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Article Two Warranties in Commercial Transactions: An Update

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SPECIAL PROJECT

ARTICLE TWO WARRANTIES IN COMMERCIAL TRANSACTIONS: AN UPDATE

TABLE OF CONTENTS

I.	The Scope of the Warranty Sections	1162
A.	Sale-Service Hybrids.....	1163
B.	Leases	1166
1.	Judicial Deference to the Legislature	1166
2.	Transactions in Goods	1167
3.	Disguised Sales	1167
4.	Reasoning by Analogy to the Code.....	1168
II.	Express Warranties—Section 2-313	1170
A.	The Quality of Representation.....	1170
B.	The Basis of the Bargain	1173
1.	Reliance and the Basis-of-the-Bargain Test	1173
a.	Shifting the Burden of Proving Reliance	1174
b.	The Consideration Test	1176
2.	The No-Reliance Approach	1179
3.	Proposal.....	1183
C.	Negating an Express Warranty.....	1184
1.	Opinions or “Puffing”	1184
2.	Buyer Knowledge	1188
III.	Implied Warranties	1190
A.	The Implied Warranty of Merchantability—Section 2-314	1191
1.	The Merchant Requirement—Section 2-314(1) .	1192
a.	Definition of Merchant.....	1192
b.	Isolated Sale of Goods	1193
2.	Scope of “Goods” Under Section 2-314	1197
a.	Services as Goods	1197
b.	Technological Products as Goods	1201
c.	Used Goods	1202
3.	A “Contract for Sale” Under Section 2-314	1204
a.	Incomplete Sales	1204
b.	Loans	1204
c.	Lease Transactions	1205
4.	The Standards of Merchantability—Section 2- 314(2)	1206
a.	Pass Without Objection in the Trade.....	1207

	b. Fair Average Quality (Fungible Goods)	1208
	c. Fit for Ordinary Purposes	1208
	d. Run of Even Kind, Quality, and Quantity	1211
	e. Adequately Contained, Packaged, and Labeled	1211
	f. Conform to Representations on Container or Label	1212
B.	The Implied Warranty of Fitness for a Particular Purpose—Section 2-315	1213
	1. Seller's Knowledge of Buyer's Purpose	1214
	2. Reliance	1215
	3. Overlap with Other Warranties	1217
C.	Supplemental Implied Warranties—Section 2-314(3)	1218
D.	Conclusions	1219
IV.	Damages	1220
A.	Primary Damages—Section 2-714(2)	1221
	1. Cost of Repair	1221
	2. Independent Indicia of Value	1223
	a. Value as Warranted	1224
	b. Value as Accepted	1225
	3. Special Circumstances	1225
	a. Resultant Damages	1226
	b. Entry into Section 2-714(1)	1226
	c. Subjective Valuation	1227
	d. Time-shifting	1228
B.	Resultant Damages—Section 2-715(1)	1229
	1. Incidental Damages—Section 2-715(1)	1232
	2. Consequential Damages—Section 2-715(2)	1236
	a. Loss	1238
	b. Causation	1240
	c. Foreseeability, Certainty, and Duty to Cover	1244
	1. Foreseeability	1244
	2. Certainty	1246
	a. Interruptions to the Buyer's Production Process	1247
	b. New Businesses	1248
	c. Goodwill	1250
	3. Duty to Cover	1252
C.	Conclusions	1256
V.	Limitations on Warranty Liability	1257
A.	Basic Purpose of Section 2-316	1258
B.	Disclaimers and Express Warranties—Section 2-316(1)	1258

1.	Warranty Language in the Written Agreement—	
	Consistency	1259
a.	Words of Disclaimers and the Basis of the	
	Bargain.....	1259
b.	“Time Warranties”—A Special Problem of	
	Consistency	1261
2.	Parol Warranties	1262
C.	Express Disclaimers of Implied Warranties Under	
	Section 2-316(2).....	1264
1.	Language Requirements	1264
a.	Language to Disclaim the Implied Warranty	
	of Merchantability	1264
b.	Language to Disclaim the Implied Warranty	
	of Fitness	1265
2.	Conspicuousness.....	1266
a.	The Objective Test	1267
b.	The “Evidence of Buyer Awareness” Test...	1270
c.	The Modified Objective Test.....	1271
3.	Disclaimer or Limitation of Remedy Subsequent	
	to Contracting	1272
a.	Frequently Encountered Fact Patterns.....	1274
b.	Security Agreement Disclaimers	1275
D.	Express Disclaimers of Implied Warranties Under	
	Section 2-316(3)(a).....	1276
1.	Language Requirements	1276
2.	Conspicuousness.....	1277
3.	A Narrow Reading of Section 2-316(3)(a).....	1278
4.	“As Is” and Express Warranties	1279
E.	Disclaimers Implied from Circumstances	1280
1.	By Examination—Section 2-316(3)(b).....	1280
2.	By Course of Dealing, Trade Usage, or Course	
	of Performance—Section 2-316(3)(c)	1282
F.	Cumulation and Conflict of Warranties—Section	
	2-317.....	1283
1.	Consistency Among Warranties	1284
2.	Consistency Between Express and Implied	
	Warranties	1285
3.	Conflicts Among Express Warranties	1287
G.	Remedy Limitations	1289
1.	Distinguished from Disclaimers.....	1289
2.	Unconscionability and Liability Limitations	1292
a.	Warranty Disclaimers	1292
b.	Consequential Damage Exclusions	1297
c.	Primary Damage Limitations	1299

3.	Exclusiveness of the Remedy—The Language Requirement of Section 2-719(1)(b)	1301
4.	Scope of Remedy Limitations	1302
5.	Failure of Purpose—Section 2-719(2).....	1303
a.	When Applicable	1303
b.	Failure of an Exclusive Remedy of Repair or Replacement	1305
c.	Effect of Separate Consequential Damage Exclusions After Failure of Purpose	1307
d.	Failure of Price Repayment Remedies	1309
VI.	Defenses to Warranty Actions	1310
A.	Privity—Section 2-318	1310
1.	Recovery for Personal Injury by Buyers' Employees	1315
2.	Buyer Recovery for Economic Loss from Remote Sellers.....	1316
B.	Notice.....	1317
1.	Content	1320
2.	Reasonable Time	1323
C.	The Statute of Limitations—Section 2-725	1324
1.	Timing of Accrual	1325
2.	Period of Limitation	1327

In 1978 the *Cornell Law Review* published a Special Project devoted to Article Two commercial warranties.¹ Nine years have since elapsed, and we have decided to update and reassess this important area of the law. We have discovered that although judicial treatment of many aspects of Article Two warranty law has remained stable, in some instances the courts' treatment has progressed and in other instances it has become unclear. This Special Project is our attempt to assemble these changes, interpret the progress, and suggest new lines of analysis to clarify areas of conflict.

I

THE SCOPE OF THE WARRANTY SECTIONS

Article Two's commercial warranty provisions apply to a large, but nonetheless limited, class of transactions. Article Two applies only to "transactions in goods,"² and the language of the various

¹ Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30 (1978).

² U.C.C. § 2-102 (1977). (All Special Project citations to the Uniform Commercial Code refer to the 1978 official text unless otherwise noted.) That section, which defines the scope of Article Two, provides:

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the

warranty sections further limits their application to contracts for the sale of goods.³

A. Sale-Service Hybrids

The traditional distinction between services and tangible goods blurs in today's complex commercial world.⁴ For purposes of Code warranty law, characterization of the transaction depends on whether the sale of the good or the performance of the service predominates.⁵ "This determination turns on the nature of the transac-

form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

Id.

³ *Id.* Section 2-314 explicitly states that "a warranty that the goods shall be merchantable is implied in a contract for their sale." *Id.* § 2-314 (implied warranty of merchantability). Sections 2-313 and 2-315 use the terms "seller" and "buyer." *Id.* §§ 2-313 (express warranties), 2-315 (implied warranty of fitness for particular purpose).

Although distribution agreements involve more than sales of goods, most jurisdictions treat them as governed by Article Two. *See* *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 26 U.C.C. Rep. 301 (5th Cir.) (exclusive home appliance distributorship), *cert. denied*, 444 U.S. 938 (1979); *Kirby v. Chrysler Corp.*, 554 F. Supp. 743, 35 U.C.C. Rep. 497 (D. Md. 1982) (automobile dealership); *Quality Performance Lines v. Yoho Automotive, Inc.*, 609 P.2d 1340, 29 U.C.C. Rep. 787 (Utah 1980) (automotive parts distribution); *Meuse-Rhine-Ijssel Cattle Breeders of Can., Ltd. v. Y-Tex Corp.*, 590 P.2d 1306, 26 U.C.C. Rep. 292 (Wyo. 1979) (exclusive bull semen dealership contract). *But see* *Vigano v. Wylain, Inc.*, 633 F.2d 522 (8th Cir. 1980) (applying Missouri rule that U.C.C. does not cover distribution agreements).

⁴ Section 2-105 defines "goods" as follows:

(1) "Goods" means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

U.C.C. § 2-105.

⁵ *See* *Sally Beauty Co. v. Nexxus Prods. Co.*, 801 F.2d 1001, 1005, 2 U.C.C. Rep. 2d 82, 89 (7th Cir. 1986) ("Texas applies the 'dominant factor' test to determine whether the UCC applies to a given contract or transaction: was the essence of or dominant factor in the formation of the contract the provision of goods or services?"); *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130, 26 U.C.C. Rep. 1128 (D.C. 1979) (blood transfusions considered services); *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 290 n.9, 408 N.E.2d 1370, 1375 n.9, 29 U.C.C. Rep. 1121, 1128 n.9 (1980) ("The essential thrust of the [franchise agreement] was an exchange of intangible rights, obligations and services," not sale of goods.) *Montgomery Ward & Co. v. Dalton*, 665 S.W.2d 507, 511, 38 U.C.C. Rep. 428 (Tex. Ct. App. 1983) (Code inapplicable to roof repair because service

tion, the intent of the parties as reflected in the agreement, and a common-sense judgment of whether the buyer paid for goods or for services."⁶

To determine whether a transaction constitutes a sale of goods a court must examine the entire transaction to find the essence of the agreement. When the service component is only incidental to the transaction, Article Two applies.⁷ For example, courts often treat installation of a purchased good as incidental to the sale and consequently apply Article Two warranties to both the good and the installation.⁸ In *Levin v. Hoffman Fuel Co.*⁹ a New York court determined that a contract to supply heating oil was primarily a contract

aspect predominant); *Potts v. W. Q. Richards Memorial Hosp.*, 558 S.W.2d 939, 946, 23 U.C.C. Rep. 360, 361 (Tex. Civ. App. 1977) (in case involving hospital supplying both goods and services to patient, court "must decide whether the 'essence' of this transaction was for goods or services"); *see also* *Briscoe's Foodlands, Inc. v. Capital Assocs.*, 42 U.C.C. Rep. 1234, 1238 (Miss. 1986) (relationship between supplier of video monitoring equipment and lessee was lender/secured party-debtor relationship such that supplier "did not manufacture or sell the equipment and it was not sufficiently like a seller so as to impose Article 2 warranties"). *But see* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6, at 347 (2d ed. 1980) ("We doubt that courts are deciding these cases on the basis of distinctions between sales and services.").

⁶ Special Project, *supra* note 1, at 35; *see also* *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1388-89, 36 U.C.C. Rep. 1516, 1522 (Colo. 1983) ("Useful factors to consider in determining whether 'goods' or 'service' predominates include the following: the contractual language used by the parties; whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one hand and labor on the other; the ratio that the cost of goods bears to the overall contract price; and the nature and reasonableness of the purchaser's contractual expectations of acquiring a property interest in goods . . .") (citations omitted). *But see* *Xerox Corp. v. Hawkes*, 124 N.H. 610, 615, 475 A.2d 7, 9, 38 U.C.C. Rep. 159, 162 (1984) (Code applies to warranty provisions of service agreements despite parties' intentions to create lease rather than sale).

⁷ *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 26 U.C.C. Rep. 1162 (2d Cir. 1979) (when service aspect predominates and sale is incidental, contract is for service; sale of goods aspect predominated in computer hardware and software transaction, so governed by Article Two); *cf. Zapatha*, 381 Mass. at 290, 408 N.E.2d at 1375, 29 U.C.C. Rep. at 1128 (when sale of goods is minor aspect of transaction, court is "disinclined to import automatically all the provisions of the sales article into a relationship involving a variety of subjects other than the sale of goods, merely because the contract dealt in part with the sale of goods"); *Allied Indus. Serv. Corp. v. Kasle Iron & Metals, Inc.*, 62 Ohio App. 2d 144, 405 N.E.2d 307, 29 U.C.C. Rep. 439 (1977) (no implied warranty because furnishing of goods only incidental to pollution control equipment contract).

⁸ *See, e.g., R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 35 U.C.C. Rep. 477 (8th Cir. 1983) (Article Two applied because service aspect of aluminum siding contract incidental to sale of goods); *B & B Refrigeration & Air Conditioning Serv. v. Haifley*, 25 U.C.C. Rep. 635 (D.C. 1978) (thrust of contract to furnish and install home air conditioning system was sale of goods, not installation, regardless of amount of labor required); *Sawyer v. Camp Dudley*, 102 A.D.2d 914, 477 N.Y.S.2d 498, 38 U.C.C. Rep. 1287 (N.Y. App. Div. 1984) (service of screening sand and delivery incidental to sale of sand and gravel).

⁹ 94 A.D.2d 640, 462 N.Y.S.2d 195, 36 U.C.C. Rep. 181 (N.Y. App. Div.), *aff'd*, 60 N.Y.2d 665, 468 N.Y.S.2d 104, 455 N.E.2d 663 (1983); *see also* *University of Pittsburgh v.*

for the sale of oil. Although important, the promised delivery service was incidental to the sales contract, and thus the Code warranties applied.

Similarly, Article Two may apply to goods sold in connection with repair service if the sale aspect predominates the transaction.¹⁰ Thus, in *T-Birds, Inc. v. Thoroughbred Helicopter Service, Inc.*¹¹ the court held that the Code did not apply to a helicopter repair contract because the service aspect, overhauling the helicopter engine, predominated.¹²

In deciding whether to classify a transaction as a sale of goods subject to Article Two courts should focus on the Code's underlying principles.¹³ The Code itself requires liberal construction to promote its underlying principles.¹⁴ Consequently, courts examining

Equitable Gas Co., 5 Pa. D. & C. 3d 303, 24 U.C.C. Rep. 1131 (Ct. C.P. 1978) (warranty implied under Code in sale of natural gas).

¹⁰ See, e.g., *Northwestern Equip., Inc. v. Cudmore*, 312 N.W.2d 347, 33 U.C.C. Rep. 160 (N.D. 1981) (primary purpose of contract to repair bulldozer was service; sale of parts incidental); *Montgomery Ward & Co. v. Dalton*, 665 S.W.2d 507, 511, 38 U.C.C. Rep. 428 (Tex. Ct. App. 1983) (repair of roof predominantly service under dominant purpose test).

¹¹ 540 F. Supp. 548, 34 U.C.C. Rep. 13 (E.D. Ky. 1982).

¹² *Id.* at 551, 34 U.C.C. Rep. at 14. The *T-Birds* court concluded that the case did not involve a transaction in goods, but "involved a rendition of services in which a sale of goods were [sic] incidental thereto." *Id.*, 34 U.C.C. Rep. at 14.

¹³ Section 1-102 expresses some of those principles; it provides in part:

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102(1)-(2). Professors White and Summers, after noting that this section "does not exhaustively specify all the Code's underlying purposes," mention the additional purpose "that the law of commercial transactions be, so far as reasonable, liberal and nontechnical" even to the extent of being "anti-technical." J. WHITE & R. SUMMERS, *supra* note 5, § 4, at 15-16.

¹⁴ U.C.C. § 1-102; see *supra* note 13. The official commentary to the section provides in part:

It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.

Courts have . . . recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act. They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply. Nothing in this Act stands in the way of the continuance of such action by the courts.

hybrid situations should consider factors such as simplification, modernization, and clarification of commercial law.

B. Leases

As with goods and services, the distinction between sales and leases is unclear. Courts have followed several approaches in handling lease cases under the Code.

1. *Judicial Deference to the Legislature*

Several courts have strictly construed various Article Two provisions to preclude extension of Code warranties to leases absent express legislative authorization.¹⁵ For example, in *Baker v. Promark Products West, Inc.*¹⁶ the Tennessee Supreme Court reversed a lower-court finding that even in the absence of a good reason to restrict the implied warranty of merchantability to sales, section 2-314's reference to contracts for sale controlled, and only the legislature could expand its scope to include leases and bailments.¹⁷ The Supreme Court concluded that "the Tennessee legislature *intended* that there exist in a products liability action a cause of action for

Id. comment I (citations omitted); *see infra* text accompanying note 35.

One commentator has suggested that courts should apply the Code's warranty provision by analogy to utility service contracts:

The problems arising between sellers and buyers in utility supply contracts are similar to those encountered in other commercial relationships. Problems of . . . warranty . . . may even be magnified, both because utility products are necessary and potentially dangerous and because there is great disparity of bargaining power between seller and buyer. Applying the Code to the sale of utilities would serve the Code's policies of uniformity, expansion and modernization of commercial practices.

Mallor, *Utility "Services" Under the Uniform Commercial Code: Are Public Utilities in for a Shock?*, 56 NOTRE DAME LAW. 89, 97 (1980); *see infra* notes 32-34 and accompanying text.

¹⁵ *See* *Briscoe's Foodland, Inc. v. Capital Assocs.*, 42 U.C.C. Rep. 1234, 1237 (Miss. 1986) (noting limiting language of sections 2-102 and 2-106, court determined transaction did not fall under Article Two because title did not pass to lessee and transaction was lease rather than sale); *R. & W. Leasing v. Mosher*, 195 Mont. 285, 290, 636 P.2d 832, 835, 33 U.C.C. Rep. 150, 151 (1981) (implied warranties inapplicable to leasing agreement because limited to sales); *Leake v. Meredith*, 221 Va. 14, 17, 267 S.E.2d 93, 95, 29 U.C.C. Rep. 484, 487 (1980) ("If the General Assembly had intended the warranty provisions of the Code to be applicable to leases, it could have changed the terms of these provisions. Since the legislature chose not to do so, we conclude that [Virginia's § 2-315] is inapplicable to chattel leases."). *But cf. Briscoe's*, 42 U.C.C. Rep. at 1241 (Robertson, J., concurring) ("when determining whether Article 2 applies by analogy to a lease, one question which should *not* be asked is 'Where is the title?'").

¹⁶ 692 S.W.2d 844, 41 U.C.C. Rep. 725 (Tenn. 1985).

¹⁷ *See id.* at 846, 41 U.C.C. Rep. at 728 (paraphrasing lower court's reasoning). *But cf. H. Russell Taylor's Fire Prevention Serv. v. Coca Cola Bottling Corp.*, 99 Cal. App. 3d 711, 160 Cal. Rptr. 411, 27 U.C.C. Rep. 1312 (1979) (California law allows bailor to elect to treat bailee's conversion of goods as fictional contract in sales resulting in application of section 2-725).

breach of warranty arising out of a lease transaction.”¹⁸ Thus, deference to the legislature served to expand warranties rather than to restrict them.

Strict construction of the Code’s statutory language may also contravene the intent of the Code’s drafters.¹⁹ Given section 1-102’s language that the Code “shall be liberally construed and applied to promote its underlying purposes and policies,”²⁰ courts should reject strict constructions whenever the result conflicts with such purposes and policies.

2. *Transactions in Goods*

Some courts rely on section 2-102’s provision that Article Two “applies to transactions in goods”²¹ in order to bring leases within the scope of the warranty provisions.²² For example, in *Xerox Corp. v. Hawkes*²³ the New Hampshire Supreme Court applied warranty provisions to an equipment lease, reasoning that section 2-102 does not refer to “sales,” but rather to the broader concept of “transactions in goods.”²⁴ Under this approach, the phrase “transactions in goods” encompasses leases as well as sales.²⁵

3. *Disguised Sales*

Several courts look to the effect of the lease and deny warranty protection to “true leases,” but grant protection to leases they deem “disguised sales.”²⁶ In determining whether the transaction constitutes a disguised sale, courts consider “the intention of the parties as determined by the [particular] facts of each case.”²⁷ Some courts

¹⁸ 692 S.W.2d at 849, 41 U.C.C. Rep. at 732 (emphasis added).

¹⁹ See U.C.C. § 1-102 comment 1; *supra* note 14.

²⁰ U.C.C. § 1-102(1).

²¹ *Id.* § 2-102.

²² The phrase “transaction in goods” can have various meanings; in *Wood v. Wilkinson*, 425 So. 2d 1062, 35 U.C.C. Rep. 41 (Ala. 1982), the court considered the exchange of an airplane for real estate a transaction in goods.

²³ 124 N.H. 610, 475 A.2d 7, 38 U.C.C. Rep. 159 (1984).

²⁴ *Id.* at 615, 475 A.2d at 9, 38 U.C.C. Rep. at 162.

²⁵ See *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 696, 399 N.E.2d 1355, 1364, 28 U.C.C. Rep. 336, 350 (1980) (Rizzi, J., dissenting) (“any transaction in goods meeting the requirements of § 2-315 should carry with it an implied warranty of fitness regardless of whether the transaction is a sale or lease”).

²⁶ For discussion of the “true lease” theory, see *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1295, 30 U.C.C. Rep. 849, 854-55 (5th Cir. 1980).

²⁷ *All-States Leasing Co. v. Ochs*, 600 P.2d 899, 904, 42 Or. App. 319, 323, 27 U.C.C. Rep. 808, 813 (1979); see also *Uniflex, Inc. v. Olivetti Corp. of Am.*, 86 A.D.2d 538, 445 N.Y.S.2d 993, 33 U.C.C. Rep. 294 (N.Y. App. Div. 1982) (if lease for computer is a “true” one, Code warranties will not apply); *Burton Compressor Corp. v. Stateline Forest Prods., Inc.*, 79 Or. App. 626, 628, 720 P.2d 386, 387, 2 U.C.C. Rep. 2d 259, 260 (1986) (“Rental Purchase Agreement” for industrial air compressor not a “pure lease,” but rather a contract for sale under which seller lessor reserved only a security interest).

rely on objective factors in making the characterization. According to a Maine court, "Whether a lease is 'intended as security' is not a matter of the parties' subjective intent, but rather of the objective effects of the transaction."²⁸ The court added that "[t]he objective effect of the contract, taken as a whole, was that 'upon compliance with the terms of the lease, [lessee-buyer would] become . . . the owner of the property for no additional consideration.'"²⁹

4. Reasoning by Analogy to the Code

Courts also apply Article Two's commercial warranty rules to leases by analogy.³⁰ Under this approach, "The Code, as a general legislative statement of public policy regarding commercial transactions, becomes a premise for judicial reasoning."³¹ The policies that support applying warranties to sales of goods usually apply with

²⁸ *Hannaford Bros., Co. v. State Tax Assessor*, 487 A.2d 251, 254, 40 U.C.C. Rep. 374, 378 (Me. 1985) (using Code standards in tax case to determine whether transaction was lease or sale).

²⁹ *Id.*, 40 U.C.C. Rep. at 378.

³⁰ See Special Project, *supra* note 1, at 41. The official comments provide some support for this view:

The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

U.C.C. § 2-101 comment; see also *id.* § 2-313 comment 2; *infra* note 31.

According to the concurring opinion in *Briscoe's Foodland, Inc. v. Capital Assocs.*, 42 U.C.C. Rep. 1234 (Miss. 1986), the courts should "incorporate into our law the 'by analogy' approach to use of Article 2 of the Uniform Commercial Code in equipment leasing transactions . . . but only to the extent that the lease is the functional equivalent of a sale and the provisions of Article 2 otherwise fit." *Id.* at 1239 (Robertson, J., concurring).

³¹ Special Project, *supra* note 1, at 41-42. Comment 2 to section 2-313 states:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents [T]he policies of this Act may offer useful guidance in dealing with further cases as they arise.

U.C.C. § 2-213 comment 2; see also 3 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-314:12, at 118-19 (1983) (use of reasoning by analogy to extend Code warranties to lease transactions that in past would have been conducted as sales). *But see* *Leake v. Meredith*, 221 Va. 14, 17, 267 S.E.2d 93, 95, 29 U.C.C. Rep. 484, 486 (1980) (comments "should not become devices for expanding the scope of Code sections where language within the sections themselves defies such an expansive interpretation").

equal force to leases.³² Moreover, commercial realities such as the increased use of leases and the resemblance of many leases to sales support an analogy approach.³³ Courts use this approach to extend Code warranties to nonsale transactions in goods.³⁴

Of the approaches canvassed, the analogy method offers the greatest potential for expanding the application of Code warranty principles. The reasoning of the Code's drafters supports such application:

The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle

³² See *W. E. Johnson Equip. Co. v. United Airlines*, 238 So. 2d 98, 100, 8 U.C.C. Rep. 53, 56 (Fla. 1970):

The reasons for imposing the warranty of fitness in sales cases are often present in lease transactions. Public policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases. . . . [T]here may be as much or more reliance on the competence or expertise of the lessor than on the competence of the seller. The prospective lessee with an immediate need is more apt to spend less time "shopping around" for the most suitable chattel if he contemplates possession for a relatively short time rather than permanent ownership. Just as in the sale of goods, the lessee may have little opportunity or ability to detect a design or other characteristic inherent in the leased chattel that might render it unsuitable for a particular intended use. The lessor as well as the seller is able to sustain or distribute as a cost of doing business the expense of protecting himself against damages sustained by breach of this warranty.

See also *Hertz Comm. Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 226, 229, 298 N.Y.S.2d 392, 395, 6 U.C.C. Rep. 132, 135 (N.Y. Civ. Ct. 1969) ("it would be anomalous if this large body of commercial transactions involving leases were subject to different rules of law than other commercial transactions which tend to the identical economic result"), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (N.Y. App. Term 1970).

³³ Special Project, *supra* note 1, at 41-43.

³⁴ See *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1297, 30 U.C.C. Rep. 849, 858 (5th Cir. 1980) (noting in dicta that economic effect of computer lease same as that of sale); *Januse v. U-Haul Co.*, 399 So. 2d 402, 31 U.C.C. Rep. 1005 (Fla. Dist. Ct. App. 1981) (Code extended in Illinois by analogy so that warranties apply to equipment lease for trucks with defective steering mechanism); *All-States Leasing Co. v. Bass*, 96 Idaho 873, 879, 538 P.2d 1177, 1183, 17 U.C.C. Rep. 933, 948 (1975) (By analogy in a lease transaction, in order for such an implied warranty [of fitness for a particular purpose] to arise, it must be shown that: (1) the lessor was made aware of the lessee's need, (2) that the lessor recommended a product, and (3) that the lessee leased the product as recommended.); *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 687, 399 N.E.2d 1355, 1358, 28 U.C.C. Rep. 336, 341 (1980) (Code not applicable to facts of case, but "application of selected provisions of article 2 to leases by analogy is the most well-reasoned approach"); *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 291, 408 N.E.2d 1370, 1375, 29 U.C.C. Rep. 1121, 1128 (1980) (in nonwarranty case, principles of Code apply by analogy even if franchise agreements not otherwise covered by Code); cf. *Briscoe's*, 42 U.C.C. Rep. at 1239 (Robertson, J., concurring) (Article Two warranties inapplicable "not because the instrument on its face is a lease agreement and not a contract of sale—a fact to my mind of little consequence, but because the transaction in question is not analogous to the concept of a sale as contemplated by UCC Article 2").

in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.³⁵

The Code stresses substance over form³⁶ and liberal constructions that "promote its underlying purposes and policies."³⁷ Consequently, the philosophy of the Code all but demands use of the analogy method to fully implement its purposes. Moreover, courts can best accommodate the needs of modern commercial transactions by applying warranty protection in situations where the Code's principles apply, regardless of the transaction's form.

II

EXPRESS WARRANTIES—SECTION 2-313

A. The Quality Representation

Express warranties are representations made by a seller to a buyer that relate to the quality or performance of the product sold. The seller must deliver goods that conform to his representations unless he proves that those representations did not create an enforceable express warranty:³⁸

- (1) Express warranties by the seller are created as follows:
 - (a) 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.
 - (b) 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.
 - (c) 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.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" 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

³⁵ U.C.C. § 1-102 comment 1; see J. WHITE & R. SUMMERS, *supra* note 5, § 4, at 18 ("The comment to 1-102 [directs] that Code provisions be extended by analogy when their rationale justifies this.").

³⁶ See J. WHITE & R. SUMMERS, *supra* note 5, § 4, at 15.

³⁷ U.C.C. § 1-102(1); see also Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965) (discussing use of reasoning by analogy in context of Code).

³⁸ See *infra* note 74 and accompanying text.

opinion or commendation of the goods does not create a warranty.³⁹

Section 2-313 enumerates two necessary components of an express warranty. First, the seller's representations must include either an affirmation of fact or promise relating to the goods, a description of the goods, or a sample or model of the goods.⁴⁰ Second, the affirmation or promise, the description, or the sample or model must be part of the basis of the bargain.

The first component describes the various forms of an express warranty. An affirmation of fact or promise relating to the product represents the most common way to create an express warranty. Sellers make these warranties by advertisement,⁴¹ brochure,⁴² written sales contract,⁴³ owner's manual,⁴⁴ repairs logbook,⁴⁵ or oral representation.⁴⁶ Affirmations of fact or promises generally relate to the good's quality.⁴⁷

Descriptions also create express warranties. Like affirmations

³⁹ U.C.C. § 2-313.

⁴⁰ Special Project, *supra* note 1, at 45-50. The phrase "seller's representations" refers collectively to the three categories listed in the Code.

⁴¹ See, e.g., *McKnely v. Sperry Corp.*, 642 F.2d 1101, 1106, 30 U.C.C. Rep. 1533, 1538 (8th Cir. 1981) (advertisement stated product was "general purpose winch"); *Yost v. Millhouse*, 373 N.W.2d 826, 829, 41 U.C.C. Rep. 1623, 1626 (Minn. Ct. App. 1985) (advertisement stated horse was registered); *Pake v. Byrd*, 55 N.C. App. 551, 552-53, 286 S.E.2d 588, 589, 33 U.C.C. Rep. 835, 836-37 (1982) (advertisement that tractor was in "good condition"); *McGregor v. Dimou*, 101 Misc. 2d 756, 760, 422 N.Y.S.2d 806, 810, 28 U.C.C. Rep. 66, 70-71 (N.Y. Civ. Ct. 1979) (advertisement that car was in "very good condition").

⁴² See, e.g., *Automated Controls, Inc. v. MIC Enters., Inc.*, 27 U.C.C. Rep. 661, 669 (D. Neb. 1978), *aff'd*, 559 F.2d 288, 27 U.C.C. Rep. 677 (8th Cir. 1979) (brochure represented seller's expertise in product manufacture); *Colorado-Ute Elec. Ass'n v. Envirotech Corp.*, 524 F. Supp. 1152, 1156, 33 U.C.C. Rep. 965, 971 (D. Colo. 1981) (brochure stated that product would meet any industrial application); *Keith v. Buchanan*, 173 Cal. App. 3d 13, 21-22, 220 Cal. Rptr. 392, 396-97, 42 U.C.C. Rep. 386, 391-92 (1985) (brochure represented boat as "seaworthy" and "well equipped").

⁴³ See, e.g., *Colorado-Ute Elec. Ass'n*, 524 F. Supp. at 1156-57, 33 U.C.C. Rep. at 971-72 (sales contract warranted performance of product); *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261-62, 36 U.C.C. Rep. 437, 440 (Ala. 1983) (warranty included in sales agreement).

⁴⁴ See, e.g., *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 321, 34 U.C.C. Rep. 71, 74-75 (Me. 1982) (statements in owner's manual affirming quality of good could be affirmation of fact but not found express warranty here because not relied on by buyer).

⁴⁵ See, e.g., *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 56, 29 U.C.C. Rep. 1497, 1502-03 (8th Cir. 1980) (repair and inspection history of aircraft given in logbook).

⁴⁶ See, e.g., *Leininger v. Sola*, 314 N.W.2d 39, 43-44, 33 U.C.C. Rep. 191, 197-98 (N.D. 1981) (statement that cows purchased were pregnant); *Society Nat'l Bank v. Pemberton*, 63 Ohio Misc. 26, 27-31, 409 N.E.2d 1073, 1075-77, 30 U.C.C. Rep. 76, 78-80 (Ohio Mun. Ct. 1979) (statement on truck's ability to perform); *Miller v. Hubbard-Wray Co.*, 52 Or. App. 897, 901-03, 630 P.2d 880, 882-83, 32 U.C.C. Rep. 1378, 1382-84 (1981) (statement that baler was only two years old and was used only one year).

⁴⁷ See *supra* notes 41-46.

of fact, descriptions may exist in brochures,⁴⁸ advertisements,⁴⁹ owner's manuals,⁵⁰ and sales agreements.⁵¹ Additionally, they may exist in letters⁵² and invoices.⁵³ Furthermore, unlike affirmations of fact, the buyer can create an express warranty by providing specifications to which the goods must conform.⁵⁴ Descriptions generally tend to focus on the product's physical attributes.⁵⁵

Finally, section 2-313 allows samples or models presented to the buyer to form express warranties. The official commentary distinguishes a sample from a model: "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."⁵⁶ For example, in *Amtel, Inc. v. Arnold Industries, Inc.*⁵⁷ the seller produced threaded steel cones as a component for the buyer's log-splitting machine. The buyer approved a test-run batch and ordered 1,500 cones. The court stated that the case "involve[d] a 'model,' rather than a 'sample,' for when the cones in the 'test run' were produced, the bulk of the goods ultimately sold had not yet even been created."⁵⁸ However, a sam-

⁴⁸ See, e.g., *AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 228-29, 30 U.C.C. Rep. 81, 85-86 (N.D. Ill. 1980) (bulletins distributed by seller gave product specifications); *Keith v. Buchanan*, 173 Cal. App. 3d 13, 22, 220 Cal. Rptr. 392, 397, 42 U.C.C. Rep. 386, 391 (1985) (brochure described boat as "picture of sure-footed seaworthiness"); *Carter Hawley Hale Stores, Inc. v. Conley*, 372 So. 2d 965, 968, 26 U.C.C. Rep. 860, 862-63 (Fla. Dist. Ct. App. 1979) (certificate described diamond's features).

⁴⁹ See, e.g., *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 195, 668 P.2d 65, 71 35 U.C.C. Rep. 804, 814 (1983) (advertising material made numerous descriptions of mobile home's features).

⁵⁰ See, e.g., *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 321, 34 U.C.C. Rep. 71, 74-75 (Me. 1982) (owner's manual description of goods creating express warranty).

⁵¹ See, e.g., *In re Barney Schogel, Inc.*, 34 U.C.C. Rep. 29, 46 (Bankr. S.D.N.Y. 1981) (sales agreement gave specifications of product).

⁵² See, e.g., *Modley v. Fluid Power of Memphis, Inc.*, 640 S.W.2d 222, 224-25, 35 U.C.C. Rep. 1141, 1143-44 (Tenn. Ct. App. 1982) (letter describing operation of clothing press machine).

⁵³ See, e.g., *Superior Wire & Paper Prods., Ltd. v. Talcott Tool & Mach., Inc.*, 184 Conn. 10, 18-19, 441 A.2d 43, 47-48, 31 U.C.C. Rep. 101, 107-08 (1981) (invoice giving product's specifications generally creates express warranty but when invoice contains conflicting descriptions warranty's existence is jury question).

⁵⁴ See, e.g., *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 411-12, 42 U.C.C. Rep. 1, 10-11 (8th Cir. 1985) (buyer's proposed technical specifications adopted by seller in contract created express warranty); see also R. NORDSTROM, LAW OF SALES § 71, at 222 (1970).

⁵⁵ For more detailed discussion of descriptions under section 2-313, see Special Project, *supra* note 1, at 46-49.

⁵⁶ U.C.C. § 2-313 comment 6.

⁵⁷ 31 U.C.C. Rep. 48 (D. Conn. 1980).

⁵⁸ *Id.* at 56; see also *AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 228, 30 U.C.C. Rep. 81, 85-88 (N.D. Ill. 1980) (lining materials for bottle caps supplied to buyer was sample); *Automated Controls, Inc. v. MIC Enters., Inc.*, 27 U.C.C. Rep. 661, 669 (D. Neb. 1978), *aff'd*, 559 F.2d 288, 27 U.C.C. Rep. 677 (8th Cir. 1979) (in-house test of

ple drawn from the bulk of the goods sold "must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility," while "the mercantile presumption that [a model] . . . has become a literal description of the subject matter is not so strong."⁵⁹ Samples, therefore, create an express warranty more easily than models.⁶⁰

B. The Basis of the Bargain

Section 2-313's second component prescribes when an effective representation becomes an express warranty. It requires that a seller's representations become "part of the basis of the bargain"⁶¹ to create an express warranty. Section 2-313 and the official comments fail to define this requirement, leaving courts without a specific standard to apply in breach-of-express-warranty cases.⁶² Courts have fashioned a number of tests to respond to this ambiguous requirement.⁶³ This section first discusses the various interpretations of the basis-of-the-bargain requirement, devoting particular attention to those tests purporting to incorporate the commentary's "no particular reliance" provision.⁶⁴ Next, this section presents its own interpretation of the basis-of-the-bargain requirement. Finally, it proposes a standard for applying the requirement in express warranty cases. The discussion incorporates the goals of section 2-313, which are to ease the buyer's burden of proof in establishing an express warranty claim⁶⁵ and to protect the buyer's expectations created by the seller's statements.⁶⁶

1. *Reliance and the Basis-of-the-Bargain Test*

Section 2-313 replaced the Uniform Sales Act's express requirement that the buyer prove actual reliance on the seller's representa-

electronic control system demonstrated to buyer deemed a sample); *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 289, 29 U.C.C. Rep. 794, 803 (Tex. Civ. App. 1980) (steel pans lined with particular lining would be sample under section 2-313).

⁵⁹ U.C.C. § 2-313 comment 6.

⁶⁰ For more on samples and models, see Special Project, *supra* note 1, at 49-50.

⁶¹ U.C.C. § 2-313(1).

⁶² Although the official comments do not give a precise definition for the basis-of-the-bargain requirement, they do provide courts with a loose framework to begin constructing a workable test for determining if a seller's representations create an express warranty. See *infra* notes 139-142 and accompanying text.

⁶³ These tests generally turn on whether a buyer must rely on the seller's representations when purchasing a good for those representations to create an express warranty. See *infra* notes 67-112 and accompanying text.

⁶⁴ See U.C.C. § 2-313 comment 3.

⁶⁵ See *infra* notes 109-12 and accompanying text.

⁶⁶ See *infra* notes 131-36 and accompanying text.

tions⁶⁷ with the basis-of-the-bargain test.⁶⁸ Courts are divided on the nature of the reliance requirement under section 2-313.⁶⁹ Some courts interpret the basis-of-the-bargain clause as shifting to the seller the burden of proving the buyer's reliance. Others reject a reliance requirement but substitute an awareness or inducement standard.

a. *Shifting the Burden of Proving Reliance.* Although the law remains unsettled in this area, most courts cite the official commentary when addressing the buyer reliance issue.⁷⁰ The relevant provision states: "In actual practice affirmations of fact made by the seller about the goods during a 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."⁷¹ Some courts⁷² and commentators⁷³ interpret the commentary to shift the burden of proof so that the seller must

⁶⁷ Section 12 of the Uniform Sales Act provided:

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.

UNIF. SALES ACT § 12 (1906), reprinted in I. MARISH, A TREATISE ON THE LAW OF SALES 758 (1930); see Special Project, *supra* note 1, at 50-51.

⁶⁸ See Special Project, *supra* note 1, at 50.

⁶⁹ *Id.* at 51-55.

⁷⁰ See, e.g., *Downie v. Abex Corp.*, 741 F.2d 1235, 39 U.C.C. Rep. 427 (10th Cir. 1984); *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 36 U.C.C. Rep. 437 (Ala. 1983); *Keith v. Buchanan*, 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 42 U.C.C. Rep. 386 (1985); *Allied Fidelity Ins. Co. v. Pico*, 99 Nev. 15, 656 P.2d 849, 35 U.C.C. Rep. 380 (1983); *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 416 A.2d 394, 29 U.C.C. Rep. 369 (1980); *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 29 U.C.C. Rep. 794 (Tex. Civ. App. 1980). But see *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 37 U.C.C. Rep. 429 (11th Cir. 1983); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 39 U.C.C. Rep. 1625 (Fla. Dist. Ct. App. 1984); *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 219 Neb. 775, 366 N.W.2d 424, 40 U.C.C. Rep. 1659 (1985). These latter cases inexplicably held that under section 2-313 the buyer must still prove reliance on the seller's representations to satisfy the basis-of-the-bargain requirement.

⁷¹ U.C.C. § 2-313 comment 3.

⁷² See *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 659, 42 U.C.C. Rep. 462, 470-73 (Del. Super. Ct. 1985) (reaching same result without expressly mentioning comment 3); *Indust-Ri-Chem Laboratory, Inc.*, 602 S.W.2d at 294, 29 U.C.C. Rep. at 810-11. The *Pack & Process, Inc.* court did not cite comment 3 in its short discussion of express warranties, but simply stated that section 2-313 shifts the burden of proof to the seller. 503 A.2d at 659, 42 U.C.C. Rep. at 472.

⁷³ See J. WHITE & R. SUMMERS, *supra* note 5, § 9-4, at 334-35; Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372, 385 (1968). Professors White and Summers do not conclusively adopt a precise interpretation of comment 3's no reliance provision, but state that the burden shifting theory is arguably sound.

prove that the buyer did not rely on the seller's affirmations of fact. This construction rests primarily on comment 3's statement that "any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."⁷⁴

In *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*⁷⁵ the court adopted this interpretation by ruling that a seller, who introduced proof of the buyer's lack of reliance, was entitled to a jury instruction on reliance.⁷⁶ After declaring that the U.C.C. does not require an affirmative reliance test,⁷⁷ the court confronted the difficult problem of a buyer who knew that the seller's representations were false.⁷⁸ The court reasoned that such a "representation cannot be a part of the basis of the bargain" and therefore, "in some instances a jury instruction on *lack of reliance* may be germane to the basis of the bargain issue."⁷⁹ The court concluded that the instruction must place the burden of proving the buyer's lack of reliance on the seller.⁸⁰

The court's reasoning in *Indust-Ri-Chem* contains several flaws. The most obvious is that, even though purporting to reject a reliance requirement,⁸¹ the court nonetheless retained it by allowing the seller to escape liability upon proof that the buyer failed to rely.⁸² The nonrelying buyer still risks losing his claim if the seller can adequately show a lack of reliance.⁸³ Therefore, the buyer must have relied to succeed on his warranty claim.

One commentator has suggested that the *Indust-Ri-Chem* court confused itself with its illustration of a buyer who knows that a seller's representation is untrue.⁸⁴ The court assumed that the only rationale for taking the representation out of the basis of the bargain was a lack of reliance.⁸⁵ A buyer who knows a seller's statements are either untrue or mistaken, however, does not expect the goods to conform to these statements.⁸⁶ Such statements never enter into the agreement between the two parties, not because the buyer failed to rely, but "because the buyer's knowledge forecloses

⁷⁴ U.C.C. § 2-313 comment 3.

⁷⁵ 602 S.W.2d 282, 29 U.C.C. Rep. 794 (Tex. Civ. App. 1980).

⁷⁶ *Id.* at 293-94, 29 U.C.C. Rep. at 810-11.

⁷⁷ *Id.* at 293, 29 U.C.C. Rep. at 809.

⁷⁸ See *infra* notes 166-78 and accompanying text.

⁷⁹ 602 S.W.2d at 293, 29 U.C.C. Rep. at 810 (emphasis added).

