰

In summary, the Magnuson-Moss Warranty Act, although flawed, is an important complement to state laws that offer consumers warranty protection. The federal statute takes a different tack from state laws by attempting to impose controls on the wording of warranties. Regulation of this type gives the ordinary buyer an opportunity to shop on the basis of the quality of warranties and therefore purchase the level of protection he or she desires.

IX. CONCLUSION

On the basis of this extensive analysis of warranty law under the Uniform Commercial Code in general and the Ohio Revised Code's version in particular, it should be evident that current warranty law has evolved from the common law doctrine of caveat emptor. Caveat emptor rewarded the seller's silence and encouraged the sale of inferior or defective items. The implied war-

Litigation, 594 F.2d 1106 (7th Cir. 1979) (all class actions brought under the Magnuson-Moss Warranty Act must comply with the jurisdictional prerequisites set forth in § 2310(d)(3)); *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D. N.Y. 1978) (plaintiff must comply with the amount in controversy requirement of § 2310(d)(3)(B) on the basis of compensatory damages alone and is not permitted to include potential punitive damages in order to have an amount in controversy of more than \$50,000); *Barnette v. Chrysler Corp.*, 434 F. Supp. 1167 (D. Neb. 1977) (action for \$7000 was dismissed for failure to comply with the jurisdictional amount in controversy of \$50,000).

438. 15 U.S.C. § 2310(c)(1) (1976).

439. *Id.* See also *Scott v. Hunt Int'l Resources Corp.*, 481 F. Supp. 21 (D.C. Ill. 1979) (district court has jurisdiction to hear case in which consumer claimed damages for failure of service contractor to comply with obligation of service contract).

440. *Id.*

ranties of the Code provide some protections for the buyer while forcing the seller to police the sale of goods. Although the Uniform Sales Act clearly began the trend, the Code and the Magnuson-Moss Warranty Act have crystalized the improvements in warranty law.

Several improvements in the evolution of sales law deserve specific consideration. First, the warranty of title is particularly well drafted and provides significant protection. The automatic attachment of the warranty and avoidance of the express-implied dichotomy is particularly commendable. In fact, it is probably in accordance with the general expectation of buyers; buyers expect the seller to possess the title to goods as well as to be able to pass such title free from any encumbrances. By requiring the seller to exclude or modify this warranty with specific language, the Code prevents a sharpdealing seller from conveying an encumbered good free from a warranty of title. Under the Code, the buyer must possess knowledge of potential or actual defects in the good's title before it may be excluded.

Second, the Code's elimination of the "patent or other trade name" exception to the implied warranty of fitness for a particular purpose is especially noteworthy. Given the exponential increase in advertising by trade name, coupled with the common usage of generic terms to indicate the type of goods an individual desires to purchase, it is easily conceivable that a buyer asking for a "Hoover" or "Wonder Bread" may rely on a seller's skill in selecting the desired good. Under prior law, the above buyer would be considered to have self-selected the goods. Therefore, no implied warranty of fitness for a particular purpose would arise. Under the Code, however, the designation of a trade name is only one factor to be considered, and it does not automatically prevent the creation of an implied warranty of fitness so long as the requisite reliance on the seller's skill is present.

The Code strikes a fair balance between buyers and sellers. The buyer is given considerable warranty protection, while the seller is not required to *insure* the goods sold and is permitted to disclaim warranties on the goods. Most of the Code's disclaimer provisions are designed to notify the buyer that he or she is purchasing goods without certain types of warranty protections. Despite the improvements in warranty law under the Code, the "as is" sale remains a problem. An "as is" sale permits the seller to exclude all implied warranties. The language may be buried in a lengthy document and may not adequately inform the buyer of

its effect. Clearly, the language "with all faults" is more informative, but the "as is" approach has received greater usage. The elimination of the "as is" language would be the best solution; failing that, the language should at least be subject to the conspicuousness requirement.

The Magnuson-Moss Warranty Act appears to be a valuable tool for the consumer interested in shopping around for the best warranty. In fact, if all consumers were to engage in this type of behavior, then the Act should conceivably operate in a manner that induces sellers to offer improved warranties in order to increase sales. Indeed, the drafters of the Act were confident that market forces would operate to force the manufacturers of goods to give better warranties and, ultimately, market a better product. However, because of its recent enactment and the relative paucity of case law, "the jury is still out," so to speak on whether the Act will actually produce any substantial improvements in warranty law.