⁸⁰ *Id.* at 294, 29 U.C.C. Rep. at 811.

⁸¹ *Id.* at 293, 29 U.C.C. Rep. at 809.

⁸² *Id.* at 294, 29 U.C.C. Rep. at 811.

⁸³ *Id.* at 293-94, 29 U.C.C. Rep. at 810.

⁸⁴ See Murray, "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 294-95 (1982).

⁸⁵ 602 S.W.2d at 293-94, 29 U.C.C. Rep. at 810.

⁸⁶ Murray, *supra* note 84, at 295.

any such expectation."⁸⁷ The *Indust-Ri-Chem* court's reliance analysis needlessly creates the possibility that other classes of buyers may have their warranty protection curtailed.

Finally, the *Indust-Ri-Chem* court erroneously concluded that comment 3's "clear affirmative proof"⁸⁸ requirement for removing a seller's representation from the agreement meant proof that the buyer failed to rely. Because the previous line in comment 3 states that "no particular reliance on such statements need be shown,"⁸⁹ the court's finding that lack of reliance will remove those statements from the agreement seems implausible. Rather, the "affirmative proof" clause requires the seller to show that the buyer could not have understood the representations to be within the context of the bargain. Proof that the buyer knew the seller's representations were false or mistaken⁹⁰ or that the seller had effectively withdrawn his statements from the bargain⁹¹ would satisfy this standard.⁹²

b. *The Consideration Test.* Other courts interpreting section 2-313's comment 3 require that the buyer at least consider the seller's representations prior to the purchase.⁹³ Some courts apply the consideration standard objectively, requiring only that the buyer be aware of the seller's representations prior to completing the sale. In *Massey-Ferguson, Inc. v. Laird*,⁹⁴ for example, the seller acknowledged making an express warranty, but argued that it was not part of the basis of the bargain because the warranty was delivered after the sale. The court, however, noted that the buyer "knew about the express warranty prior to the delivery . . . as it was discussed in the sales agreement; furthermore, . . . [the buyer] was familiar with the type of warranty given on such machines."⁹⁵ The court distin-

⁸⁷ *Id.* A buyer who does not expect goods to conform to the seller's statements cannot reasonably rely on them. However, looking at a buyer's expectations is better than looking for a lack of reliance.

⁸⁸ U.C.C. § 2-313 comment 3.

⁸⁹ *Id.*

⁹⁰ See *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 422-23, 31 U.C.C. Rep. 469, 474-75 (6th Cir. 1981) (buyer's expertise and familiarity with product precluded seller's statements concerning product's quality from creating express warranty).

⁹¹ See *McGhee v. GMC Truck & Coach Division*, 98 Mich. App. 495, 500, 296 N.W.2d 286, 289, 30 U.C.C. Rep. 121, 125 (1980) (buyer, an experienced truck mechanic, understood that no warranties were given on tractor's running parts).

⁹² R. NORDSTROM, *supra* note 54, § 68, at 211-12.

⁹³ See *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261, 36 U.C.C. Rep. 437, 440 (Ala. 1983); *Keith v. Buchanan*, 173 Cal. App. 3d 13, 23, 220 Cal. Rptr. 392, 398, 42 U.C.C. Rep. 386, 393 (1985); *Perfetti v. McGhan Medical*, 99 N.M. 645, 652, 662 P.2d 646, 653, 35 U.C.C. Rep. 1472, 1477 (1983); see also *infra* notes 94-106 and accompanying text.

⁹⁴ 432 So. 2d 1259, 36 U.C.C. Rep. 437 (Ala. 1983).

⁹⁵ *Id.* at 1261, 36 U.C.C. Rep. at 440 (distinguishing *Tiger Motor Co. v. McMurty*, 284 Ala. 283, 224 So. 2d 638, 6 U.C.C. Rep. 608 (1969)).

guished this case from one in which a warranty was found invalid because the buyer did not discuss it until after delivery.⁹⁶ Although the court in *Massey-Ferguson* did not explicitly require that the buyer know of the warranty's existence, it implied that the buyer must have such knowledge to bring a claim under section 2-313.

An awareness standard, however, conflicts with comment 3's elimination of reliance. Comment 3 states that a seller's affirmations of fact "are regarded as part of the description of those goods."⁹⁷ The comment's language eliminates reliance by presuming that all affirmations of fact create express warranties. Because the buyer need not rely on the seller's representation, he should not need to know that such a representation exists. Comment 3 directs the inquiry of whether an express warranty was made away from the buyer's awareness of a representation and towards a factual examination of the seller's representations.⁹⁸ A seller who creates an express warranty by an affirmation of fact, description, or sample or model, therefore, should not escape liability simply because the buyer fortuitously failed either to hear the representation or to see a brochure or advertisement describing the product.⁹⁹ Once the seller injects the express warranty into the bargain, comment 3 creates a presumption that the buyer has relied on the warranty.¹⁰⁰ Courts should allow sellers to rebut this presumption only by showing that the buyer could not have understood these representations to be an express warranty.¹⁰¹

Some courts apply the consideration standard subjectively, requiring that the seller's representations at least partially induced the buyer's purchase. In *Keith v. Buchanan*¹⁰² the court explained in detail its interpretation of section 2-313's basis-of-the-bargain test. After finding that the buyer need not show reliance on the seller's representations, the court stated:

The change of the language in Section 2-313 of the California Uniform Commercial Code modifies . . . the degree of reliance . . . in express warranties under the code. The representation need only be part of the basis of the bargain, or merely a factor or con-

⁹⁶ *Id.*, 36 U.C.C. Rep. at 440.

⁹⁷ U.C.C. § 2-313 comment 3; see *supra* note 71 and accompanying text.

⁹⁸ R. NORDSTROM, *supra* note 54, § 68, at 208-10.

⁹⁹ Professor Nordstrom supported this proposition by arguing that the term bargain, as used in section 2-313, encompasses a much broader range of activity and time than the traditional contract law notion of the term. R. NORDSTROM, *supra* note 54, § 67, at 206.

¹⁰⁰ Murray, *supra* note 84, at 210.

¹⁰¹ R. NORDSTROM, *supra* note 54, § 68, at 210 ("The words used by the seller must be read in the way in which the buyer should reasonably have understood them.")

¹⁰² 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 42 U.C.C. Rep. 386 (1985).

sideration inducing the buyer to enter into the bargain.¹⁰³

Similarly, in *Perfetti v. McGhan Medical*¹⁰⁴ the court found that representations made by the seller appearing on the product itself did not become part of the basis of the bargain because the representations did not enter into the buyer's decision to use the good.¹⁰⁵ The court held that the buyer's testimony "that he normally used [the seller's] implants and 'had no reason to use anyone else's'" established that the representation failed to induce the purchase in any way. Consequently, it did not become part of the basis of the bargain.¹⁰⁶

The requirement that the seller's representations induce, at least in part, the buyer's entrance into the bargain has two defects in light of section 2-313. First, an inducement standard cannot be reconciled with the language of comment 3. If a representation induced a buyer to purchase a product, he relied on that representation in making his decision. To reiterate, comment 3 specifically states that "no particular reliance on such statements need be shown."¹⁰⁷ This provision eliminates both the need for buyer reliance and the need for the buyer to know that the representation existed.¹⁰⁸ If the buyer need not even know that the representation exists, then he certainly does not have to be induced by the seller's representations.

The second problem with the inducement standard is its failure to accomplish section 2-313's goal of easing the buyer's burden of proof. Section 12 of the Uniform Sales Act required buyers to prove "both that the affirmation or promise induced them to purchase the goods, and that they relied upon the statement in purchasing the goods."¹⁰⁹ Section 2-313 relieved the buyer from the

¹⁰³ *Id.* at 23, 220 Cal. Rptr. at 398, 42 U.C.C. Rep. at 393.

¹⁰⁴ 99 N.M. 645, 662 P.2d 646, 35 U.C.C. Rep. 1472 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983).

¹⁰⁵ The plaintiff in this case sued the manufacturer of a breast prosthesis after the product deflated inside her body. *Id.* at 647, 662 P.2d at 648, 35 U.C.C. Rep. at 1473-74. The court first found that the plaintiff's surgeon acted as her agent in the use of the prosthesis and thus any express warranty made to the surgeon inured to the plaintiff's benefit. *Id.* at 650-51, 662 P.2d at 651-52, 35 U.C.C. Rep. at 1475. The buyer, therefore, is the surgeon who decided to use the defendant's product.

¹⁰⁶ *Id.* at 652, 662 P.2d at 653, 35 U.C.C. Rep. at 1477.

¹⁰⁷ U.C.C. § 2-313 comment 3.

¹⁰⁸ R. NORDSTROM, *supra* note 54, § 68, at 208-09. Professor Nordstrom stated that courts that allow representations unknown to the buyer to create an express warranty reach a result consistent with the Code. He argued, "The court's task is to determine whether that injury was caused by a defect in the product, and any statements made by the seller designed to induce the public to buy his product are relevant in making this determination." *Id.* at 209. Nordstrom would thus shift the inquiry of inducement by the seller's statements from the individual buyer at issue, to the public at large.

¹⁰⁹ Murray, *supra* note 84, at 285.

burden of proving that he relied on the seller's statement by removing the term "reliance" and replacing it with a requirement that the seller's representation become part of the basis of the bargain.¹¹⁰ Comment 3 shifted the burden of proof to the seller: "any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."¹¹¹ "Under this clause, the buyer must prove that the seller made a statement of fact relating to the goods. It is presumed that such a statement became part of the 'agreement.'¹¹² Section 2-313, therefore, requires the buyer to show only that the seller made a representation concerning the product. A buyer should not have to show to what extent, if any, the representations entered into his decision to purchase.

Thus, a consideration standard defeats section 2-313's goal of easing the buyer's burden of proving that the seller's representation created an express warranty. By requiring the buyer to prove that he considered the seller's representations in purchasing, courts essentially require the buyer to prove that he relied on the representation. Section 2-313's elimination of reliance, however, should eliminate the need for the buyer to even be aware that the representation existed.

2. *The No-Reliance Approach*

Although the cases examined above interpreted comment 3, they failed to clarify adequately¹¹³ the basis-of-the-bargain provision and devise a proper test for applying it.¹¹⁴ To propose a standard, a definition of the phrase "part of the basis of the bargain"¹¹⁵ as used in section 2-313 is necessary. The drafters of the Code intended the phrase to mean an inclusion of the seller's representations in the

¹¹⁰ *Id.* at 286.

¹¹¹ U.C.C. § 2-313 comment 3.

¹¹² Murray, *supra* note 84, at 287.

¹¹³ See *supra* notes 72-106 and accompanying text.

¹¹⁴ Keith v. Buchanan, 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 42 U.C.C. Rep. 386 (1985), demonstrates this failure to define the phrase:

The shift in language clearly changes the degree to which it must be shown that the seller's representation affected the buyer's decision to enter into the agreement A warranty statement is deemed to be part of the basis of the bargain and to have been relied upon as one of the inducements for the purchase of the product. In other words, the buyer's demonstration of reliance on an express warranty is "not a prerequisite for breach of warranty, as long as the express warranty involved became part of the bargain."

Id. at 23, 220 Cal. Rptr. at 397, 42 U.C.C. Rep. at 392 (citing J. WHITE & R. SUMMERS, *supra* note 5, § 9-4, at 332-39).

The Keith court stated only that reliance is unnecessary if the warranty becomes part of the bargain. The court failed to explain how it would determine whether the buyer has met this requirement.

¹¹⁵ U.C.C. § 2-313.

“commercial relationship”¹¹⁶ between the buyer and the seller. A seller’s representations thus create an express warranty whenever they enter the buyer’s and seller’s commercial relationship.

This definition is based primarily on that of a “bargain” as used in section 2-313.

A “bargain” is not something that occurs at a particular moment in time, and is forever fixed as to its content; instead, it describes the commercial relationship between the parties in regard to this product The Code’s word is “bargain”—a process which can extend beyond the moment in time that the offeree utters the magic words, “I accept.”¹¹⁷

The Code’s usage of “bargain,” then, eschews its traditional contract law meaning as an event that comes “into existence at some specific point in time.”¹¹⁸ Instead, it takes on a broader scope that covers the entire span of the parties’ commercial relationship. This relationship can begin before the buyer contacts the seller¹¹⁹ or after the sale’s completion.¹²⁰

Section 2-313’s basis-of-the-bargain provision is an objective requirement under which a court should merely determine whether the seller provided a quality representation about the product. The buyer should not have to prove that he purchased with any knowledge of, or reliance on, the seller’s representations. Comment 3 demonstrates the drafters’ intent to eliminate completely the need for reliance on or consideration of the seller’s representations by the buyer.¹²¹ An express warranty exists if the seller used words of affirmation or description or displayed a sample or model relating to the product purchased.¹²² Once the buyer shows this, the seller is liable should the product not conform to his representations.

Comment 7 further supports this expansive interpretation of section 2-313 by ratifying the existence of post-sale warranties. Because comment 7 provides that the “precise time” when the seller

¹¹⁶ R. NORDSTROM, *supra* note 54, § 67, at 206. The language used herein to describe “the basis of the bargain” comes primarily from Nordstrom’s treatise on sales. *See id.* §§ 66-68. Nordstrom clearly rejected a reliance requirement under section 2-313, *id.* § 68, at 208, and broadly construed the section in order to ease the buyer’s ability to establish an express warranty. *Id.* § 67, at 206-07. Nordstrom, however, did not expressly extend his analysis to provide that all quality representations made by the seller are presumptively express warranties until the seller proves otherwise. *See infra* notes 137-42 and accompanying text.

¹¹⁷ R. NORDSTROM, *supra* note 54, § 67, at 206-07.

¹¹⁸ *Id.* at 206.

¹¹⁹ J. WHITE & R. SUMMERS, *supra* note 5, § 9-4, at 335-36.

¹²⁰ R. NORDSTROM, *supra* note 54, § 67, at 206-07.

¹²¹ *See supra* note 71 and accompanying text.

¹²² Murray, *supra* note 84, at 287.

makes a product representation is irrelevant,¹²³ post-sale representations may create warranties. Courts cannot possibly require a buyer to rely on those representations made after the sale's completion.¹²⁴

Comment 7 assumes that post-sale representations create express warranties: "If language is used after the closing of the deal . . . the *warranty* becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order."¹²⁵ Professor Nordstrom has argued that the modification requires no consideration because "it is reasonable to assume that a buyer would agree to an expansion of his warranty protection."¹²⁶

Some courts, however, do not allow post-sale representations to become express warranties because the buyer did not rely on the statements made.¹²⁷ In *Global Truck & Equipment Co., Inc. v. Palmer Machine Works, Inc.*¹²⁸ the buyer received a sales brochure describing the purchased product's features after he entered into the contract. The court found that the brochure could not create an express warranty, stating, "If the buyer is not aware of the affirmation of fact and there is no evidence of any reliance on such affirmation, then it would seem that the mutual assent requirement¹²⁹ is not met such

¹²³ "The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract." U.C.C. § 2-313 comment 7.

¹²⁴ The following example illustrates the deliverance of a post-sale express warranty:
A man enters a hardware store and selects a can of paint remover from the shelf. Upon paying for his selection at the counter, the cashier states: "This paint remover is the best made. It is guaranteed to remove paint without damaging the object's surface." The man returns home and properly applies the product to his car only to find that the paint remover contains a highly corrosive agent that badly damages the metal surface.

The clerk's statements created an express warranty because under our expansive notion of a bargain, *see supra* notes 116-20 and accompanying text, they "are part of the entire *bargain* even though they did not induce the *contract*." R. NORDSTROM, *supra* note 54, § 67, at 207.

¹²⁵ U.C.C. § 2-313 comment 7 (emphasis added).

¹²⁶ R. NORDSTROM, *supra* note 54, § 67, at 207. Nordstrom's argument that the buyer would not object to an expansion of his warranty protection also applies to presale representations not known by the buyer until after the sale. (E.g., sales literature included within the product's package which was sealed at the time of the sale.)

¹²⁷ *See Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 42 U.C.C. Rep. 1250 (N.D. Miss. 1986); *Anderson v. Heron Eng. Co.*, 198 Colo. 391, 394, 604 P.2d 674, 676 (1979). *But see Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1424-25, 41 U.C.C. Rep. 1233, 1237 (4th Cir. 1985) (salesman's post-sale representations created valid express warranty because purchase was conditioned on subsequent inspection of property by the salesman); *Downie v. Abex Corp.*, 741 F.2d 1235, 1240-41, 39 U.C.C. Rep. 427, 434-35 (10th Cir. 1984) (jury may find post-sale representations to be part of basis of bargain if representations were relied on).

¹²⁸ 628 F. Supp. 641, 42 U.C.C. Rep. 1250 (N.D. Miss. 1986).

¹²⁹ The *Global Truck* court required mutual assent because it viewed a bargain under section 2-313 as a contractual relationship between the buyer and the seller. A prerequisite for a valid contract, mutual assent means that each party is aware of the contract's

that a binding modification does not exist."¹³⁰ By finding that no warranty existed because the buyer failed to rely, the court completely disregarded both comments 3 and 7 in reaching its decision. Courts that continue to require reliance as a prerequisite for meeting the basis-of-the-bargain test unjustifiably refuse to allow a post-sale representation to create a warranty.

One commentator has argued that courts should enforce these post-sale representations to protect the buyer's "reasonable expectations that a seller's statements create, regardless of when those statements were made or when the buyer learned of them."¹³¹ This analysis also applies to those presale representations that the buyer does not learn of until after completing the purchase.¹³² If a seller includes an owner's manual or other product description with the purchase, then "[t]he buyer will feel oppressed and unfairly surprised if the goods do not contain the features represented in the sales literature."¹³³ Protecting the buyer's reasonable expectations about the product's quality and the truth of the seller's statements, therefore, justifies upholding unrelieved-upon express warranties.

The example of advertising illustrates further that reliance on representations should not be required for them to fall under section 2-313. A seller advertises in order to induce the public, rather than one specific buyer, to purchase his product. Because the seller is able to represent his product's quality to all potential buyers, he should bear the cost of any product defect. The law should protect the public whenever the product does not properly perform,¹³⁴ even if a particular buyer did not rely on the advertisement in his purchase. This protective function makes the relationship between the individual buyer and the mass-media seller more fair because it requires the seller to stand by any public statements he has made about his product. The law, therefore, would deter a seller from overrepresenting to the public the virtues of his product.

This approach imposes a limited form of strict liability on the seller.¹³⁵ Imposing a strict liability standard on the seller's representations would allow courts to avoid the difficult evidentiary task of determining whether the product's malfunction corresponded to the buyer's reason for purchase. A strict liability approach would

terms or modifications and agrees to include those terms into the contract. See U.C.C. §§ 1-201(3), 2-204(1).

¹³⁰ 628 F. Supp. at 652, 42 U.C.C. Rep. at 1262 (footnote added).

¹³¹ Murray, *supra* note 84, at 318.

¹³² *Id.* at 321-23.

¹³³ *Id.* at 322 (footnotes omitted).

¹³⁴ R. NORDSTROM, *supra* note 54, § 67, at 209.

¹³⁵ The seller can still escape liability if he can show "clear affirmative proof" that the statement was his opinion or that the buyer knew the representation was false.

effectively deter a seller from overrepresenting his product and raising false expectations in the buying public.

The seller should also bear the burden of a defect because, generally, he increases the price of the product to offset the risk he bears for providing an express warranty. This risk is the potential liability the seller may incur should the product not perform as promised by the express warranty. Knowing that some of the products sold will subsequently become defective, the seller recoups this cost by increasing the product's price to the entire buying public. Therefore, even if the buyer is unaware of the warranty he has paid for it by simply purchasing the product.¹³⁶

3. *Proposal*

Section 2-313, in light of comments 3 and 7, does not require the buyer to rely on, consider, or even know about a seller's representations. A court should therefore decide if an express warranty exists by examining only the seller's representations to see whether they constituted either an affirmation of fact or "merely [an affirmation] of the value of the goods or a statement purporting to be merely the seller's opinion."¹³⁷ Under this test, the buyer need prove only that the seller made representations relating to the product. The seller then has the burden of proving that the buyer could not have understood his representations to be an express warranty.¹³⁸

Comments 4 and 8 to section 2-313 also support this test.¹³⁹ Comment 4 states that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell."¹⁴⁰ As one commentator has noted, "it is interesting that the comment emphasizes the search for what 'the seller has in essence agreed to sell,' and not what the buyer has agreed to buy."¹⁴¹ This statement suggests that a court's inquiry should focus on the seller's conduct, i.e., whether he made representations relating to the product's quality, and not on the physical product purchased by the buyer.

Comment 8 states that "all of the statements of the seller . . .

¹³⁶ R. NORDSTROM, *supra* note 54, § 68, at 212; *see also* Special Project, *supra* note 1, at 56.

¹³⁷ U.C.C. § 2-313(2).

¹³⁸ The seller can meet this burden by showing either that his representations amounted only to his opinions on the product's value or that the buyer knew that his representations were false.

¹³⁹ *See supra* notes 97-101 & 107-12 and accompanying text (discussion of comment 3); notes 123-26 and accompanying text (discussion of comment 7).

¹⁴⁰ U.C.C. § 2-313 comment 4.

¹⁴¹ Murray, *supra* note 84, at 290.

[are a part of the basis of the bargain] unless good reason is shown to the contrary."¹⁴² The court's inquiry, therefore, should objectively focus on the affirmations of fact, descriptions, or samples or models included by the seller in the scope of the bargain to determine if those representations expressly warranted the product sold.

C. Negating an Express Warranty

The previous section proposed an expansive definition for section 2-313's basis-of-the-bargain requirement. This section suggests how a seller, once he creates an express warranty by his representations, can avoid liability by rebutting the warranty's existence.

Courts generally allow two groups of factors to rebut the existence of an express warranty. The first group looks at the seller's representations directly to see whether they are affirmations of fact or simply opinions as to the products's value.¹⁴³ The second group looks at the circumstances surrounding the bargain to determine whether the buyer knew that the seller's representations could not have warranted the product.¹⁴⁴

The 1978 Special Project called this the "reasonableness of reliance"¹⁴⁵ issue and stated that an express warranty will not exist "unless the buyer would be justified in relying upon it."¹⁴⁶ We prefer to ask whether the buyer could have reasonably understood the seller's representations to create an express warranty. Under this approach, a court does not run the risk of inadvertently incorporating a reliance requirement into its analysis. Instead, a court will only focus on the representations made and the context of their delivery.

1. *Opinions or "Puffing"*

Section 2-313(2) acknowledges that not every statement by a seller relating to a product will become part of the basis of the bargain. It states that "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."¹⁴⁷ A seller, therefore, must show that a reasonable buyer would have construed

¹⁴² U.C.C. § 2-313 comment 8.

¹⁴³ See *infra* notes 147-65 and accompanying text.

¹⁴⁴ See *infra* notes 166-78 and accompanying text.

¹⁴⁵ Although the 1978 Special Project used the term "reliance," it rejected reliance as a factor for courts to consider under section 2-313. It used the word simply as a shorthand for the conclusion that the basis-of-the-bargain requirement "is one of reasonable, constructive expectation based on the context of the sale and assuming the buyer's awareness of the seller's affirmations." Special Project, *supra* note 1, at 56.

¹⁴⁶ Special Project, *supra* note 1, at 59.

¹⁴⁷ U.C.C. § 2-313(2).

his representations merely as the seller's opinion concerning the product, not as an express warranty.

The official commentary supplements section 2-313(2):

Concerning affirmations of value or a seller's opinion or commendation under subsection (2), 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? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary.¹⁴⁸

In determining whether a seller's representation is merely an opinion, courts should apply an objective standard. They should look only at the statements made and not at the knowledge of the parties when deciding whether the statements created an express warranty.¹⁴⁹ Juries should distinguish between a warranty and an opinion solely on the nature of the seller's statements. The 1978 Special Project addressed four elements that point toward construing a seller's representations as an opinion rather than an affirmation of fact: specificity, hedging, experimental goods, and buyer knowledge.¹⁵⁰

Specificity addresses the clarity of the seller's representations. Courts generally will not regard imprecise or vague seller representations that do not convey "a positive averment of fact describing a product's capabilities"¹⁵¹ as creating an express warranty.¹⁵²

Hedging refers to a seller's equivocal statements that demon-

¹⁴⁸ U.C.C. § 2-313 comment 8.

¹⁴⁹ For a discussion of buyer knowledge, see *infra* notes 166-78 and accompanying text.

¹⁵⁰ For a detailed explanation of these elements, see Special Project, *supra* note 1, at 61-67.

¹⁵¹ *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 42, 30 U.C.C. Rep. 462, 468 (7th Cir. 1980).

¹⁵² See *id.*, 30 U.C.C. Rep. at 468 ("high quality," "frequency of repair very low," and "substantial profit" all viewed as seller's opinion); *Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F. Supp. 1194, 1200, 42 U.C.C. Rep. 1330, 1334 (S.D.W. Va. 1986) (statement that product is "specifically formulated to provide durability and weatherability" an opinion); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 249, 39 U.C.C. Rep. 1625, 1627 (Fla. Dist. Ct. App. 1984) ("state of the art" and "fail-safe" are opinions); *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 822-23, 33 U.C.C. Rep. 840, 848 (1982) (statement that product is "designed and constructed to the highest quality specifications" seller's opinion). But see *Wiseman v. Wolfe's Terre Haute Auto Auction, Inc.*, 459 N.E.2d 736, 37 U.C.C. Rep. 1486 (Ind. Ct. App. 1984) ("road-ready" created express warranty for truck's performance); *McGregor v. Dimou*, 101 Misc. 2d 756, 422 N.Y.S.2d 806, 28 U.C.C. Rep. 66 (N.Y. Civ. Ct. 1979) (advertisement that car in "good condition" an express warranty); *Slyman v. Pickwick Farms*, 15 Ohio App. 3d 25, 472 N.E.2d 380, 39 U.C.C. Rep. 1630 (1984) (statement made over loudspeaker by veterinarian at auction that horse's "nasal cavities are normal and in no way is the animal's breathing affected" created express warranty); *Taylor v. Alfama*, 145 Vt. 4, 481 A.2d 1059, 39 U.C.C. Rep. 1235 (1984) (advertisement that car in "mint condition" with "re-built engine" created express warranty).

strate his unwillingness to commit fully to the product's quality. In *Perfetti v. McGhan Medical*¹⁵³ a mammary prosthesis manufacturer included a flyer in the product's packaging which read: "McGhan Medical Corporation is aware of the potential for leakage in inflatable implants over an undefined time period. Considering the chemical and physical properties of the material used in the manufacture of the inflatable implants, deflation is not expected. However, long term results cannot be guaranteed by the manufacturer."¹⁵⁴ The buyer argued that the last line warranted the product's short-term lifespan by negative implication. The court stated, "Whatever the meaning of 'long term', the affirmation also negates less than a long-term result; it is affirmatively stated that leakage can occur over an undefined period of time."¹⁵⁵ By not making a commitment as to the product's lifespan, the seller effectively limited its liability.

Representations relating to unproven or untested products do not create an express warranty.¹⁵⁶ Consequently, the experimental goods factor allows a seller to escape liability for a product's defect. The 1978 Special Project correctly stressed that a product's novelty should not definitively determine whether a warranty attaches to the seller's representations.¹⁵⁷

The final element that helps distinguish between an affirmation of fact and a mere opinion is buyer knowledge. One court has stated:

The decisive test for whether a given representation is a warranty or merely an expression of the seller's opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment.¹⁵⁸

This test is not particularly helpful in making the distinction between fact and opinion, however, because it does not focus on the

¹⁵³ 99 N.M. 645, 662 P.2d 646, 35 U.C.C. Rep. 1472 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983).

¹⁵⁴ *Id.* at 651, 662 P.2d at 652, 35 U.C.C. Rep. at 1476 (emphasis deleted).

¹⁵⁵ *Id.* at 652, 662 P.2d at 653, 35 U.C.C. Rep. at 1477 (emphasis deleted).

¹⁵⁶ Research uncovered no new cases involving experimental goods.

¹⁵⁷ See Special Project, *supra* note 1, at 65 (novelty should be one element in a general reasonableness requirement).

¹⁵⁸ *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 41, 30 U.C.C. Rep. 462, 467 (7th Cir. 1980); see also *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 1290-91, 33 U.C.C. Rep. 174, 180 (6th Cir. 1982); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 250, 39 U.C.C. Rep. 1625, 1628 (Fla. Dist. Ct. App. 1984); *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 262-63, 354 N.W.2d 625, 630, 39 U.C.C. Rep. 1637, 1642 (1984); *Valley Datsun v. Martinez*, 578 S.W.2d 485, 490, 26 U.C.C. Rep. 331, 333 (Tex. Civ. App. 1979).

statements actually made. Instead, it looks to the knowledge of the parties. Under this test, any statement made to an ignorant buyer becomes an express warranty simply because the buyer is ignorant. Conversely, the test allows a seller with little knowledge to make specific statements about the product without creating an express warranty. The test fails because it does not consider whether a reasonable buyer could understand the statements to create an express warranty on their face. Concededly, buyer knowledge can preclude a warranty from attaching to a clear affirmation of fact.¹⁵⁹ This does not necessarily lead to the conclusion, however, that all statements made to ignorant buyers are warranties and all statements made by ignorant sellers are not.

In *Keith v. Buchanan*¹⁶⁰ a California appeals court attempted to ease the buyer's efforts to show that the seller made an affirmation of fact rather than an opinion:

Recent decisions have evidenced a trend toward narrowing the scope of representations which are considered opinion, . . . resulting in an expansion of the liability that flows from broad statements of manufacturers or retailers as to the quality of their products It has even been suggested 'that in an age of consumerism all seller's statements, except the most blatant sales pitch, may give rise to an express warranty.'"¹⁶¹

The *Keith* court adopted comment 8 to section 2-313¹⁶² as the standard to distinguish between fact and opinion. Comment 8 provides that all seller's representations will presumptively become part of the basis of the bargain unless the seller can prove otherwise. The drafters of section 2-313 intended comment 8 to create this broad presumption to ease the buyer's burden in establishing an express warranty.¹⁶³ Comments 3 and 7 each have the effect of broadening the scope of representations that create an express warranty and easing the buyer's burden of establishing a warranty's existence.¹⁶⁴ The *Keith* court correctly applied comment 8, holding that "[s]tatements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion."¹⁶⁵

¹⁵⁹ See *infra* notes 166-78 and accompanying text.

¹⁶⁰ 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 42 U.C.C. Rep. 386 (1985).

¹⁶¹ *Id.* at 21, 220 Cal. Rptr. at 396, 42 U.C.C. Rep. at 390 (citing 1 E. ALDERMAN & B. DOLE, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 89 (2d ed. 1983)).

¹⁶² See *supra* note 148 and accompanying text.

¹⁶³ See *supra* notes 109-12 and accompanying text.

¹⁶⁴ See *supra* notes 97-101, 107-12 & 123-26 and accompanying text.

¹⁶⁵ *Keith*, 173 Cal. App. 3d at 21, 220 Cal. Rptr. at 396, 42 U.C.C. Rep. at 391.

2. Buyer Knowledge

A seller can also rebut the presumption that his representations became part of the basis of the bargain by showing that the buyer knew that the representations were either untrue or probably untrue. This would naturally preclude him from understanding that an express warranty was created. The 1978 Special Project dealt with buyer knowledge in its discussion of a seller's opinion.¹⁶⁶ An examination of the buyer's knowledge, however, requires a court to focus on the circumstances surrounding the bargain rather than the representations made. Because the court must examine the knowledge possessed by the individual buyer in question, this inquiry requires a subjective standard; the standard applicable to sellers' opinions, however, is objective.¹⁶⁷

A seller can show that the buyer knew the untruthfulness of the representations by proving that the buyer inspected the goods before purchasing them and discovering patent defects.¹⁶⁸ The *Keith* court found that although the buyer had experts inspect a boat, the warranty of seaworthiness was not waived because no in-water testing took place.¹⁶⁹ "[A]n examination or inspection by the buyer of the goods does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived."¹⁷⁰ Because the inspection was limited, the buyer could not have discovered the boat's unseaworthiness.

The seller can also establish that the buyer knew of the falsity of his representations by showing either that the buyer had knowledge about the product before entering the bargain¹⁷¹ or that the buyer acquired such knowledge during the course of the parties' commercial relationship.¹⁷² In *Price Brothers Co. v. Philadelphia Gear Corp.*,¹⁷³ for example, the seller erroneously represented that the compo-

¹⁶⁶ See Special Project, *supra* note 1, at 66-67.

¹⁶⁷ See *supra* text accompanying note 149.

¹⁶⁸ See *Keith*, 173 Cal. App. 3d at 28, 220 Cal. Rptr. at 398, 42 U.C.C. Rep. at 393-94; *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 194-95, 668 P.2d 65, 70-71, 35 U.C.C. Rep. 804, 813-14 (1983).

¹⁶⁹ *Keith*, 173 Cal. App. 3d at 24, 220 Cal. Rptr. at 398, 42 U.C.C. Rep. at 393-94.

¹⁷⁰ *Id.*, 220 Cal. Rptr. at 398, 42 U.C.C. Rep. at 393.

¹⁷¹ See *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101, 37 U.C.C. Rep. 429, 439 (11th Cir. 1983) (buyer's general experience with copiers not enough for knowledge of specific copier at issue); *Carson v. Chevron Chem. Co.*, 6 Kan. App. 2d 776, 786, 635 P.2d 1248, 1256, 32 U.C.C. Rep. 834, 844-45 (1981) (farmer's knowledge about pesticide prevented seller's affirmation from becoming part of basis of bargain); *Scaringe v. Holstein*, 103 A.D.2d 880, 880, 477 N.Y.S.2d 903, 904, 38 U.C.C. Rep. 1595, 1595 (N.Y. App. Div. 1984) (buyer's knowledge of car's transmission defect prevented newspaper ad stating excellent condition from creating warranty).

¹⁷² See *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 43-44, 30 U.C.C. Rep. 462, 471-72 (1980).

¹⁷³ 649 F.2d 416, 31 U.C.C. Rep. 469 (6th Cir. 1981).

nents ordered by the buyer would meet the specifications listed in the buyer's purchase order. The court held that the seller's erroneous assurances that the components would conform to the purchase order's specifications did not create an express warranty because "Price Brothers' experts should have recognized this error as either 'puffing' or falsehood."¹⁷⁴

In both the inspection and prior knowledge cases, the good faith standard of section 1-203 prevents the buyer "from remaining silent in the face of known overstatements of performance by [the seller] and then asserting that those falsehoods were a basis of the bargain."¹⁷⁵ A buyer who knows the seller's representations are untrue has an obligation under section 1-203 to inform the seller of his overstatement. Under these circumstances a buyer cannot plausibly claim that he understood the seller's representations to create an express warranty.

Representations do not become part of the basis of the bargain if the seller can show that he withdrew them before completing the bargain.¹⁷⁶ In *McGhee v. GMC Truck & Coach Division*¹⁷⁷ a Michigan appeals court found that the seller explicitly withdrew any representations made concerning the quality of the truck purchases in the sales contract. "They so structured the terms of the sale as to lay the risk of hidden mechanical defects on the plaintiff, who admittedly understood this to be the case."¹⁷⁸ Thus, the buyer could not establish that the seller's statement regarding the truck's good condition became part of the basis of the bargain.

¹⁷⁴ *Id.* at 423, 31 U.C.C. Rep. at 474-75. The court's use of the phrase "should have recognized" should not be confused with an objective standard for measuring buyer knowledge. The court discussed the buyer's representative's personal familiarity with the product at issue: "The expertise of Price Brothers' representatives, and their familiarity with the requirements of Price Brothers' pipe wrapping machine enabled them to make an independent assessment of the adequacy of the proposed components for the tasks assigned to them." *Id.*, 31 U.C.C. Rep. at 475. The court used the phrase "should have known" not to invoke a reasonable man standard, but to hold these buyers' to a standard commensurate with their established knowledge of the product. The court looked only at the knowledge of the buyer in question.

¹⁷⁵ *Id.*, 31 U.C.C. Rep. at 475.

¹⁷⁶ A seller's withdrawal of a representation should not be confused with a disclaimer. For a discussion of express-warranty disclaimers, see *infra* notes 576-605 and accompanying text. A seller withdraws a representation by informing the buyer that a specific statement made about the product is no longer included in their bargain. This withdrawal occurs before the bargain's completion. Each party agrees to the representation's removal. The buyer, therefore, knows not to expect the product to conform to the representation withdrawn. See R. NORDSTROM, *supra* note 54, § 68, at 211.

¹⁷⁷ 98 Mich. App. 495, 296 N.W.2d 286, 30 U.C.C. Rep. 121 (1980).

¹⁷⁸ *Id.* at 504, 296 N.W.2d at 291, 30 U.C.C. Rep. at 125. The sales contract stated in part: "[T]here are no express warranties and no representations, promises or statements have been made by said seller in respect of said property unless endorsed hereon or incorporated herein by reference hereon . . ." *Id.* at 499-500, 296 N.W.2d at 289, 30 U.C.C. Rep. at 124.

The basis-of-the-bargain requirement provides the buyer with a great deal of latitude in establishing the creation of an express warranty. The buyer need only prove that the seller made representations relating to the product.¹⁷⁹ The seller can escape liability only by showing that he merely stated his opinion as to the product's value or that the buyer's knowledge concerning the product precluded the representation from becoming part of the basis of the bargain. Section 2-313's policy goals of easing the buyer's burden of proving an express warranty¹⁸⁰ and protecting the buyer's expectations in the product as represented¹⁸¹ justify this framework.

III IMPLIED WARRANTIES

Implied warranties, now a common element of the commercial environment,¹⁸² are codified in Code sections 2-314 and 2-315.¹⁸³ "An implied warranty 'is a curious hybrid, born of the illicit intercourse of tort and contract'—a contractual term promising quality but imposed by law rather than agreement."¹⁸⁴ This section of the Special Project examines the current status of implied warranties and recommends a number of changes or clarifications in existing doctrine.

There are several justifications for imposing warranties on the sale of goods.¹⁸⁵ In this section we focus on the rationale that buyers ought to be able reasonably to rely on knowledgeable sellers. Courts have paid less attention to this policy in section 2-314 cases than they have in section 2-315 cases; nevertheless, we propose to show that in both contexts the policy not only furthers desirable

179 See *supra* notes 137-38 and accompanying text.

180 See *supra* notes 109-12 and accompanying text.

181 See *supra* notes 131-33 and accompanying text.

182 The focus of the Special Project is on warranties arising from transactions between businesses. However, because implied warranties arising from consumer transactions also illuminate code policies, we will examine both kinds of transactions.

For the history of implied warranties, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 95A, 679-81 (5th ed. 1984) [hereinafter W. KEETON].

183 U.C.C. §§ 2-314, 2-315.

184 Special Project, *supra* note 1, at 68 (footnote omitted) (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 95, at 636 (4th ed. 1971)).

185 Justifications include: "(a) public policy which requires that the party which puts goods into the stream of commerce should bear the risk of harm caused by defective goods, rather than the person injured by it; (b) the fact that one party has induced the reliance of the consumer on his skill and knowledge; (c) the fact that the former is in a better position to control the antecedents which affect the quality of the product; and (d) the fact that he is better able to distribute the loss." Note, *The Extension of Warranty Protection to Lease Transactions*, 10 B.C. INDUS. & COM. L. REV. 127, 140-41 (1968).

goals, but also serves to reconcile otherwise seemingly divergent results.

A. The Implied Warranty of Merchantability—Section 2-314

Section 2-314 codifies the implied warranty of merchantability.¹⁸⁶ It provides in part: “Unless excluded or modified (Section 2-316), 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.”¹⁸⁷

We propose that the way to understand the merchantability warranty, and thereby to resolve the gray areas of the law, is to examine the policies and theories underlying the Code and to use them to interpret new or unclear situations. The implied warranty of merchantability was “designed to protect the buyer of goods from bearing the burden of loss where merchandise . . . does not conform to the normal commercial standards.”¹⁸⁸ Its underlying theory is that by marketing goods a merchant makes certain implicit representations about their merchantability. In making a purchase, the buyer relies upon those representations.¹⁸⁹ This reliance is justified because, as Prosser explained, “The seller has asserted, whether expressly or by his conduct, that the goods are of a particular kind, quality or character, and the buyer has purchased in reliance upon that assertion.”¹⁹⁰ The implied warranty of merchantability is thus an expression of the “reliance” concept underlying much of warranty law and can be seen as protecting the expectations that reasonably arise when a merchant of a particular good sells that good.¹⁹¹

¹⁸⁶ In the words of Professors White and Summers, the implied warranty of merchantability is “by far the most important” of the Code warranties. J. WHITE & R. SUMMERS, *supra* note 5, § 9-6, at 343.

¹⁸⁷ U.C.C. § 2-314. For a discussion of section 2-316, see *infra* notes 606-707 and accompanying text.

¹⁸⁸ *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846, 849, 4 U.C.C. Rep. 164, 167 (3rd Cir. 1967). “The entire purpose behind the implied warranty sections of the Code is to hold the seller responsible when inferior goods are passed along to the unsuspecting buyer.” *Id.* at 850, 4 U.C.C. Rep. at 168.

¹⁸⁹ This is an objective conception of reliance—the seller’s conduct has opened the way for a buyer to rely on the product; the buyer need not explicitly have done so. “The maker, by placing the goods upon the market represents to the public that they are suitable and safe for use, and by packaging, advertising, or otherwise, he does everything he can to induce that belief. He intends and expects that the product will be purchased and used in reliance upon this assurance of safety, and it is in fact so purchased and used.” W. PROSSER, *supra* note 184, § 97, at 651.

¹⁹⁰ Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 122 (1943).

¹⁹¹ Reliance is used in an objective sense. We are not proposing that subjective reliance by the buyer is a consideration in a general merchantability case. See J. WHITE & R. SUMMERS, *supra* note 5, § 9-6 (reliance by buyer on seller’s representation not neces-

In examining section 2-314, we first consider the condition that the seller be a "merchant with respect to goods of that kind." Later, we will turn to the question of whether the merchant has sold "goods."

1. *The Merchant Requirement—Section 2-314(1)*

a. *Definition of Merchant.* Section 2-104(1) defines "merchant" as

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.¹⁹²

Although section 2-104(1) defines merchant as encompassing those with special knowledge or skill both of business practices and of the kind of goods involved, section 2-314(1) conditions liability on the seller being "a merchant with respect to goods of that kind."¹⁹³ Merchants with respect to goods of a particular kind should possess special knowledge about the goods,¹⁹⁴ which they are likely to have

sary under § 2-314). Rather, we focus on objective reliance arising solely out of the implicit expectations promoted by a merchant selling goods.

¹⁹² U.C.C. § 2-104(1).

¹⁹³ *Id.* § 2-314(1).

¹⁹⁴ The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish merchant status is indicated by the nature of the provisions.

. . . For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction. . ." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants" . . .

On the other hand, in Section 2-314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with respect to goods of that kind."

Id. § 2-104 comment 2. One court recently provided the following description of "merchant":

Plaintiffs George Alpert and Lee Wolfman are partners and owners of Georgian Hill Arabians, which trains, breeds and sells Arabian horses for profit. Prior to the transaction involved in this lawsuit, Georgian Hill Arabians had consigned seven or eight mares for sale at auctions and had sold shares in a breeding stallion. George Alpert, through Georgian Hill Arabians, holds himself out as having knowledge and skill peculiar to the purebred Arabian horse business. Georgian Hill Arabians also employs agents who hold themselves out as having such knowledge and skill.

Alpert v. Thomas, 643 F. Supp. 1406, 1409, 2 U.C.C. Rep. 2d 99, 102-03 (D. Vt. 1986).

due to their handling of them. Buyers may naturally expect such a merchant to have special knowledge and thus tend justifiably to rely on the seller.

Accordingly, the limitation of section 2-314 to "merchants with respect to goods of that kind" suggests that warranties be imposed based on the respective knowledge and reliance of the parties involved.¹⁹⁵ The seller's expertise with respect to the goods provides justification for holding the seller liable for the quality and performance of the goods he sells.¹⁹⁶ Thus, the more a seller knows, the more justifiable it is to consider him a merchant of the goods of that kind for section 2-314 purposes.¹⁹⁷ We suggest that courts adopt the following test for a merchant: As a general rule, merchant status is a function of the frequency of sales and the knowledge of the seller with respect to the goods in question. Under this test, a highly knowledgeable seller could be deemed a merchant even with few sales; conversely, a seller with relatively frequent sales, but who obviously lacked all knowledge of the product, would less likely be deemed a merchant.

b. *Isolated Sale of Goods.* The official commentary to section 2-314 states, "A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply."¹⁹⁸ Such a seller

¹⁹⁵ The buyer's knowledge may also be relevant to whether an implied warranty arises. See *Wingo v. Norfolk & W. Ry.*, 1 U.C.C. Rep. 2d 389, 391 (W.D. Va. 1986) (Implied warranty of merchantability can be defeated if seller "can prove by a preponderance of the evidence that the buyer's knowledge of the defective quality of the goods was extensive enough for the buyer to truly appreciate the hazards of the goods."); *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 567, 39 U.C.C. Rep. 450, 455 (W.D. Va. 1984) (employer's actual knowledge of dangerous nature of product defeats employee's claim against seller for breach of implied warranty), *aff'd sub nom.* *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

¹⁹⁶ This is analogous to common law tort principles imposing liability on the person possessing knowledge of a hazard because he has a greater chance to protect against its dangers. The more knowledge a merchant has of a particular good, the more capable she is of foreseeing problems with it. For discussion of warnings and implied warranties, see *infra* notes 297-302 and accompanying text. See RESTATEMENT (SECOND) OF TORTS §§ 388-401 (1977); J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 508-09 (2d ed. 1981).

¹⁹⁷ See *infra* notes 198-203 & 247-49 and accompanying text.

¹⁹⁸ U.C.C. § 2-314 comment 3. The comment further explains that the seller's "knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions of good faith, impose an obligation that known material but hidden defects be fully disclosed." *Id.* Indeed, lack of disclosure brings a nonmerchant into the merchant category, resulting in imposition of the implied warranty of merchantability. In the case of a fire board selling an old pumper truck, a New York court stated, section 2-314 of the Uniform Commercial Code would seem inapplicable for the reason that it speaks of a 'merchant with respect to goods of that kind' which defendant clearly is not. However, should it be demonstrated

should not be deemed a merchant because he will not have special knowledge or skill with regard to the good, and because a buyer presumably is less likely to rely upon one who seldom deals in the good and who possesses less knowledge of it.¹⁹⁹

We suggest, however, that isolated sellers should not be conclusively excluded from the implied warranty of merchantability. Isolated sellers should be included in the warranty of merchantability if they are experts or hold themselves out as experts in the sale of the goods. As the 1978 Special Project pointed out, "Refusing to find a warranty in an isolated sale may create the anomalous result of placing greater liability on a retailer who knows nothing about the goods than on a seller with substantial expertise as to the goods and upon whose reputation a buyer could more reasonably rely."²⁰⁰ *McGregor v. Dimou*²⁰¹ illustrates this anomaly. *McGregor* involved the sale of a used car by a body and fender specialist. Despite the seller's knowledge, acquired by virtue of his specialty, the court deemed the seller a nonmerchant because the sale was an isolated transaction.²⁰² The decision failed to follow the underlying policy of an implied warranty of merchantability because such a person holds himself out to the public as an expert in the type of goods that he subsequently sold—even if the actual sale is isolated. We contend that section 2-314 suggests that a seller with specialized knowledge should be liable as a merchant because it would be reasonable for a buyer to rely on such a seller regardless of the fact that the sale may have been isolated.

The 1978 Special Project argued that with an "isolated sale" there should be a rebuttable presumption that the seller is a nonmerchant;²⁰³ a buyer could rebut the presumption by showing that the seller has held himself out as knowledgeable or skillful with respect to the goods sold. We endorse this proposition. Several courts, however, still appear to treat the nonmerchant status of isolated sellers as conclusive rather than as a rebuttable

that defendant or its representatives knew of any defects, not apparent on inspection, and failed to disclose them, such conduct would bring defendant within the precincts of that section.

Village of Chatham v. Board of Fire Comm'rs, 90 A.D.2d 860, 861, 456 N.Y.S.2d 494, 496, 34 U.C.C. Rep. 1533, 1534 (N.Y. App. Div. 1982) (citations omitted).

¹⁹⁹ Although comment 3 to section 2-314 supports this rationale, it presumes that such a seller of an isolated good neither deals in, nor by the seller's occupation represents that he has special knowledge or skill with respect to, the goods sold. This presumption is not always correct, yet courts often apply the "isolated sale" exemption regardless of whether such skill or knowledge exists.

²⁰⁰ Special Project, *supra* note 1, at 72 n.177.

²⁰¹ 101 Misc. 2d 756, 422 N.Y.S.2d 806, 28 U.C.C. Rep. 66 (N.Y. Civ. Ct. 1979).

²⁰² *Id.* at 760, 422 N.Y.S.2d at 809, 28 U.C.C. Rep. at 70.

²⁰³ Special Project, *supra* note 1, at 71.

presumption.²⁰⁴

Courts have applied the general concept of "merchant" to cases involving isolated sales and related concepts in a variety of ways. A merchant of one type of good generally will not be held to be a merchant of another type of good in which he does not usually trade. In such a situation, the issue will be whether the seller's involvement with the second good is sufficient to justify merchant status in the second good.

*Vince v. Broome*²⁰⁵ involved a seller whose primary business was construction and who occasionally sold farm products at auction. A Mississippi court concluded that he was also a merchant of the farm products.²⁰⁶ The court held that the seller's volume justified this

²⁰⁴ See, e.g., *All States Leasing Co. v. Bass*, 96 Idaho 873, 880, 538 P.2d 1177, 1184, 17 U.C.C. Rep. 933, 942 (1975) ("It is true that prior to the execution of the lease in issue, appellant handled between forty to fifty transactions over a period of six to eight months, concerning the same Budg-O-Matic Car Wash System that is the subject of this dispute. However, this in our mind does not make All-States Leasing a 'merchant' for purposes of the Code."); *McGregor*, 101 Misc. 2d at 760, 422 N.Y.S.2d at 809, 28 U.C.C. Rep. at 69 (sale of car by specialist in collision repair held to be an isolated sale by a nonmerchant); *Foley v. Dayton Bank & Trust*, 696 S.W.2d 356, 42 U.C.C. Rep. 92 (Tenn. Ct. App. 1985) (bank not merchant of used truck). *But see* *Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So. 2d 92, 18 U.C.C. Rep. 891 (1976) (bank sued on sale of repossessed boat); *Bass*, 96 Idaho at 881, 538 P.2d at 1185, 17 U.C.C. Rep. at 943 (Shepard, J., dissenting) (In disagreeing with the majority's holding that the lessor was not a merchant, the dissenting judge argued: "I cannot agree that the appellant who purchased and thereafter leased large numbers of car wash systems was not 'a person who deals in goods of the kind.' Although the appellant here did not build or manufacture such equipment, neither do most retailers."); *Bennett v. Jansma*, 329 N.W.2d 134, 35 U.C.C. Rep. 432 (S.D. 1983) (court considered frequency of sale, employment of intermediary, skill and knowledge in determining whether farmer was a merchant); see also *Foley*, 696 S.W.2d at 357, 42 U.C.C. Rep. at 94 (providing some basis for holding the bank a merchant of repossessed cars although not a merchant of the repossessed trucks involved in the case).

²⁰⁵ 443 So. 2d 23, 37 U.C.C. Rep. 1498 (Miss. 1983).

²⁰⁶ The court explained: "We are compelled to note that some farming operations are worth millions of dollars. These farmers are engaged in multicommercial transactions and are generally considered to be agribusiness persons. It would stretch the imagination to conclude that all these operations were exempt from coverage under the Commercial Code." *Id.* at 25, 37 U.C.C. Rep. at 1501. *But see* *Pierson v. Arnst*, 534 F. Supp. 360, 362, 33 U.C.C. Rep. 457, 460 (D. Mont. 1982) ("It is inconceivable that the drafters of the Uniform Commercial Code intended to place the average farmer, who merely grows his yearly crop and sells it to the local elevator, etc., on equal footing with the professional commodities dealer whose sole business is the buying and selling of farm commodities.").

Livestock and farm products are big business. See Grossman, *Choice of Law in Interstate Livestock Sales: Nonuniform Warranty Provisions Under the UCC*, 30 S.D.L. REV. 214, 215 (1985). Although the implied warranties generally would apply in such cases, "at least twenty-five states have amended their laws to exclude implied warranties in the sale of livestock under certain conditions." *Id.* at 216. For example, twenty-five states have excluded implied warranties on the health of livestock. *Id.* at 229 n.100. For a general discussion of livestock as "goods," see Note, *Commercial Law—Implied Warranty of Merchantability—Sale of Goods by Farmers May Give Rise to Implied Warranty of Merchantability*, 54 Miss. L.J. 175 (1984).

conclusion, despite its relative insignificance to his overall business.²⁰⁷

Banks that routinely repossess and sell cars or other goods may be similar to the seller in *Vince*, yet courts have generally refused to apply the same analysis to them. Courts have commonly held that banks are not merchants of these repossessed cars.²⁰⁸ Although banks presumably function primarily as financial institutions, a given bank could conceivably repossess cars frequently enough for the buyer to refute the presumption of the bank's nonmerchant status.²⁰⁹ Certain types of "isolated sales," however, are clearly covered by the warranty of merchantability. For instance, the "isolated sale" exemption does not exonerate a seller in a new business who should have the relevant knowledge, despite the fact that only one item had been sold.²¹⁰ Accordingly, an importer's first shipment of

²⁰⁷ *Vince*, 443 So. 2d at 28, 37 U.C.C. Rep. at 1504.

²⁰⁸ See, e.g., *Joyce v. Combank/Longwood*, 405 So. 2d 1358, 32 U.C.C. Rep. 1118 (Fla. Dist. Ct. App. 1981) (bank that sold five repossessed automobiles in a year did not hold itself out as having any special knowledge or skill and was therefore not a merchant); *Foley v. Daton Bank & Trust*, 696 S.W.2d 356, 359, 42 U.C.C. Rep. 92, 95 (Tenn. Ct. App. 1985) ("[I]t is clear that the defendants . . . are not merchants within the meaning of the statute.").

²⁰⁹ The central question, of course, is whether the bank has the requisite knowledge about automobiles. Precisely what knowledge suffices to require a particular seller to comply with the implied warranty of merchantability cannot be specified as a formula, but must be handled on a case-by-case basis. A Florida court, for example, held that merchant status requires, in addition to frequency of sale, a professional status as to the particular kinds of goods in question, which even those banks that frequently deal in used cars did not have. *Joyce*, 405 So. 2d 1358, 1359, 32 U.C.C. Rep. 1118, 1119; see *infra* note 212.

Similarly, courts have typically held that financial lessors are not merchants. See, e.g., *Agristor Leasing v. Meuli*, 634 F. Supp. 1208, 1 U.C.C. Rep. 2d 1102 (D. Kan. 1986) (lessor whose contact with good is solely for the purpose of providing it to lessee has limited knowledge of the good which generally would be acquired by the lessor according to the lessee's wishes); *Miller Auto Leasing Co. v. Weinstein*, 189 N.J. Super. 543, 461 A.2d 174, 36 U.C.C. Rep. 786 (1983) (financier lessor not liable under the implied warranty of merchantability), *aff'd*, 193 N.J. Super. 328, 473 A.2d 996, *cert. denied*, 97 N.J. 676, 483 A.2d 192 (1984).

Contrasted to the situation of the merchant of a specific good making an isolated sale of a different product is that of the retailer of many types of goods who adds additional items to his inventory. Such a seller is presumably a merchant with respect to all the various goods with which he deals. See, e.g., *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1 U.C.C. Rep. 2d 1115 (11th Cir. 1986) (cookie jar in K-Mart); *Schuessler v. Coca-Cola Bottling Co.*, 12 U.C.C. Rep. 1050 (Fla. Dist. Ct. App. 1973) (soda bottle in retail store). Even in cases such as *McQuiston*, where the warranty did not apply for other reasons, there is no question as to the general retailer's merchant status. Thus, if a wholesaler of office supplies adds office furniture to its inventory, it will be presumed to be a merchant with respect to both desk chairs and paper clips.

²¹⁰ See *Alpert v. Thomas*, 643 F. Supp. 1406, 1416, 2 U.C.C. Rep. 2d 99, 113 (D. Vt. 1986) (regardless of number of previous sales, seller is a merchant because he "holds himself out as having knowledge and skills peculiar to the practices and goods involved in the Arabian horse business").

a particular type of goods comes within the implied warranty.²¹¹

We suggest that individualized treatment of these cases is appropriate. Courts should apply a rebuttable presumption of non-merchant status instead of a conclusive rule. Certainly a bank that professes to hold no knowledge whatsoever of the cars with which it deals, but which is simply converting repossessed collateral into capital, should not be deemed a merchant under our test.²¹² This does not mean, however, that banks can never be merchants. A court should deem a bank a merchant when it would be reasonable for a buyer of repossessed collateral to rely on the bank's special knowledge of the collateral because of its advertising, its volume of sales, or some other relevant factor. In these situations, the seller's knowledge is the crucial factor, for the extent of the seller's knowledge determines whether the buyer would be reasonable in relying on that knowledge.

The criteria for merchant status should therefore turn on both the seller's "professional" status (encompassing knowledge of the product) and the frequency of sales. Thus, the more often a person sells a particular product the greater the possibility that he would be deemed a merchant of that particular good.²¹³ Buyers are more likely to assume that sellers who frequently deal in certain goods possess such knowledge; they are therefore more likely to rely upon such a seller. This fits our thesis well, as the more contact a person has with a product, the more knowledge and skill he should develop.

2. *Scope of "Goods" Under Section 2-314*

Once a court determines that the seller is a merchant, its focus shifts to whether there has been a sale of "goods." What constitutes a "good" under the Code?²¹⁴ The simple answer is that a good is a tangible item; difficulty arises when courts need to apply the basic principles developed for traditional goods to services and other nontraditional goods.

a. *Services as Goods.* Courts disagree as to whether the sale of a service will give rise to an implied warranty of merchantability.²¹⁵

²¹¹ See, e.g., *Geo. Byers Sons, Inc. v. East Europe Import Export, Inc.*, 488 F. Supp. 574, 28 U.C.C. Rep. 1293 (D. Md. 1980) (importer's first shipment of motorcycles).

²¹² See *Joyce*, 405 So. 2d at 1359, 32 U.C.C. Rep. at 1120 (Plaintiff-buyer "testified that he was better qualified to determine the condition of the car than was defendant's employee who negotiated the sale. It appears without dispute that the bank had no 'professional status as to the particular [kind] of goods.'") (brackets in original).

²¹³ The new business merchant is a logical exception, where knowledge should be imputed to the new dealer. See *supra* notes 210-11 and accompanying text.

²¹⁴ See *supra* notes 2-37 and accompanying text.

²¹⁵ The 1978 Project suggested a "nexus test" to determine whether a transaction should be covered by warranties. "Where a sale would not be made but for the accompa-

Generally, the more the transaction at issue resembles a traditional sale of a good, the more likely the court will hold that the transaction is covered by an implied warranty. Thus, hybrid transactions, in which a tangible item is delivered to the buyer along with a service, tend to fall more readily within the warranties than do sales of pure services.

For example, repair services often do not give rise to an implied warranty of merchantability,²¹⁶ even when a major part is conveyed to the service buyer as part of the repair.²¹⁷ Generally, the inquiry is whether the transaction more closely resembles a sale of a repair service or a pure sale of the part. Some courts call this inquiry the "predominant purpose test."²¹⁸

The installation of goods is another form of a hybrid sale. Like the repair of parts, installations involve both a service and a conveyance of a tangible product. Arguably, an installation resembles a pure sale more closely than does a repair because, with the installation, a good is clearly being "sold." Perhaps for this reason, courts are more willing to find an implied warranty arising from an installation than from a repair.²¹⁹ Yet, distinguishing between a "repair"

nying services, a sufficient nexus exists to justify applying Code warranties to both components of the transaction. Similarly, a nexus exists where the service is necessary to the enjoyment of the goods." Special Project, *supra* note 1, at 38. Although this solution seems rational and workable, courts have not uniformly followed it. See *supra* notes 4-14 and accompanying text.

²¹⁶ See *Swenson Trucking & Excavating, Inc. v. Truckweld Equipment Co.*, 604 P.2d 1113, 28 U.C.C. Rep. 336 (Alaska 1980) (repairs on equipment bought from another seller not covered by implied warranties).

²¹⁷ See, e.g., *Gee v. Chattahoochee Tractor Sales, Inc.*, 172 Ga. App. 351, 323 S.E.2d 176, 40 U.C.C. Rep. 30 (1984) (part installed during repair is part of the service of repairing and therefore not a "good" for implied warranty purposes); *Montgomery Ward & Co. v. Dalton*, 665 S.W.2d 507, 38 U.C.C. Rep. 428 (Tex. Civ. App. 1983) ("dominant purpose test" applied to repair and installation of roof resulting in classification of transaction as service); see also *Mack Fin. Corp. v. Harnett Transfer, Inc.*, 42 N.C. App. 116, 121, 256 S.E.2d 491, 495, 27 U.C.C. Rep. 8, 10-11 (1979) ("The fact that various parts are also required to properly repair and service the truck is merely incidental to the repair contract . . .").

²¹⁸ See, e.g., *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 308, 363 N.W.2d 155, 160, 40 U.C.C. Rep. 396, 402 (1985) ("The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved," or vice versa); *Mees v. Bell*, 710 S.W.2d 789, 795, 1 U.C.C. Rep. 2d 1118, 1122 (Tex. Civ. App. 1986) (implied warranty applies to mixed sales-service contract if "predominant purpose" of transaction was sale of a good), *rev'd on other grounds*, 725 S.W.2d 179 (Tex. 1987). But see *Gee*, 172 Ga. App. at 353, 323 S.E.2d at 178, 40 U.C.C. Rep. at 32 (stating that repairs are not covered sales without inquiring into predominant purpose of transaction).

²¹⁹ See, e.g., *Bailey v. Montgomery Ward & Co.*, 690 P.2d 1280, 1282, 40 U.C.C. Rep. 90, 92-93 (Colo. Ct. App. 1984) (seller who "incidentally renders services in the installation" of the goods sold, and who knows of buyer's intended use and of buyer's reliance on his skill and judgment, is held to implied warranty of merchantability); *Mennonite*

contract and a "purchase with installation" contract is often difficult. Thus, the disparate treatment accorded these situations by the courts is unsettling. Consider the following two scenarios:

- (1) Buyer, not knowing what is wrong with his car, goes to a service station to have the car repaired. Buyer says to the seller, "Fix my car." As it turns out, all that is wrong with the car is a flat tire. The service station replaces the tire. Because the buyer purchased repair service, the transaction does not involve a good, and the implied warranty would not apply.²²⁰
- (2) Buyer, knowing that her tire is flat, goes to a service station to buy a new tire she says to the seller, "Sell me a tire." The seller removes the flat tire and mounts the new one. Because the buyer went to the service station to purchase the tire, the transaction involved a good, and the implied warranty would apply.²²¹

Such results are surely preposterous: The buyer not knowing the nature of his car's problems is excluded from warranty protection while the more knowledgeable buyer receives the warranty. Clearly the less knowledgeable buyer is in as much (or, indeed, greater) need of the implied warranty. Because the transactions are virtually identical, we propose that courts should apply the same warranty standards in both scenarios.

Pure services, those transactions in which only a service is provided without any accompanying tangible good usually do not give rise to an implied warranty of merchantability under section 2-314 even if the seller holds himself out as having knowledge or skill peculiar to the service involved in the transaction. Regardless of the skill or knowledge of the seller, a service is simply not a good.²²²

The concept of services as goods may, however, be gaining ac-

Deaconess, 219 Neb. at 309, 363 N.W.2d at 161, 40 U.C.C. Rep. at 403 (installation of roof was "incidental" to its purchase). *But see Gee*, 172 Ga. App. at 353, 323 S.E.2d at 178, 40 U.C.C. Rep. at 32 ("although a 'repairer' may include new parts in the repair of a vehicle engine, the primary purpose of the contract is to 'repair' the vehicle, and is not the 'sale' of any component part of the engine").

²²⁰ *See Gee*, 173 Ga. App. at 353, 323 S.E.2d at 178, 40 U.C.C. Rep. at 32.

²²¹ *See Meeke*, 710 S.W.2d 789, 1 U.C.C. Rep. 2d 1118. For a similar analysis involving section 2-315, see *Skelton v. Druid City Hospital Bd.*, 459 So. 2d 818, 821-22, 39 U.C.C. Rep. 369, 377 (Ala. 1984).

²²² *See, e.g., De Valerio v. Vic Tanny Int'l*, 140 Mich. App. 176, 180, 363 N.W.2d 447, 449, 40 U.C.C. Rep. 836 (1984) (use of equipment spa not covered by implied warranty of merchantability because the contract is for service and not for sale of goods); *Mennonite Deaconess*, 219 Neb. at 307, 363 N.W.2d at 160, 40 U.C.C. Rep. at 402 ("If the transaction was really a contract for services and not a sale of goods, the provisions of article 2 of the Uniform Commercial Code do not apply."); *see also supra* notes 4-14 and accompanying text (service-sales hybrids).

ceptance.²²³ The Alabama Supreme Court provided support for this position in *Skelton v. Druid City Hospital Board*.²²⁴ The *Skelton* court held that a hospital could be liable under section 2-315's warranty of fitness for a particular purpose when a surgical needle broke inside of a patient.²²⁵ The court rejected the hospital's contention that surgery constitutes solely a provision of services not covered under the U.C.C.²²⁶ Instead, the court viewed the surgical procedure as a hybrid transaction to which the Code applied,²²⁷ stating that "[the hospital] can make no serious contention that Skelton did not pay for the *use* of the suturing needle, or that patients generally do not buy supplies and pay charges for equipment used in the course of their treatment."²²⁸ The Court explicitly noted that the plaintiff went to the hospital "seeking services and products necessary to those services."²²⁹ Although the court acknowledged that the suturing needles were re-used, and thus not sold to the patient, it held that this did not preclude the U.C.C.'s application. The court noted that Article Two applies to transactions in goods, and not just to sales.²³⁰ Although the hospital did not sell the suturing needle to the patient, it did, in a sense, lease its use.²³¹ This lease constituted a transaction in goods, covered under Article Two; the analysis applies equally well to section 2-314.²³²

Although the *Skelton* court's reasoning applies to hybrid service transactions, in practical effect it arguably subjects virtually all service transactions to Article Two's implied warranties, for these services may be characterized as *Skelton*-type hybrid transactions. Although we agree with the result in *Skelton*, we believe that the court's reasoning could result "in hairsplitting over contracts in

²²³ See Mallor, *supra* note 14, at 89-90 (noting that although courts have traditionally characterized supplying utilities to consumers as a service, "[i]n recent years, a growing number of courts have either characterized utility supply contracts as sales of goods, or have considered such contracts to be sufficiently analogous to sales of goods to justify the application of the Uniform Commercial Code principles.") (footnote omitted).

²²⁴ 459 So. 2d 818, 39 U.C.C. Rep. 369 (Ala. 1984).

²²⁵ *Id.* at 823, 39 U.C.C. Rep. at 378.

²²⁶ *Id.* at 821, 39 U.C.C. Rep. at 373.

²²⁷ *Id.* at 822, 39 U.C.C. Rep. at 374. Prior courts had used the "essence of transaction" test to determine that a hospital's provision of medical care is a service and therefore not a good under article 2. See, e.g., *Potts v. W. Q. Richards Memorial Hosp.*, 558 S.W.2d 939, 946, 23 U.C.C. Rep. 360, 361 (Tex. Civ. App. 1977) ("Texas follows the majority rule that the essence of a hospital stay is the furnishing of the institution's healing services which may include incidental sales of medicines and the like.").

²²⁸ *Skelton*, 459 So. 2d at 821, 39 U.C.C. Rep. at 373 (emphasis in original).

²²⁹ *Id.* at 822, 39 U.C.C. Rep. at 375.

²³⁰ *Id.* at 821, 39 U.C.C. Rep. at 373-74.

²³¹ *Id.*, 39 U.C.C. Rep. at 373.

²³² *Id.*, 39 U.C.C. Rep. at 373-74. For a discussion of whether leases are included within the U.C.C. under "transaction in goods" theory, see *supra* notes 21-25 and accompanying text.

which the goods and services elements are not realistically separable."²³³ As an alternative, we recommend applying the Code to services by analogy.²³⁴ "Under this 'analogical approach,' Code principles are given broad application to problems analogous to those contemplated by the drafters of the Code."²³⁵

We suggest that courts should analogize services to goods where the buyer's reliance on the service provider resembles a buyer's reliance on a merchant when purchasing a good. Persons competent to perform repairs or installations probably meet and perhaps exceed the knowledge criteria for status as a merchant; conceivably, exceptions analogous to those applicable for merchants of pure goods would apply in appropriate circumstances. As services become more pervasive in commercial dealings, the protections arising from transactions in classic goods should expand to include them.

b. *Technological Products as Goods.* The development of computer technology has also challenged the traditional concept of what constitutes a good under Article Two.²³⁶ Although courts have uniformly regarded computer hardware as within the classic definition of "goods," their treatment of computer software has been less consistent. One commentator has suggested that the inconsistency stems from the intangible nature of software: "Computer software . . . is an intangible collection of ideas, even though it must be kept and transferred on a tangible medium. Traditional sales law was developed to deal with tangible goods, not intangibles."²³⁷ The commentator suggested two reasons why the implied warranty of

²³³ Mallor, *supra* note 14, at 93.

²³⁴ As Professors White and Summers have stated:

[W]e suspect that the sale-service dichotomy is merely a verbal formula in which results are expressed, results which courts reach upon analysis of a wide variety of factors. We would urge courts to identify these factors more candidly. We would also remind courts who do wish to impose warranty liability in nonsale cases that *they can do so by analogy* without indulging the fiction that the transaction at hand is a true sale of goods.

J. WHITE & R. SUMMERS, *supra* note 5, § 9-6, at 349 (emphasis added) (footnote omitted); see also *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W.2d 316, 10 U.C.C. Rep. 977 (1972) (applying implied warranties to electricity by analogy). But see Special Project, *Recent Developments in Commercial Law*, 11 RUT.-CAM. L.J. 527, 679-688 (1980).

²³⁵ Mallor, *supra* note 14, at 93.

²³⁶ "The explosive growth of the computer industry has outdistanced efforts to adapt legal theories to govern computer-related disputes." Comment, *The Warranty of Merchantability and Computer Software Contracts: A Square Peg Won't Fit in a Round Hole*, 59 WASH. L. REV. 511, 511 (1984). For a description of various computer terms, see Holmes, *Applications of Article Two of the Uniform Commercial Code to Computer System Acquisitions*, 9 RUTGERS COMPUTER & TECH. L.J. 1, 4-6 (1982).

²³⁷ Comment, *supra* note 236, at 511 (footnotes omitted).

merchantability should not attach to computer software. First, the inherent diversity of such collections of ideas makes developing a minimum standard of merchantability almost impossible.²³⁸ Second, because a software purchaser generally obtains a mere license to use the software, and not full rights of ownership, there has not been a sale.²³⁹ We disagree. Instead, we recommend that courts apply traditional standards of merchantability. First, we believe that when a merchant is particularly concerned about the merchantability of the product, he should so inform the buyer who will be purchasing and relying upon it. Second, we believe that courts should look past the formality of the computer software license and equate the transaction to a sale.²⁴⁰

The purchasers of computer goods, like buyers of services, are likely to rely on the seller's superior knowledge and are thus entitled to warranty protection. This protection should not be denied by strict construction of either "goods" or "sales."

c. *Used Goods.* The implied warranty of merchantability applies to used as well as to new goods.²⁴¹ Whether implied warranties apply depends on the expectations appropriate to the type of good.²⁴² The good's used condition therefore influences the standard of merchantability by which the good is judged.²⁴³ Although used

²³⁸ *Id.* at 521-23.

²³⁹ *Id.* at 518-20.

²⁴⁰ Passage of full rights of ownership is not necessarily a requirement for imposition of warranties. See U.C.C. § 2-105(3). Passage of title is not necessary either. See *infra* note 258.

²⁴¹ See, e.g., *Lee v. Peterson*, 110 Idaho 601, 716 P.2d 1373, 1 U.C.C. Rep. 2d 85 (Ct. App. 1986) (used photocopier that failed to function properly for over one month breached warranty of merchantability); *Dickerson v. Mountain View Equip. Co.*, 109 Idaho 711, 710 P.2d 621, 42 U.C.C. Rep. 114 (Ct. App. 1985); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 463, 29 U.C.C. Rep. 75, 80 (Okla. 1980) ("the provisions of § 2-314(1) were clearly intended to apply to *all sales* of goods by a merchant who deals in them . . .") (emphasis in original). *But see* *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 38 U.C.C. Rep. 78 (Tex. Ct. App. 1983) (no implied warranty attaches when buyer purchases goods he knows are used).

²⁴² "A contract for the sale of second-hand goods . . . involves only such obligation as is appropriate to such goods . . ." U.C.C. § 2-314 comment 3.

²⁴³ *Dickerson*, 109 Idaho at 711, 710 P.2d at 625, 42 U.C.C. Rep. at 120 ("[T]he new or used character [of a product] is a factor in determining its standard of merchantability.").

The Code is silent as to whether section 2-315 applies to used goods. One commentator has suggested that this omission, in light of the explicit coverage under comment 3 to section 2-315, could be intentional according to the statutory interpretation maxim *inclusio unius est exclusio alterius*. However, recent case law has chosen instead to interpret section 2-315 to apply to second hand goods. Comment, *Uniform Commercial Code—Implied Warranty of Fitness for a Particular Purpose—Applicability to the Sale of Secondhand Goods*, 6 WHITTIER L. REV. 499 (1984). There appears to be no theoretical reason for the courts to draw a distinction between used goods and new goods for section 2-315 purposes.

goods are not generally expected to be in mint condition, they nevertheless must meet a basic standard of merchantability. For example, used cars are expected to be in reasonably safe condition and substantially free from defects that would render them inoperable.²⁴⁴ Notably, used goods are less likely to give rise to an implied warranty of merchantability because often the seller will not be considered a merchant.²⁴⁵ For example, the sale of a used good will frequently fall within the isolated sale exception of section 2-314.²⁴⁶

Consistent with our notion that courts should base liability on factors of reliance and knowledge, we believe that the likelihood that a seller will be subject to Article Two implied warranties should be a function of the knowledge he possesses and the buyer's reliance upon him. When the seller is a merchant dealing in used goods, such as a used car dealer, the implied warranties should clearly apply. Problems may arise when a seller of used goods is not clearly a merchant because the sales are only incidental to his regular business.²⁴⁷ We believe that where the seller has special knowledge of the used goods, such as a metropolitan transit authority selling its used trolleys for scrap, there should be an implied warranty of merchantability arising out of the sale.²⁴⁸ However, when the seller has no specialized knowledge there should be no implied

²⁴⁴ See *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wash. App. 208, 716 P.2d 911, 1 U.C.C. Rep. 2d 394 (1986).

²⁴⁵ See *Joyce v. Combank/Longwood*, 405 So. 2d 1358, 32 U.C.C. Rep. 1118 (Fla. Dist. Ct. App. 1981) (bank selling repossessed cars not merchant); *Bernstein v. Sherman*, 130 Misc. 2d 741, 497 N.Y.S.2d 298, 1 U.C.C. Rep. 2d 375 (N.Y. Jus. Ct. 1986) (private seller of used car not a merchant); see also *Guess v. Lorenz*, 612 S.W.2d 831, 30 U.C.C. Rep. 1529 (Mo. Ct. App. 1981) (same). For a discussion of the merchant requirement, see *supra* notes 192-97 and accompanying text.

²⁴⁶ See, e.g., *Perry v. Rockwell Graphic Sys.*, 42 U.C.C. Rep. 409 (D. Mass. 1982) (selling equipment no longer needed does not make seller a merchant); *Guess*, 612 S.W.2d 831, 30 U.C.C. Rep. 1529 (used car sale); *Allen v. Nicole, Inc.*, 172 N.J. Super. 442, 412 A.2d 824, 28 U.C.C. Rep. 982 (1980) (seller not merchant in isolated sale of amusement ride); *Bernstein*, 130 Misc. 2d 741, 497 N.Y.S.2d 298, 1 U.C.C. Rep. 2d 375 (prior owners' sale of car); *McGregor v. Dimou*, 101 Misc. 2d 756, 422 N.Y.S.2d 806, 28 U.C.C. Rep. 66 (N.Y. Civ. Ct. 1979) (seller not merchant in isolated sale of used car even though seller was body and fender specialist and had sold other used cars); see also *supra* notes 198-213 and accompanying text.

²⁴⁷ See *supra* notes 208-09 and accompanying text.

²⁴⁸ See *Ferragamo v. Massachusetts Bay Transp. Auth.*, 395 Mass. 581, 481 N.E.2d 477, 41 U.C.C. Rep. 304 (1985). In *Ferragamo* the Massachusetts Bay Transportation Authority (MBTA) argued that its primary business was provision of transportation and that the sale of its old trolley cars was "incidental" as a matter of law. The court disagreed and, reversing the lower court's decision, considered the MBTA a merchant of used trolley cars. The court based the decision on the following facts: the MBTA sold almost all of its old trolley cars for scrap; it solicited bids for the cars; the trolleys had been operated and repaired by its employees for 25 years; and it had originally designed the cars. *Id.* at 585-89, 481 N.E.2d at 480-82, 41 U.C.C. Rep. at 308-11. The court therefore concluded that the MBTA was highly experienced and knowledgeable with respect to the goods.

warranty.²⁴⁹

3. A "Contract for Sale" Under Section 2-314

Under section 2-314(1), "a warranty that the goods shall be merchantable is implied in a contract for their sale." Courts have interpreted "contract for their sale" broadly, focusing not upon the formal transfer of title from buyer to seller, but rather on whether a commercial relationship exists between a merchant and another party.²⁵⁰ As a result, leases, loans, and other transactions not involving transfer of title may give rise to an implied warranty of merchantability.

a. *Incomplete Sales.* Some courts have broadened "contract for sale" to create an implied warranty to a retail purchaser before he has actually bought the goods. A common factual pattern involves a customer picking up an item off a shelf in a self-service store and manifesting an intent to purchase the item—by putting food in a grocery basket to carry it to the checkout counter, for example. Some courts have reasoned that placing goods on a shelf in a self-service store for customer inspection and selection constitutes an offer to sell such goods at the stated price, and the customer's act of taking possession of the goods with intent to pay for them constitutes a reasonable mode of acceptance, so as to form a "contract for sale."²⁵¹ Likewise, a restaurant that serves a glass of wine to a patron can be held liable under an implied warranty theory for injuries sustained when the glass breaks in the patron's hand.²⁵² Courts have based this rule squarely on section 2-314, which expressly provides that "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."²⁵³

b. *Loans.* Implied warranties do not apply when goods are loaned. For example, school officials were not responsible for injuries resulting from a defective athletic helmet because they did not

²⁴⁹ See *Perry v. Rockwell Graphics Sys., Inc.*, 42 U.C.C. Rep. 409 (D. Mass. 1985).

²⁵⁰ See generally J. WHITE & R. SUMMERS, *supra* note 5, § 9-6, at 344.

²⁵¹ See *Barker v. Allied Supermarket*, 596 P.2d 870, 26 U.C.C. Rep. 597 (Okla. 1979) (taking possession of softdrink bottle with intent to purchase constituted contract for sale.); see also Note, *Barker v. Allied Supermarket: An Expanded Interpretation of the UCC's "Contract for Sale,"* 33 Sw. L.J. 1294, 1295 (1980) (suggesting that the trend is to find an implied warranty of merchantability in these circumstances).

²⁵² See, e.g., *Shaffer v. Victoria Station, Inc.*, 91 Wash. 2d 295, 588 P.2d 233, 25 U.C.C. Rep. 427 (1978).

²⁵³ *Id.* at 297, 588 P.2d at 234, 25 U.C.C. Rep. at 428. Notably, one court has refused to find an implied warranty when a browsing customer picked up a jar that injured her hand because the customer had not formed an intent to purchase. *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1 U.C.C. Rep. 2d 1115 (11th Cir. 1986).

sell it, but loaned it to the subsequently injured student.²⁵⁴ Similarly, a car dealer was not liable for injuries sustained by a prospective buyer test-driving the vehicle.²⁵⁵

We believe, however, that implied warranties should arise from loans in some circumstances. Courts should distinguish between gratuitous loans and loans integral to a sales transaction—a bailment for mutual benefit. In the former case, it is proper to exclude loaned goods from implied warranty coverage because such a transaction clearly falls outside of section 2-106's definition of a sale. In the latter case, however, the bailment may "be considered so closely allied to selling as to become a sale."²⁵⁶

We propose a rebuttable presumption that loans are not covered by implied warranties. A party could rebut this presumption by showing that the bailment was part of an anticipated commercial transaction. For example, under this test, school officials loaning athletic gear in a noncommercial setting would not be liable.²⁵⁷ However, a car dealer who loans a car to a potential customer in anticipation of a sale to that customer should be held to the implied warranty of merchantability assuming that the other requirements for the implied warranty were met.

c. *Lease Transactions.* Arguably, a lease resembles a contract for sale even more than does a loan.²⁵⁸ Courts that find the Code applicable to leases do so in one of three ways.²⁵⁹ If the leases are "disguised sales," courts may hold that they are in fact a "sale" for

²⁵⁴ See *Hemphill v. Sayers*, 552 F. Supp. 685, 35 U.C.C. Rep. 758 (D. Ill. 1982).

²⁵⁵ See *Mason v. General Motors Corp.*, 397 Mass. 183, 189, 490 N.E.2d 437, 441, 42 U.C.C. Rep. 1553, 1558 (1986) ("There is no statutory language, however, that reasonably may be construed as either creating or sanctioning the judicial creation of a warranty in connection with a bailment of the kind that occurred in this case.").

²⁵⁶ *Id.* at 196 n.3, 409 N.E.2d at 445 n.3, 42 U.C.C. Rep. at 1561 n.3 (Liacos, J., dissenting).

²⁵⁷ We do not address the question of whether the school officials would be liable for a breach of duty to the students on any theory other than implied warranty.

²⁵⁸ See *All-States Leasing Co. v. Ochs*, 42 Or. App. 319, 600 P.2d 899, 27 U.C.C. Rep. 808 (1979). In discussing Oregon's version of section 2-314, the court stated:

The more difficult question is whether the implied warranty of merchantability, which by the express terms of ORS 72.3140 is applicable to the sale of goods, also applies to the lease of goods. We observe that the U.C.C. is more concerned with the rights and obligations which attach to a transaction which has certain characteristics and with respect to which the parties have certain intentions, than it is with the form in which the transaction is cast.

Id. at 334, 600 P.2d at 909, 27 U.C.C. Rep. at 820 (footnote omitted); see *supra* notes I6-37 and accompanying text.

²⁵⁹ See *supra* notes I6-37 and accompanying text. Additionally, there is a fourth method—legislative action. Maryland, for example, adds a fourth subsection to section 2-314 providing that "Subsections (1) and (2) of this section apply to a lease of goods and a bailment for hire of goods that pass through the physical possession of and are

purposes of the Code.²⁶⁰ Other courts use the "transaction in goods" language of section 2-102 to justify extending warranty protection to leases.²⁶¹ Finally, some courts simply incorporate leases into the goods language by analogy.²⁶²

We suggest that a more consistent application of the underlying policies of the Code would condition the existence of an implied warranty arising from a lease on the amount of reliance and knowledge involved, and the resemblance of the transaction to a sale of goods. Often those policies lead to the use of the analogy method to expand the Code's applications to such transactions as services, leases, loans, and infrequent and incomplete sales.

4. *The Standards of Merchantability—Section 2-314(2)*

Assuming that an implied warranty of merchantability applies under section 2-314(1), section 2-314(2) sets forth the standards of merchantability:

Goods to be merchantable must be at least such as to

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.²⁶³

Violation of any one of these standards constitutes a breach of the

maintained by the lessor, sublessor, or bailor." MD. COM. LAW CODE ANN. § 2-314(4) (Supp. 1986).

²⁶⁰ See *supra* notes 26-29 and accompanying text.

²⁶¹ See *supra* notes 21-25 and accompanying text.

²⁶² See *supra* notes 30-37 and accompanying text.

Generally, the rights and obligations defined by the lease and the seller's knowledge determine whether the lease gives rise to implied warranties. See *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 703 n.6, 324 S.E.2d 462, 468 n.6, 40 U.C.C. Rep. 408, 414 n.6 (1985) (lease that provided that the lessee shall purchase the leased goods at the termination of the lease is a "contract for sale" and thus is covered by the U.C.C.); *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 399 N.E.2d 1355, 28 U.C.C. Rep. 336 (1980) (repair provisions render lease a sale under section 2-315); *Ochs*, 42 Or. App. 319, 600 P.2d 899, 27 U.C.C. Rep. 808 (doctor who leased a computer relied on his own knowledge and not the lessor's who had no expertise in the field). Generally, the more the lease resembles a sale, the more likely the lessor will be liable.

²⁶³ U.C.C. § 2-314(2).

implied warranty of merchantability. Although comment 6 to section 2-314 implies that this list is not exhaustive,²⁶⁴ courts tend not to impose additional standards.²⁶⁵ For the most part, courts use a reasonableness standard to determine whether section 2-314(2)'s requirements have been met.²⁶⁶

a. *Pass Without Objection in the Trade.* Section 2-314(2)(a) requires that goods "pass without objection in the trade." This section simply requires that goods meet whatever standard or custom prevails in the trade for goods of the kind.²⁶⁷ A few examples illustrate the application of this section.

With consumer goods, the courts have interpreted the standard to encompass public expectations of the product. In *Thomas v. Rudell Lease-Sales, Inc.*²⁶⁸ the buyer purchased a used Corvette, which, unbeknownst to him, had been wrecked and repaired prior to the sale.²⁶⁹ According to the court, the public generally rejects wrecked, although subsequently repaired, Corvettes and therefore found that such a Corvette fails to pass without objection in the trade.²⁷⁰

With commercial transactions, courts often link the ordinary purpose of the goods to the expectations in the trade. For instance, one court found that seeds that had a general reputation in the trade for being disease-free did not pass without objection if they were highly contaminated with bacteria.²⁷¹ Likewise, a court held that wine containing "Fresno mold" does not pass without objection in the trade, and therefore the seller of the wine breached the implied

²⁶⁴ Subsection (2) 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.

Id. § 2-314 comment 6.

²⁶⁵ Instead of creating new standards, courts may expand those listed in section 2-314 to cover unforeseen situations. However, our research has not disclosed any such new standards.

²⁶⁶ See Special Project, *supra* note 1, at 75.

²⁶⁷ The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in the line of trade under the description or other designation of the goods used in the agreement.

U.C.C. § 2-314 comment 2.

²⁶⁸ 43 Wash. App. 208, 716 P.2d 911, 1 U.C.C. Rep. 2d 394 (1986).

²⁶⁹ *Id.* at 209-10, 716 P.2d at 912-13, 1 U.C.C. Rep. 2d at 395-96.

²⁷⁰ *Id.* at 214, 716 P.2d at 915, 1 U.C.C. Rep. 2d at 390.

²⁷¹ *Latimer v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 632-34, 386 N.W.2d 618, 623-24, 1 U.C.C. Rep. 2d 1128, 1134-35 (1986).

warranty of merchantability.²⁷²

b. *Fair Average Quality (Fungible Goods)*. Section 2-314(2)(b) provides that to be merchantable, fungible goods must be of "fair average quality" within the contract description. "Fungible" means goods "of which any unit is, by nature or usage of trade, the equivalent of any other like unit."²⁷³ The commentary to section 2-314 states:

"Fair average" . . . means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description.²⁷⁴

Subsection 2-314(2)(b) is often used in connection with subsection 2-314(2)(a)²⁷⁵ because "[b]oth refer . . . to the standards of that line of the trade which fits the transaction and the seller's business."²⁷⁶ As with subsection (2)(a), few cases specifically address this area. Those cases that do involve one subsection usually involve the other as well.²⁷⁷

c. *Fit for Ordinary Purposes*. Subsection (2)(c) provides that goods must be "fit for the ordinary purposes for which such goods are used." This subsection embodies a fundamental concept of section 2-314—that goods be reasonably fit for their usual, intended purpose.²⁷⁸ To meet this standard goods must be reasonably safe when put to their ordinary use²⁷⁹ and reasonably capable of per-

²⁷² *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 672, 473 N.E.2d 1066, 1070, 40 U.C.C. Rep. 93, 98 (1985).

²⁷³ U.C.C. § 1-201(17).

²⁷⁴ *Id.* § 2-314 comment 7. Fair average is a term directly appropriate to agricultural bulk products. *Id.*

²⁷⁵ Although an item failing to meet any one of the six standards is not merchantable, comment 7 to section 2-314 advises that subsections (2)(a) and (b) "are to be read together." *Id.*

²⁷⁶ *Id.*

²⁷⁷ See, e.g., *Maybank v. S.S. Kresge Co.*, 46 N.C. App. 687, 266 S.E.2d 409, 29 U.C.C. Rep. 69 (1980), *modified on other grounds and aff'd*, 302 N.C. 129, 273 S.E.2d 681, 30 U.C.C. Rep. 985 (1981); *Latimer v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 386 N.W.2d 618, 1 U.C.C. Rep. 2d 1128 (1986); Special Project, *supra* note 1, at 77-78.

²⁷⁸ Comment 8 to section 2-314 characterizes paragraph (c) as "a fundamental concept" of that section.

²⁷⁹ See, e.g., *Maybank*, 46 N.C. App. at 692, 266 S.E.2d at 412, 29 U.C.C. Rep. at 73 ("A flashcube which does not work properly and which causes . . . unexpected harm . . . is not merchantable."); *Taterka v. Ford Motor Co.*, 86 Wis. 2d 140, 271 N.W.2d 653, 25 U.C.C. Rep. 680 (1978) (car is unmerchantable if it has single defect causing substantial safety hazard).

Food and drink are covered by this paragraph as well. See U.C.C. § 2-314 comment 5. For cases discussing the application of section 2-314, see *Shaffer v. Victoria Station*,

forming their ordinary functions.²⁸⁰ A product's ordinary purpose is one which is reasonably foreseeable to the merchant.²⁸¹ The merchant will not be held liable for harm caused by deliberate misuse of the goods totally unrelated to any normal or intended use.²⁸² The fitness for ordinary purpose requirement applies to goods sold for resale as well as to those sold to the customer.²⁸³

Plaintiffs have attempted to expand the application of subsection (2)(c) by injecting a notice of freedom from hazard into the concept of ordinary purpose. For example, in *Rhodes v. R.G. Industries*²⁸⁴ a buyer argued that a handgun which had caused the death of a child was not merchantable because the ordinary purpose

Inc., 91 Wash. 2d 295, 297, 588 P.2d 233, 235, 25 U.C.C. Rep. 427, 429 (1978) (Where customer in a restaurant was injured by a glass of wine that shattered, the court stated, "[p]laintiff alleges the drink sold—wine in a glass—was unfit and has, therefore, stated a cause of action."); *Orlando v. Herco, Inc.*, 351 Pa. Super. 144, 505 A.2d 308, 42 U.C.C. Rep. 1624 (1986) (food merchant may present evidence pertaining to purchase, storage, and inspection of ingredients used to prepare food to show that the food was merchantable and fit for human consumption).

A merchant also may be liable for breach of an implied warranty under section 2-314(2)(c) if a product causes some kind of allergic reaction in a substantial number of people. Compare *Tideman v. Fleetwood Homes*, 102 Wash. 2d 334, 339, 684 P.2d 1302, 1305, 39 U.C.C. Rep. 442, 445 (1984) (buyer could recover for hypersensitive allergic reaction to formaldehyde in mobile home interior because "formaldehyde [is] harmful to some extent to a reasonably foreseeable and appreciable percentage of users") (emphasis in original) with *Griggs v. Combe, Inc.*, 456 So. 2d 790, 793, 39 U.C.C. Rep. 446, 449 (Ala. 1984) (Plaintiff could not recover for severe reaction to benzocaine because the plaintiff was "the only person who ha[d] suffered this kind of injury in the long history of use of the drug in question.").

²⁸⁰ See *Salcetti v. Tuck*, 27 U.C.C. Rep. 679 (D.C. Super. Ct. 1979) (puppy sold with distemper not fit for ordinary purpose); *Welch v. Fitzgerald-Hicks Dodge, Inc.*, 121 N.H. 358, 430 A.2d 144, 31 U.C.C. Rep. 1336 (1981) (reversing directed verdict for defendant because continuing "shimmy" in car could justify jury finding that car was not fit for ordinary purpose); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 29 U.C.C. Rep. 75 (Okla. 1980) (frequent breakdown of combine rendered it unfit for ordinary purpose).

²⁸¹ See, e.g., *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 649-50, 42 U.C.C. Rep. 1250, 1259 (N.D. Miss. 1986) (dumptruck that overturned when used to haul clay not used for ordinary purpose because manufacturer could not reasonably have foreseen that truck would be used for other than its intended purpose of hauling washed rock); *Allen v. Chance Mfg.*, 398 Mass. 32, 34, 494 N.E.2d 1324, 1326, 1 U.C.C. Rep. 2d 1124, 1126 (1986) (in personal injury claim asserting a breach of the implied warranty of merchantability plaintiff "must prove that at the time of his injury he was using the product in a manner that the defendant . . . reasonably could have foreseen").

²⁸² *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 29 U.C.C. Rep. 487 (1st Cir. 1980) (deciding manufacturer did not need to design beer bottle to withstand deliberate misuse by throwing bottle against telephone pole); see also *infra* notes 295-302 and accompanying text (related discussion of necessary warnings and labels).

²⁸³ "[P]rotection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be 'honestly' resalable in the normal course of business because they are what they purport to be." U.C.C. § 2-314 comment 8.

²⁸⁴ 173 Ga. App. 51, 325 S.E.2d 465, 40 U.C.C. Rep. 1668 (1984).

of a handgun is self-protection as opposed to killing children.²⁸⁵ The court refused to accept this characterization of a gun's ordinary purpose, however, reasoning that a gun's purpose is to fire when the trigger is pulled.²⁸⁶ Because the gun in *Rhodes* had so fired, the Court held that it was merchantable.²⁸⁷

Plaintiffs have had some success in including in a product's ordinary purpose the notion that the product must function without causing damage. For example, in *Streich v. Hilton-Davis*²⁸⁸ a buyer purchased a potato-sprout suppressant designed to facilitate the winter storage of seed potatoes.²⁸⁹ Although the suppressant did facilitate the storage of the buyer's seed potatoes by preventing them from sprouting, "the seed potatoes treated with [the suppressant] showed delayed and erratic emergence, multiple sprouting, a heavy tuber set resulting in small potatoes, and reduced yield."²⁹⁰ The defendant argued that the potato sprout suppressant had fulfilled its ordinary purpose of preventing potato seeds from sprouting, and that the altered growth pattern of the plaintiff's potatoes was merely an unfortunate side effect.²⁹¹ The court held for the plaintiff, however, stating that "[s]urely goods are not merchantable, if in their ordinary use, the goods cause damage to the property to which they are applied or harm to the person using them."²⁹²

Arguably, the reasoning in *Streich*, if taken to its logical extreme, would impose liability on the handgun merchant in *Rhodes*. The handgun would be unfit for its ordinary purpose because its ordinary use had caused the death of a child. Although we support the result in *Streich*, its reasoning should not extend to cases such as *Rhodes* because there is a difference between harm resulting from improper use of a product and harm resulting from a malfunctioning product. Purchasers of guns and other goods intended to be

²⁸⁵ *Id.* at 51, 325 S.E.2d at 446, 40 U.C.C. Rep. at 1669.

²⁸⁶ *Id.* at 52, 325 S.E.2d at 467, 40 U.C.C. Rep. at 1669-70 ("[T]he evidence showed that the gun performed exactly as was expected: when the hammer was cocked and the trigger was pulled, it fired.")

²⁸⁷ *Id.*, 325 S.E.2d at 467, 40 U.C.C. Rep. at 1669-70; *see also* First Nat'l Bank v. Regent Sports Corp., 619 F. Supp. 820, 42 U.C.C. Rep. 419 (N.D. Ill. 1985) (dart thrown by child at infant merchantable because it did not malfunction and warnings were given), *aff'd in part and rev'd in part*, 803 F.2d 1431, 2 U.C.C. Rep. 2d 458 (7th Cir. 1986); *Love v. Zales Corp.*, 689 S.W.2d 282, 284, 41 U.C.C. Rep. 69 (Tex. Ct. App. 1985) (affirming summary judgment for defendant in action to recover for breach of warranty on shotgun used as murder weapon because "[t]here was nothing wrong with the shotgun").

²⁸⁸ 692 P.2d 440, 40 U.C.C. Rep. 109 (Mont. 1984).

²⁸⁹ *Id.* at 442, 40 U.C.C. Rep. at 109-10 ("The [sprout suppressant] is expected to keep the treated seed potatoes from sprouting until after they are taken from storage, aerated, and planted.")

²⁹⁰ *Id.*, 40 U.C.C. Rep. at 110.

²⁹¹ *Id.* at 448, 440 U.C.C. Rep. at 111.

²⁹² *Id.*, 440 U.C.C. Rep. at 111.

hazardous should be aware of the danger inherent in the improper use of the product, and should be responsible for any damage from such misuse. By contrast, where, as in *Streich*, damage results from a product's malfunction, the merchant should be held liable. In such a case the buyer should be able to rely on the proper functioning of the product.

d. *Run of Even Kind, Quality, and Quantity.* Subsection (2)(d) provides that goods must "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved." This paragraph adds "precautionary language . . . as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units."²⁹³ The 1978 Special Project noted that no reported cases raised the issue of uniformity.²⁹⁴ We have found no noteworthy cases since 1978.

e. *Adequately Contained, Packaged, and Labeled.* Subsection (2)(e) requires that goods must be "adequately contained, packaged, and labeled as the agreement may require" to be merchantable. "Adequate packaging generally entails protection of the goods or persons using the goods from harm."²⁹⁵ Therefore, whether a particular label or package is adequate will depend upon the characteristics of the goods involved in the transaction.²⁹⁶ Inadequate warnings may render a good unmerchantable.²⁹⁷ For example, a truck may be unmerchantable because of a failure to warn of the danger resulting from underinflated tires when the truck is overloaded.²⁹⁸ Similarly, a failure to warn of the risks attending the use of prescription drugs can render the drugs unmerchantable.²⁹⁹

Whether a buyer or seller knows of a product's potential dan-

²⁹³ U.C.C. § 2-314 comment 9.

²⁹⁴ See Special Project, *supra* note 1, at 81.

²⁹⁵ *Id.*; see also *Shaffer v. Victoria Station, Inc.*, 91 Wash. 2d 295, 588 P.2d 233, 25 U.C.C. Rep. 427 (1978) (glass as wine container).

²⁹⁶ See U.C.C. § 2-314 comment 10; see also Special Project, *supra* note 1, at 82.

²⁹⁷ For a general discussion of the duty to warn, see Comment, *The Duty to Warn Within the Implied Warranty of Merchantability*: *Reid v. Eckerds Drugs, Inc.*, 41 OHIO ST. L.J. 747 (1980).

²⁹⁸ *Wolfe v. Ford Motor Co.*, 6 Mass. App. 346, 376 N.E.2d 143, 24 U.C.C. Rep. 94 (1978).

²⁹⁹ See *Stephens v. G.D. Searle & Co.*, 602 F. Supp. 379, 380, 40 U.C.C. Rep. 440, 443 (E.D. Mich. 1985) (Holding that a manufacturer of prescription contraceptives has a duty to warn users of risks and potential side effects because "oral contraceptives are distinguished from other prescription drugs by the zealous marketing practices used by . . . manufacturers."). Often drug manufacturers may fulfill their duty to warn by advising the prescribing physicians, not the public, of potential risks. *Dunkin v. Syntex Laboratories, Inc.*, 443 F. Supp. 121, 24 U.C.C. Rep. 304 (W.D. Tenn. 1977) (where a prescription drug is sold by a drug manufacturer that has warned the medical commu-

gers helps determine the necessity of a warning. The seller who knows of a product's hazards can protect against harm by warning the buyer. Indeed, it is likely that the buyer will have relied upon the seller's superior knowledge and expertise for such warnings. According to this analysis, the seller's failure to warn renders the goods unsafe and therefore unmerchantable. Conversely, when a buyer knows of the hazard he need not rely on the seller's warnings; therefore, a warranty need not arise.³⁰⁰

Because the adequacy of warnings is a question of fact,³⁰¹ the cases in this area fail to produce clear criteria for determining how explicit a warning must be. Therefore, sellers often must choose between risking liability because they have provided inadequate warnings and discouraging customers by providing excessive warnings.³⁰²

f. *Conform to Representations on Container or Label.* Subsection (2)(f), the last of section 2-314's specified standards for merchantability, requires that goods "conform to the promises or affirmations of fact made on the container or label if any." This standard applies "wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation."³⁰³ Courts tend to rely on this provision less frequently than on section 2-314's other standards due to

not of specific risks associated with using the drug, the warranty of merchantability is not breached where a particular user suffers the warned-of adverse side effects).

³⁰⁰ See *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 567, 39 U.C.C. Rep. 450, 455 (W.D. Va. 1984) ("When a skilled purchaser . . . knows or reasonably should be expected to know of the dangerous propensities or characteristics of a product, no implied warranty of merchantability arises.").

³⁰¹ See *Reid v. Eckerds Drugs, Inc.*, 40 N.C. App. 476, 485, 253 S.E.2d 344, 350, 26 U.C.C. Rep. 20, 29 ("Whether the product in question, when viewed as a whole (including contents, packaging, labeling and warnings) was merchantable is a jury question not susceptible of summary adjudication."), *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

³⁰² This dilemma is not solely the result of the U.C.C. provisions; general tort principles may produce the same effect. Yet, the duty to warn under an implied warranty does differ from the duty under tort law. See *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1045, 36 U.C.C. Rep. 1569, 1576 (4th Cir. 1983) ("[T]he duty to warn under an implied warranty theory focuses upon whether the lack of warning renders the product unreasonably dangerous; in contrast, a manufacturer will be liable in negligence for a failure to warn if its conduct is unreasonable.") (footnote omitted). Additionally, the implied warranty duty to warn exists only at the time the good leaves the manufacturer, while under tort principles the duty is continuous. *Id.* at 1046, 36 U.C.C. Rep. at 1577; see also RESTATEMENT (SECOND) OF TORTS § 301(2)(b) (1965).

³⁰³ U.C.C. § 2-314 comment 10. "This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container." *Id.*

the overlap between it and section 2-313's express warranty.³⁰⁴ When the product fails to meet the representations of its label, the presence of the express warranty will often render the existence of an implied warranty of merchantability irrelevant.³⁰⁵

The 1978 Special Project speculated that, under certain circumstances, conformity with label standards might "possess greater independent significance" than express warranties alone.³⁰⁶ "Suppose a farmer buys an insecticide to spray on his wheat crop. He later notices a label on the package indicating fitness for corn as well as wheat. Pleasantly surprised the farmer sprays his corn crop, which promptly dies."³⁰⁷ Even though there may be no express warranty,³⁰⁸ the implied warranty of merchantability could apply. Although court decisions have not expressly adopted the 1978 Special Project's contention that this standard of merchantability has potentially independent significance,³⁰⁹ the theory still holds. In the above example, the seller explicitly expressed his knowledge in the form of the label specifications of insecticide use. The label conveyed to the buyer the seller's understanding of the unique qualities of the good. The buyer justifiably relied on such representations. Although such reliance does not justify finding an express warranty, it represents a good example of reliance on an implied warranty.

B. The Implied Warranty of Fitness for a Particular Purpose— Section 2-315

The Code provides for an implied warranty of fitness for a particular purpose:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.³¹⁰

³⁰⁴ See U.C.C. § 2-313; see also *supra* note 39 and accompanying text.

³⁰⁵ See *supra* notes 38-142 and accompanying text.

³⁰⁶ Special Project, *supra* note 1, at 83.

³⁰⁷ *Id.*

³⁰⁸ See *supra* notes 61-136 and accompanying text.

³⁰⁹ Apparently courts have not had the opportunity to address the issue. See *Fischbach & Moore Int'l Corp. v. Crane Barge R-14*, 476 F. Supp. 282, 287, 27 U.C.C. Rep. 961, 968 (D. Md. 1979) ("The record reflects no warranty between plaintiffs and General Electric relating to the weight of the transformers other than that which may have arisen as a result of the stencilling by General Electric of weight information on the side of the various units. Where an affirmation of fact is made on a product or its container, an implied warranty arises that the product will conform to the representations."), *aff'd*, 632 F.2d 1123, 29 U.C.C. Rep. 1165 (4th Cir. 1980).

³¹⁰ U.C.C. § 2-315.

The commentary to this provision notes:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.³¹¹

Courts have characterized this distinction in various ways.

In section 2-315, the relationship between the warranty and the presence of reliance and knowledge is particularly apparent. According to Professors White and Summers, there are three prerequisites to imposition of an implied warranty of fitness for a particular purpose. Notably, all three relate directly either to the seller's knowledge of the buyer's purpose or to the buyer's reliance on the seller's knowledge:

- (1) The seller must have reason to know the buyer's particular purpose.
- (2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods.
- (3) The buyer must, in fact, rely upon the seller's skill or judgment.³¹²

1. *Seller's Knowledge of Buyer's Purpose*

Where the buyer has explicitly informed the seller of the particular purpose for which the buyer requires the goods, it is clear that the seller had "reason to know" of the buyer's particular purpose.³¹³ When the seller reasonably should know about reliance or purpose, such knowledge will be imputed to him, regardless of whether he actually does have such knowledge.³¹⁴

The commentary to section 2-315 explains:

Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the

³¹¹ *Id.* comment 2. Courts have characterized this distinction in various ways. *See, e.g., Agristor Leasing v. Meuli*, 634 F. Supp. 1208, 1220, 1 U.C.C. Rep. 2d 1102, 1112, (D. Kan. 1986) ("particular purpose . . . means an unusual, nonordinary purpose"); *Perry v. Rockwell Graphics Sys., Inc.*, 42 U.C.C. Rep. 409 (D. Mass. 1985) (no fitness warranty when use not "special").

³¹² J. WHITE & R. SUMMERS, *supra* note 5, § 9-9, at 358 (footnote omitted).

³¹³ *See, e.g., AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 30 U.C.C. Rep. 81 (N.D. Ill. 1980) (manufacturer of bottle caps told liner supplier how bottle cap liners were to be used). We do not here consider the various proof problems which could arise from oral exchanges.

³¹⁴ *See, e.g., Cohen v. Hathaway*, 595 F. Supp. 579, 39 U.C.C. Rep. 857 (D. Mass. 1984) (seller had reason to know of buyer's intended use for boat).

purpose intended or that the reliance exists.³¹⁵

The seller will only be presumed to have knowledge of the particular purpose when such a presumption is reasonable under the circumstances.³¹⁶ For instance, a seller was not presumed to have knowledge of the buyer's need for a fireproof baseball jacket that would not ignite when doused with petroleum.³¹⁷ Similarly, no implied warranty of fitness for a particular purpose attached when a buyer provided product specifications to the seller without informing the seller of the product's intended use.³¹⁸ In the extreme case, where the buyer refuses to disclose his particular purpose to the seller, the argument for the imposition of implied warranties certainly fails.³¹⁹ On the whole, using common sense in the application of the knowledge-of-purpose and reason-to-know requirements for the imposition of the implied warranty of fitness for a particular purpose seems to be the rule, which we endorse wholeheartedly.

2. *Reliance*

The buyer's reliance in fact and the seller's reason to know of this reliance are related elements of the implied warranty of fitness for a particular purpose.³²⁰ To determine whether the buyer relied on the seller to provide suitable goods, courts often examine the comparative expertise of the buyer and seller.³²¹ Although the

³¹⁵ U.C.C. § 2-315 comment 1.

³¹⁶ See, e.g., *Hiskey v. City of Seattle*, 44 Wash. App. 110, 720 P.2d 867, 1 U.C.C. Rep. 2d 1127 (no implied warranty arose when buyer specified the thickness of rigging cable without explaining purpose to seller), *review denied*, 107 Wash. 2d 1001 (1986); *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 42 U.C.C. Rep. 1250 (N.D. Miss. 1986) (defendant did not breach section 2-315 when buyer used product for purpose other than that which defendant had been told).

³¹⁷ *Keirs v. Weber Nat'l Stores*, 352 Pa. Super 111, 507 A.2d 406, 1 U.C.C. Rep. 2d 387 (1986).

³¹⁸ See, e.g., *Hiskey*, 44 Wash. App. 110, 720 P.2d 867, 1 U.C.C. Rep. 2d 1127 (no warranty when leasee specified thickness of rigging cable without informing lessor of his intent to use cable to hoist ten-ton truss.); cf. *infra* note 326 and accompanying text.

³¹⁹ See, e.g., *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 40 U.C.C. Rep. 1245 (D. Conn. 1984) (no implied warranty for particular purpose arises when buyer refuses to disclose purpose of component part because of secret design).

³²⁰ In 1978 we suggested that these two elements "are two sides of an evidentiary coin." Special Project, *supra* note 1, at 89. "At trial, the buyer will introduce circumstances of the transaction to convince the court and jury that he actually relied upon the seller; the same circumstances probably gave the seller reason to know of the buyer's reliance." *Id.*; see also *Medcom, Inc. v. C. Arthur Weaver Co.*, 232 Va. 80, 343 S.E.2d 243, 2 U.C.C. Rep. 2d 126 (1986) (allowing buyer to present evidence of its reliance in fact and of seller's knowledge of buyer's reliance).

³²¹ Special Project, *supra* note 1, at 92; see *Dotts v. Bennett*, 382 N.W.2d 85, 42 U.C.C. Rep. 1273 (Iowa 1986) (buyer who was lifetime farmer did not rely on expertise of merchant-farmer); *All-States Leasing Co. v. Ochs*, 42 Or. App. 319, 600 P.2d 899, 27 U.C.C. Rep. 808 (1979) (doctor leased computer based on his own prior knowledge

buyer must have actually relied on the seller, courts often exhibit a willingness to find the buyer's reliance by inference.³²²

*Skelton v. Druid City Hospital Board*³²³ provides an example of a buyer's inferred reliance on the seller. Patients, especially unconscious ones during surgery, must rely on the skill and expertise of the seller. Hospitals foster this reliance by holding themselves out to the public as having special knowledge regarding the provision of medical services, and therefore are necessarily cognizant of the buyer's reliance.³²⁴ Accordingly, hospitals implicitly warrant that they will furnish patients with goods for use in the provision of medical services that are fit for the intended purpose of medical care, giving rise to an implied warranty of fitness for the particular purpose.³²⁵

Several factors may lead a factfinder to conclude that a buyer did not actually rely on the seller. For example, when a buyer provides product specifications to the seller, the factfinder may conclude that buyer reliance is lacking, thus preventing the creation of the implied warranty of fitness.³²⁶ A buyer's examination of the goods³²⁷ and his knowledge and expertise in the area³²⁸ also serve

from lessor who had no expertise in the field). Leased goods may be covered by section 2-315 as well as section 2-314. *See* *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 399 N.E.2d 1355, 28 U.C.C. 336 (1980) (lease with certain repair provisions).

³²² *But see* *Khan v. Velsicol Chem. Corp.*, 711 S.W.2d 310, 319, 1 U.C.C. Rep. 2d 1114 (Tex. Ct. App. 1986) (suggesting reliance not necessary element of breach of warranty claim under section 2-315 because section 2-315 is alternative to strict liability in tort).

³²³ 459 So. 2d 818, 39 U.C.C. Rep. 369 (Ala. 1984); *see supra* notes 224-31 and accompanying text.

³²⁴ 459 So. 2d at 823, 39 U.C.C. Rep. at 376; *see also* *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 399 N.E.2d 1355, 1359, 28 U.C.C. Rep. 336, 342 (1980) (Where lease arrangement placed duties of maintenance and repair upon the lessor, plaintiff-lessee, "even more so than in a sale situation[,] relied upon [lessor's] undertaking to provide a boxcar which was safe and suitable for the purpose contemplated by the parties to the lease. Such an undertaking on the part of the defendant lessor gives rise to a contractual implied warranty of fitness analogous to that applicable under § 2-315.").

³²⁵ 459 So. 2d at 823, 39 U.C.C. Rep. at 377.

³²⁶ *See, e.g.*, *Shell v. Union Oil Co.*, 489 So. 2d 569, 1 U.C.C. Rep. 2d 692 (Ala. 1986) (plaintiff's employer set specifications for product containing a carcinogen); *Keith v. Buchanan*, 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 42 U.C.C. Rep. 386 (1985) (no reliance on seller where buyer of sailing yacht had extensive experience with sailboats, provided specifications to seller, examined many vessels, surveyed advertisements, and received much advice from experienced friends); *Hiskey v. City of Seattle*, 44 Wash. App. 110, 720 P.2d 867, 1 U.C.C. Rep. 2d 1127, *review denied*, 107 Wash. 2d 1001 (1986) (no reliance where buyer specified thickness of leased rigging cable without explaining intended purpose to seller).

Only precise specifications suffice to extinguish buyer reliance. *See, e.g.*, *Global Truck and Equip. Co. v. Palmer Mach. Works*, 628 F. Supp. 641, 650, 42 U.C.C. Rep. 1250, 1260 (N.D. Miss. 1986) (truck specifications too general to defeat warranty of fitness; warranty failed on other grounds).

³²⁷ *See* U.C.C. § 2-316 comment 8; *see also* *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 41 U.C.C. Rep. 419 (3d Cir. 1985) (any implied warranties on plastic tray used

to defeat a finding of reliance. Finally, misuse of the product may prevent application of the implied warranty of fitness.³²⁹

3. *Overlap with Other Warranties*

The implied warranties of the Code at times overlap with each other³³⁰ and with the other Article Two warranties.³³¹ As we stated

in candy making waived by buyers having tested samples where defect would surface during reasonable testing).

³²⁸ See *supra* notes 195 & 321 and accompanying text; cf. *Dunkin v. Syntex Labs*, 443 F. Supp. 121, 126, 24 U.C.C. Rep. 304, 308 (W.D. Tenn. 1977) ("A similar analysis [to that used in the implied warranty of merchantability discussion] leads to the same conclusion as to the implied warranty of fitness for a particular purpose. Where a drug manufacturer sells a drug designed for a specific purpose . . . and warns the medical profession of possible side effects in some users, the warranty of fitness for a particular purpose is not breached where one of those side effects occurs.").

³²⁹ *Global Truck & Equip. Co.*, 628 F. Supp. at 651, 42 U.C.C. Rep. at 1260 ("[I]n designing the product, Palmer had a right to rely on Global's assertion that the trailers were to be used to haul washed rock. . . . [As the trailers were not used for that purpose,] the court [held] that any breach of implied warranty of fitness for a particular purpose was the result of the ultimate purchaser's use of the product for other than the stated particular purpose and that allowing recovery under section [] 2-315 would be improper."); see also *Keirs v. Weber Nat'l Stores*, 352 Pa. Super. 111, 507 A.2d 406, 1 U.C.C. Rep. 2d 387 (1986) (dousing baseball jacket in petroleum deemed "abnormal" use).

³³⁰ See Special Project, *supra* note 1, at 95. Comment 2 to section 2-315 acknowledges that a contract may give rise to more than one warranty: "A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose." But see *Agristor Leasing v. Meuli*, 634 F. Supp. 1208, 1 U.C.C. Rep. 2d 1102 (D. Kan. 1986) (distinguishing between ordinary and particular purposes); *supra* note 311 and accompanying text.

³³¹ See *Lupa v. Jock's*, 131 Misc. 2d 536, 500 N.Y.S.2d 962, 1 U.C.C. Rep. 2d 724 (N.Y. Civ. Ct. 1986) (existence of manufacturer's express warranty over refrigerator did not displace local merchant's implied warranty of merchantability).

In addition to those fact patterns where multiple warranties theoretically apply, plaintiffs may simply claim that the various warranties all apply to the facts. A current case in point, as evidenced by the complaint:

Deborah Jean Surber, a Little Rock lass
 (A devoted chocolate addict, alas)
 Trotted down to her friendly Alco store
 Her Hershey supply to restore.
 Now Hershey's, a company in Pennsylvania
 Sells candy worldwide (even in Transylvania)
 And way down south in Ar-Kansas
 (In the Alco Stores, headquartered in Kansas)
 There wiggled on the shelves some Hershey's candy.
 Deborah shrieked in horror and practically fainted
 She had no idea that the candy was tainted
 After all, there were the company guarantees
Of expressed and implied merchantabilities
And of fitness for the particular purpose
 To-wit, to eat it, for which she'd purchased it.
 But somehow Hershey in stirring this batch
 (Or maybe it was Alco on its shelves, alas)
 Thought ghosts and goblins were not sufficient
 On this Halloween they would be negligent

in 1978, "several decisions implicitly condone the merging of the two warranties."³³² The overlap occurs where courts find a breach of the implied warranty of a particular purpose and the intended purpose is one of ordinary use.³³³ As we proposed in 1978, this overlap often suits the policies of the Code.

The policies underlying the fitness warranty apply regardless of the buyer's purpose for the goods. Aware of the buyer's purpose and reliance, the seller selecting the goods tacitly represents their particular suitability. Such a tacit representation may exist even where the buyer's purpose happens to be ordinary. Moreover, the presence of the fitness elements often suggests a disparity of bargaining power. Section 2-315 seeks to relieve buyers from the oppression such disparity might engender. The presence of bargaining disparity does not depend upon the nature of the buyer's purpose for the goods. Hence to advance fully the policies underlying the implied warranty of fitness, courts should not require that the aggrieved buyer's purpose be other than ordinary.³³⁴

This is not to say that the separate warranties do not have their individual uses. We believe, however, that when the seller is aware of the buyer's specific purpose for the good, whether it be ordinary or unusual, the implied warranty of fitness for a particular purpose should apply, assuming that the reliance requirement has been satisfied. When the seller does not possess, nor has reason to possess, knowledge of the buyer's purpose, the standards of the implied warranty of merchantability should suffice. We believe it is no more difficult to apply more than one kind of warranty to a particular transaction than it is to apply more than one standard of merchantability to a single transaction. We continue to advocate such a move as consistent with the underlying policies of the Code and recommend that it be followed.

C. Supplemental Implied Warranties—Section 2-314(3)

Section 2-314(3) provides: "Unless excluded or modified . . .

By adding all those squirming worms and maggots
(Well—maybe not so many, just a few to gag us.)

Jackson, Pulaski Circuit Court Complaint, *reprinted in Stop Him Before He Rhymes Again*, Arkansas Gazette, Nov. 3, 1986, at 12A, col. 1 (emphasis added).

³³² Special Project, *supra* note 1, at 96.

³³³ See *Streich v. Hilton-Davies*, 692 P.2d 440, 448, 40 U.C.C. Rep. 109, 112 (Mont. 1984) (Sprout suppressant used for its ordinary purpose of suppressing sprouts breached the implied warranty of fitness for a particular purpose; because the seller knew of the particular, though ordinary, purpose, the buyer had "brought himself within the statutory language with respect to implied warranty of fitness for a particular purpose . . . for which the goods [were] required.").

³³⁴ Special Project, *supra* note 1, at 99-100 (footnotes omitted).

other implied warranties may arise from course of dealing or usage of trade.”³³⁵ Comment 12 to section 2-314 explains that the purpose of “[s]ubsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties.”³³⁶

The effect of the supplemental course-of-dealing or usage-of-trade warranty has been minimal at best.³³⁷ As before, buyers seldom attempt to use this warranty.³³⁸ In 1978, we suggested that at least four reasons why this is so:

1. “[T]here may be no relevant course of dealing or usage of trade to create a supplemental warranty.”³³⁹
2. The buyer’s case falls easily within one of the other warranties, and therefore he “need not resort” to supplemental warranties.³⁴⁰
3. “[T]he seller may have effectively disclaimed all implied warranties under section 2-316(3).”³⁴¹
4. The buyer may have “confuse[d] this genus of implied warranty with the implied warranty of merchantability because of their shared location in section 2-314.”³⁴²

In spite of this neglect, a section 2-314(3) warranty could serve a plaintiff as a last resort when all else has failed.

D. Conclusions

Over the years, the implied warranties codified in sections 2-314 and 2-315 of the Code have become fixtures in our commercial environment. A developing conception of reliance on the part of the buyer, coupled with the knowledge of the seller, can reasonably determine whether application of the implied warranties in a particular situation serves the underlying policy of reasonable protection, and therefore determine when and where these warranties should apply.

³³⁵ U.C.C. § 2-314(3).

³³⁶ *Id.* § 2-314 comment 12.

³³⁷ *See id.* at 102.

³³⁸ “[E]ither because litigation have failed to raise independent warranties or because courts have failed to address them, very few cases are to be found which discuss implied warranties actually created by dealing or usage.” Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D.L. Rev. 509-572-73 (1980).

³³⁹ Special Project, *supra* note 1, at 102.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

IV
DAMAGES

After the buyer has satisfied sections 2-313 through 2-315, has met the requirements of privity and notice,³⁴³ and has avoided any exclusions and limitations³⁴⁴ erected by the seller, he must prove damages. The Code spells out four general principles for measuring damages:

(1) The court should attempt to place the aggrieved party in the same position as performance would have placed him.³⁴⁵

(2) The court should require the parties to mitigate damages where possible.³⁴⁶

(3) The court, where consistent with public and statutory policies, should respect the intentions of the parties.³⁴⁷

(4) Common sense, commercial practicality and Code policies should guide the court.³⁴⁸

The buyer's damages fall into two categories: primary and resultant.³⁴⁹ A buyer suffers primary damages to the extent that the goods he receives are not as promised. Any other damages that the buyer suffers are resultant damages, including property damages,

³⁴³ See *infra* notes 901-44 & 945-80 and accompanying text.

³⁴⁴ See *infra* notes 367-77 and accompanying text.

³⁴⁵ The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

U.C.C. § 1-106(1).

³⁴⁶ "[T]he Act . . . makes it clear that damages must be minimized." *Id.* § 1-106 comment 1; see *id.* § 1-203 (obligation of good faith in performance and enforcement); *id.* § 2-706(1) (seller's remedy of resale when buyer breaches); *id.* § 2-712(2) (formula for damages when buyer covers after seller's breach).

³⁴⁷ See *id.* § 1-102(2) ("[u]nderlying purposes and policies of this Act are . . . to permit the continued expansion of commercial practices through custom, usage and agreement of the parties").

³⁴⁸ (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions

Id. § 1-102.

It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

.....

The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of . . . the Act as a whole, and . . . should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

Id. comment 1.

³⁴⁹ We have chosen these terms to avoid confusing our analysis with the common-law concepts of "direct" and "special" damages, which the Code rejects.

personal injuries, lost profits, and the like. Section 2-714(3) allows recovery for resultant damages "in a proper case," as determined under section 2-715.³⁵⁰

A. Primary Damages—Section 2-714(2)

Section 2-714(2) provides a formula for measuring primary damages in warranty cases where the buyer has accepted and retained nonconforming goods:

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.³⁵¹

Courts often use either the cost of repair or independent indicia of value to determine the difference between the value of the goods as warranted and as delivered.

1. *Cost of Repair*

An easy and often accurate shortcut to measuring the difference between the value of goods as warranted and as received is the cost of repair. Courts often use cost of repair as the measure of primary damages in cases in which the goods can be brought into conformity with their warranties at a reasonable cost.³⁵² The use of the cost of repair measure is constrained by the requirements of section 2-714(2) which sets the proper recovery amount at the difference between the value of the defective goods as accepted and the value of

³⁵⁰ See *infra* note 403 and accompanying text.

³⁵¹ *Id.* § 2-714(2).

³⁵² See, e.g., *Custom Automated Mach. v. Penda Corp.*, 537 F. Supp. 77, 84 (N.D. Ill. 1982) (difference in value between goods as accepted and as warranted equaled cost of repairs); *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 802 (D. Minn. 1980) (if repairs will restore CB radios to their warranted value, cost of repairs is a reliable measure of damages for breach of implied warranty of merchantability); *Bendix Home Sys., Inc. v. Jessop*, 644 P.2d 843, 847, 33 U.C.C. Rep. 1686, 1692 (Alaska 1982) (absent evidence of actual value of defective mobile home, only basis for awarding damages is cost of repairing home so that it will conform to warranties of sale); *Midland Supply Co. v. Ehret Plumbing & Heating Co.*, 108 Ill. App. 3d 1120, 1126, 440 N.E.2d 153, 157 (1982) (practical measure of damages in determining difference between actual and warranted value of boilers for heating system is cost of repairing goods to quality warranted); *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 1075, 445 N.E.2d 19, 25 (1982) (useful objective measurement of difference between value of goods accepted and value they would have had if they had been as warranted is cost of repair or replacement); *Vista St. Clair, Inc. v. Landry's Commercial Furnishings, Inc.*, 57 Or. App. 254, 258, 643 P.2d 1378, 1380 (1982) (useful objective measure of difference in value "as is" and value as warranted is cost of repair or replacement); *Cundy v. International Trencher Serv., Inc.*, 358 N.W. 2d 233, 240 (S.D. 1984) (where repairable, proper measure of damages for breach of warranty for sale of trenching machine should be based on cost of repair).

the goods as warranted.³⁵³ Therefore, if the cost of repair exceeds the value of the goods as warranted,³⁵⁴ repair costs could not represent the proper recovery amount.

Nevertheless, in *Continental Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc.*³⁵⁵ the court allowed the buyer of defective construction equipment to recover the cost of repairing the equipment even though it exceeded the purchase price. The court found this result logical because capping damages at the purchase price "would clearly deprive the purchaser of the benefit of its bargain in cases in which the value of the goods as warranted exceeds that price."³⁵⁶ Other courts adhere strictly to the theory that limits the buyer's recovery to the purchase price.³⁵⁷

Continental Sand adopts the better approach. Assume the seller has promised the buyer functioning goods. Presumably, if the seller could acquire goods in "as warranted" condition for less than the cost of repairing the defective goods, he would do so. Because he does not, the court must presume that the market value of the goods as warranted is greater than both the cost of repair and the original purchase price. In other words, contract price and value as warranted are not always equivalent.³⁵⁸ A difference between the contract price and the value as warranted is often attributable to section 2-714(2)'s requirement that courts measure the value as warranted on the date of acceptance of the goods rather than on the contract date.³⁵⁹

Normally, a buyer seeking repair costs does not need to produce additional evidence that the same figure would result from subtracting the value as received from the value as warranted. Such a requirement would defeat the purpose of using the cost of repair

³⁵³ Section 2-714 "deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by." U.C.C. § 2-714 comment 1.

³⁵⁴ Usually the purchase price. See *infra* notes 370-72 and accompanying text.

³⁵⁵ 755 F.2d 87, 40 U.C.C. Rep. 387 (7th Cir. 1985).

³⁵⁶ *Id.* at 91-92, 40 U.C.C. Rep. at 393; cf. *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 454 & n.34, 19 U.C.C. Rep. 1009, 1025 & n.34 (S.D.N.Y. 1976) (replacement of defective parts may be recoverable if reasonable because direct damages not limited to measure set forth in section 2-714(2)).

³⁵⁷ See, e.g., *Richardson v. Car Lot Co.*, 10 Ohio Misc. 2d 32, 462 N.E.2d 459, 462 (Mun. Ct. 1983) (difference in market value of automobile as warranted and its value due to defects can be proven by establishing reasonable cost of repairs as long as this cost is less than warranted market value); *Neuman v. Spector Wrecking & Salvage Co.*, 490 S.W.2d 875, 878, 12 U.C.C. Rep. 254, 257 (Tex. Civ. App. 1973) (buyer denied full recovery for repairs to defective truck scale where repair cost exceeded purchase price).

³⁵⁸ See *Hill v. BASF Wayandotte Corp.*, 280 S.C. 174, 177-78, 311 S.E.2d 734, 736 (1984) (appropriate damages in breach-of-warranty case involving defective herbicide was value crop would have had if herbicide had worked minus value of crop actually produced).

³⁵⁹ See *infra* notes 370-72 and accompanying text.

as a practical shortcut to calculating the difference in value under section 2-714(2). Courts should presume that the cost of repair accurately represents the buyer's primary damages unless the seller presents evidence to the contrary.³⁶⁰

Repairs to bring the goods into conformity with the contract also might improve or extend the life of the goods beyond what was originally warranted. In such a situation, the buyer will receive a windfall. For example, in *Cundy v. International Trencher Service*³⁶¹ the buyer of a trenching machine was able to use the trencher, despite its defects, for almost two years before the seller finally paid for repairs. The repairs included installation of a new front axle and a total cleaning of the machine costing over \$15,000.³⁶² The court did not subtract the value of the buyer's use before repair;³⁶³ thus, the buyer may have obtained the benefit of almost two years' free wear and tear at the seller's expense.

The more logical approach is to allocate the cost of improvement in value to the buyer.³⁶⁴ A Texas court, in *Neuman v. Spector Wrecking & Salvage Co.*,³⁶⁵ reversed a jury award of the estimated repair cost of a used truck scale where repairs included new parts and cost more than the purchase price of the used scales. The court reasoned that the buyer "purchased an old used scale . . . and his recovery is for the cost of a new scale."³⁶⁶ A court should make an aggrieved buyer whole, but should not give him a windfall in the form of greater efficiency or longer life at the seller's expense.³⁶⁷

2. *Independent Indicia of Value*

Sometimes defective goods cannot be repaired or the cost of repair is an inappropriate measure of the buyer's primary damages.³⁶⁸ In these situations, the buyer must independently prove "the value of the goods accepted and the value they would have had if they had been as warranted."³⁶⁹

³⁶⁰ Not all courts accept cost of repair as a practical measure of the difference between value as received and value as warranted. See, e.g., *Simmons v. Simpson*, 626 S.W.2d 315, 317 (Tex. Civ. App. 1980) (cost of repairing defective van not proper measure of damages in breach-of-warranty case).

³⁶¹ 358 N.W.2d 233 (S.D. 1984).

³⁶² *Id.* at 236.

³⁶³ See *id.* at 240 (damages based solely upon repair cost without deduction).

³⁶⁴ The court should place the buyer in as good a position as if the seller had fully performed but no better.

³⁶⁵ 490 S.W.2d 875, 12 U.C.C. Rep. 254 (Tex. Civ. App. 1973).

³⁶⁶ *Id.* at 878, 12 U.C.C. Rep. at 257.

³⁶⁷ For a more detailed look at the cases in this area, see Special Project, *supra* note 1, at 111-12. Our research has uncovered no new cases dealing with this particular issue since 1978.

³⁶⁸ See *supra* notes 352-367 and accompanying text.

³⁶⁹ U.C.C. § 2-714(2). Because the plaintiff has the burden of proving and pleading

a. *Value as Warranted.* Section 2-714(2) fails to define "value as warranted." Courts should attempt to ascertain the fair market value of the goods as warranted³⁷⁰ rather than use the purchase price as an estimate of value.³⁷¹ The Code requires that courts measure the difference in value at the time of acceptance.³⁷² The purchase price, if it represents value at all, measures value at the time of contract, not at the time of delivery. For example, assume a buyer agrees on January 1 to take delivery of 100 direct-drive turntables on June 1 for \$200 each. On June 1, however, a direct-drive turntable is only worth \$100 because compact disc players are making turntables obsolete. Additionally, the seller supplies turntables that are not direct drive, but are belt driven and therefore are worth only \$75. Upon discovering this defect, the buyer sues the seller for breach of warranty. A court that accepts the purchase price as prima facie evidence of value will award the buyer \$12,500, which includes the buyer's \$10,000 loss due to the rapidly improving technology of compact disc players. Alternatively, a court using fair market value at the time of acceptance of the goods would award the buyer only the \$2,500 difference in value between direct- and belt-driven turntables.

damages, the buyer will not recover if he cannot prove to the court's satisfaction the "value" of the goods as warranted and as accepted. *See* Chrysler Corp. v. Marinari, 177 Ga. App. 304, 306-07, 339 S.E.2d 343, 345-46, 42 U.C.C. Rep. 1310, 1311-12 (1985) (buyer denied damages because he failed to establish value of defective van at time and place of delivery), *cert. denied* (Ga. Jan. 17, 1986); Settell's, Inc. v. Pitney Bowes, Inc., 209 Neb. 26, 30, 305 N.W.2d 896, 898-99 (1981) (affirming directed verdict for seller because buyer failed to offer "even a scintilla of evidence" of the value of defective good); Ellison v. Heritage Dodge, Inc., 283 S.C. 21, 26, 320 S.E.2d 716, 718-19 (1984) (affirming summary judgment for seller because buyer failed to establish value of van in its defective state).

³⁷⁰ Courts have defined "fair market value" as "the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell." *Commissioner v. Marshman*, 279 F.2d 27, 32 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960); *see also* *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1379, 20 U.C.C. Rep. 1181, 1195 (8th Cir. 1977) (value is highest price product would have sold for on open market if neither party is forced to deal).

³⁷¹ Many courts use the purchase price as the value of the goods as warranted. *See, e.g.,* *Marinari*, 177 Ga. App. at 306, 339 S.E.2d at 345, 42 U.C.C. Rep. at 1311 (purchase price of van sufficient evidence of value of goods as warranted); *Schatz Distrib. Co. v. Olivetti Corp. of Am.*, 7 Kan. App. 2d 676, 681, 647 P.2d 820, 825, 34 U.C.C. Rep. 578, 581 (1982) (court presumes that the purchase price is value of computer as warranted); *Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 112-13, 317 S.E.2d 5, 12 (1984) (purchase price is strong proof of value as warranted); *Ellison v. Heritage Dodge, Inc.*, 283 S.C. 21, 24, 320 S.E.2d 716, 718 (1984) (accepting purchase price of automobile as proof of value of car as warranted); *Long v. Quality Mobile Home Brokers, Inc.*, 271 S.C. 482, 484, 248 S.E.2d 311, 312, 25 U.C.C. Rep. 470, 471 (1978) ("the cash price paid for goods is prima facie the value of the goods as warranted"); *Lone Star Ford, Inc. v. McGlashan*, 681 S.W.2d 720, 725 (Tex. Ct. App. 1984) (in absence of other proof sales price is sufficient evidence of value of automobile as warranted).

³⁷² U.C.C. § 2-714(2).

The buyer, as well as the seller, keeps the benefit of a good bargain when the court uses fair market value. In our example, if protective trade legislation causes a shortage of turntables driving the price up to \$300 each, the buyer's primary damages could well exceed the agreed upon purchase price of the goods.

b. *Value as Accepted.* Fair market value also provides the best measure of the value of defective goods as accepted. The fair market value of defective goods, however, is often more difficult to measure than the fair market value of the goods as warranted. Thus, some courts use the resale price of the defective goods as an approximation of the fair market value at the time of acceptance.³⁷³

Three criteria determine the appropriateness of using the resale measure. First, the buyer must resell the goods in a reasonable market.³⁷⁴ Standardized goods freely traded in a commercial market will usually meet this test.³⁷⁵ Second, if the goods are perishable or for some other reason their value fluctuates over time, the sale must be timely. A buyer who waits one month before selling defective fresh vegetables cannot use the resale price of the vegetables as their value at the time of acceptance.³⁷⁶ Third, the resale purchaser must know of the defects because the price obtained on resale will accurately reflect the goods' actual value only if the resale purchaser knows of the defects.³⁷⁷

3. *Special Circumstances*

Section 2-714(2) allows courts to dispense with the prescribed difference-in-value assessment of damages if "special circumstances" exist which "show proximate damages of a different amount."³⁷⁸ The Code fails to define the meaning or scope of "special circumstances"; therefore, courts must determine the term's meaning and scope.³⁷⁹ The 1978 Special Project addressed four ways that courts interpret the "special circumstances" clause: (1) to

³⁷³ See *infra* notes 374-77 and accompanying text.

³⁷⁴ See Special Project, *supra* note 1, at 115.

³⁷⁵ *Id.*

³⁷⁶ See *Th. Van Huijstee, N.V. v. Faehndrich*, 10 U.C.C. Rep. 598, 601, 603-04 (N.Y. Civ. Ct. 1972) (buyer waiting over one month to resell defectively marked eggs cannot use the price received as value at time of acceptance). Nevertheless, when the resale price is the best evidence available, some courts will use it as evidence of value. See *Lackawanna Leather Co. v. Martin & Stewart, Ltd.*, 730 F.2d 1197, 1203 (8th Cir. 1984) (accepting resale price of defective cattle hides as value of defective goods when accepted even though goods were resold four months after acceptance when price of cattle hides may have been inflated).

³⁷⁷ See Special Project, *supra* note 1, at 116.

³⁷⁸ U.C.C. § 2-714(2).

³⁷⁹ See Special Project, *supra* note 1, at 117.

award resultant damages; (2) to enter into the broader language of section 2-714(1); (3) to allow a buyer's subjective valuation of damages; and (4) to shift the time frame used to measure damages.³⁸⁰ Building on the approach of the 1978 Special Project, we will define the scope of the "special circumstances" clause and discuss the events that allow courts to bypass the difference-in-value formula.

a. *Resultant Damages.* Most courts no longer use the "special circumstances" provision to award resultant damages to an injured buyer.³⁸¹ Courts that still permit the buyer to recover resultant damages under section 2-714(2) are evidently confused by the section's general language.³⁸² By awarding resultant damages under the "special circumstances" clause, these courts render sections 2-714(3) and 2-715 superfluous.³⁸³ For example, section 2-715's specific requirements for recovering resultant damages are moot if the buyer can recover these damages under "special circumstances."

b. *Entry into Section 2-714(1).* Some courts construe the "special circumstances" clause to allow the buyer to recover damages under the expansive language of section 2-714(1).³⁸⁴ That section provides that the buyer "may recover as damages . . . the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."³⁸⁵ The 1978 Special Project found that courts generally apply section 2-714(1) to award "fair" damages when faced with complex fact patterns that make ascertaining actual damages difficult.³⁸⁶ The danger of applying section 2-714(1) to assess damages is that courts will confuse primary and resultant damages. If courts thoughtfully applied section 2-714(2)'s difference-in-value formula in conjunction with section 2-715, then they would avoid this danger and buyers would recover

³⁸⁰ *Id.* at 117-28.

³⁸¹ For a complete discussion of resultant damages, see *infra* notes 401-571 and accompanying text.

³⁸² See, e.g., *Jeanneret v. Vichey*, 541 F. Supp. 80, 86, 34 U.C.C. Rep. 56, 64-65 (S.D.N.Y. 1982) (buyer allowed to recover resultant damages of \$188,000 due to incurred interest charges and lost business income); *In re Barney Schogel, Inc.*, 34 U.C.C. Rep. 29, 48 (Bankr. S.D.N.Y. 1981) (buyer recovered replacement costs in excess of product's value as warranted due to special circumstances arising from seller's failure to make necessary repairs); *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*, 268 S.E.2d 886, 893, 30 U.C.C. Rep. 134, 144 (W. Va. 1980) (allowing buyer to recover repair costs plus loss of equipment's use).

³⁸³ See Special Project, *supra* note 1, at 117-18.

³⁸⁴ See, e.g., *Hill v. BASF Wyandotte Corp.*, 311 S.E.2d 734, 736, 38 U.C.C. Rep. 1254, 1256 (S.C. 1984) (special circumstances exist when court cannot ascertain warranted or accepted value of goods).

³⁸⁵ U.C.C. § 2-714(1).

³⁸⁶ See Special Project, *supra* note 1, at 119.

adequate compensation for their losses.³⁸⁷

c. *Subjective Valuation.* Under a subjective standard, a buyer receives the goods' value as warranted less the goods' current value to him. This value can either be higher or lower than the defective goods' market value. In contrast, under an objective standard a buyer recovers the value of the good as warranted less the market value of the defective product.³⁸⁸

Professors White and Summers suggest that "special circumstances" exist when "the value of the goods to the particular buyer [are not] the same as their value to a class of buyers in general," and that courts should apply a subjective standard to determine damages in these cases.³⁸⁹ Courts should award damages based on a subjective measure only if an objective measure would overcompensate the buyer.³⁹⁰ "[C]ourts should recognize a presumption in favor of the objective standard."³⁹¹ This presumption would force the seller to prove a higher subjective value before a court would award damages based on the subjective measure.

As an illustration, suppose a buyer purchases a mobile home for \$16,900 and discovers soon after delivery that the roof leaks.³⁹² After living in the home and attempting repairs, the buyer moves out and sues the seller for damages. The buyer estimates that the home has zero value. Suppose the seller objectively establishes that the mobile home has a salvage value of \$5,000. If the court awards subjective damages, then the buyer will recover \$16,900, because the value of the home to the buyer is zero and the value as warranted is the purchase price. The buyer, however, can still sell the home for its market value of \$5,000 and receive a windfall. Thus, a court, in order to avoid overcompensating the buyer for his loss, should only award objective damages of \$11,900. The buyer can then sell the home and recover its market value.

Suppose, however, that the buyer values the mobile home at more than the market price (assume \$10,000). If the court awards objective damages, then the buyer will receive \$11,900 (warranted value less market value) and a windfall in overall value received (his subjective value of \$10,000 plus the award of \$11,900). For this rea-

³⁸⁷ *Id.* at 119 n.372.

³⁸⁸ J. WHITE & R. SUMMERS, *supra* note 5, § 10-2, at 382-83.

³⁸⁹ The "special circumstances" clause allows courts to calculate market value of the defective goods at the time the buyer discovers the defect. This interpretation shifts the time frame of § 2-714(2), which ordinarily requires valuation at the time the buyer accepts the goods. See *infra* notes 394-400 and accompanying text.

³⁹⁰ Professors White and Summers state that section 1-106 suggests this same result. J. WHITE & R. SUMMERS, *supra* note 5, § 10-2, at 382.

³⁹¹ Special Project, *supra* note 1, at 122.

³⁹² See *Vreeman v. Davis*, 348 N.W.2d 756, 38 U.C.C. Rep. 850 (Minn. 1984).

son, when a buyer values a good above its market value, a court should apply a subjective measure to avoid overcompensating the buyer. Because the Code favors a "liberal administration" of its remedies,³⁹³ however, the seller should bear the burden of proving that the buyer has a higher subjective value.

d. *Time-shifting*. Courts have also used the "special circumstances" clause to shift the timeframe used in measuring the buyer's damages from the time of acceptance (as stipulated in section 2-714(2)) to some time after acceptance. The 1978 Special Project argued that although the U.C.C. drafters intended this application of the clause, the courts expressly used the time shifting construction only in section 2-312 warranty-of-title cases.³⁹⁴ Since 1978, however, courts have applied the clause to cases involving defective products.³⁹⁵

Courts apply the time-shifting interpretation primarily in cases involving latent product defects.³⁹⁶ Courts deem the latent defect's manifestation a "special circumstance" and measure the buyer's damages using the date of discovery of the defect. In *Intervale Steel Corp. v. Borg & Beck Division, Borg-Warner Corp.*,³⁹⁷ for example, a buyer purchased sheets of steel to manufacture parts for an automobile clutch assembly. The buyer inspected and accepted the sheets,

³⁹³ U.C.C. § 1-106(1); see also Special Project, *supra* note 1, at 122.

³⁹⁴ See Special Project, *supra* note 1, at 124-25. Courts continue to use the time-shifting construction of "special circumstances" in warranty-of-title cases. See, e.g., *Jeaneret v. Vichey*, 541 F. Supp. 80, 34 U.C.C. Rep. 56 (S.D.N.Y. 1982); *U-J Chevrolet Co. v. Marcus*, 460 So. 2d 1341, 40 U.C.C. Rep. 485 (Ala. Civ. App. 1984); *City Car Sales, Inc. v. McAlpin*, 380 So. 2d 865, 28 U.C.C. Rep. 993 (Ala. Civ. App. 1979); *De Weber v. Bob Rice Ford, Inc.*, 99 Idaho 847, 590 P.2d 103, 25 U.C.C. Rep. 1057 (1979); *Metalcraft, Inc. v. Pratt*, 65 Md. App. 281, 500 A.2d 329, 42 U.C.C. Rep. 14 (1985). These cases involve goods that were accepted before defects in title were revealed. The buyers in these cases generally used the product for some period of time after acceptance and later were dispossessed of the goods. Courts have assessed damages in these cases by finding the defective title to be a "special circumstance." This approach relieves the courts of section 2-714(2)'s difference-in-value formula and allows them to shift the calculation of the goods' actual value to the date the buyer lost his use of the goods.

³⁹⁵ See *Intervale Steel Corp. v. Borg & Beck Div., Borg Warner Corp.*, 578 F. Supp. 1081, 38 U.C.C. Rep. 805 (E.D. Mich. 1984) (valuing defective steel at scrap value after molded into unusable parts); *Harlan v. Smith*, 507 So. 2d 943 (Ala. Civ. App. 1986) (valuing defective mobile home at time defect discovered); *Vreeman v. Davis*, 348 N.W.2d 756, 38 U.C.C. Rep. 850 (Minn. 1984) (valuing leaky mobile home at date leak deemed irreparable); *Ford Motor Co. v. Fairley*, 398 So. 2d 216, 32 U.C.C. Rep. 440 (Miss. 1981) (assessing damages for two-year-old car at difference between value of a functioning two-year-old car and value of car as defective); *Vista St. Clair v. Landry's Commercial Furnishings, Inc.*, 57 Or. App. 254, 643 P.2d 1378, 33 U.C.C. Rep. 1332 (1982) (valuing carpet three and one half years after discoloration discovered).

³⁹⁶ Latent defects are defects that the buyer cannot detect by a reasonable inspection of the goods upon acceptance. The defect manifests itself after acceptance through no fault of the buyer.

³⁹⁷ 578 F. Supp. 1081, 38 U.C.C. Rep. 805 (E.D. Mich. 1984).

and then began to fabricate the steel by stamping out “blanks” that it stored until needed. One month later, the buyer discovered that the blanks failed various stress requirements; the steel was defective and unfit for its intended purpose. The buyer argued that the blanks had only scrap value. The seller contended that under section 2-714(2) the court must determine damages on the basis of the steel’s value at the time of acceptance. This value was higher than the scrap value because the buyer could have sold the unprocessed steel for another use. The court found that the seller’s calculation “of the ‘value’ of the steel would be unfair and contrary to the purpose of the Code” because the buyer “reasonably could not have discovered the defect in the steel until the steel was blanked out.”³⁹⁸ The court adopted the time-shifting construction of the “special circumstances” provision and awarded damages by assessing the steel’s value at the time that the buyer discovered the defect.³⁹⁹

Such an approach is equitable because a buyer saddled with a latently defective good cannot minimize his damages at the time of acceptance (when the good has a higher value). Furthermore, because the seller’s conduct is more culpable than the buyer’s, the seller should absorb the loss. Thus, courts should shift the time of assessment of the defective good’s value from the date of acceptance to the date of the defect’s discovery.⁴⁰⁰

B. Resultant Damages—Section 2-715

A commercial buyer who receives nonconforming goods often sustains losses beyond the diminution in their value. In addition to recovery of proximate damages for breach of the seller’s contractual

³⁹⁸ *Id.* at 1090, 38 U.C.C. Rep. at 817 (emphasis in original). The *Intervale* court also stated that although the steel was more valuable than scrap before the buyer stamped it out, the buyer “could not have benefitted from that value nor could [he] have reasonably known of the material’s defective condition until the steel was processed.” *Id.* at 1091, 38 U.C.C. Rep. at 817-18.

³⁹⁹ *Id.* at 1091, 38 U.C.C. Rep. at 818.

⁴⁰⁰ The 1978 Special Project attempted to justify the time-shifting construction of “special circumstance” by citing the last clause of comment 3: “If, however, the non-conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer’s decision not to revoke.” U.C.C. § 2-714 comment 3. In 1978, the Special Project found no cases that cited this clause, nor did we. *See* Special Project, *supra* note 1, at 124-25 & n.391.

Although the comment suggests a time-shifting assessment in “special circumstances” cases, courts can reach this conclusion without referring to the comment. The language of section 2-714(2) requires the use of the difference-in-value formula “unless special circumstances show proximate damages of a different amount.” *Id.* Courts have correctly read this clause to release them completely from the Code’s narrow formula for calculating primary damages. Courts, therefore, can adopt the time-shifting method without the comment’s support. As long as the courts award only primary, and not resultant, damages, the “special circumstances” clause of section 2-714(2) seems to allow any formula chosen.

obligations,⁴⁰¹ section 2-714(3)⁴⁰² allows the buyer to recover incidental and consequential damages as defined in Section 2-715. Section 2-715 provides:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.⁴⁰³

Courts must clearly distinguish between incidental and consequential damages in order to honor the parties' contractual allocations of risk and to avoid overcompensating the buyer for his loss.⁴⁰⁴ Some courts have upset the parties' contractual allocations

⁴⁰¹ "Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance," section 2-711 allows the buyer to seek incidental and consequential damages pursuant to sections 2-712 and 2-713. U.C.C. § 2-711.

⁴⁰² "In a proper case any incidental and consequential damages [for breach of warranty of an accepted good] under the next section may also be recovered." U.C.C. § 2-714(3). The Code also provides for incidental and consequential damages for nondelivered or repudiated goods. U.C.C. § 2-713. Not all of the cases discussed in the following sections are warranty cases, but the same principals of recovery apply.

⁴⁰³ U.C.C. § 2-715. Forty-nine states, the District of Columbia, and the Virgin Islands, have adopted § 2-715 without modification. Louisiana has not adopted Article Two. See U.C.C., 1A U.L.A. I-2 (1987 Supp.).

⁴⁰⁴ The court in *Petroleo Brasileiro, S.A. Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 14 U.C.C. Rep. 661 (E.D.N.Y. 1974), made the following distinction between incidental and consequential damages:

While the distinction between the two is not an obvious one, the Code makes plain that incidental damages are normally incurred when a buyer (or seller) repudiates the contract or wrongfully rejects the goods, causing the other to incur such expenses as transporting, storing, or reselling the goods. On the other hand, consequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.

Id. at 508, 14 U.C.C. Rep. at 667.

It often makes no difference whether a court labels damages "incidental" or "consequential." See Special Project, *supra* note 1, at 130-31. Nevertheless, an accurate classification of resultant damages is important because the Code's different categories base recovery on separate legal requirements. A buyer may recover any reasonable incidental damages. To recover consequential damages, however, a buyer must establish that, at

of risk by labeling consequential damages as incidental.⁴⁰⁵ For example, in *Council Bros., Inc., v. Ray Burner Co.*⁴⁰⁶ the buyer purchased a pressure vessel under an agreement excluding the seller's liability for consequential damages.⁴⁰⁷ The buyer incorporated the pressure vessel into a unit and sold this combined unit. When the pressure vessel failed, the original buyer sought indemnification from the seller.⁴⁰⁸ In addition to a refund of the contract price,⁴⁰⁹ the court awarded the reselling buyer incidental expenses incurred in adding to, shipping, and starting up the boiler.⁴¹⁰ The court also granted, as incidental damages, the labor and repair expenses incurred by the buyer's customer.⁴¹¹ This last item, however, is more properly classified as consequential damages, and the court should have denied recovery under the limitation clause of the contract. Allowing recovery overcompensated the buyer.⁴¹²

Classifying damages as consequential or incidental provides a framework for accurately assessing damages and thereby facilitates planning by allowing parties to allocate risks pursuant to established categories of damages. Courts should first take care to distinguish consequential losses from incidental losses. Then, before awarding consequential damages, a court should examine the contractual intentions of the parties and the type of transaction involved.⁴¹³

the time of contracting, the losses were foreseeable and could not have been prevented by "cover or otherwise." U.C.C. § 2-715 (2)(a). Thus, a court that classifies consequential damages as incidental may overcompensate the buyer to the extent the buyer did not meet the restrictive standards of § 2-715(2). Cf. *Indiana Farm Bureau Coop. Assoc. v. S.S. Sovereign Faylene*, 24 U.C.C. Rep. 74, 80-83 (S.D.N.Y. 1977) (labeling buyer's mitigation expenses "incidental"). Conversely, a court labeling incidental damages "consequential" may deny the buyer recovery if it finds the losses were not foreseeable under § 2-715(2).

Fortunately, mislabeling damages is often harmless. See *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 507, 8 U.C.C. Rep. 625, 636-37 (8th Cir. 1971) (applying Arkansas Law) (labeling cost of equipment repairs necessitated by seller's breach "incidental" damages although buyer would have recovered same damages under the correct label). See generally Special Project, *supra* note 1, at 134-36.

⁴⁰⁵ See Special Project, *supra* note 1, at 136.

⁴⁰⁶ 473 F.2d 400, 11 U.C.C. Rep. 1126 (5th Cir. 1973).

⁴⁰⁷ Specifically, the warranty provided that "[n]o claim for cost of removing, returning, or replacing defective parts or for other consequential damages will be allowed." *Id.* at 406, 11 U.C.C. Rep. at 1134 (emphasis added). In view of this clause the court stated: "[C]onsequential damages having been excluded by the terms of the warranty, Ray Burner would be entitled to recover only those items of damage which might properly be classified as incidental." *Id.* at 407, 11 U.C.C. Rep. at 1136.

⁴⁰⁸ *Id.* at 402, 11 U.C.C. Rep. at 1129.

⁴⁰⁹ *Id.* at 408 n.9, 11 U.C.C. Rep. at 1136 n.9.

⁴¹⁰ *Id.* at 408, 11 U.C.C. Rep. at 1137.

⁴¹¹ The court awarded \$3505.72 for repairs made by the third party, and \$1519.76 for labor associated with those repairs. *Id.*, 11 U.C.C. Rep. at 1137.

⁴¹² See Special Project, *supra* note 1, at 135-36.

⁴¹³ See *A.E.S. Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933, 941, 24 U.C.C. Rep. 861, 871-72 (7th Cir. 1978) (Before court awards consequential damages, it

Courts that mislabel damages not only upset commercial planning, but also violate the express provisions of the Code.

1. *Incidental Damages—Section 2-715(1)*

The Code expressly allows recovery of incidental damages where the buyer rightfully rejects nonconforming goods, revokes acceptance, or incurs expenses associated with cover.⁴¹⁴ A buyer who justifiably rejects nonconforming goods may recover, as incidental damages, the costs of inspecting the goods in addition to storage and transportation expenses.⁴¹⁵ Similarly, although the Code's language is not explicit on this point, a buyer who accepts and subse-

should "carefully examine the individual factual situation including the type of goods involved, the parties and the precise nature and purpose of the contract. The purpose of the courts in contractual disputes is not to rewrite contracts by ignoring parties' intent; rather, it is to interpret the existing contract as fairly as possible when all events did not occur as planned.")

⁴¹⁴ Section 2-715(1) refers expressly to expenses connected with "goods rightfully rejected" and with "effecting cover." U.C.C. § 2-715(1). A comment to that section provides:

Subsection (1) is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage.

Id. § 2-715 comment 1. The Code encourages the buyer to mitigate damages by covering his losses in the marketplace. Accordingly, a buyer may recover expenses associated with effecting cover. These typically involve transaction costs associated with the buyer's efforts to locate alternative goods or buyers in the marketplace. Section 2-711(1) provides that "[w]here the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance . . . [the buyer] may "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract." *Id.*

Section 2-712(2) states that "[t]he buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach." *Id.*

Consequential damages under § 2-715(2)(a) may only be recovered if they "could not reasonably be prevented by cover or otherwise." *Id.* Accordingly, a buyer who wishes to recover consequential damages is obligated to attempt to cover his losses. The concept of "cover" is absent from consequential damages under section 2-715(2) concerning "injury to persons or property." *See, e.g.,* Larry Goad & Co. v. Lordstown Rubber Co., 560 F. Supp. 583, 36 U.C.C. Rep. 167 (E.D. Mo. 1983) (buyer entitled to recover reasonable expenses for materials and labor in its attempt to complete contract with customers).

⁴¹⁵ *See, e.g.,* Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp., 585 F. Supp. 45, 51, 39 U.C.C. Rep. 186, 195 (S.D.N.Y. 1983) (costs of transportation, inspection, and storage of nonconforming goods recoverable as incidental damages); AFA Corp. v. Phoenix Closures, Inc., 501 F. Supp. 224, 230, 30 U.C.C. Rep. 81, 88-89 (N.D. Ill. 1980) (buyer recovers cost of returning nonconforming goods to the seller even though some of the goods were only suspected of being defective); Western Conference Resorts, Inc. v. Pease, 668 P.2d 973, 977, 36 U.C.C. Rep. 131, 136 (Colo. Ct. App. 1983) (expenses

quently revokes acceptance of nonconforming goods may recover these items as incidental expenses.⁴¹⁶

For example, suppose that a wine bottler contracts to buy wine from a California wholesaler.⁴¹⁷ After accepting the wine, the bottler learns from indignant customers that the wine contains fresno mold. The bottler justifiably revokes acceptance. Upon notice of the seller's breach, the bottler may recover as an incidental expense the shipping charges incurred when the customers returned the spoiled wine.⁴¹⁸ Additionally, the buyer may recover the cost of inspecting the remaining cases of wine and the cost of storing the wine until the bottler could return it to California.⁴¹⁹

Although courts may find it more difficult to conceptualize items of incidental damages in a case in which the buyer retains the good, this difficulty should not automatically bar a meritorious claim.⁴²⁰ In *Horizons, Inc. v. Avco Corp.*,⁴²¹ for example, the buyer

related to defective plane's inspection, transportation, and maintenance recoverable as incidental expenses).

⁴¹⁶ Comment 1 states that the objective of section 2-715 is to reimburse the buyer for reasonable expenses in connection with "goods whose acceptance may be justifiably revoked." U.C.C. § 2-715 comment 1.

⁴¹⁷ See *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 473 N.E.2d 1066, 40 U.C.C. Rep. 93 (1985).

⁴¹⁸ *Id.* at 678-79 & n.6, 473 N.E.2d at 1074 & n.6, 40 U.C.C. Rep. at 103-04 & n.6.

⁴¹⁹ The buyer in *Delano* actually inspected and reprocessed the wine at the seller's request. Thus, the wine was not returned. The court properly allowed recovery for this reprocessing expense. 393 Mass. at 678-79 & n.6, 473 N.E.2d at 1074 & n.6, 40 U.C.C. at 103-4 & n.6.

The incidental damages listed in section 2-715(1) are not exhaustive. See U.C.C. § 2-715 comment 1. For example, the buyer of a defective automobile may be able to recover as incidental damages the expenses associated with car insurance, license plates, and interest on the purchase price of the automobile pending the return of the car. *Devore v. Bostrom*, 632 P.2d 832, 835, 31 U.C.C. Rep. 984, 988 (Utah 1981).

⁴²⁰ The 1978 Special Project argued that a retaining buyer should not recover damages labeled incidental. This assertion was not based upon the Code's language, but upon the view that by excluding the retaining buyer from recovery of such expenses, courts would avoid the risk of awarding double compensation to the buyer. See Special Project, *supra* note 1, at 132-40; see also *Jackson v. Glasgow*, 622 P.2d 1088, 1091, 30 U.C.C. Rep. 482, 486 (Okla. Ct. App. 1980) (incidental damages under section 2-715(1) "would not be recoverable in this action because the owner accepted the goods rather than taking other actions afforded him under the code upon seller's breach") (dictum). But section 2-714(3) and comment 1 to section 2-715 indicate that the retaining buyer may recover incidental damages in appropriate circumstances. Section 2-714(3) provides that where the buyer has accepted defective goods, "[i]n a proper case any incidental and consequential damages under [section 2-715] may also be recovered." *Id.* § 2-714(3). Moreover, the language of § 2-715 may be read as consisting of three separate clauses under which incidental damages are recoverable for expenses related to rejection, for expenses related to cover, and for expenses related to delay or any other breach. A seller who provides nonconforming goods is in breach whether the buyer rejects the goods on receipt or accepts and subsequently revokes acceptances. Thus, under section 2-715 courts should grant either type of aggrieved buyer recovery of incidental expenses.

⁴²¹ 551 F. Supp. 771, 35 U.C.C. Rep. 102 (D.S.D. 1982), *rev'd. in part on other grounds*,

purchased a remanufactured airplane engine from the seller. Following acceptance, the buyer incurred, among other expenses, the cost of shipping the defective engine to and from the seller's factory for repairs, employee travel expenses to the factory, and additional inspection costs.⁴²² The court found that these costs were recoverable as incidental damages.⁴²³

Section 2-715 imposes two principal requirements for recovery of incidental damages: (1) they must be incident to the breach, and (2) they must be reasonable. Incidental expenses are limited to those expenses solely attributable to the nonconformity of the goods.⁴²⁴ One of the purposes behind section 2-715(1) is to carry forward the Code's policy that damages put the aggrieved party "in as good a position as if the other had fully performed."⁴²⁵ Limiting incidental damages to expenses directly arising out of the breach furthers this policy and also avoids overcompensating the buyer.

Courts risk overcompensating a buyer when they fail to identify whether the claimed expenses reflect losses actually suffered as a result of the breach.⁴²⁶ In *Productora E Importadora de Papel, S.A. de C.V. v. Fleming*⁴²⁷ the buyer of newsprint agreed to pay the required import fees and freight charges from Boston to Mexico.⁴²⁸ The seller breached by providing substantially less newsprint than agreed upon in the contract.⁴²⁹ The trial judge awarded the buyer shipping expenses as well as import fees for the entire quantity of

714 F.2d 862, 36 U.C.C. Rep. 1207 (8th Cir. 1983) (affirming holding below as to cover expenses, reversing the holding as to amount of consequential damages). The following discussion draws principally from the district court's memorandum opinion as the Eighth Circuit focused primarily on the question of the buyer's right to consequential damages, did not discuss the question of incidental damages, and cursorily affirmed the lower court's decision on the issue of cover.

⁴²² *Id.* at 774-75, 35 U.C.C. Rep. at 107-08.

⁴²³ *Id.* at 780-81, 35 U.C.C. Rep. at 116.

⁴²⁴ *See, e.g., Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 808, 28 U.C.C. Rep. 647, 668 (D. Minn. 1980) (incidental damages only recoverable "to the extent that such losses would not have been incurred except for the breach"); *McGinnis v. Wentworth Chevrolet Co.*, 295 Or. 494, 503, 668 P.2d 365, 370-71, 37 U.C.C. Rep. 130, 138 (1983) (incidental damages under section 2-715(1) are "restricted to those costs and expenses incurred by the buyer which directly result from the fact of the breach").

⁴²⁵ The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

U.C.C. § 1-106(1).

⁴²⁶ Courts also risk overcompensating the buyer when they confuse the Code's incidental and consequential damages categories. *See supra* notes 404-13 and accompanying text.

⁴²⁷ 376 Mass. 826, 383 N.E.2d 1129, 25 U.C.C. Rep. 729 (1978).

⁴²⁸ *Id.* at 839, 383 N.E.2d at 1137, 25 U.C.C. Rep. at 736.

⁴²⁹ *Id.* at 828-29, 383 N.E.2d at 1132-33, 25 U.C.C. Rep. at 731-33.

newsprint specified in the contract, including the unshipped newsprint.⁴³⁰ In reversing the award for these damages, the reviewing court correctly observed that if the seller had shipped the agreed upon tonnage of newsprint, the buyer would have had to pay the import fees and the shipping costs for the entire order. Thus, the costs associated with the undelivered amount represented expenses saved because of the breach.⁴³¹ Upon recovery of these damages, the buyer could effectively fill its order through other suppliers without having to pay any shipping or import fees. In short, these expenses were not "incident" to the breach because they represented expenses that the buyer would have had to pay absent the seller's breach.⁴³²

Section 2-715(1) also requires that the incidental damages be reasonable. This requirement often directly relates to whether the incidental expenses arose as a result of the seller's breach. In *Industrial Graphics, Inc. v. Asahi Corp.*⁴³³ a federal district court held that the buyer of defective citizens band radios could not claim incidental damages for additional overhead and interest expenses incurred in the buyer's unsuccessful attempt to cover its losses by reselling the radios.⁴³⁴ The court decided that these expenses were unreasonable because the buyer maintained high prices in a declining market.⁴³⁵

Where the buyer establishes that the breach caused the claimed expenses and that he acted reasonably under the circumstances, courts generally grant incidental expenses. In *District Concrete Co. v. Bernstein Concrete Corp.*,⁴³⁶ for example, the court awarded the buyer incidental damages for the costs of field overhead necessitated by defective concrete supplied by the seller. Although the buyer could have chosen a less costly method of repairing the damage resulting from the defective concrete, the court found the buyer's chosen remedy reasonable under the circumstances and therefore held the seller liable for the field overhead expenses.⁴³⁷

⁴³⁰ *Id.* at 837, 383 N.E.2d at 1136, 25 U.C.C. Rep. at 734.

⁴³¹ *Id.* at 839, 383 N.E.2d at 1137, 25 U.C.C. Rep. at 736.

⁴³² Although *Productura* does not involve a warranty situation, the damages analysis is the same.

⁴³³ 485 F. Supp. 793, 28 U.C.C. Rep. 647 (D. Minn. 1980).

⁴³⁴ *Id.* at 808-09, 28 U.C.C. Rep. at 669.

⁴³⁵ *Id.*, 28 U.C.C. Rep. at 669 ("The unreasonable adherence to high pricing decisions throughout the time the 23 channel market was disintegrating was in large part the cause of the delay which in turn contributed to the increased overhead and interest expense.").

⁴³⁶ 418 A.2d 1030, 30 U.C.C. Rep. 201 (D.C. 1980).

⁴³⁷ "The choice of the composite slab was reasonable at the time it was made. Clearly Bernstein [the buyer] was most concerned with minimizing costs and delays. Bernstein need not bear the burden of unanticipated costs that were actually incurred

District Concrete suggests that courts may presume the reasonableness of an incidental expense provided the buyer can establish that the cause of the expense was the seller's breach. Courts are unlikely to challenge the amount of the claimed incidental expenses provided the buyer establishes the reasonableness of the claim. Although a buyer should provide more than a rough guess,⁴³⁸ the Code recognizes that buyers may suffer loss and still not have precise records of the amount of loss.⁴³⁹ Thus, courts have properly interpreted the Code to prevent breaching sellers from escaping liability merely because the other party was unable to establish losses with mathematical precision.⁴⁴⁰

2. Consequential Damages—Section 2-715(2)

A buyer who receives nonconforming goods often sustains losses peculiar to his situation that are not solely attributable to the nonconformity. The Code recognizes this commercial reality and authorizes consequential damages when appropriate.⁴⁴¹ Recoverable consequential damages include physical injuries,⁴⁴² property damage,⁴⁴³ and economic losses including loss of use or down-

because the selected method proved more expensive." *Id.* at 1037, 30 U.C.C. Rep. 210-11.

⁴³⁸ See *Buckeye Trophy, Inc. v. Southern Bowling & Billiard Supply Co.*, 3 Ohio App. 3d 32, 443 N.E.2d 1043, 35 U.C.C. Rep. 140 (1982) (where buyer did not sit down and calculate damages, but instead made a "guesstimate" that damages were between \$1,000 and \$1,500, buyer only entitled to nominal damages of \$5).

⁴³⁹ U.C.C. § 1-106(1) provides that the Code's remedies are to be administered liberally. See *supra* note 425. Commentary to section 2-715 states: "the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances." U.C.C. § 2-715 comment 4.

⁴⁴⁰ "The damage award need not be absolutely exact; a reasonable estimate based on relevant data is sufficient to support an award." *District Concrete*, 418 A.2d at 1038, 30 U.C.C. Rep. at 211.

⁴⁴¹ U.C.C. § 2-714(3).

⁴⁴² Personal injuries resulting from a seller's breach of warranty occur primarily in the consumer context. See, e.g., *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116, 24 U.C.C. Rep. 1070 (Okla. 1978) (warranty excluding consequential damages unconscionable so buyer entitled to damages for personal injuries sustained when car's tire blew out). They also occur in commercial settings when a seller's breach results in injury to a buyer's employee. See e.g., *Jennett v. Colorado Fuel & Iron Corp.*, 9 Mass. App. 823, 398 N.E.2d 755 (1980) (employees of co-defendant buyer entitled to damages from seller who negligently failed to test steel-sling cable).

⁴⁴³ See e.g., *Prutch v. Ford Motor Co.*, 618 P.2d 657, 662, 29 U.C.C. Rep. 1507, 1514 (Colo. 1980) (farmer entitled to recover for crop damage resulting from defects in farm equipment); *Fire Supply & Serv., Inc. v. Chico Hot Springs*, 196 Mont. 435, 444, 639 P.2d 1160, 1165 (1982) (buyer of defective fire alarm system entitled to recover for damage to hotel); *Lidstrand v. Silvercrest Indus.*, 28 Wash. App. 359, 366, 623 P.2d 710, 715, 31 U.C.C. Rep. 978, 983 (buyer of mobile home entitled to recover for damage to drapes, carpets, clothing, and furniture resulting from roof leakage).

time,⁴⁴⁴ investments made in reliance upon the seller's assurances of conformity,⁴⁴⁵ increased production costs,⁴⁴⁶ and attorney's fees where the buyer incurs liability to third parties.⁴⁴⁷ In addition, a buyer in the resale business may recover lost profits where the breach frustrates plans to resell the warranted goods.⁴⁴⁸ Courts also award consequential damages where the buyer suffers loss of

⁴⁴⁴ See, e.g., *Volkswagen of Am., Inc. v. Harrell*, 431 So. 2d 156, 36 U.C.C. Rep. 553 (Ala. 1983) (automobile buyers entitled to recover damages including motel and food bills, taxi expenses, and car rental expenses); *Jacobs v. Rosemount Dodge-Winnebago S.*, 310 N.W.2d 71, 79, 32 U.C.C. Rep. 456, 466 (Minn. 1981) (buyer entitled to damages for loss of use of motorhome); *Chapman v. Neil*, 25 U.C.C. Rep. 1296, 1300 (Tenn. Ct. App. 1978) (damages awarded for down-time while loader-dozer was being repaired).

⁴⁴⁵ See, e.g., *Huntington Beach Union High School Dist. v. Continental Info. Sys. Corp.*, 621 F.2d 353, 358, 29 U.C.C. Rep. 112, 118 (9th Cir. 1980) (where seller knew buyer ordered peripheral equipment in reliance on timely delivery of computer system, buyer awarded consequential damages for cost of renting equipment upon seller's failure to deliver computer by specified date).

⁴⁴⁶ See, e.g., *Hawthorne Indus., Inc. v. Balfour Maclaine Int'l, Ltd.*, 676 F.2d 1385, 1387, 33 U.C.C. Rep. 1339, 1342-43 (11th Cir. 1982) (buyer entitled to recover increased production costs as consequential damages after defective goods caused buyer to incur additional machine time and lose materials in production process); *Danjee, Inc. v. Addressograph Multigraph Corp.*, 44 N.C. App. 626, 627, 262 S.E.2d 665, 672, 28 U.C.C. Rep. 689 (1980) (buyer entitled to recover extra expenses associated with cost of redoing tapes occasioned by defect of seller's phototypesetter), *cert. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

⁴⁴⁷ See, e.g., *Alterman Foods, Inc. v. G.C.C. Beverages Inc.*, 168 Ga. App. 921, 924, 310 S.E.2d 755, 757-58, 38 U.C.C. Rep. 148, 152 (1983) (where supermarket buyer defended action by consumer of manufacturer's softdrinks, supermarket could recover attorney's fees from manufacturer under general principles of indemnity). Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982), a successful plaintiff may recover the costs of litigation and attorney fees. *Id.* § 2310(d) (1982). See *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 705, 324 S.E.2d 462, 469, 40 U.C.C. Rep. 408, 416 (1985); *Champion Ford Sales, Inc. v. Levine*, 49 Md. App. 547, 562-63, 433 A.2d 1218, 1226-27, 32 U.C.C. Rep. 108, 120 (1981).

⁴⁴⁸ "In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of subsection (2)(a)." U.C.C. § 2-715 comment 6; see, e.g., *Mann v. Weyerhaeuser Co.*, 703 F.2d 272, 276, 35 U.C.C. Rep. 1147, 1153 (8th Cir. 1983) (buyer entitled to recover from box manufacturer revenues lost when it reduced price to dissatisfied customers); *Kunststoffwerk Alfred Huber v. R.J. Dick, Inc.*, 621 F.2d 560, 563, 28 U.C.C. Rep. 1371, 1375 (3rd Cir. 1980) (seller who knew that buyer was in the business of resale liable for costs incurred by buyer in extending credit to customers for seller's defective belting); *Wullschlegler & Co. v. Jenny Fashions, Inc.*, 618 F. Supp. 373, 378, 41 U.C.C. Rep. 1213, 1221-22 (S.D.N.Y. 1985) (dressmaker entitled to recover profits lost from cancelled order for dresses to be made from seller's flawed fabric); *Sun-Maid Raisin Growers v. Victor Packing Co.*, 146 Cal. App. 3d 787, 792, 194 Cal. Rptr. 612, 615, 37 U.C.C. Rep. 148, 152 (1983) (seller who knew buyer was in business of resale required to reimburse buyer for profits lost due to seller's failure to deliver raisins); *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60, 70, 41 U.C.C. Rep. 843 (Fla. Dist. Ct. App. 1985) (buyer entitled to recover consequential damages from lost sales; buyer's customers purchased sprinkler systems from another supplier due to their bad experience with manufacturer's systems), *review dismissed*, 482 So. 2d 348 (Fla. 1986).

business reputation or goodwill.⁴⁴⁹

To recover consequential damages an aggrieved buyer must establish: first, that he suffered loss; second, that such loss resulted from the seller's breach; and third, that the seller could have foreseen the consequences flowing from the breach. The buyer must also establish the claimed losses with reasonable certainty and attempt to mitigate those losses.⁴⁵⁰

a. *Loss.* The Code's damages provisions seek to make the aggrieved buyer whole without allowing him to profit from the seller's breach. A court, therefore, should not award consequential damages when the seller's breach does not cause the buyer any loss whatsoever.⁴⁵¹ For example, in *Wilson v. Marquette Electronics, Inc.*⁴⁵² the lower court awarded the corporate buyer damages for the time an employee doctor was required to spend away from his private practice to work on a computer system which failed to function as warranted.⁴⁵³ The Eighth Circuit denied these damages because no evidence showed that the corporate buyer suffered loss. Rather, the evidence showed a loss to the doctor's private practice.⁴⁵⁴ Other courts have recognized that only variable expenses are proper items of loss and have barred buyer claims for the recovery of fixed expenses.⁴⁵⁵

Courts must also distinguish between profits lost from inability

⁴⁴⁹ See, e.g., *Consolidated Data Terminals v. Applied Digital Data Sys., Inc.*, 708 F.2d 385, 394, 36 U.C.C. Rep. 59, 70 (9th Cir. 1983) (buyer entitled to recover loss of goodwill because manufacturer of computer equipment had reason to know that buyer-distributor would suffer loss of business reputation in connection with seller's nonconforming equipment); *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 683-84, 473 N.E.2d 1066, 1077, 40 U.C.C. Rep. 93, 108 (1985) (wine bottler entitled to damages for loss of goodwill arising directly from seller-winery's supply of spoiled wine).

⁴⁵⁰ Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." U.C.C. § 2-715(2)(a).

⁴⁵¹ A buyer who has not suffered a loss would probably not sue. For practical purposes, the loss requirement only comes in where problems of proof arise.

⁴⁵² 630 F.2d 575, 29 U.C.C. Rep. 399 (8th Cir. 1980).

⁴⁵³ *Id.* at 585, 29 U.C.C. Rep. at 415.

⁴⁵⁴ *Id.* at 586, 29 U.C.C. Rep. at 415-16.

⁴⁵⁵ Courts have avoided including the buyer's fixed expenses when calculating lost profits. See, e.g., *Barnard v. Compugraphic Corp.*, 35 Wash. App. 2d 414, 418, 667 P.2d 117, 120, 37 U.C.C. Rep. 141, 145 (1983) ("employee costs were a fixed expense, unaffected by defendant's breach and need not have been deducted in calculating profits"); see also *Special Project*, *supra* note 1, at 145 ("[s]eller's breach does not reduce buyer's fixed expenses, so a court should deduct only variable expenses from buyer's recovery"); cf. *Coast Trading Co. v. Parmac, Inc.*, 21 Wash. App. 896, 909, 587 P.2d 1071, 1079, 25 U.C.C. Rep. 1047, 1054 (1978) ("overhead expenses or plant 'burden' should not have been deducted in computing [seller's] lost profit" where the buyer was in breach).

to produce and those lost as a result of diminished business reputation. In *Hydraform Products Corp. v. American Steel & Aluminum Corp.*⁴⁵⁶ the buyer contracted with the seller for enough steel to manufacture 400 woodstoves during the peak manufacturing season.⁴⁵⁷ The seller failed to supply the steel in time for the peak season and the buyer was unable to locate alternative suppliers. The resultant delays led to cancelled orders. Two years later, the buyer sold the woodstove business.⁴⁵⁸ The court held that the buyer could recover profits "lost on the sale of 150 stoves, the difference between the 400 mentioned in the contract and the 250 actually sold."⁴⁵⁹ The court, however, denied the buyer's claim for lost profits on sales projected for the two subsequent years in addition to loss of goodwill.⁴⁶⁰ In denying the buyer recovery for these items, the court stated: "even if such profits could have been calculated in this case, allowing the jury to consider both a claim for diminished value resting on lost profits and a claim for lost profits themselves would have allowed a double recovery."⁴⁶¹ In the two years following the breach, the buyer could have procured substitute steel from other sources and could have continued to manufacture woodstoves. Whatever lost profits the buyer suffered in the two years subsequent to the breach arose from loss of business reputation, not from the buyer's inability to produce.

Courts also risk overcompensating the buyer where the claimed damages include interest expenses on money borrowed to finance the purchase. The Third Circuit observed:

In the absence of special circumstances, interest is not a proper factor to be considered. Interest represents the cost of the money borrowed to buy the goods because capital was not available to make a cash purchase. If, however, the buyer is awarded lump sum damages, he would be able to make a replacement purchase without borrowing and incurring interest expenses. To the extent, therefore, that the recovery included interest on the original purchase, it would constitute a windfall.⁴⁶²

Thus, a buyer should not ordinarily recover financing expenses as

⁴⁵⁶ 127 N.H. 187, 498 A.2d 339, 41 U.C.C. Rep. 1201 (1985).

⁴⁵⁷ *Id.* at 191, 498 A.2d at 341-42, 41 U.C.C. Rep. at 1203 (seller agreed to provide steel beyond the 400-stove level on demand).

⁴⁵⁸ *Id.*, 498 A.2d at 341-42, 41 U.C.C. Rep. at 1203.

⁴⁵⁹ *Id.* at 198, 498 A.2d at 345-46, 41 U.C.C. Rep. at 1211.

⁴⁶⁰ *Id.* at 199, 498 A.2d at 346, 41 U.C.C. Rep. at 1210.

⁴⁶¹ *Id.* at 199-200, 498 A.2d at 346-47, 41 U.C.C. Rep. at 1211.

⁴⁶² *Chatlos Sys., Inc., v. National Cash Register Corp.*, 635 F.2d 1081, 1088, 30 U.C.C. Rep. 416, 425 (3rd Cir. 1980), *cert. dismissed*, 457 U.S. 1112 (1982); *see also Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 113, 317 S.E.2d 5, 12, 38 U.C.C. Rep. 1583, 1592 (1984) (buyer could recover established purchase price despite having received discount for paying cash).

consequential damages. If, however, the seller had reason to know that the buyer would borrow money to purchase the goods, a court might award expenses as consequential damages.⁴⁶³ Additionally, courts might allow recovery of losses caused by rapidly changing interest rates incurred as a result of a seller's breach.⁴⁶⁴

Courts thus risk overcompensating buyers when they fail to differentiate the elements of the claimed losses. For this reason, courts should avoid awarding lump sum damages. For example, suppose an insecticide that a farmer applies to his crop fails to perform as warranted, resulting in crop loss. To place the farmer in the position he would have been in had the insecticide performed as warranted, the court should award the difference between the crop's probable value at harvest had the insecticide performed as warranted and its actual value at harvest, less any savings in labor and expenses attributable to the reduced yield.⁴⁶⁵ At least one court, however, has granted buyers in similar circumstances double recovery by also awarding the price of the worthless goods.⁴⁶⁶ Nevertheless, most courts in recent years have apparently avoided the mistake of granting buyers lump sum damages representing both the integrated whole and its parts.⁴⁶⁷

b. *Causation.* In addition to proving loss, the buyer must prove that damages resulted from the seller's breach.⁴⁶⁸ The causation re-

⁴⁶³ See, e.g., *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325, 334, 12 U.C.C. Rep. 1070, 1080 (E.D. Pa. 1973) (because seller had reason to know at time of contracting that buyer would borrow money to purchase computer, interest charge was a proper item of damages under section 2-715), *aff'd mem.*, 493 F.2d 1400 (3d Cir. 1974).

⁴⁶⁴ See, e.g., *Chatlos*, 635 F.2d at 1088, 30 U.C.C. Rep. at 425. ("With today's rapidly changing interest structures, however, it may be that the buyer can demonstrate some actual loss.")

⁴⁶⁵ See *Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38, 18 U.C.C. Rep. 67 (1975); see also Special Project, *supra* note 1, at 144-45 (discussing *Swenson* and its implications).

⁴⁶⁶ See *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838, 846, 23 U.C.C. Rep. 310, 319-20 (N.D. Miss. 1977) (awarding buyer cost of worthless antifreeze, cost of repair, and lost profits).

⁴⁶⁷ See Special Project, *supra* note 1, at 144-45. We have uncovered no other cases since 1978 in which the court made such a mistake.

⁴⁶⁸ Compare *J & J Farms, Inc. v. Cargill, Inc.*, 693 F.2d 830, 836 (8th Cir. 1982) (buyer of contaminated seed not entitled to consequential damages from subsequent disruption of marketing program because such project "too remote and speculative") and *Kirby v. Chrysler Corp.*, 554 F. Supp. 743, 752-54, 35 U.C.C. Rep. 497, 511-12 (D. Md. 1982) (automobile dealer failed to prove that investment losses arose from manufacturer's breach where dealer had lost money in preceding years and unordered vehicles could not account for the magnitude of the claimed losses) with *Cottonwood Elevator Co. v. Zenner*, 105 Idaho 469, 470, 670 P.2d 876, 877 (1983) (buyer of spring wheat seed in business of resale could recover losses sustained in reimbursing customers for their subsequent damages proximately resulting from seller's breach) and *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 464, 29 U.C.C. Rep. 75, 82 (Okla. 1980)

quirement poses two immediate practical problems. First, the buyer must establish an independent link of causation between the seller's breach and each item of claimed damages.⁴⁶⁹ Second, the buyer must establish that the seller's breach was both the cause in fact and the proximate cause of the loss.⁴⁷⁰ Courts generally do not differentiate between these two elements of causation,⁴⁷¹ but an alert seller should be careful to make the distinction. Suppose that a buyer purchases watered-down gasoline that causes her truck to break down. Another vehicle strikes the disabled truck, causing damage to the truck and injuring the buyer. If the court fails to differentiate between the two elements of causation it might award the buyer lump sum damages for personal injuries and damage to the truck, even though the personal injuries probably were not proximately caused by the seller's breach of warranty.⁴⁷²

Situations in which either the goods or the buyer are unique create the greatest conceptual difficulty with the causation requirement. The Sixth Circuit addressed such a situation in *Overstreet v. Norden Laboratories, Inc.*⁴⁷³ The buyer, a veterinarian, desired to prevent mares from contracting a particular virus which caused them to abort their foals.⁴⁷⁴ The seller represented that its vaccine would inoculate horses against the virus.⁴⁷⁵ Although the buyer administered the vaccine, six inoculated mares contracted the virus and

(buyer's damages could have proximately resulted from nonconforming combine where rains and birds destroyed crops while buyer awaited delivery of parts).

⁴⁶⁹ This is an obvious proposition, but in cases involving complicated items of proof seller's counsel must examine whether the claimed damages in fact resulted from the breach and not from some other intervening or independent cause.

⁴⁷⁰ Cause in fact asks the question: Did the defendant's conduct in fact cause the plaintiff's harm? Often, the cause-in-fact issue involves circumstantial proof, and plaintiffs may try to introduce statistical evidence to establish causation. See, e.g., *Smith v. Rapid Transit, Inc.*, 317 Mass. 469, 470, 58 N.E.2d 754, 755 (1945) (evidence that mathematical chances suggest that defendant bus company caused plaintiff's accident was insufficient to establish causation).

Proximate cause, on the other hand, asks the question of whether the defendant should be held legally responsible for the injury. See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928). See generally *W. KEETON, supra* note 182, §§ 41-42, at 263-80 (5th ed. 1984). The proximate cause issue is often framed in terms of foreseeability. See *infra* notes 483-99 and accompanying text.

⁴⁷¹ See, e.g., *Southern Ill. Stone Co. v. Universal Eng'g Corp.*, 592 F.2d 446, 454, 25 U.C.C. Rep. 1336, 1347 (8th Cir. 1979) (buyer entitled to "incidental and consequential damages proximately flowing from" breach); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 704-05, 261 N.W.2d 358, 363 (1978) (buyer may recover, as consequential damages, lost profits proximately resulting from seller's breach).

⁴⁷² See *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 537 n.1, 218 S.E.2d 260, 261 n.1, 17 U.C.C. Rep., 963 n.1 (1975) (stating under similar facts that court had grave doubts as to whether buyer's injuries "proximately resulted" from the seller's breach).

⁴⁷³ 669 F.2d 1286, 33 U.C.C. Rep. 174 (6th Cir. 1982).

⁴⁷⁴ *Id.* at 1288, 33 U.C.C. Rep. at 176.

⁴⁷⁵ *Id.*, 33 U.C.C. Rep. at 177.

aborted.⁴⁷⁶ The court held that the buyer failed to establish causation as a matter of law because no alternative treatment existed to prevent the horses from contracting the virus and the vaccine did not *cause* the mares to abort.⁴⁷⁷ In the words of a concurrence, "There was simply a failure to prevent an occurrence that nothing would have prevented, and [the buyer] may not recover the value of the foals."⁴⁷⁸ The dissent vigorously argued that the majority had established an "alternative product" rule allowing "manufacturers of new products to make unsupported claims concerning product effectiveness; yet insulate the manufacturers from liability for consequential damages."⁴⁷⁹

The dispute centers on whether the court should focus on the buyer's resulting *injury*, or the seller's *breach of warranty*. When determining causation, courts should focus on the warranty rather than the resulting injury. Although the seller's vaccine did not cause the mares to abort, the abortions would not have occurred had the product performed as warranted. The implied warranty extended not only to preventing the mares from contracting the virus, but ultimately to preventing the abortions caused by the virus. The Code's language permits recovery for damages "resulting from the breach." Although the manufacturer's drug did not cause the mares to abort, the abortions resulted directly from the breach of warranty.⁴⁸⁰

The advantage of focusing on the warranty rather than on the particular buyer's situation is especially clear when the buyer's situa-

⁴⁷⁶ *Id.*, 33 U.C.C. Rep. at 177.

⁴⁷⁷ *Id.* at 1296, 33 U.C.C. Rep. at 189.

⁴⁷⁸ *Id.*, 33 U.C.C. Rep. at 189 (Engel and Kennedy, JJ., concurring). The concurring judges discussed several ways the buyer might have established a causal link between the loss of the foals and the seller's breach: "He might have claimed that the abortions were directly due to some effect of the vaccine, or that this batch of Rhinomune [the vaccine] was ineffective and a good batch of Rhinomune would better have prevented the abortions. He might have claimed that the warranty induced him to forego some other, effective means of preventing the abortions, or that he acted to his detriment in some other way in reliance on the warranty." *Id.*, U.C.C. Rep. at 189. The opinion goes on to state that there was evidence in the record to support such claims.

⁴⁷⁹ *Id.* at 1294, 33 U.C.C. Rep. at 186.

⁴⁸⁰ Other courts facing similar causation issues have not had the same trouble finding the seller liable for the resulting damages. *See, e.g.*, *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 507, 8 U.C.C. Rep. 625, 636 (8th Cir. 1971) (unsuitability of additive oil resulted in damage to buyer's mill). Because consequential damages flow not from the nature of the goods supplied but from the unique needs and position of the buyer, *see supra* note 403 and accompanying text, nonconforming goods may have adverse effects on the buyer not directly connected with the supplied goods. In these situations the issue is foreseeability rather than causation. *See infra* notes 491-505 and accompanying text. In *Overstreet*, however, the foreseeability limitation did not apply because the seller should have known at the time of contracting of the veterinarian's intended use and need for the vaccine.

tion is unique. Assume that several available drugs will prevent horses from contracting the virus, but one horse is allergic to all except one of the drugs.⁴⁸¹ Under the *Overstreet* majority's reasoning, the buyer could not recover consequential damages if the product fails to prevent the allergic horse from aborting, but could recover if the other horses aborted because the alternative drugs, presumably, would have prevented the abortions. To avoid this anomalous conclusion courts must focus on the breach of warranty. Courts should consider the difference between the product's actual performance and the warranted performance, disregarding what would have happened without the product.

The causation issue also arises when the buyer's intervening conduct contributes to the damages or to the nonconformity of the goods.⁴⁸² In *Signal Oil & Gas Co. v. Universal Oil Products*,⁴⁸³ for example, the seller furnished and installed a reactor charge heater in the buyer's factory. The buyer sued to recover for property damage and economic loss after the heater and the refinery caught fire.⁴⁸⁴ The Texas Supreme Court, upon evidence that the explosion resulted from both the defective design of the heater and the buyer's failure to follow warnings, held:

The buyer may recover only those consequential damages proximately caused by the breach of warranty; he may not recover for those consequential damages proximately caused by the buyer's own negligence or fault. . . . [T]he buyer's negligence or fault does not automatically bar recovery, but only diminishes or mitigates the damages the buyer may recover.⁴⁸⁵

When the buyer's negligence is a concurring proximate cause of the damages, the trier of fact should determine the percentages by which the concurring causes contributed to the damages.⁴⁸⁶ If the buyer is ninety-five percent negligent, the seller should be liable for the remaining five percent.⁴⁸⁷ This result is sensible if the

⁴⁸¹ The court in *Overstreet* presented this hypothetical. 669 F.2d at 1293-94, 33 U.C.C. Rep. at 185-86 (Keith, J.).

⁴⁸² Subsection (2)(b) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

U.C.C. § 2-715 comment 5.

⁴⁸³ 572 S.W.2d 320, 24 U.C.C. Rep. 555 (Tex. 1978).

⁴⁸⁴ *Id.* at 322-23, 24 U.C.C. Rep. at 557-58.

⁴⁸⁵ *Id.* at 328, 24 U.C.C. Rep. at 567.

⁴⁸⁶ *Id.*, 24 U.C.C. Rep. at 567.

⁴⁸⁷ See *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-55, 33 U.C.C. Rep.

seller's breach of warranty did in fact cause some of the damages. Thus, the seller's attorney should distinguish cause in fact from proximate cause to avoid compensating the buyer for expenses not caused by the seller's breach.

c. *Foreseeability, Certainty, and Duty to Cover.* In addition to loss and causation, an aggrieved buyer must establish three other elements to recover damages: (1) that the loss resulted from needs the seller knew or had reason to know about, at the time of contracting;⁴⁸⁸ (2) that the damages are ascertainable with reasonable certainty;⁴⁸⁹ (3) that the damages could not have been prevented by cover or otherwise.⁴⁹⁰

(1) *Foreseeability.* The Code's foreseeability requirement finds its origin in *Hadley v. Baxendale*,⁴⁹¹ where the court declared that the aggrieved parties could only recover damages "arising naturally" from the breach, or damages that both parties could reasonably contemplate, at the time of contracting, would result from a breach.⁴⁹² Following the *Hadley* rule, the Code rejects the tacit agreement test⁴⁹³ and requires only that the parties know the facts that make the loss a foreseeable result of the breach.⁴⁹⁴

876, 880-84 (Minn. 1982) (under Minnesota comparative fault law plaintiff-buyer's 75 percent fault in living at home with toxic formaldehyde fumes is a defense to claim for consequential damages, but not to nonconsequential damages); *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 290-92, 29 U.C.C. Rep. 794, 804-05 (Tex. Civ. App. 1980) (buyer's consequential damages reducible to the extent damages resulted from buyer's unreasonable conduct).

⁴⁸⁸ U.C.C. § 2-715(2) ("Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know.").

⁴⁸⁹ *Id.* § 2-715 comment 4 ("Loss may be determined in any manner which is reasonable under the circumstances.").

⁴⁹⁰ *Id.* § 2-715(2)(a) ("Consequential damages resulting from the seller's breach include (a) any loss . . . which could not reasonably be prevented by cover or otherwise.").

⁴⁹¹ 156 Eng. Rep. 145 (Ex. 1854).

⁴⁹² *Id.* at 151. The court stated that the buyer could recover only such damages as "may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Id.*

⁴⁹³ For the tacit agreement test see, e.g., *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903) ("The consequences [of the breach] must be contemplated at the time of the making of the contract."). Thus, the tacit agreement test would require the parties to have contemplated the extent of potential liability, not just the facts that give rise to the liability.

⁴⁹⁴ See U.C.C. § 2-715 comment 2.

Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The "tacit agreement" test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in

Under the Code, a buyer rarely has difficulty recovering consequential losses because the commercial contexts in which parties contract suggest to the seller how a breach will affect the buyer's general needs.⁴⁹⁵ For example, if the seller is aware that resale is part of the ordinary course of the buyer's business, the buyer need not expressly state plans to resell the goods.⁴⁹⁶ Moreover, the "reason to know"⁴⁹⁷ requirement is an objective standard. The Code presumes the seller is a reasonable, sophisticated party and therefore imposes liability for all foreseeable consequences of a breach, even if the seller did not in fact foresee the actual consequence.⁴⁹⁸

The Code's foreseeability requirement balances the buyer's interest in recovering for all losses resulting from the breach against the seller's need to identify potential liabilities when structuring prices. If a court finds that the risks associated with the breach were foreseeable, the Code requires the seller to assume the full consequences of the buyer's loss. If the seller does not wish to assume liability for consequential damages, the seller may exclude them in the sales contract as an item of recovery.⁴⁹⁹

A buyer with particular needs that the seller could not reasonably foresee must make these needs known to the seller to recover

advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise.

Id.; see also C. McCORMICK, THE LAW OF DAMAGES § 138, at 562-65 (1935) (observing that immediate effect of *Hadley* was to limit discretion in imposing jury awards). For a brief discussion of the *Hadley* foreseeability rule and the background to the Code's foreseeability requirement, see Special Project, *supra* note 1, at 147-48.

⁴⁹⁵ See U.C.C. § 2-715 comment 3 ("[G]eneral needs [of the buyer] must rarely be made known to charge the seller with knowledge."); Special Project, *supra* note 1, at 140-52 and sources cited therein.

⁴⁹⁶ U.C.C. § 2-715 comment 6 states: "[i]n the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know." *Id.*; see *supra* note 448 (cases interpreting this provision).

⁴⁹⁷ U.C.C. § 2-715(2)(a).

⁴⁹⁸ See, e.g., *Troxler Elec. Laboratories, Inc. v. Solitron Devices, Inc.*, 722 F.2d 81, 84-85, 37 U.C.C. Rep. 472, 475-77 (4th Cir. 1983) (lost profits due to delayed delivery may be foreseeable); *Clark v. International Harvester Co.*, 99 Idaho 326, 346, 581 P.2d 784, 804, 25 U.C.C. Rep. 91, 121 (1978) (defendant seller had reason to know that defective tractor would cause plaintiff's consequential damages); *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15, 19-20, 32 U.C.C. Rep. 424, 431-32 (Miss. 1981). Additionally, the seller need not foresee the actual amount of the buyer's loss. See, e.g., *Barnard v. Compugraphic Corp.*, 35 Wash. App. 414, 418, 667 P.2d 117, 120, 37 U.C.C. Rep. 141, 145 (1983) ("It is not necessary that the *specific* injury or *amount* of harm be foreseen, but only that a reasonable person in [the seller's] position would foresee that in the usual course of events, damages would follow from its breach.") (emphasis in original).

⁴⁹⁹ U.C.C. section 2-719 expressly allows the parties to exclude consequential damages unless the exclusion is unconscionable. In *Carboline Co. v. Oxmoor Center*, 40 U.C.C. Rep. 1728 (Ky. Ct. App. 1985), the court upheld a seller's exclusion of liability for consequential damages, but refused to enforce the contractual exclusion of incidental damages.

consequential damages. This requirement allows the parties to allocate risks in the contract. In *Seaman v. United States Steel Corp.*⁵⁰⁰ the seller constructed a heel plate to link the boom of a floating crane to the crane base. The seller breached its warranty by providing steel of inappropriate quality.⁵⁰¹ Although the seller knew at the time of contracting that the buyer needed the steel to fashion a heel plate for the floating crane, the seller had no reason to know, and the buyer failed to inform it, that the buyer planned to use the crane in a bid on an Army Corps of Engineers contract.⁵⁰² The buyer spent \$410.45 for the steel and claimed damages of \$85,000.⁵⁰³ In rejecting the buyer's claim, the court commented that if the seller had known that it could be liable for lost profits it "might have refused to sell the plate without some assurance that [it] would not be responsible beyond a stipulated sum."⁵⁰⁴ The Code is generous in the amount of consequential damages a buyer may recover for breach of warranty, but if the buyer fails to advise the seller of special needs, and the seller neither knows nor has reason to know of such needs, the buyer must bear the consequential losses.⁵⁰⁵

(2) *Certainty*. An aggrieved buyer must show consequential losses with a reasonable degree of certainty in order to recover. A buyer need not show mathematical precision, however.⁵⁰⁶ Com-

⁵⁰⁰ 166 N.J. Super. 467, 400 A.2d 90, 26 U.C.C. Rep. 80, *cert. denied*, 81 N.J. 282, 405 A.2d 826 (1979).

⁵⁰¹ *Id.* at 470, 400 A.2d at 92, 26 U.C.C. Rep. at 82.

⁵⁰² *Id.* at 472, 400 A.2d at 93, 26 U.C.C. Rep. at 84.

⁵⁰³ *Id.* at 468-70, 400 A.2d at 91-92, 26 U.C.C. Rep. at 81-82.

⁵⁰⁴ *Id.* at 472, 400 A.2d at 93, 26 U.C.C. Rep. at 84.

⁵⁰⁵ *See also* Ohoud Establishment for Trade & Contracts v. Tri-State Contracting & Trading Corp., 523 F. Supp. 249, 32 U.C.C. Rep. 1131 (D.N.J. 1981) (broker could not recover future profits because seller could not have foreseen that broker's deliveries of unmerchantable sodas would alienate clients and reduce future business in Saudi Arabia).

⁵⁰⁶ *See, e.g.*, National Papaya Co. v. Domain Indus., 592 F.2d 813, 818, 26 U.C.C. Rep. 429 (5th Cir. 1979) (damages need not be established with "absolute exactness"); *In re Lifeguard Indus.*, 42 Bankr. 734, 739-40, 39 U.C.C. Rep. 1268, 1275 (Bankr. S.D. Ohio 1983) (mathematical certainty not required, but proof of lost profits must be more than "pure conjecture"); *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 248, 24 U.C.C. Rep. 1077, 1083-84 (Mo. Ct. App. 1978) ("substantial basis," not mathematical certainty, required, but buyer failed to prove that work was available for him while truck was being repaired, so claim of lost profits not allowed); *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 204 Neb. 248, 253-55, 281 N.W.2d 778, 781-82, 27 U.C.C. Rep. 137 (1979) (buyer's evidence of production, price, sales, and costs of manufacturing sufficient factual basis for computation of damages); *Leininger v. Sola*, 314 N.W.2d 39, 46, 33 U.C.C. Rep. 191, 201 (N.D. 1981) (exact calculation or mathematical precision not required). *But see* *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 464, 29 U.C.C. Rep. 75, 82-83 (Okla. 1980) (conjecture not sufficient); *cf.* *Cates v. Morgan Portable Bldg. Corp.*, 591 F.2d 17, 21, 25 U.C.C. Rep. 1060, 1064 (7th Cir. 1979) (holding that the trial court erred in accepting damages evidence on the grounds that the calculations were overly-specific).

ment 4 to section 2-715 indicates that courts should apply the certainty standard flexibly and liberally:

The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies [section 1-106] rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.⁵⁰⁷

The buyer need only establish the probability of some loss. By identifying an available market for the goods, a buyer in the business of resale can establish lost profits.⁵⁰⁸ Where a buyer purchases goods to incorporate into the production process, however, the amount of loss is not as easy to quantify because the lost profits become more remote from the breach of warranty.

In some cases, the buyer's claim for lost profits is based upon sheer speculation. Suppose a buyer in the home repair business purchases defective aluminum siding.⁵⁰⁹ The buyer testifies that the business depends on word-of-mouth advertising and since the seller's breach she has been unable to locate other work in the neighborhood. If the buyer's testimony is the only evidence linking the loss to the breach, a court should not award damages for lost profits.⁵¹⁰ As one court stated under similar facts: "This may or may not be true, and if true may be either an unfortunate coincidence or a conspiracy by the homeowners of that neighborhood."⁵¹¹ Suppose, however, that the buyer establishes that she did, in fact, lose business because of the defective siding, but cannot specify the amount lost. In response to this practical problem, courts have adopted the "fact-amount" doctrine: "The reasonable level of certainty required to establish the *amount* of a loss is generally lower than that required to establish the *fact* or *cause* of a loss."⁵¹² The fact-amount doctrine most frequently applies where the breach interrupts the buyer's production process, the buyer is involved in a new business, or the buyer suffers a loss of goodwill.

(a) Interruption to the Buyer's Production Process. *Hawthorne*

⁵⁰⁷ U.C.C. § 2-715 comment 4.

⁵⁰⁸ See *supra* note 448 and accompanying text (cases discussing section 2-715).

⁵⁰⁹ See *In re Lifeguard Indus.*, 42 Bankr. 734, 736, 39 U.C.C. Rep. 1268, 1269-70 (Bankr. S.D. Ohio 1983).

⁵¹⁰ *Id.* at 740, 39 U.C.C. Rep. at 1276.

⁵¹¹ *Id.* at 744, 39 U.C.C. Rep. at 1276.

⁵¹² *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1166, 36 U.C.C. Rep. 1213, 1219 (Utah 1983) (emphasis in original). For a discussion of the doctrine, see Special Project, *supra* note 1, at 155-56. *But see* 5 A. CORBIN, CORBIN ON CONTRACTS § 1022, at 135-47 (1964) (negating the fact-amount doctrine).

*Industries, Inc. v. Balfour Maclaine International, Ltd.*⁵¹³ illustrates the practical difficulties that make the fact-amount doctrine necessary. In *Hawthorne* a carpet manufacturer bought jute to use as carpet backing.⁵¹⁴ Substantial deviations in the quality of the jute forced the buyer to slow down its machinery to make adjustments by hand and to add extra adhesive to the carpet surface. The buyer sought to recover consequential damages for increased production costs caused by the nonconforming jute. The buyer testified that the normal speed of the jute processing machines had to be slowed by approximately three feet per minute to process the seller's jute.⁵¹⁵ The buyer used this estimate, together with weekly production reports and estimates of plant down-time while processing the seller's jute, to prepare an estimate of the total costs to the buyer. A witness previously involved with other carpet plants in the buyer's locale substantially confirmed the buyer's estimate of lost efficiency.⁵¹⁶ Unquestionably, the buyer suffered loss due to seller's breach. The court decided that having established some loss, the buyer's recovery "should not be denied merely because the amount of damages cannot be precisely and exactly determined."⁵¹⁷

Courts are loathe to deny recovery if the buyer can establish some loss. Even if documented proof is lacking, the testimony of the buyer, corroborated by an independent expert, should provide a sufficient basis for assessing damages.⁵¹⁸ Ultimately, the fact-amount doctrine helps to deter breaches. The Code's provisions discourage breaches and favor contractual performance.⁵¹⁹ A seller should stand behind all representations made and should not escape liability merely because the buyer cannot quantify loss with exacting particularity.

(b) New Businesses. The rationale for the fact-amount doctrine is perhaps most evident in situations involving new busi-

⁵¹³ 676 F.2d 1385, 33 U.C.C. Rep. 1339 (11th Cir. 1982).

⁵¹⁴ *Id.* at 1386, 33 U.C.C. Rep. at 1340.

⁵¹⁵ *Id.* at 1386-87, 33 U.C.C. Rep. at 1340-41.

⁵¹⁶ *Id.* at 1386, 33 U.C.C. Rep. at 1341.

⁵¹⁷ *Id.* at 1388, 33 U.C.C. Rep. at 1343. Because the district court held that the plaintiff's claimed damages were not certain enough, *id.* at 1387, 33 U.C.C. Rep. at 1343, the Eleventh Circuit remanded the case for determination of whether the buyer established his losses with reasonable certainty. *Id.* at 1388, 33 U.C.C. Rep. at 1344.

⁵¹⁸ *Cf. infra* text accompanying note 525.

⁵¹⁹ See Hillman, *Keeping the Deal Together after Material Breach—Common Law Mitigation Rules, the U.C.C., and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 579-93 (1976) (arguing that the Code's provisions on cover, good faith, notice, seller's right to cure, and parties' rights to demand adequate assurance of performance encourage parties to avoid breaching); see also 5 A. CORBIN, *supra* note 512, § 1002, at 34 ("The fact that damages must be paid tends directly to the prevention of breaches of contract."). This applies equally to breaches of warranty.

nesses.⁵²⁰ When a seller's breach causes interruption of a buyer's ongoing business, courts prefer records of past profits as evidence of the business's lost prospective profits.⁵²¹ The buyer may strengthen this proof by showing profits earned after the operation returned to normal.⁵²²

Where the seller's breach interrupts the buyer's new business, but does not cause it to fail, the buyer likewise should be able to establish his losses with reasonable certainty. In *Cook Assocs., Inc. v. Warnick*⁵²³ the buyer contracted to buy parts for the silo storage complex of an explosives plant it was constructing. The seller delayed delivery of some of the parts for almost a year, causing delay in plant completion.⁵²⁴ The court awarded the buyer lost profits based on two elements of proof: (1) evidence of the buyer's profits once the plant opened; (2) profit and sales statistics from a similar plant.⁵²⁵ Taken together, these elements of proof supplied a reasonably certain basis for awarding the buyer lost profits.⁵²⁶

Proof of lost profits is more difficult, however, if the buyer's new business fails as a result of the seller's breach. The buyer cannot introduce evidence of past or subsequent profitability. The buyer must therefore rely solely on evidence of sales from comparable businesses. Although this is not the preferred method of proof, courts have begun to accept this comparative approach for new businesses.⁵²⁷

⁵²⁰ See *Vickers v. Wichita State Univ.*, 213 Kan. 614, 518 P.2d 512 (1974).

Strict application of the certainty doctrine would place a new business at a substantial disadvantage. To hold recovery is precluded as a matter of law merely because a business is newly established would encourage those contracting with such a business to breach their contracts. The law is not so deficient.

Id. at 620, 518 P.2d at 517. See generally Comment, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*, 56 N.C.L. REV. 693 (1978) (arguing that the new-business rules, predicated on the belief that lost profits of new businesses cannot be established with reasonable certainty and therefore are not recoverable, should be abandoned).

⁵²¹ See Wallach, *The Buyer's Right to Monetary Damages*, 14 U.C.C. L.J. 236, 260-65 (1982) (twentieth-century common law has preferred proof of lost profits based upon the individual business's established pattern of profits); cf. *Lorenz Supply Co. v. American Standard, Inc.*, 100 Mich. App. 600, 613, 300 N.W.2d 335, 340-41, 30 U.C.C. Rep. 810, 816 (1980) (allowing plaintiff to estimate lost profits based on profits in past years), *aff'd*, 419 Mich. 610, 358 N.W.2d 845, 39 U.C.C. Rep. 1169 (1984).

⁵²² See *infra* text accompanying note 525.

⁵²³ 664 P.2d 1161, 36 U.C.C. Rep. 1213 (Utah 1983).

⁵²⁴ *Id.* at 1163-64, 36 U.C.C. Rep. at 1215.

⁵²⁵ *Id.* at 1165-66, 36 U.C.C. Rep. at 1217-19.

⁵²⁶ *Id.* at 1166 n.4, 36 U.C.C. Rep. at 1218 n.4.

⁵²⁷ See Comment, *supra* note 520, at 713 (the "yardstick measure" which compares "the performance of businesses as similar to the plaintiff's as possible in size, location and nature during the time period in question" is the most recognized method of proving lost profits other than using past profits); see also *supra* note 521 (demonstrating the

Allowing new businesses to rely on comparative sales evidence places them under a looser evidentiary standard than a buyer with an established business. Situations could arise in which a court denies recovery to a buyer in an established business but, under similar evidence, grants recovery to a counterpart in a new business. The fact-amount doctrine is the fairest way to allocate liability because it requires any buyer, new or old, to establish actual loss. Once loss is established, the factfinder must assess damages. Although damages awarded under this doctrine may not always reflect the exact value of the loss, the doctrine roughly apportions liability according to the risks bargained for, and provides consistent application of the Code's damages provisions.

(c) Goodwill. Loss of goodwill presents the final situation in which proving loss with reasonable certainty becomes difficult. Goodwill is an intangible property interest "which attaches to a business on account of name, location, reputation for competency and the imponderables which cause buyers to return."⁵²⁸ When a breach injures goodwill, a plaintiff should recover if he proves damages with sufficient certainty. Nevertheless, some courts deny recovery for goodwill damages because of the inherently speculative nature of such claims⁵²⁹ or because the seller could not have known of the buyer's needs under section 2-715(2)(b).⁵³⁰ However, some courts have allowed recovery for loss of goodwill.⁵³¹

In contrast to profits lost from a specific transaction, goodwill relates closely to future profits. In calculating the "good will" value

preferred method of proof—past profits); *Gates v. Morgan Portable Bldg. Corp.*, 591 F.2d 17, 21-22 n.7, 25 U.C.C. Rep. 1060, 1065 n.7 (7th Cir. 1979) (noting that "profits of closely comparable businesses are the second-best measure of consequential damages after a party's own track record") (citing Comment, *supra* note 520, at 713).

⁵²⁸ *Westric Battery Co. v. Standard Elec. Co.*, 522 F.2d 986, 988 (10th Cir. 1975) (per curiam); see also *Wallach*, *supra* note 521, at 269 (loss of future business occurs when present customers take their business elsewhere or when potential customers learn of dissatisfaction.).

⁵²⁹ See, e.g., *Argo Welded Products, Inc. v. J.T. Ryerson Steel & Sons, Inc.*, 528 F. Supp. 583, 589, 33 U.C.C. Rep. 1349, 1357 (E.D. Pa. 1981) (goodwill damages too speculative to be recoverable under section 2-715(2)); *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472, 1 U.C.C. Rep. 40 (1959) (same). Pennsylvania categorically denies a buyer recovery of goodwill damages. See, e.g., *Draft Sys., Inc. v. Rimar Mfg.*, 34 U.C.C. Rep. 585, 587 (3d Cir. 1982) (stating Pennsylvania's rule barring recovery for lost goodwill); *Blackwood Coal Co. v. Deister Concentrator Co.*, 626 F. Supp. 727, 731, 42 U.C.C. Rep. 1228, 1233 (E.D. Pa. 1985) (same); *Argo Welded Prods., Inc. v. J.T. Ryerson Steel & Sons, Inc.*, 528 F. Supp. 583, 588, 33 U.C.C. Rep. 1349, 1356 (E.D. Pa. 1981) (same).

⁵³⁰ See *Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743, 744-45, 19 U.C.C. Rep. 519, 522 (7th Cir. 1976) (holding that seller could not have known of buyer's lost job opportunities).

⁵³¹ See *supra* note 449 (cases allowing recovery of goodwill losses).

of a business, courts consider such matters as the profit the business has made "over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner . . . ; (2) . . . [and] the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation."⁵³² The method by which a buyer proves loss of goodwill varies with the nature of the business. A reselling buyer might establish loss of goodwill by showing that certain customers began trading with a competitor as a result of the seller's breach.⁵³³ Alternatively, the buyer might introduce evidence of decreasing profits following the breach,⁵³⁴ or the buyer might provide testimony of the value of the goodwill.⁵³⁵ Finally, a buyer might sell the business and claim the difference between the pre-breach value and the sale price as the value of the goodwill loss.⁵³⁶

The above examples illustrate that no comprehensive method exists for establishing the value of goodwill loss. A buyer may successfully establish that a loss in goodwill occurred as a result of the seller's breach, but precisely quantifying that loss may be impossible. Nevertheless, goodwill is often one of a business's primary assets. Thus, courts should not, per se, bar recovery for loss of goodwill. In many commercial contexts, a seller can anticipate that a breach will injure the buyer's goodwill, causing substantial damage. A California wine wholesaler, for example, should anticipate that the bottler it supplied will suffer loss of goodwill when customers discover that the bottler has sold them bad wine.⁵³⁷ The customers will likely blame the bottler, not the wholesaler; the bottler may permanently lose customers. The fact-amount doctrine allows the bottler to recover for some of its lost goodwill. This doctrine should not, however, override the requirements of causation, loss, and cer-

⁵³² *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

⁵³³ *Cf. Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 681-84, 473 N.E.2d 1066, 1075-77, 40 U.C.C. Rep. 93, 106-08 (1985) (retail wine bottler could recover loss of goodwill following customer dissatisfaction with distributor's wine).

⁵³⁴ *See* Special Project, *supra* note 1, at 166.

⁵³⁵ *Id.*; *see also* Wallach, *supra* note 521, at 270 ("The courts have not required certainty in the evidence showing the value of the lost goodwill. In a development paralleling that involving proof of lost profits for new businesses, the courts have been willing to accept expert testimony to establish the amount of loss.") (citations omitted). For judicial discussion on the use of expert testimony, *see Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990, 995, 27 U.C.C. Rep. 1010, 1018 (6th Cir. 1979) (plaintiffs lost goodwill claim because they failed to provide expert testimony valuing goodwill); *Westric Battery Co. v. Standard Elec. Co.*, 522 F.2d 986, 988 (10th Cir. 1975) (*per curiam*) (expert testimony permitted to show loss of goodwill).

⁵³⁶ *See* Special Report, *supra* note 1, at 166.

⁵³⁷ *See supra* note 533.

tainty. The Code protects the seller from unwarranted claims by requiring the buyer to prove that the seller did foresee or should have foreseen the loss of goodwill and that the loss proximately resulted from the seller's breach. Only after the buyer has met these threshold requirements does the fact-amount doctrine lower the evidentiary standard required to meet the Code's reasonable certainty provision.

(3) *Duty to Cover*. A buyer may only recover those consequential losses "which could not reasonably be prevented by cover or otherwise."⁵³⁸ The Code's mitigation requirement reduces the seller's overall liability to the difference between the cost of reasonable cover and the actual damages under the contract. Thus, the Code attempts to place the buyer in the same economic position that he would have occupied had the seller performed as warranted.⁵³⁹ The duty to cover also reduces difficulties associated with calculating damages and allows the buyer to achieve the primary objective of securing conforming goods.⁵⁴⁰

The greatest practical difficulty with the cover requirement lies in determining what activities qualify as reasonable attempts to cover. If the buyer is unable to cover because of either lack of present resources or unavailability of alternative conforming goods, courts may still award consequential damages.⁵⁴¹ If circumstances

⁵³⁸ U.C.C. § 2-715(2)(a).

Subsection (2)(b), seemingly designed principally for consumer situations, does not impose a mitigation requirement. The reason for the distinction between the two subsections is that commercial parties can control risks through contractual planning more easily than the consumer, who frequently is in no position to negotiate the terms of sale. Moreover, the consumer is frequently unable to effect cover because of either a lack of resources or because the harm resulting from the defective goods is not readily remediable. See Special Project, *supra* note 1, at 252 n.938. The Code defines "cover" as follows: "making in good faith and without reasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller." U.C.C. § 2-712(1).

⁵³⁹ *Dura-Wood Treating Co. v. Century Forest Indus.*, 675 F.2d 745, 753, 33 U.C.C. Rep. 1201, 1212 (5th Cir.), *cert. denied*, 459 U.S. 865 (1982); see *supra* text accompanying note 525. The cover requirement also helps prevent the buyer from profiting as a result of the seller's breach.

⁵⁴⁰ 675 F.2d at 753, 33 U.C.C. Rep. at 1212-13.

⁵⁴¹ See, e.g., *Wullschleger & Co. v. Jenny Fashions, Inc.*, 618 F. Supp. 373, 378, 41 U.C.C. Rep. 1213, 1221 (S.D.N.Y. 1985) (buyer recovers lost profits after reasonable but unsuccessful attempt to purchase substitute fabric); *Bende & Sons, Inc. v. Crown Recreation, Inc.*, 548 F. Supp. 1018, 1022-23, 34 U.C.C. Rep. 1587, 1593 (E.D.N.Y. 1982) (reselling buyer awarded lost profits for nondelivery of 11,000 army combat boots where it was unable to locate substitute goods), *aff'd*, 722 F.2d 727 (2d Cir. 1983); cf. *Chatlos Sys. Inc. v. National Cash Register Corp.*, 479 F. Supp. 738, 746, 27 U.C.C. Rep. 647, 657 (D.N.J. 1979) (buyer in no position to cover by obtaining alternate computer system), *remanded on other grounds*, 635 F.2d 1081, 30 U.C.C. Rep. 416 (3d Cir. 1980), *cert. dismissed*, 457 U.S. 1112 (1982).

make cover impossible the buyer should cooperate with the seller's efforts to make the goods conforming. Failure to cooperate in good faith or to effect cover may reduce consequential damages in proportion to the losses that the buyer could have avoided through reasonable attempts to mitigate.⁵⁴²

One court has held that the buyer may cover by manufacturing the goods internally. In *Dura-Wood Treating Co. v. Century Forest Industries*⁵⁴³ the seller breached by not supplying cross-ties at the contract price.⁵⁴⁴ After soliciting price quotations from other manufacturers, the buyer determined that producing the ties internally was cheaper than buying substitutes.⁵⁴⁵ The court found this method of cover reasonable because it provided goods that were the object of the contract and reduced the buyer's overall damages.⁵⁴⁶ Moreover, by covering in this manner, the buyer did "not have to prove damages through more onerous means."⁵⁴⁷ The *Dura-Wood* opinion, however, suggests that courts should not compel buyers to cover by producing goods internally. Frequently, a buyer with the capacity to produce the goods internally will suffer lost volume profits. In *Dura-Wood* the buyer could have sold the cross-ties used for cover to new or different customers at the higher market price.⁵⁴⁸ The court, however, denied the buyer recovery for profits lost by using the goods to cover rather than to fill other orders because "Century Forest should not be obligated to pay for Dura-Wood's poor choice."⁵⁴⁹ Following this reasoning to its logical conclusion, *Dura-Wood* should have bought cross-ties at the higher market price and recovered the price differential from the breaching seller. The buyer then could have sold internally manufactured ties at the market price. The court might have awarded lost profits had the buyer demonstrated that it actually had to forego some orders.⁵⁵⁰ The lesson of *Dura-Woods* is that a buyer may cover by manufactur-

⁵⁴² See, e.g., *Larry Goad & Co. v. Lordstown Rubber Co.*, 560 F. Supp. 583, 588, 36 U.C.C. Rep. 167 (E.D. Mo. 1983) (reducing buyer's damages by the amount third party offered to pay and buyer unreasonably refused to accept); *Chatlos Sys.*, 479 F. Supp. at 746, 27 U.C.C. Rep. at 657 (denying buyer recovery of consequential damages when it refused to cooperate with seller's attempts to cure).

⁵⁴³ 675 F.2d 745, 33 U.C.C. Rep. 1201 (5th Cir.), cert. denied, 459 U.S. 865 (1982).

⁵⁴⁴ *Id.* at 748, 33 U.C.C. Rep. at 1204.

⁵⁴⁵ *Id.*, 33 U.C.C. Rep. at 1204.

⁵⁴⁶ *Id.* at 753-54, 33 U.C.C. Rep. at 1212-13.

⁵⁴⁷ *Id.* at 753, 33 U.C.C. Rep. at 1213.

⁵⁴⁸ *Id.* at 755, 33 U.C.C. Rep. at 1215.

⁵⁴⁹ *Id.*, 33 U.C.C. Rep. at 1216. One concern in internal cover cases is that damages may be too speculative. See, e.g., *Gives Corp. v. Callier Steel Pipe & Tube, Inc.*, 482 A.2d 852, 858-60, 39 U.C.C. Rep. 1705, 1713-16 (Me. 1984) (buyer could not recover claims for overhead expenses associated with internal cover because of inadequate proof of loss).

⁵⁵⁰ 675 F.2d at 755, 33 U.C.C. Rep. at 1216.

ing substitute goods internally, but in so doing risks losing profits that could have been made by selling the goods used for cover on the open market.

To recover consequential damages, a buyer need not choose what, in hindsight, appears the best method of mitigation. In *S.J. Groves & Sons Co. v. Warner Co.*⁵⁵¹ the seller failed to deliver adequate supplies of ready-mixed concrete at the scheduled times, but reassured the buyer that it would make the deliveries.⁵⁵² The buyer had one alternative source for ready-mixed concrete, but that supplier had limited production facilities, charged more for the concrete, and did not have certification to do state work.⁵⁵³ Commenting that “[t]here are situations in which continuing with the performance of an unsatisfactory contractor will avoid losses which might be experienced by engaging others to complete the project,”⁵⁵⁴ the Third Circuit held that the buyer met its obligation to mitigate by cooperating with the seller.⁵⁵⁵

In an alternative holding, the *Groves* court adopted the “equal opportunity doctrine”: “Where both the plaintiff and the defendant have had equal opportunity to reduce the damages by the same act and it is equally reasonable to expect the defendant to minimize damages, the defendant is in no position to contend that the plaintiff failed to mitigate.”⁵⁵⁶ Thus, the court held that the seller had an obligation to cover the buyer’s losses because the seller could have engaged the alternative supplier to meet the delivery schedule.⁵⁵⁷

The Seventh Circuit in *Cates v. Morgan Portable Building Corp.*⁵⁵⁸ rejected the “equal opportunity doctrine” because it conflicts with the policy behind the duty to cover: “to preserve the buyer’s incentive to consider a wide range of possible methods of mitigation of damages.”⁵⁵⁹ Less incentive would exist if a buyer could rely on the seller’s ability to find substitute goods or make the present goods conforming.

Courts should reject the “equal opportunity doctrine” because the economic inefficiency it creates outweighs any fairness arguments that support it. The buyer is often in a better position to assess the potential damages flowing from the breach of warranty and is therefore in a better position to determine appropriate steps

⁵⁵¹ 576 F.2d 524, 24 U.C.C. Rep. 1 (3d Cir. 1978).

⁵⁵² *Id.* at 526, 24 U.C.C. Rep. at 4.

⁵⁵³ *Id.*, 24 U.C.C. Rep. at 4.

⁵⁵⁴ *Id.* at 530, 24 U.C.C. Rep. at 10.

⁵⁵⁵ *Id.*, 24 U.C.C. Rep. at 10.

⁵⁵⁶ *Id.*, 24 U.C.C. Rep. at 10.

⁵⁵⁷ *Id.*, 24 U.C.C. Rep. at 10.

⁵⁵⁸ 780 F.2d 683, 42 U.C.C. Rep. 451 (7th Cir. 1985).

⁵⁵⁹ *Id.* at 689, 42 U.C.C. Rep. at 457.

to reduce losses.⁵⁶⁰ This is particularly true with consequential damages, which flow from the buyer's particular situation.⁵⁶¹ The Code imposes liability on the seller to the full extent of the buyer's consequential losses, even if the amount of the damages was not foreseeable;⁵⁶² thus the party in the best position to reduce losses should have an affirmative duty to do so. Moreover, because the seller often has the burden of establishing the buyer's failure to cover,⁵⁶³ the buyer's claim that the seller passed up an equal opportunity to cover would unduly burden the seller. The seller would have to show not only that the buyer failed to cover, but that the seller lacked the opportunity. These considerations outweigh the fairness argument that would place responsibility to mitigate on the breaching seller as well as the innocent buyer.⁵⁶⁴ Finally, efforts to cover may allow the buyer to recover for loss incurred after discovery of the defect. Normally, a buyer may not recover consequential damages for losses which occur after the buyer discovers the defect in the goods.⁵⁶⁵ Nevertheless, in *Prutch v. Ford Motor Co.*⁵⁶⁶ the court allowed farmers to recover such losses from the seller of defective farm equipment. The court reasoned that the farmers had a duty to mitigate by producing a partial crop, and this necessitated the use of the defective equipment.⁵⁶⁷

Courts permit a wide range of activities to constitute mitigation

⁵⁶⁰ See *id.* at 688, 42 U.C.C. Rep. at 455-56.

⁵⁶¹ See *supra* note 403 and accompanying text.

⁵⁶² See *supra* notes 512-27 and accompanying text.

⁵⁶³ Cases are split on the burden to prove failure to cover. See *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 688, 42 U.C.C. Rep. 451, 455-56 (burden on seller to prove failure to mitigate); *Carnation Co. v. Olivet Egg Ranch*, 229 Cal. Rptr. 261, 266-67, 1 U.C.C. Rep. 2d 1531, 1534-40 (1986) (burden on breaching party to prove inadequacy of efforts to mitigate consequential damages). But see *International Petroleum Serv. v. S&N Well Serv., Inc.*, 230 Kan. 452, 463, 639 P.2d 29, 33 U.C.C. Rep. 217, 229 (1982) (buyer must prove compliance with cover requirement). Some courts place the burden of proving attempts to cover on the buyer, and the burden of proving the impropriety of such attempts on the seller. *Kiser v. Lemco Indus., Inc.*, 536 N.W.2d 585, 589, 19 U.C.C. Rep. 1134, 1139 (Tex. Civ. App. 1976).

⁵⁶⁴ See *supra* text accompanying note 556.

⁵⁶⁵ Consequential damages created by a buyer's use of a product after discovery of a defect may not be recovered in a breach-of-warranty action. *General Instrument Corp. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139, 149-50, 13 U.C.C. Rep. 829, 835-37 (M.D. Pa. 1973), *aff'd*, 506 F.2d 1051 (3d Cir. 1974); *Michigan Sugar Co. v. Jebavy-Sorenson Orchard Co.*, 66 Mich. App. 642, 646, 239 N.W.2d 693, 695, 19 U.C.C. Rep. 100, 103 (1976); *cf.* U.C.C. § 2-715 comment 5 ("Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of 'proximate' cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.")

⁵⁶⁶ 618 P.2d 657, 29 U.C.C. Rep. 1507 (1980) (per curiam).

⁵⁶⁷ *Id.* at 662, 29 U.C.C. Rep. at 1514.

so long as they do not find bad faith.⁵⁶⁸ A buyer who incurs reasonably avoidable losses acts in bad faith and the Code reduces damages accordingly. The decision of whether a buyer should have covered losses depends upon the Code's policy concerns and the court's judgment concerning the buyer's good faith actions.

C. Conclusions

The Code's damages provisions present two principal policy issues: the extent to which the seller should be held liable for breach of warranty and the amount of proof the buyer must produce to recover claimed losses. These policy issues do not generally arise with the Code's incidental damages provisions because the claims result directly from the goods involved in the transaction;⁵⁶⁹ they are more capable of proof. Consequential damages, however, present greater difficulties. The Code allows courts to award damages for breach of warranty in many situations. The seller is liable for breach of warranty when the goods fail to meet their implied warranty of merchantability or implied warranty for a particular purpose.⁵⁷⁰ Additionally, a wide range of actions may create express warranties that trigger liability against the seller.⁵⁷¹

Although the frequent creation of warranties suggests that the buyer should easily recover both primary and incidental damages, recovery of consequential losses is not so easy. The Code presumes that commercial parties can more efficiently allocate risk by contract than through litigation and it therefore limits the seller's liability by requiring cover and foreseeability. The foreseeability requirement

⁵⁶⁸ U.C.C. § 2-712 comment 2 states, "The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may prove that the method of cover used was not the cheapest or most effective." *Id.*; see also *Waters v. Massey-Ferguson, Inc.*, 775 F.2d 587, 590 n.2, 41 U.C.C. Rep. 1553, 1557 n.2 (4th Cir. 1985) (buyer's hiring of neighboring farmers to plant after tractor failed was reasonable cover); *Huntington Beach Union High School Dist. v. Continental Information Sys.*, 621 F.2d 353, 357, 29 U.C.C. Rep. 112, 116-17 (9th Cir. 1980) (purchase of substitute computer system following seller's failure to deliver not made in bad faith); *Wullschleger & Co. v. Jenny Fashions, Inc.*, 618 F. Supp. 373, 378, 41 U.C.C. Rep. 1213, 1221 (S.D.N.Y. 1985) (buyer's unsuccessful but good faith effort to purchase substitute fabrics satisfied cover requirement); *Bende & Sons, Inc. v. Crown Recreation, Inc.*, 548 F. Supp. 1018, 1022-23, 34 U.C.C. Rep. 1587, 1593 (E.D.N.Y. 1982) (buyer's good faith effort to locate substitute army boots satisfied section 2-715(2)(a)), *aff'd*, 722 F.2d 727 (2d Cir. 1983); *Leininger v. Sola*, 314 N.W.2d 39, 49, 33 U.C.C. Rep. 191, 205 (N.D. 1981) (purchase of one bull to impregnate cows reasonable cover for seller's failure to provide pregnant cows). *But see* *Larry Goad & Co. v. Lordstown Rubber Co.*, 560 F. Supp. 583, 588, 36 U.C.C. Rep. 167 (E.D. Mo. 1983) (buyer's refusal to accept money offered by its customer for the value of its work upon cancellation of contract resulted in reduction of buyer's consequential damages).

⁵⁶⁹ See *supra* note 424 and accompanying text.

⁵⁷⁰ See *supra* notes 186-202 and accompanying text.

⁵⁷¹ See *supra* notes 38-142 and accompanying text.

assures that, at the time of contracting, the parties at least implicitly allocated the risks of loss associated with the transaction. Likewise, the duty to cover reflects the view that reasonable parties expect each other to minimize losses. The Code permits efficient breach to the extent that a breaching party can calculate potential losses associated with the breach and consider the buyer's ability to mitigate losses. If the risks of entering a transaction outweigh the potential profits, the Code authorizes the parties to exclude liability for consequential losses.

Once a court determines that the parties implicitly agreed to allocate the risk of consequential loss, a reduced evidentiary standard applies. Under the fact-amount doctrine, once the buyer establishes that a loss occurred, the buyer need not establish the exact amount of loss to recover. The buyer must, however, establish the creation—and subsequent breach—of a warranty. Once the buyer makes this showing, the Code's damages provisions establish a framework for the accurate assessment of loss and reasonable standards for recovery of such losses.

V

LIMITATIONS ON WARRANTY LIABILITY

We have examined thus far the creation of both express and implied warranties in commercial sales and considered a buyer's potential remedies against a seller who has breached his warranty obligations. For the most part, we have assumed a passive seller who leaves the resolution of warranty conflicts to the Code rather than to contract. Such an assumption is unrealistic in an actual commercial context, for sellers often carefully draft agreements to limit significantly their exposure to warranty liability. Sellers may employ section 2-316 to negate virtually all implied warranties in commercial transactions. Section 2-719 allows sellers to restrict buyer recovery for breach of warranty, thus limiting the reach of undisclaimable express warranties.

Applying sections 2-316 and 2-719 to both commercial and consumer transactions creates tension. The drafters found commercial utility in allowing parties to allocate contractually the risks inherent in any sale.⁵⁷² The drafters tempered this power, however, by imposing procedural and substantive requirements to protect unsophisticated buyers.⁵⁷³ Because commercial sellers need less pro-

⁵⁷² See Special Project, *supra* note 1, at 170.

⁵⁷³ Note that the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982), imposes federal limitations on disclaimers to consumers. Section 2-316 might have differed had it been drafted after the Magnuson-

tection, courts are less likely to demand strict compliance with the requirements in cases involving sophisticated buyers.

A. Basic Purpose of Section 2-316

Sellers often include phrases like "there are no warranties express or implied" in their sales contracts to limit liability. Section 2-316 establishes the requirements that these phrases must meet to serve as effective disclaimers of warranties. The section

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 unbar-gained 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.⁵⁷⁴

In seeking to protect buyers from unbargained disclaimers, section 2-316 establishes procedures to ensure that the buyer knows the risks he undertakes regarding product quality pursuant to the agreement.⁵⁷⁵

B. Disclaimers and Express Warranties—Section 2-316(1)

The Code's position regarding conflicts between express warranties and disclaimers appears in section 2-316(1):

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 this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.⁵⁷⁶

In accordance with the Code's mandate that warranties and disclaimers be reconciled "wherever reasonable," courts may interpret a disclaimer narrowly rather than simply declare it invalid.⁵⁷⁷ When

Moss Act went into effect. The drafters could have avoided the present tension in the Code by relying on the Magnuson-Moss Act to protect consumers.

⁵⁷⁴ U.C.C. § 2-316 comment 1.

⁵⁷⁵ See 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-316:01, at 376-77 (1984).

⁵⁷⁶ U.C.C. § 2-316(1).

⁵⁷⁷ See, e.g., *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 57, 29 U.C.C. Rep. 1497, 1503-04 (8th Cir. 1980) (reading "as is" disclaimer "to disclaim all implied warranties, leaving the written express warranties . . . intact"); *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 958, 199 Cal. Rptr. 789, 794-95, 38 U.C.C. Rep. 55, 60 (1984) (construing disclaimer not to exclude express description which could not reasonably be disclaimed rather than simply finding disclaimer ineffective); *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 520, 319 N.W.2d 855, 859-60, 34 U.C.C. Rep.

courts cannot construe away apparent inconsistencies, however, the Code declares inoperative disclaimers that conflict with express warranties.⁵⁷⁸ Most courts routinely⁵⁷⁹ refuse to give effect to disclaimers that negate express warranties.⁵⁸⁰

1. *Warranty Language in the Written Agreement—Consistency*

a. *Words of Disclaimer and the Basis of the Bargain.* An express warranty, once created, may not be disclaimed. But words of disclaimer may help to prevent the formation of express warranties by excluding warranties from the basis of the bargain.⁵⁸¹ Subsection

146, 153 (1982) (finding disclaimer does not apply to specially manufactured equipment like that at issue but noting that, if disclaimer did apply to the equipment, disclaimer would be ineffective as inconsistent with the express warranty).

⁵⁷⁸ Ambiguity should be resolved in favor of the express warranty. *See, e.g.*, *Hartman v. Jensen's, Inc.* 277 S.C. 501, 504, 289 S.E.2d 648, 649, 33 U.C.C. Rep. 889, 890-91 (1982) (disclaimer placed under bold heading of "TERMS OF WARRANTY" ineffective because it created an ambiguity not likely to alert the consumer of exclusion of warranty); *W.R. Weaver Co. v. Burroughs Corp.*, 580 S.W.2d 76, 81, 27 U.C.C. Rep. 64, 71 (Tex. Civ. App. 1979) ("[T]he inconsistent language of the instruments . . . creates a question of fact as to the intention of the parties . . . [A]ny ambiguity [should] . . . be resolved in favor of the express warranty.").

⁵⁷⁹ In applying the Uniform Commercial Code to leases in three recent cases, federal district courts ignored the express mandate of section 2-316(1) and found disclaimers of express warranties effective. *See Agristor Credit Corp. v. Schmidlin*, 601 F. Supp. 1307, 1315-16, 41 U.C.C. Rep. 1653, 1659 (D. Or. 1985) ("Whether the U.C.C. applies or not, [the lessor] disclaimed all warranties, either *express* or implied. The disclaimers are conspicuous and are valid under Oregon law.") (emphasis added) (footnote omitted); *Agristor Leasing v. Hansen*, 41 U.C.C. Rep. 1660, 1666 n.7 (D. Minn. 1985) ("The lease provision in [question] . . . effectively disclaims any express warranties which might exist."); *Agristor Leasing v. Kjergaard*, 41 U.C.C. Rep. 1667, 1671 n.5 (D. Minn. 1985) (same). These cases seem to be based on *St. Paul Leasing Co. v. Winkel's Inc.*, 309 Minn. 583, 244 N.W.2d 661 (1976) (granting summary judgment in favor of lessor enforcing disclaimer terms in lease despite finding that salesman for lessor "made certain representations . . . concerning the performance of the equipment"). These cases should not be followed.

⁵⁸⁰ *See, e.g.*, *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 412, 42 U.C.C. Rep. 1, 12 (8th Cir. 1985) (disclaimer inoperative when inherently inconsistent with the warranty specifications as found by the jury); *Consolidated Data Terminals v. Applied Digital Data Sys., Inc.*, 708 F.2d 385, 391, 36 U.C.C. Rep. 59, 67 (9th Cir. 1983) (express statements prevail over general warranty disclaimer); *Schlenz v. John Deere Co.*, 511 F. Supp. 224, 229, 31 U.C.C. Rep. 1020, 1027 (D. Mont. 1981) (disclaimer "ineffective to destroy the express warranty of safety made in the operator's manual"); *First New England Fin. Corp. v. Woffard*, 421 So. 2d 590, 597, 35 U.C.C. Rep. 650, 658 (Fla. Dist. Ct. App. 1982) (disclaimer of warranty of fitness for particular purpose ineffective when warranty essential factor in the initial agreement between the parties); *Century Dodge, Inc. v. Mobley*, 155 Ga. App. 712, 713, 272 S.E.2d 502, 504, 30 U.C.C. Rep. 844, 846 (1980) (unreasonable to allow express warranty, a description of car as new, to be negated by disclaimer); *H. G. Fischer X-Ray Co. v. Meredith*, 121 N.H. 707, 710, 433 A.2d 1306, 1308, 31 U.C.C. Rep. 1586, 1589 (1981) (effective warranty created by the description of goods despite a disclaimer in the installment contract).

⁵⁸¹ For a detailed discussion of express warranties and the basis of the bargain, see *supra* notes 61-142 and accompanying text. Note also, however, that a disclaimer may not be given effect if it simply is not part of the bargain between the parties. *See McNamara*

(1) emphasizes that courts should attempt to construe words of disclaimer and warranty consistently wherever reasonable. This reminds courts that the underlying goal of buyer protection does not override section 2-313's express warranty requirements. According to section 2-313 comment 4, parties may consciously make any bargain they wish. Thus, the parties may, by carefully disclaiming warranties, create an agreement without warranties.

*Universal Drilling Co. v. Camay Drilling Co.*⁵⁸² illustrates how a disclaimer may operate to prevent the creation of an express warranty. In *Universal Drilling* the Tenth Circuit applied section 2-316(1) to find that the description of the used goods accompanying the contract did not create an express warranty. The court reasoned that "[t]he exhibits to the contract that described the goods must be read in conjunction with the contract itself."⁵⁸³ In an agreement between "experienced, sophisticated, intelligent business[persons] with vast education and experience"⁵⁸⁴ the court gave effect to the contractual statement that "the goods are used and there is no guarantee that they are fit or even *operable*."⁵⁸⁵ The court stated that it could not "think of alternative language which would memorialize the intent of the parties—to purchase and sell used 'as is' equipment which has value but which may need repairs or additional parts to be fit and operable."⁵⁸⁶ This specific disclaiming language, in conjunction with sections 2-313 and 2-316, prevented the formation of any warranties.⁵⁸⁷

Most courts, however, do not enforce such disclaimers.⁵⁸⁸ Courts often find the disclaimer inoperative because it conflicts with the product's description. While such findings may protect buyers from unexpected disclaimers, courts should avoid a reflexive pro-buyer, antidisclaimer stance. Courts should carefully consider the entire contract to determine whether the description forms a guarantee that the parties consider integral to the bargain, or whether they consider the disclaimer integral to the bargain and the descrip-

mara Pontiac, Inc. v. Sanchez, 388 So. 2d 620, 621, 30 U.C.C. Rep. 931, 932 (Fla. Dist. Ct. App. 1980) (dealer warranty disclaimer not given effect when neither purpose of document nor nature of disclaimer discussed with buyer and salesman described dealer warranty to buyer); *Rottinghaus v. Howell*, 35 Wash. App. 99, 106-07, 666 P.2d 899, 903, 37 U.C.C. Rep. 42, 47-48 (1983) (disclaimers ineffective because not part of bargain between parties).

⁵⁸² 737 F.2d 869, 38 U.C.C. Rep. 1576 (10th Cir. 1984).

⁵⁸³ *Id.* at 874, 38 U.C.C. Rep. at 1581.

⁵⁸⁴ *Id.* at 870, 38 U.C.C. Rep. at 1577.

⁵⁸⁵ *Id.* at 874, 38 U.C.C. Rep. at 1581 (emphasis in original).

⁵⁸⁶ *Id.* at 871, 38 U.C.C. Rep. at 1581.

⁵⁸⁷ See also *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 291, 35 U.C.C. Rep. 91, 96 (4th Cir. 1982) (disclaimer on label limited warranties to those expressly stated; disclaimer instrumental in preventing creation of any parol warranties).

⁵⁸⁸ See *supra* note 580.

tion merely secondary. Although section 2-316(1) subordinates disclaimers to warranties in the event of conflict, both section 2-313 and section 2-316 mandate enforcement of the bargain between the parties. Rather than declare *any* inconsistent disclaimer inoperative, courts must evaluate carefully all descriptions⁵⁸⁹ and only enforce those that clearly constitute warranties basic to the bargain.

b. “*Time Warranties*”—*A Special Problem of Consistency*. Sellers often limit the duration of warranties. Time qualifications may directly limit the duration of the warranty or simply limit the period⁵⁹⁰ after delivery in which a buyer must notify the seller of a breach to recover under the warranty. Such limitations effectively exclude warranties covering nonconformities that a buyer could not reasonably discover within the prescribed time period.⁵⁹¹ So long as such exclusions do not conflict with express warranties, courts should enforce these limitations.⁵⁹² Conflicts may arise when a seller provides an unqualified warranty in one clause while a subsequent clause attempts to qualify it by establishing a time limit.⁵⁹³ Sellers can avoid these conflicts by extending limited warranties only, or by placing clauses describing the time limit immediately after the warranty. For example, rather than make an unqualified promise that items are of good, merchantable quality, a seller might simply warrant goods against any defects discovered within a certain time period.

Professors White and Summers have noted that “[s]ince the Code does not oblige the seller to make any express warranties, limitations on such warranties should stand in the absence of inconsistency under [section] 2-316(1).”⁵⁹⁴ Since 1978, few reported cases have addressed the problem of “time warranties.” Courts that have addressed the issue appear more willing to enforce time limitations than they were in 1978.⁵⁹⁵

⁵⁸⁹ Pictures in advertisements and brochures may also create undisclaimable warranties. See Grady, *Inadvertent Creation of Express Warranties: Caveats for Pictorial Product Representations*, 15 U.C.C. L.J. 268 (1983).

⁵⁹⁰ Special Project, *supra* note 1, at 173.

⁵⁹¹ *Id.*

⁵⁹² J. WHITE & R. SUMMERS, *supra* note 5, § 12-2, at 431 n.19 (2d ed. 1980).

⁵⁹³ See, e.g., *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 404-05, 244 N.E. 2d 685, 689, 297 N.Y.S.2d 108, 112-13, 5 U.C.C. Rep. 1213, 1217-18 (1968) (clause excluding liability for defects discovered more than 10 days after delivery does not limit unqualified express warranty that yarn was of good, merchantable quality).

⁵⁹⁴ J. WHITE & R. SUMMERS, *supra* note 5, § 12-2, at 431 n.19.

⁵⁹⁵ See *Kodiak Elec. Ass'n., Inc. v. DeLaval Turbine, Inc.*, 694 P.2d 150, 156-57, 40 U.C.C. Rep. 155, 158-59 (Alaska 1984) (neither citing nor considering section 2-316 in finding 18-month warranty provision effective); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 953, 33 U.C.C. Rep. 1277, 1286 (Ind. Ct. App. 1982) (jury could find buyer aware of warranty's limited duration and thus find it effective); *McCullough v. General Motors Corp.*, 577 F. Supp. 41, 44, 47, 37 U.C.C. Rep. 1529, 1532, 1536 (W.D. Tenn. 1982) (Question of fact whether language “ANY IMPLIED WARRANTY APPLICABLE TO

In *Hart Engineering Co. v. FMC Corp.*,⁵⁹⁶ for example, the court accepted the White and Summers position and validated a one-year time warranty. The court found the warranty disclaimers governed by section 2-316 but also found

no explicit authorization anywhere in the Code for invalidating [time warranties]. In fact, such an approach would appear to run at cross purposes with the spirit, if not with any specific provision, of the Code [A]ssuming arguendo that the interdiction of a time warranty might be appropriate in an exceptional case, no such departure is merited . . . [where] no . . . unfairness polluted the process by which the contract was negotiated, drafted, and ultimately executed.⁵⁹⁷

2. *Parol Warranties*

Section 2-316(1), by explicitly referring to section 2-202,⁵⁹⁸ protects sellers' disclaimers from buyers' allegations of oral warranties that the parties did not include in their complete and final agreement.⁵⁹⁹ Most courts apply section 2-202 literally and require that evidence of parol warranties meet the same standards of admissibility as the agreement's other terms.⁶⁰⁰ Of course, the parol evi-

THIS CAR IS LIMITED TO THE DURATION OF THIS WRITTEN WARRANTY" effective to limit duration of all warranties; court will consider "the purpose and effect of the time limitation, the commercial setting in which the contract was executed, the reasonableness of the time limitation at the time of contracting, and the particular consequences of applying such a time limitation to a safety device").

⁵⁹⁶ 593 F. Supp. 1471, 39 U.C.C. Rep. 1313 (D.R.I. 1984)

⁵⁹⁷ *Id.* at 1479-80, 39 U.C.C. Rep. at 1323-25 (footnotes omitted). The court also considered the length of the warranty—a year rather than days—and the fact that the seller's attempts to repair went far above and beyond the call of duty in validating the warranty.

⁵⁹⁸ U.C.C. § 2-202 provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

⁵⁹⁹ See also U.C.C. § 2-316 comment 2 ("The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence")

⁶⁰⁰ Parol evidence is admissible when the written agreement is not the complete and final expression of the parties' agreement. See, e.g., *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 763, 37 U.C.C. Rep. 1076, 1082-83 (10th Cir. 1983) (where invoice not intended to express final agreement of the parties, district court properly submitted express warranty question and properly excluded written disclaimer language); *Computerized Radiological Servs. v. Syntex Corp.*, 595 F. Supp. 1495, 1505, 40 U.C.C. Rep. 49,

dence rule only protects the seller who raises the defense.⁶⁰¹

Occasionally a court may fail to consider the parol evidence rule in determining the effectiveness of a disclaimer. For example, in *Art Hill, Inc. v. Heckler*⁶⁰² the court did not mention section 2-202 in finding a written disclaimer ineffective to disclaim an express warranty created by the seller's conduct. The court noted that "[b]ecause these affirmations were made orally and were not contained in a writing intended as a final expression of the agreement, whether they amount to an express warranty is a question of fact."⁶⁰³ The court found that the seller's conduct created an express warranty;⁶⁰⁴ however, the court never specifically stated that the purchase agreement was not a complete and final expression of the parties' agreement. The court should have decided this fact before finding the disclaimer inoperative.⁶⁰⁵

61-62 (E.D.N.Y. 1984) (agreement explicitly referring to extrinsic secondary documents not complete and exclusive statement and may be supplemented by evidence of consistent additional terms), *aff'd in part and rev'd in part*, 786 F.2d 72, 42 U.C.C. Rep. 1656 (2d Cir. 1986); *Session v. Chartrand Equip. Co.*, 133 Ill. App. 3d 719, 725, 479 N.E.2d 376, 380, 41 U.C.C. Rep. 749, 753 (1985) (jury could find writing not final expression of parties' agreement and thus effective oral warranty created despite disclaiming language). Courts may properly refuse to consider parol warranties that are inconsistent with effective disclaimers. *See, e.g., Jaskey Fin. & Leasing v. Display Data Corp.*, 564 F. Supp. 160, 164, 36 U.C.C. Rep. 26, 31 (E.D. Pa. 1983) (parol evidence rule precludes claim that advertising and promotional material produced warranty where seller included an effective disclaimer in writing); *Corbett v. North Fla. Clarklift, Inc.*, 155 Ga. App. 701, 701, 272 S.E.2d 563, 564, 30 U.C.C. Rep. 825, 826 (1980) (where warranty disclaimer effective under section 2-316, evidence of contradictory prior or contemporaneous parol agreement prohibited by section 2-202); *Harper v. Calvert*, 687 S.W.2d 227, 230, 39 U.C.C. Rep. 1655, 1658 (Mo. Ct. App. 1984) ("The term 'as is' is not ambiguous and parol evidence contradicting its meaning is not to be permitted under [section 202]."); *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283, 288, 420 N.Y.S.2d 983, 986, 27 U.C.C. Rep. 933, 937-38 (N.Y. Civ. Ct. 1979) ("[S]pecific written disclaimer . . . governs to overcome the alleged orally expressed warranty which in any event would run afoul of the parol evidence rule . . ."); *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891-92, 38 U.C.C. Rep. 78, 82 (Tex. Ct. App. 1983) (where sales agreement unambiguous parol evidence inadmissible to show warranties that conflict with effective express disclaimer).

⁶⁰¹ *See, e.g., Miller v. Hubbard Wray Co.*, 52 Or. App. 897, 903, 630 P.2d 880, 884, 32 U.C.C. Rep. 1378, 1384 (where defendant failed to raise parol evidence rule objection, disclaimer ineffective against inconsistent express oral warranty), *modified*, 53 Or. App. 531, 633 P.2d 1 (1981).

⁶⁰² 457 N.E.2d 242, 37 U.C.C. Rep. 697 (Ind. Ct. App. 1983).

⁶⁰³ *Id.* at 244, 37 U.C.C. Rep. at 700.

⁶⁰⁴ *Id.* at 245, 37 U.C.C. Rep. at 700.

⁶⁰⁵ Had the court considered the issue, however, it would likely have reached the same result. The court's reference to the fact that the oral affirmations were not in a "writing intended as a final expression of the agreement," *id.* at 244, 37 U.C.C. Rep. at 700 (emphasis added), leads one to believe that the court would not have found the writing the final expression of the agreement, rendering the parol evidence admissible. If the court had found the purchase agreement the final expression of the parties' agreement, the court might still have considered the sellers' promises under the fraud exception to the parol evidence rule. The seller's repeated assurances that created the

C. Express Disclaimers of Implied Warranties Under Section 2-316(2)

Section 2-316(2) establishes the general procedure by which a seller can effectively disclaim the implied warranties of merchantability and fitness for a particular purpose.⁶⁰⁶ Subsection(2) provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a 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."⁶⁰⁷

1. Language Requirements

a. *Language to Disclaim the Implied Warranty of Merchantability.* Section 2-316(2) mandates that the seller use the word "merchantability" effectively to exclude or modify the implied warranty of merchantability.⁶⁰⁸ Uniformly⁶⁰⁹ requiring the parties to

express warranty induced the buyer to enter into the agreement. If the seller had no intention of fulfilling the promises, then his conduct might be considered fraud under state law. Parol evidence is admissible to prove fraud. J. WHITE & R. SUMMERS, *supra* note 5, § 2-11, at 88; *see also* Society Nat'l Bank v. Pemberton, 63 Ohio Misc. 26, 409 N.E.2d 1073, 30 U.C.C. Rep. 76 (Mun. Ct. 1979) (court failed to consider parol evidence rule in finding oral express warranty created and not effectively disclaimed by conspicuous written disclaimers since such disclaimers inconsistent with oral express warranty), *aff'd mem.*, Case No. 9502 (Ohio Ct. App. Jun. 25, 1980). Had this court considered the parol evidence rule, it probably would have found the written agreement was not the complete and final expression of the parties' agreement. *See generally* J. WHITE & R. SUMMERS, *supra* note 5, § 2-1 to -12, at 50-95 (detailed analysis of parol evidence rule and its exceptions).

⁶⁰⁶ For discussion of effective disclaimers of implied warranties under section 2-316(3)(a), see *infra* notes 682-707 and accompanying text.

⁶⁰⁷ U.C.C. § 2-316(2).

⁶⁰⁸ While the express language requirements of section 2-316(2) are clear, section 2-316(3)(a) appears to undermine completely these requirements. For a discussion of the relationship between the two subsections, see *infra* notes 682-707 and accompanying text. Nevertheless most courts enforce disclaimers under section 2-316(2) without reference to section 2-316(3)(a). *See, e.g.*, Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1252, 29 U.C.C. Rep. 1169, 1179 (5th Cir. 1980) (applying only section 2-316(2) to find effective disclaimer of merchantability); Hi Neighbor Enters., Inc. v. Burroughs Corp., 492 F. Supp. 823, 826, 29 U.C.C. Rep. 1256, 1260 (N.D. Fla. 1980) (holding that "[t]he warranty exclusions of the contracts in this case meet the requirements for modification or exclusion" after citing section 2-316(2)); Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co., 491 F. Supp. 611, 30 U.C.C. Rep. 127 (N.D. Tex. 1979) (enforcing a waiver that refers specifically to merchantability, without reference to the requirements of section 2-316(3)(a)).

⁶⁰⁹ Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497, 1 U.C.C. Rep. 73 (1st Cir. 1962), appeared to ignore this requirement by finding a waiver of the warranty of

use the word "merchantability" before enforcing disclaimers, courts have adopted the express language of section 2-316(2).⁶¹⁰

b. *Language to Disclaim the Implied Warranty of Fitness.* Section 2-316(2) does not require specific language to disclaim the implied warranty of fitness. Rather, written and conspicuous general language that clearly demonstrates the seller's intent suffices to disclaim such warranties.⁶¹¹ The case law does not include many examples of effective⁶¹² or ineffective⁶¹³ uses of general language to disclaim the implied warranty of fitness. Successful disclaimers of

merchantability even though the specific language was not used. *Roto-Lith* was expressly rejected in *Potler v. MCP Facilities Corp.*, 471 F. Supp. 1344, 1350, 26 U.C.C. Rep. 651, 661 (E.D.N.Y. 1979) ("We believe we must follow the example set by [*Zicari v. Harris Co.*, 33 A.D.2d 17, 304 N.Y.S.2d 918, 6 U.C.C. Rep. 1246 (N.Y. App. Div. 1969),] rather than *Roto-Lith* and hold that the language printed on MCP's brochure and labels does not exclude or modify the warranty of merchantability.") (footnote omitted).

⁶¹⁰ See, e.g., *Jaskey Fin. & Leasing v. Display Data Corp.*, 564 F. Supp. 160, 165, 36 U.C.C. Rep. 26, 33 (E.D. Pa. 1983) (upholding claim for breach of implied warranty of merchantability on a motion to dismiss because the disclaimer provisions in the contracts, although conspicuous, failed to mention the word merchantability); *Wright v. T & B Auto Sales, Inc.*, 72 N.C. App. 449, 453, 325 S.E.2d 493, 496, 41 U.C.C. Rep. 58, 61-62 (1985) (ineffective disclaimer where no mention of "merchantability"); *Allis-Chalmers Credit Corp. v. Herbolt*, 17 Ohio App. 3d 230, 234, 479 N.E.2d 293, 298, 41 U.C.C. Rep. 485, 491 (1984) (no effective disclaimer because "the word 'merchantable' occurs in the *express warranty* but is not found in the disclaiming language") (emphasis in original); *Discount Drug Corp. v. Honeywell Protection Servs., Div. of Honeywell, Inc.*, 303 Pa. Super. 522, 525-26, 450 A.2d 49, 50, 34 U.C.C. Rep. 491, 494 (1982) (finding ineffective disclaimer where contract neither mentions the term "merchantability" nor indicates that the buyer takes the goods "with all faults" or "as is").

⁶¹¹ "Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by *general language*, but only if it is in writing and conspicuous." U.C.C. § 2-316 comment 4 (emphasis added).

⁶¹² See, e.g., *Jaskey Fin. & Leasing*, 564 F. Supp. at 163, 36 U.C.C. Rep. at 30 ("EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE OR THE REVERSE SIDE HEREOF" effectively disclaims implied warranty of fitness); *R & L Grain Co. v. Chicago E. Corp.*, 531 F. Supp. 201, 207, 209, 33 U.C.C. Rep. 532, 535, 539 (N.D. Ill. 1981) ("THERE ARE NO WARRANTIES OF MERCHANTABILITY OR OTHERWISE WHICH EXTEND BEYOND THE DESCRIPTION OF THE FACE HEREOF AND NO WARRANTIES OF ANY KIND WITH RESPECT TO ELECTRIC MOTORS" effectively disclaims the implied warranty of fitness); *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 768, 41 U.C.C. Rep. 430, 436 (Ky. Ct. App. 1985) (effective disclaiming language on purchase order: "THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE OF THOSE EXPRESSLY STATED HEREIN" and "COMPANY . . . DOES NOT MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS"); *Allis-Chalmers Credit Corp. v. Herbolt*, 17 Ohio App. 3d 230, 234, 479 N.E.2d 293, 298, 41 U.C.C. Rep. 485, 491 (1984) ("THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THOSE EXPRESSLY STATED HEREIN" effective disclaimer of implied warranty of fitness).

⁶¹³ See, e.g., *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill. App. 3d 835, 838, 403 N.E.2d 294, 297, 28 U.C.C. Rep. 1307, 1310 (1980) (language "*overall production is not guaranteed*" is unclear and ambiguous thus failing to waive the implied warranty of fitness).

this sort use language very similar to that recommended in section 2-316(2): for example, "There are no warranties which extend beyond the description on the face hereof."⁶¹⁴ Although the Code does not require mention of the word fitness, cautious sellers often preclude the creation of any implied warranty of fitness by explicitly mentioning "fitness" in the disclaimer.⁶¹⁵ Sellers risk an ineffective disclaimer if they stray too far from the recommended language.⁶¹⁶

2. *Conspicuousness*

Section 2-316(2) instructs courts to give effect only to conspicuous disclaimers of implied warranties. Courts⁶¹⁷ must choose between an objective and a subjective test for conspicuousness. "The drafters apparently felt that the goals of certainty, long-run buyer protection, and avoidance of difficult fact questions counseled against looking beyond the 'four corners' of the written instrument."⁶¹⁸ Some courts believe that this suggests that an objective test is the appropriate test to determine conspicuousness.⁶¹⁹ Other courts, however, reject the objective test and consider the buyer's actual awareness of the disclaimer in evaluating its conspicuousness.⁶²⁰ Still other courts have adopted the "modified objective test,"⁶²¹ suggested in the 1978 Special Project, which we continue to advocate.

⁶¹⁴ See *supra* note 612.

⁶¹⁵ See, e.g., *Schlenz v. John Deere Co.*, 511 F. Supp. 224, 228, 31 U.C.C. Rep. 1020, 1026 (D. Mont. 1981) (contract language states that the contract does not "MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS"); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 563, 489 A.2d 660, 664, 40 U.C.C. Rep. 1184, 1188 (1985) ("THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES . . . EXPRESSED OR IMPLIED AND THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.").

⁶¹⁶ See *Imperial Stamp & Engraving Co.*, 82 Ill. App. 3d at 838, 403 N.E.2d at 297, 28 U.C.C. Rep. at 1310 (merely stating "OVERALL PRODUCTION IS NOT GUARANTEED" is insufficient to disclaim warranty of fitness).

⁶¹⁷ Note that conspicuousness is a question of law, not fact. See U.C.C. § 1-201(10) ("Whether a term or clause is 'conspicuous' or not is for decision by the court."); see also *Bert Smith Oldsmobile, Inc. v. Franklin*, 400 So. 2d 1235, 1237, 31 U.C.C. Rep. 1273, 1275 (Fla. Dist. Ct. App. 1981) (conspicuousness is a question of law, but seller waived objection to jury instruction on this question when it failed to object at trial); *Todd Equip. Leasing Co. v. Milligan*, 395 A.2d 818, 820, 25 U.C.C. Rep. 704, 707 (Me. 1978) (trial court erred in submitting question of conspicuousness to jury).

⁶¹⁸ Special Project, *supra* note 1, at 182.

⁶¹⁹ For a complete discussion of the objective test, see *infra* notes 622-46 and accompanying text.

⁶²⁰ For a complete discussion of the buyer awareness test, see *infra* notes 647-54 and accompanying text.

⁶²¹ Special Project, *supra* note 1, at 185; see *supra* notes 597-99 and accompanying text (discussing a different instance when the Code suggests going beyond the four corners of the document). For a complete discussion of the "modified objective test," see *infra* notes 655-62 and accompanying text.

a. *The Objective Test.* Section 1-201(10) defines “conspicuous.” It suggests an objective test focusing on whether a disclaimer is “so written” that a “reasonable” buyer ought to have noticed it.⁶²² Section 1-201(10) provides:

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 or color. But in a telegram any stated term is “conspicuous”.⁶²³

Many courts base their decisions on the conspicuousness of the written words alone.⁶²⁴ In evaluating the conspicuousness of a written disclaimer, these courts frequently consider the location of and reference to the disclaimer in the contract,⁶²⁵ the type face, type size, and variation in printing,⁶²⁶ the heading referring to the dis-

⁶²² Although the Code requires that disclaimers of the implied warranty of fitness for a particular purpose be written, the Code does not mandate that disclaimers of implied warranties of merchantability be written. The conspicuousness requirement is limited to written disclaimers. See U.C.C. § 2-316(2) (“the language must mention merchantability and *in case of a writing* must be conspicuous”) (emphasis added); see also *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1252, 29 U.C.C. Rep. 1169, 1179 (5th Cir. 1980) (“To disclaim an implied warranty of merchantability, the disclaimer . . . in the case of a writing, must be conspicuous.”).

⁶²³ U.C.C. § 1-201(10).

⁶²⁴ Note, however, that some courts consider the sophistication of the buyer or parity of bargaining power in evaluating the conspicuousness of the disclaimer. For a detailed discussion of the modified objective text, see *infra* notes 655-62 and accompanying text. See, e.g., *R & L Grain Co. v. Chicago E. Corp.*, 531 F. Supp. 201, 209, 33 U.C.C. Rep. 532, 538 (N.D. Ill. 1981) (“The instant warranty [exclusion] is reasonably noticeable, especially to a business entity participating in an arms length transaction. The exclusion appears in a separate section of the sales contract and is printed, in part, in boldface type.”) (emphasis added).

⁶²⁵ See, e.g., *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 909, 41 U.C.C. Rep. 1671, 1678 (D. Minn. 1985) (notice provision on front insufficient to bring to attention of reasonable buyer presence of disclaimers on back thus disclaimer inconspicuous and ineffective); *Anderson v. Farmers Hybrid Cos.*, 87 Ill. App. 3d 493, 502, 408 N.E.2d 1194, 1200, 29 U.C.C. Rep. 1264, 1270 (1980) (“[W]hile the type used for disclaiming the warranties was conspicuous, in the sense of being larger than other type in the paragraph, the presence of that paragraph on the reverse side of the order slip was not at all conspicuous, either from the general appearance of the slip or from any conspicuous language on the front side of the slip.”); *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 768, 41 U.C.C. Rep. 430, 435-36 (Ky. App. 1985) (where large type on front of agreement refers to large type disclaimer on reverse, disclaimer conspicuous and effective); *Deaton, Inc. v. Aeroglide Corp.*, 99 N.M. 253, 256, 657 P. 2d 109, 112, 35 U.C.C. Rep. 130, 134 (1982) (Disclaimer is conspicuous if reference to disclaimer — though not actual disclaimer — printed in capital letters. “Language which refers the reader to conditions or provisions on reverse side of form suffices to make language referred to conspicuous.”).

⁶²⁶ See, e.g., *Schlenz v. John Deere Co.*, 511 F. Supp. 224, 228, 31 U.C.C. Rep. 1020, 1026 (D. Mont. 1981) (disclaimers which were “printed in significantly larger typeface than the other printing in the body of the text . . . [and] the only words in the body of the text printed in capital letters” were conspicuous); *Armco, Inc. v. New Horizon Dev. Co.*,

claimer,⁶²⁷ or some combination of these factors.⁶²⁸ Courts generally apply the same objective standards of conspicuousness to disclaimers on labels as they do to disclaimers in written contracts.⁶²⁹

Courts have not adopted a universal definition of a minimally conspicuous disclaimer. In *Collins Radio Co. v. Bell*⁶³⁰ the Oklahoma Court of Appeals considered a disclaimer in "minimal compliance"

229 Va. 561, 566-61, 331 S.E.2d 456, 460, 41 U.C.C. Rep. 367, 372 (1985) (because the excluding language in the contract is in larger type it is conspicuous).

⁶²⁷ Courts that focus solely on the heading referring to the disclaimer tend to find the disclaimer ineffective due to ambiguity rather than inconspicuousness. *See, e.g., Hartman v. Jensen's, Inc.*, 227 S.C. 501, 504, 289 S.E.2d 648, 649, 33 U.C.C. Rep. 889, 990-91 (1982). In the typical, objective conspicuousness test the heading may be one of several factors considered. *See infra* note 628.

⁶²⁸ *See, e.g., Transurface Carriers, Inc. v. Ford Motor Co.*, 738 F.2d 42, 46, 39 U.C.C. Rep. 833, 838 (1st Cir. 1984) (effective disclaimer where print not large but "disclaimer appears on the front of the document and the lead clause, 'DISCLAIMER OF WARRANTIES' . . . printed in larger type with all capital letters"); *Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1061, 33 U.C.C. Rep. 490, 506-07 (5th Cir. 1982) (conspicuous waiver when written in boldface, uppercase type, located on same side of contract as signatures, and contract contains prominent warning to read the contract before signing); *Union Exploration Co. v. Dowell Div., Dow Chem. Co.*, 41 U.C.C. Rep. 759, 762 (D. Kan. 1985) (considering the language, contrasting type, ink color, and size, as well as references on front to disclaimer on reverse page, in finding disclaimer conspicuous); *Rudy's Glass Constr. Co. v. E.F. Johnson Co.*, 404 So. 2d 1087, 1090, 32 U.C.C. Rep. 1373, 1374-75 (Fla. Dist. Ct. App. 1981) ("The reference on the front of the document to terms and conditions stated on the back, when coupled with the separate paragraph titled, 'Disclaimers of Warranties', and the contrasting type, clearly causes disclaimer" to be conspicuous.); *J & W Equip., Inc. v. Weingartner*, 5 Kan. App. 2d 466, 471, 618 P.2d 862, 866, 31 U.C.C. Rep. 866, 871 (1980) (adopting a broader objective approach to evaluating the conspicuousness of a disclaimer by referring to the whole document rather than simply to the elements of type size, color, and contrast); *Commercial Credit Corp. v. CYC Realty, Inc.*, 102 A.D.2d 970, 972, 477 N.Y.S.2d 842, 844, 39 U.C.C. Rep. 108, 111 (N.Y. App. Div. 1984) (disclaimer which was "the only boldface print in the only four paragraphs on the first page of the agreement . . . [which was] under the broad heading of "TERMS AND CONDITIONS OF LEASE" and [which] appear[ed] before the authorizing signatures on the front side of the agreement and not on the back with the boilerplate paragraphs," was conspicuous); *Henderson v. Benson-Hartman Motors, Inc.*, 33 Pa. D. & C.3d 6, 13-14, 41 U.C.C. Rep. 782, 787 (Ct. C. P. 1983) (disclaimer inconspicuous "because it appears on the second page of the lease in small print and would not come to the attention of the lessee unless he or she read the entire contents of this form lease agreement").

⁶²⁹ *See, e.g., Monsanto Agricultural Prods. Co. v. Edenfield*, 426 So. 2d 574, 577, 35 U.C.C. Rep. 781, 784 (Fla. Dist. Ct. App. 1982) (disclaimer was conspicuous when appearing in bold face capitals on labels of each can and in directions for product use, and thus effective despite buyer's claim he did not read it); *Victor v. Mammana*, 101 Misc. 2d 954, 955, 422 N.Y.S.2d 350, 351, 27 U.C.C. Rep. 1295, 1296 (N.Y. Sup. Ct. 1979) ("Courts interpreting 'conspicuousness' on labels have used standards similar to those that have been used for forms."); *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283, 290, 420 N.Y.S.2d 983, 987, 27 U.C.C. Rep. 933, 939 (N.Y. Civ. Ct. 1979) ("[C]onsidering all factors—the size, prominence, and contrast of the capitalized words—the disclaimer on the label was sufficiently conspicuous.").

⁶³⁰ 623 P.2d 1039, 31 U.C.C. Rep. 58 (Okla. Ct. App. 1980).

with the conspicuousness requirement of section 2-316(2)⁶³¹ when the disclaimer appeared on the reverse side of a single sheet contract, was in all capital letters set off in a separate paragraph, and was virtually the only language in capital letters on the page.⁶³² In addition, an easily read, small-type reference to terms on the back and a large-type general reference to warranties appeared on the front of the document.⁶³³ We agree with the *Collins Radio* court and maintain that this disclaimer meets the minimal requirements of an objective test⁶³⁴ of conspicuousness.⁶³⁵ Given the easily read reference to terms on the back and the large type and placement of the disclaimer in a separate paragraph, we believe any reasonable buyer, commercial or consumer,⁶³⁶ ought to have noticed it when reading the contract. Because the disclaimer certainly could have been more conspicuous,⁶³⁷ we agree that it simply meets minimal compliance.

We would counsel sellers when drafting disclaimers to observe the following guidelines: Disclaimers should be written in large, noticeable print, set off from the rest of the page, and placed below a heading that clearly indicates that a *disclaimer* follows; sellers should ensure that the disclaimer or a noticeable reference to it appears near the buyer's signature.

A Pennsylvania Court of Common Pleas, apparently relying on a statement in a federal district court decision in Pennsylvania,⁶³⁸ tentatively accepted "understandable" as an element of conspicuousness in *Wagaman v. Don Warner Chevrolet-Buick, Inc.*⁶³⁹ This extension of the definition led to rather bizarre results in which the court found a twenty-three-line paragraph,⁶⁴⁰ although "somewhat long

⁶³¹ *Id.* at 1051, 31 U.C.C. Rep. at 72.

⁶³² The section headings and limitation-of-remedies clause also appeared in capital letters. *Id.* at 1051, 31 U.C.C. Rep. at 71.

⁶³³ *Id.* at 1049-50, 31 U.C.C. Rep. at 71-72.

⁶³⁴ The *Collins Radio* court's test was not completely objective. *Id.* at 1051, 31 U.C.C. Rep. at 71-72; *see infra* note 636.

⁶³⁵ The *Collins Radio* court considered the sophistication of both parties before finding the disclaimer conspicuous. *Id.* at 1050, 31 U.C.C. Rep. at 72.

⁶³⁶ Note that the *Collins Radio* court specifically relied in part on the fact that the buyer was a "sophisticated business concern" in finding the disclaimer conspicuous "*in this case, upon these facts.*" *Id.* at 1051, 31 U.C.C. Rep. at 72 (emphasis in original). Nevertheless, we maintain that the minimum standard adopted is suitable for objective application even if one ignores the individual characteristics of the parties.

⁶³⁷ For example, the reference to the back of the contract could have appeared in large type or the disclaimer itself could have appeared on the front.

⁶³⁸ *See* *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75, 78, 26 U.C.C. Rep. 50, 53 (W.D. Pa.) ("We conclude, therefore, that such language is 'conspicuous,' since a reasonable person should have noticed and understood it."), *aff'd mem.*, 609 F.2d 503 (3d Cir. 1979).

⁶³⁹ 17 Pa. D. & C.3d 572, 31 U.C.C. Rep. 1604 (Ct. C. P. 1981).

⁶⁴⁰ It is mutually understood and agreed that:

(a)(1) if said property is principally used for business or agricultural purposes, or (2) if buyer is clearly informed in writing prior to the sale that

and somewhat complicated,"⁶⁴¹ understandable because "a little time and patience unravels its meaning."⁶⁴² We believe, however, that most readers would need more than a *little* time and patience to unravel and understand the morass of words constituting this disclaimer.⁶⁴³ Viewing conspicuousness without the "understandable" gloss, a reader *might* accept the twenty-three-line paragraph printed in bold type as conspicuous, although "burying [an exclusion or modification] in a profusion of words may operate to hide and to make it inconspicuous."⁶⁴⁴ Because section 1-102(10) simply defines "conspicuous" as noticeable⁶⁴⁵ without reference to ease of comprehension, no other court has or should infuse an element of understandability into the objective test of conspicuousness.⁶⁴⁶

b. *The "Evidence of Buyer Awareness" Test.* In 1978 a majority of courts considered evidence of buyer awareness to support or compel the finding of an effective disclaimer in commercial transactions.⁶⁴⁷ Since 1978, however, only a few courts have found effective disclaimers compelled by evidence of buyer awareness. These courts either completely ignored the conspicuousness requirement,⁶⁴⁸ or they enforced a disclaimer despite its inconspicu-

the property is sold on an 'as is' basis and that the entire risk as to the quality of performance of the property is with the buyer, there is no implied warranty of merchantability, no implied warranty of fitness for a particular purpose and no implied warranty which extends beyond the description of said property on the face hereof; (b) except where the seller is also the manufacturer of said property and, as such manufacturer, issued to buyer or to a prior buyer of said property said manufacturer's separate written new product warranty in respect thereof and said warranty is in effect at the date hereof, there are no express warranties and no representations, promises or statements have been made by seller in respect of said property unless endorsed hereon or incorporated herein by reference hereon; but seller's obligations under any express warranty made and evidenced as aforesaid shall continue in accordance with the terms thereof and regardless of whether seller shall have transferred and assigned to another seller's rights hereunder; and (c) except where the seller is also the manufacturer of said property, buyer will not assert against any subsequent holder as assignee of this contract any claim or defense which the buyer may have against the manufacturer or a seller other than the seller of said property obtained pursuant hereto.

Id. at 576, 31 U.C.C. Rep. at 1606.

⁶⁴¹ *Id.* at 577, 31 U.C.C. Rep. at 1606.

⁶⁴² *Id.*, 31 U.C.C. Rep. at 1606-07.

⁶⁴³ See *supra* note 640.

⁶⁴⁴ 17 Pa. D. & C.3d at 576, 31 U.C.C. Rep. at 1606.

⁶⁴⁵ See U.C.C. § 1-201(10) comment 10 ("[T]he test is whether attention can reasonably be expected to be called to it").

⁶⁴⁶ Note, however, that a Kansas federal district court alluded to the understandability gloss when stating that disclaiming "language [was] clear and concise" in its determination that a disclaimer was conspicuous. *Union Exploration Co. v. Dowell Div., Dow Chem. Co.*, 41 U.C.C. Rep. 759, 762 (D. Kan. 1985).

⁶⁴⁷ See Special Project, *supra* note 1, at 184.

⁶⁴⁸ See *Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329, 1335 n.3, 41 U.C.C.

ousness.⁶⁴⁹ We disapprove of these courts' refusals to follow the express mandate of section 2-316.⁶⁵⁰

The drafters intended section 2-316 to protect buyers from surprise and unbargained language.⁶⁵¹ Although the courts did not violate this intent, they did ignore the express conspicuousness requirement of section 2-316. Courts should abide by the section's language and only enforce disclaimers that are objectively conspicuous. Because the Code rejects the parties' subjective knowledge as a test for determining the effectiveness of disclaimers, courts should ignore evidence of such knowledge.

As a prerequisite to the enforcement of a conspicuous disclaimer, however, we believe that the buyer must have had an opportunity to read the disclaimer. In *Willoughby v. Ciba-Geigy Corp.*⁶⁵² the court justifiably refused to enforce a conspicuous disclaimer that the buyers never had the opportunity to see. The buyers purchased herbicide from the sellers and hired their agent to apply the product. Although the container bore a conspicuous disclaimer, the sellers never showed the buyers the container or told the buyers about it.⁶⁵³ The conspicuous disclaimer did not protect the buyers from surprise or unbargained language because the buyers never had an opportunity to read the disclaimer. Thus, the court considered the conspicuous disclaimer ineffective.⁶⁵⁴ To validate a conspicuous, written disclaimer the seller must at least provide the buyer with an opportunity to see the disclaimer. The buyer may acknowledge this opportunity simply by signing a contract or by receiving a written disclaimer from the seller.

c. *The Modified Objective Test.* We continue to advocate a modified objective test⁶⁵⁵ to determine the conspicuousness of a dis-

Rep. 1627, 1635 n.3 (7th Cir. 1985) ("There is . . . no need to determine whether a disclaimer is conspicuous . . . when the buyer has actual knowledge of the disclaimer."); *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill. App. 3d 835, 837, 403 N.E.2d 294, 296, 28 U.C.C. Rep. 1307, 1310 (1980) ("The conspicuousness requirement is not controlling here since defendant admits that he read and was aware of the provision.").

⁶⁴⁹ See *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776, 784, 34 U.C.C. Rep. 857, 868 (E.D. Wis. 1982) ("Discussion of the effectiveness of the disclaimer provisions in the contract does not end with the finding of lack of conspicuousness"; evidence that buyer was aware of disclaimers and disclaimers neither unexpected nor unbargained for was sufficient to make them enforceable.).

⁶⁵⁰ See also *J. WHITE & R. SUMMERS*, *supra* note 5, § 12-5, at 444 (also criticizing enforcement of inconspicuous disclaimers even when buyers knew of their existence).

⁶⁵¹ See U.C.C. § 2-316 comment 1 ("[section 2-316] seeks to protect a buyer from unexpected and unbargained language . . .").

⁶⁵² 601 S.W.2d 385, 29 U.C.C. Rep. 1515 (Tex. Civ. App. 1979).

⁶⁵³ *Id.* at 388, 29 U.C.C. Rep. at 1518.

⁶⁵⁴ *Id.*, 29 U.C.C. Rep. at 1518.

⁶⁵⁵ We first proposed the modified objective test in the 1978 Special Project. See Special Project, *supra* note 1, at 185-87.

claimer. This test focuses on the phrase "reasonable person *against whom it is to operate*"⁶⁵⁶ found in section 1-201(10). It allows courts to concentrate

not only on the writing, but on the commercial buyer's experience and size as well. Where parties of relatively equal bargaining power negotiated the contract terms, a court could appropriately find that the buyer "ought to have noticed" a disclaimer despite its inconspicuous print. The modified objective test [enables] courts to distinguish between commercial and consumer buyers without compromising the drafters' goal of avoiding inquiry into the parties' negotiations. Since courts would probably expect the reasonable *consumer* to notice only objectively conspicuous language, this approach would continue to promote disclaimer visibility.⁶⁵⁷

Several courts have adopted this test.⁶⁵⁸ For example, in *AMF Inc. v. Computer Automation, Inc.*⁶⁵⁹ the court expressly adopted the modified objective test to determine the conspicuousness of a limitation-of-remedies clause. The court noted that "[t]he modern trend . . . is to determine if the bargaining strength and commercial sophistication of the parties made it reasonable [to assume] that the limiting language was brought to the attention of the parties."⁶⁶⁰ The court found the clause conspicuous even though it did not differ from the surrounding text in size, color, or typeface.⁶⁶¹ Because both parties were commercially sophisticated, had dealt extensively with one another, and had actively negotiated the terms of the contract, the court concluded that the buyer ought reasonably to have noticed the clause. Thus, it was conspicuous.⁶⁶²

3. *Disclaimer or Limitation of Remedy Subsequent to Contracting*

Conspicuous disclaimers must constitute an element of the par-

⁶⁵⁶ U.C.C. § 1-201(10) (emphasis added).

⁶⁵⁷ Special Project, *supra* note 1, at 186.

⁶⁵⁸ See, e.g., *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 419, 30 U.C.C. Rep. 496, 501-02 (5th Cir. 1980) ("Where the disclaimer is in a commercial transaction involving experienced businesspersons rather than a consumer transaction involving ordinary purchasers, the concept of reasonableness under the circumstances depends on what a reasonable businessperson is expected to notice."); *R & L Grain Co. v. Chicago E. Corp.*, 531 F. Supp. 201, 209, 33 U.C.C. Rep. 532, 538 (N.D. Ill. 1981) ("The instant warranty is reasonably noticeable, especially to a business entity participating in an arms length transaction. The exclusion appears in a separate section of the sales contract and is printed, in part, in boldface type.") (emphasis added); *Ellmer v. Delaware Mini-Computer Sys., Inc.*, 665 S.W.2d 158, 160, 38 U.C.C. Rep. 751, 753 (Tex. Ct. App. 1983) (court considers, among other things, fact that "the buyer was a business customer dealing at arms length"); see also *infra* notes 659-62 and accompanying text.

⁶⁵⁹ 573 F. Supp. 924, 37 U.C.C. Rep. 1583 (S.D. Ohio 1983).

⁶⁶⁰ *Id.* at 929, 37 U.C.C. Rep. at 1590 (citations omitted).

⁶⁶¹ *Id.*, 37 U.C.C. Rep. at 1590.

⁶⁶² *Id.* at 930, 37 U.C.C. Rep. at 1590.

ties' bargain to have effect. Thus, the disclaimers must appear in the original contract or in a subsequent modification.⁶⁶³ Section 2-209⁶⁶⁴ controls contract modifications that seek to modify or limit warranties, while section 2-207⁶⁶⁵ governs modifications that accompany or follow delivery of goods.⁶⁶⁶

⁶⁶³ See U.C.C. § 2-209 (permitting subsequent modifications of the agreement which would include disclaimers); *infra* notes 674-75 and accompanying text.

⁶⁶⁴ (1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

U.C.C. § 2-209.

⁶⁶⁵ (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Id. § 2-207.

⁶⁶⁶ The time at which a disclaimer becomes a part of the agreement does not affect its conspicuousness. In *Flory v. Silvercrest Indus., Inc.*, 29 U.C.C. Rep. 832 (Ariz. Ct. App. 1980), the court erroneously combined conspicuousness with the requirement that a disclaimer be part of the bargain between the parties. The court stated:

The printed Silvercrest warranty containing a purported disclaimer of any warranty of merchantability or fitness was not received until several months after the sales transaction and in fact after delivery of the mobile home. As such it could not have been "conspicuous" at the time the Florys entered into the contract but was merely a unilateral attempt to limit liability and therefore ineffective under the statute.

Id. at 834.

a. *Frequently Encountered Fact Patterns.* In a simple retail sale, a seller can effectively disclaim an implied warranty by a writing on the outside of a package.⁶⁶⁷ The buyer accepts such a disclaimer as a term of the seller's offer when he purchases the goods. A seller cannot effectively disclaim an implied warranty by hiding a disclaimer inside a sealed package⁶⁶⁸ because the buyer does not accept such a hidden disclaimer as a part of the parties' agreement when he purchases the goods.

In more complex sales, a seller should disclaim implied warranties at the time he enters into an oral or written contract with the buyer. A seller who fails to do this may be unable to escape implied warranties.⁶⁶⁹ In *Gold Kist, Inc. v. Citizens & Southern National Bank*,⁶⁷⁰ for example, the court found a disclaimer printed on seed bags ineffective as a "post-contract, unbargained-for unilateral attempt by [the seller] to limit its obligations under the contract."⁶⁷¹ Because the parties had already reached an agreement prior to the delivery of the seed bags and the seller failed to direct the buyer's attention to the disclaimer at the time of the agreement, the disclaimer did not become an effective term of the agreement.⁶⁷² "According to the prevailing interpretation of the Uniform Commercial Code," the

⁶⁶⁷ See, e.g., *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 61 n.13, 32 U.C.C. Rep. 35, 49 n.13 (Mo. Ct. App. 1981) (manufacturer could disclaim warranties to consumer by "prominent package markings").

⁶⁶⁸ The disclaimer will be effective if that buyer should have been aware of the disclaimer through course of dealing or trade usage. See *infra* notes 723-31 and accompanying text.

⁶⁶⁹ See, e.g., *Pennington Grain & Seed, Inc. v. Tuten*, 422 So. 2d 948, 951, 36 U.C.C. Rep. 458, 462 (Fla. Dist. Ct. App. 1982) (disclaimer on seed bag ineffective because it was "post-contract, unbargained-for unilateral attempt to limit [seller's] obligations"); *Midland Supply Co. v. Ehret Plumbing & Heating Co.*, 108 Ill. App. 3d 1120, 1125-26, 440 N.E.2d 153, 156-57, 34 U.C.C. Rep. 1535, 1540 (1982) (dealer's implied warranty of merchantability not disclaimed by manufacturer's disclaimer given to buyer upon delivery of goods because no discussion of such terms at time parties reached agreement); *Gideon Serv. Div. v. Dunham-Bush, Inc.*, 80 Ill. App. 3d 633, 636, 400 N.E.2d 89, 91-92, 28 U.C.C. Rep. 72, 76 (1980) (written disclaimer made at or after shipment of furnace ineffective to disclaim warranty implied in oral contract completed before shipment); *Pfizer Genetics, Inc. v. Williams Mgmt. Co.*, 204 Neb. 151, 151-56, 281 N.W.2d 536, 539, 27 U.C.C. Rep. 85, 88-89 (1979) (buyer entitled to jury instructions that disclaimer of warranty made subsequent to formation of contract by means of an invoice, receipt, or similar note is ineffective unless buyer assents or is charged with knowledge of transaction); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 543, 625 P.2d 171, 173-74, 30 U.C.C. Rep. 1552, 1555-56 (1981) (disclaimer in invoice sent after oral contract complete ineffective). But see *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 291, 35 U.C.C. Rep. 91, 97 (4th Cir. 1982) (finding disclaimers on label of herbicide effective to disclaim warranties despite fact that buyer appeared to enter contract prior to delivery of herbicide; without explanation, finding these disclaimers not a "post-contract or post-sale attempt unilaterally to avoid . . . warranties").

⁶⁷⁰ 286 S.C. 272, 333 S.E.2d 67, 41 U.C.C. Rep. 327 (Ct. App. 1985).

⁶⁷¹ *Id.* at 277, 333 S.E.2d at 70, 41 U.C.C. Rep. at 330.

⁶⁷² *Id.*, 333 S.E.2d at 71, 41 U.C.C. Rep. at 330-31.

court stated, "a disclaimer printed on a label or other document and given to the buyer at the time of delivery of the goods is ineffective if a bargain has already arisen."⁶⁷³

If the parties agree to the modification, section 2-209 provides that a subsequent disclaimer may become a binding part of the agreement. To create an effective modification, the buyer must know of the modification and have the opportunity to object to it.⁶⁷⁴ In *Gold Kist* the court found no modification because the seller presented no evidence that the buyers ever learned of or accepted the terms of the disclaimer.⁶⁷⁵

The Code does not require negotiation for an effective disclaimer.⁶⁷⁶ The drafters apparently felt that requiring conspicuousness sufficiently protected buyers against surprise and unbargained language.⁶⁷⁷

b. *Security Agreement Disclaimers.* Article Two governs disclaimers of warranties in purchase money-security agreements.⁶⁷⁸ Section 9-206 comment 3 notes:

[Subsection 2] prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.⁶⁷⁹

When parties execute a security agreement and a sales agreement contemporaneously, the instruments should be construed together in the absence of conflicting terms.⁶⁸⁰ A conflict between ambiguous

⁶⁷³ *Id.*, 333 S.E.2d at 70, 41 U.C.C. Rep. at 330.

⁶⁷⁴ See U.C.C. § 2-209 (reprinted *supra* note 664). Sometimes the seller's first communication with the buyer is upon delivery pursuant to the buyer's order. This should not, however, affect the result. Under section 2-207, disclaimers constitute proposed additional terms that materially alter the contract. See U.C.C. § 2-207 comment 4. Thus, the disclaimers are effective only if the buyer is expressly aware of them.

⁶⁷⁵ *Gold Kist*, 286 S.C. at 278, 333 S.E.2d at 71, 41 U.C.C. Rep. at 331.

⁶⁷⁶ In contrast, Washington state courts require that parties bargain for a disclaimer for it to be effective. See Special Project, *supra* note 1, at 190 & n.670 (discussing *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346, 10 U.C.C. Rep. 42 (1971)); see also *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 545, 625 P.2d 171, 175, 30 U.C.C. Rep. 1552, 1557 (1981) ("Without negotiation and agreement, no disclaimer . . . can be effective.") (footnote omitted).

⁶⁷⁷ See U.C.C. § 2-316 comment 1.

⁶⁷⁸ "When a seller retains a purchase money security interest in goods the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties." U.C.C. § 9-206.

⁶⁷⁹ *Id.* comment 3.

⁶⁸⁰ See *Davis v. Dils Motor Co.*, 566 F. Supp. 1360, 1364, 36 U.C.C. Rep. 792, 795-96 (S.D.W. Va. 1983) (clear waiver language in security agreement disregarded because

waiver provisions in a purchase order may compel a court to disregard clear disclaimer language in a contemporaneously executed security agreement.⁶⁸¹

D. Express Disclaimers of Implied Warranties Under Section 2-316(3)(a)

By its terms, section 2-316(3)(a) seems to undermine entirely 2-316(2)'s disclaimer requirements. The subsection provides: "Notwithstanding subsection (2) . . . 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"⁶⁸² Most courts resist the temptation to read 2-316(3)(a) so broadly as to undermine 2-316(2). Two courts have found "as is" language inapplicable in the sale of new goods.⁶⁸³ Other language, however, may effectively disclaim implied warranties accompanying the sale of new goods if "in common understanding [it] calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."⁶⁸⁴

1. *Language Requirements*

Courts routinely validate "as is" disclaimers⁶⁸⁵ but remain reluctant to enforce other disclaiming language under 2-316(3)(a) that does not meet the language requirements of 2-316(2).⁶⁸⁶ For exam-

it conflicts with ambiguous waiver language in contemporaneously executed sales agreement).

⁶⁸¹ See *id.* at 1365, 36 U.C.C. Rep. at 796; see also *Bone Int'l Inc. v. Johnson*, 74 N.C. App. 703, 706, 329 S.E.2d 714, 716, 41 U.C.C. Rep. 29, 31 (1985) (purchase-money security agreement effectively disclaimed all warranties by meeting requirements of section 2-316(2) but disclaimer waived by subsequent modification of contract).

⁶⁸² U.C.C. § 2-316(3)(a).

⁶⁸³ *Gaylord v. Lawler Mobile Homes, Inc.*, 477 So. 2d 382, 383, 42 U.C.C. Rep. 131, 133 (Ala. 1985) ("Because the product involved was new, the statutory disclaimer and its language 'as is,' 'with all faults,' . . . has no application.").

⁶⁸⁴ U.C.C. § 2-316(3)(a).

⁶⁸⁵ See, e.g., *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 57, 29 U.C.C. Rep. 1497, 1503-04 (8th Cir. 1980) (in sale of used airplane "as is" clause effectively disclaimed all implied warranties); *Pell City Wood, Inc. v. Forke Bros. Auctioneers, Inc.*, 474 So. 2d 694, 695-96, 41 U.C.C. Rep. 1225, 1227-28 (Ala. 1985) (effective "as is" disclaimer in auction of truck); *Masker v. Smith*, 405 So. 2d 432, 434, 32 U.C.C. Rep. 1121, 1121-22 (Fla. Dist. Ct. App. 1981) (effective "as is" disclaimer in sale of used auto); *Society Nat'l Bank v. Pemberton*, 63 Ohio Misc. 26, 28, 409 N.E.2d 1073, 1076, 30 U.C.C. Rep. 76, 79 (Mun. Ct. 1979) (in sale of used truck "as is" clause in the sales agreement was sufficient to disclaim all implied warranties.), *aff'd mem.*, Case No. 9502 (Ct. App. Jun. 25, 1980).

⁶⁸⁶ See, e.g., *Lee v. Peterson*, 1 U.C.C. Rep. 2d 85, 89 (Idaho Ct. App. 1986) (statement "that the 30-day warranty was 'in lieu of all other warranties and/or representa-

ple, in *Insurance Co. of North America v. Automatic Sprinkler Corp. of America*⁶⁸⁷ the court found the phrase "in lieu of" ineffective under section 2-316(3)(a).⁶⁸⁸ Similarly, in *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*⁶⁸⁹ the court found the language "[seller] gives no warranty, express or implied, as to description, variety, quality, or productiveness, and will not in any way be responsible for the crop"⁶⁹⁰ insufficient to constitute a valid disclaimer under 2-316(3)(a).⁶⁹¹

2. *Conspicuousness*

Whether disclaimers under 2-316(3)(a) must be conspicuous remains an open question.⁶⁹² Most courts apply the section 2-316(2) conspicuousness requirement to 2-316(3)(a) disclaimers⁶⁹³ because to do otherwise "would allow the implied warranties . . . to be annulled by implication by language less conspicuous than if they were

tions' " was ineffective disclaimer language); *Discount Drug Corp. v. Honeywell Protection Servs., Div. of Honeywell, Inc.*, 34 U.C.C. Rep. 491, 493-94 (Pa. Super. Ct. 1982) (lengthly limitation of liability clause ineffective because it neither mentions "merchantability" nor employs phrases like "as is" or "with all faults"); *But see Salcetti v. Tuck*, 27 U.C.C. Rep. 679, 683 (D.C. Super. 1979) ("No guarantee as to health, tameness or longevity unless in writing on sales invoice. Buyer agrees to assume all risks and responsibilities for any losses from the time of the sale," meets requirements of valid disclaimer under 2-316(3)(a).); *Joseph Charles Parrish, Inc. v. Hill*, 173 Ga. App. 97, 98, 325 S.E.2d 595, 597, 40 U.C.C. Rep. 1673 (1984) ("I accept the above described car in its present condition . . ." . . . clearly signifies that the car was sold 'as is' and is effective to exclude any implied warranties."); *Jameson Chem. Co. v. Love*, 401 N.E.2d 41, 47, 28 U.C.C. Rep. 1298, 1305 (not clearly rejecting language "we cannot guarantee or accept any liability resulting from the use of our products" as failing to meet language requirements of 2-316(3)(a) when rejecting disclaimer as inconspicuous), *modified on other grounds*, 403 N.E.2d 928 (Ind. Ct. App. 1980).

⁶⁸⁷ 67 Ohio St. 2d 91, 423 N.E.2d 151, 31 U.C.C. Rep. 1595 (1981).

⁶⁸⁸ *Id.* at 94, 423 N.E.2d at 154, 31 U.C.C. Rep. at 1599.

⁶⁸⁹ 28 Wash. App. 539, 625 P.2d 171, 30 U.C.C. Rep. 1552 (1981).

⁶⁹⁰ *Id.* at 541 n.2, 625 P.2d at 173 n.2, 30 U.C.C. Rep. at 1555 n.2.

⁶⁹¹ *Id.* at 545, 625 P.2d at 175, 30 U.C.C. Rep. at 1557 ("disclaimer does not make it clear the buyer is assuming the risk as to the quality of the goods purchased").

⁶⁹² *See Leake v. Meredith*, 221 Va. 14, 17 n.4, 267 S.E.2d 93, 95 n.4, 29 U.C.C. Rep. 484, 487 n.4 (1980) ("It is not settled that disclaimers pursuant to [section 2-316(3)(a)] must be conspicuous.").

⁶⁹³ *See, e.g., Bevard v. Ajax Mfg. Co.*, 473 F. Supp. 35, 38, 27 U.C.C. Rep. 684, 687 (E.D. Mich. 1979) (applying section 2-316(2) standards of conspicuousness and writing to disclaimer under section 2-316(3)(a)); *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 549-50, 691 P.2d 787, 795-96, 39 U.C.C. Rep. 1902, 1907 (Ct. App. 1984) (applying conspicuousness requirement to "as is" disclaimer); *Jameson Chem. Co. v. Love*, 401 N.E.2d 41, 47, 28 U.C.C. Rep. 1298, 1305 (Ind. Ct. App. 1980) (inconspicuous section 2-316(3)(a) disclaimer ineffective); *Richards v. Goerg Boat & Motors, Inc.*, 179 Ind. App. 102, 115-16, 384 N.E.2d 1084, 1094-95, 25 U.C.C. Rep. 1002, 1015 (1979) ("as is" language must be conspicuous to operate as disclaimer of all implied warranties); *Mill Printing & Lithographing Corp v. Solid Waste Management Sys., Inc.*, 65 A.D.2d 590, 590, 409 N.Y.S.2d 257, 258, 25 U.C.C. Rep. 124, 125 (N.Y. App. Div. 1978) (finding of effective "as is" disclaimer means inferential finding that it is conspicuous).

directly eliminated."⁶⁹⁴

3. *A Narrow Reading of Section 2-316(3)(a)*

We continue to urge courts to read section 2-316(3)(a) narrowly. The drafters of section 2-316(3)(a) intended to give effect to certain "magic words"⁶⁹⁵ like "as is" and "with all faults" that are recognized in commerce as disclaiming all implied warranties.⁶⁹⁶ Courts should limit the applicability of the subsection solely to those phrases that, through trade usage, buyers clearly expect to disclaim implied warranties.⁶⁹⁷ Any broader application of section 2-316(3)(a) could surprise buyers and thus subvert the primary goal of section 2-316.⁶⁹⁸

Unlike the authors of the 1978 Special Project, however, we do not believe that application of the subsection should be limited to commercial transactions. Sellers commonly use "as is" disclaimers when selling used goods to consumers, and courts have properly enforced such disclaimers in those instances.⁶⁹⁹ Noncommercial buyers know the meaning of "as is," and they are not surprised that it effectively disclaims implied warranties. The drafters expressly endorsed disclaimers using "as is" language without limiting their use to commercial settings. We believe that courts should continue to give effect to these disclaimers in noncommercial as well as commercial sales.

We believe that courts are generally justified in requiring that disclaimers under section 2-316(3)(a) be conspicuous. In instances where clear disclaiming language would be ineffective as inconspicuous under section 2-316(2), courts should not allow sellers to effectively disclaim warranties by using hidden "as is" language. Giving effect to hidden, unexpected "as is" disclaimers would subvert the drafters' specific intent to protect buyers from unbargained language.⁷⁰⁰

However, because the drafters intended section 2-316(3)(a) to particularize the trade usage method of disclaiming warranties,⁷⁰¹

⁶⁹⁴ *White v. First Fed. Sav. & Loan Ass'n*, 158 Ga. App. 373, 373-74, 280 S.E.2d 398, 399-400, 31 U.C.C. Rep. 1283, 1284 (1981).

⁶⁹⁵ 2 W. HAWKLAND, *supra* note 575, § 2-316:03, at 384 (discussing how to reconcile section 2-316(2) with section 2-316(3)(a)).

⁶⁹⁶ See U.C.C. § 2-316 comment 7.

⁶⁹⁷ In addition to "as is" and "with all faults," these phrases include "no adjustments." See *Trimpey Tire Sales & Serv., Inc. v Stine*, 266 Pa. Super. 91, 92, 403 A.2d 108, 27 U.C.C. Rep. 92 (1979) ("no adjustments" as used in tire industry sufficient to exclude warranties under section 2-316(3)(a)).

⁶⁹⁸ U.C.C. § 2-316 comment 1.

⁶⁹⁹ See *supra* note 685.

⁷⁰⁰ U.C.C. § 2-316 comment 1.

⁷⁰¹ See U.C.C. § 2-316 comment 7 (phrases like "as is," etc. are "merely a particulari-

we believe that conspicuous language is not always necessary to disclaim warranties effectively. In particular, where trade usage in commercial sales dictates the disclaimer of warranties, buyers expect disclaimers and do not need the protection of conspicuous language.⁷⁰² In such contexts, courts should give effect to inconspicuous "as is" disclaimers.⁷⁰³

Courts should consider such objective factors as trade usage in fixing the scope of section 2-316(3)(a). They should not, however, regard this as an invitation to delve into the negotiation process in evaluating the effectiveness of disclaiming language under this section. The drafters intended to limit the application of section 2-316(3)(a) to discrete phrases that are commonly accepted in trade as warranty disclaimers.⁷⁰⁴ The subsection was not meant to invite a subjective inquiry into whether the buyer expected a disclaimer. In *South Carolina Electric & Gas Co. v. Combustion Engineering, Inc.*⁷⁰⁵ the court reviewed the following disclaimer: "There are no other warranties, whether expressed or implied, other than title."⁷⁰⁶ The court upheld the disclaimer under section 2-316(3)(a) after expressly rejecting it under section 2-316(2). The court scrutinized correspondence between the parties and found that the disclaimer was expected as a part of the bargain between the parties. We strongly disapprove of this approach. This language does not constitute a "magic words" expression commonly found in trade usage to disclaim warranties. The drafters did not intend section 2-316(3)(a) to create a subjective test which would enable courts to enforce any disclaiming language other than those discrete phrases commonly accepted in trade usage.⁷⁰⁷ Because the *South Carolina Electric* court's approach rejects the drafters' intent, it should not be followed.

4. "As Is" and Express Warranties

"As is" disclaimers apply only to implied warranties. Because section 2-316(1) mandates that language creating and disclaiming

zation of [the provision] for exclusion or modification of implied warranties by usage of trade").

⁷⁰² See *infra* notes 723-31 and accompanying text.

⁷⁰³ Note that such disclaimers would be effective under section 2-316(3)(c) even if ineffective under subsection (3)(a). See *infra* notes 723-31 and accompanying text for a discussion of § 2-316(3)(c); see also 2 W. HAWKLAND, *supra* note 575, § 2-316:03, at 384 (retracting as overbroad the statement that all disclaimers must be conspicuous; conspicuousness less important to buyer than clarity of disclaimer of all warranties).

⁷⁰⁴ See 2 W. HAWKLAND, *supra* note 575, § 2-316:03, at 382.

⁷⁰⁵ 283 S.C. 182, 322 S.E.2d 453, 40 U.C.C. Rep. 1257 (Ct. App. 1984).

⁷⁰⁶ *Id.* at 185, 322 S.E.2d at 455, 40 U.C.C. Rep. at 1259.

⁷⁰⁷ See U.C.C. § 2-316 comment 7.

warranties be construed as consistent wherever reasonable,⁷⁰⁸ courts should attempt to construe "as is" disclaimers consistently with express warranties. Like merchantability and fitness disclaimers, "as is" disclaimers may or may not effectively prevent the formation of express warranties. Thus, courts should consider the disclaiming language to determine whether the parties meant other language to create warranties.⁷⁰⁹

E. Disclaimers Implied from Circumstances

Subsections 2-316(b) and (c) provide additional circumstances which create an effective disclaimer.

1. *By Examination—Section 2-316(3)(b)*

According to section 2-316(3)(b) an effective examination by the buyer may serve to disclaim implied warranties:

Notwithstanding subsection (2)

....

- (b) 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 him⁷¹⁰

The subsection⁷¹¹ provides that implied warranties arise unless, before entering the contract, (1) the buyer examines the goods, sample, or model⁷¹² "as fully" as he desires,⁷¹³ or (2) the buyer ignores the seller's demand that the buyer examine the goods.⁷¹⁴ A

⁷⁰⁸ See, e.g., *Killion v. Buran Equip. Co.*, 27 U.C.C. Rep. 970, 973 (Cal. Ct. App. 1979) ("a reasonable construction of the parties' agreement is that the purported disclaimers were conditional and that the truck was being sold "as is" and with no warranties other than those to which the parties had expressly agreed") (emphasis in original).

⁷⁰⁹ See *supra* notes 598-605 and accompanying text (discussing the parol evidence rule); see also *Weiss v. Keystone Mack Sales, Inc.*, 310 Pa. Super. 425, 431, 456 A.2d 1009, 1011-12, 36 U.C.C. Rep. 433, 436 (1983) (trial court erred in failing to consider whether "as is" language effectively disclaimed express warranties; trial court also failed to consider the parol evidence rule).

⁷¹⁰ U.C.C. § 2-316(1).

⁷¹¹ VT. STAT. ANN. tit. 9A, § 2-316(5) (1966) excludes consumer goods; thus, section 2-316(3)(b) warranty exclusions do not apply to sale of consumer goods in Vermont. See, e.g., *Christie v. Dalmig, Inc.*, 136 Vt. 597, 396 A.2d 1385, 25 U.C.C. Rep. 1294 (1979).

⁷¹² Inspection of a prototype that is *not* presented as a definitive model does not negate implied warranties. See *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1533, 39 U.C.C. Rep. 152, 183 (E.D. Mich. 1984).

⁷¹³ See, e.g., *Cardwell v. Hackett*, 579 S.W.2d 186, 191, 26 U.C.C. Rep. 668 (Tenn. Ct. App. 1978) (no implied warranty as to defects which were plainly apparent to plaintiffs when they examined trailer at least twice prior to purchase).

⁷¹⁴ See, e.g., *Tarulli v. Birds in Paradise*, 99 Misc. 2d 1054, 417 N.Y.S.2d 854, 26 U.C.C. Rep. 872 (N.Y. Civ. Ct. 1979) (buyer who failed to have bird examined by vet as

refusal to inspect service records does not operate as a waiver of implied warranties.⁷¹⁵

An examination must occur prior to the formation of the contract to exclude implied warranties.⁷¹⁶ Acceptance after post-contractual inspection may preclude rejection or revocation of acceptance,⁷¹⁷ but the inspection itself should not affect the existence of implied warranties.⁷¹⁸

The seller may negate an implied warranty by showing that, prior to the sale, either the buyer actually discovered the defect or the buyer failed to perform a reasonably adequate inspection that would have revealed the defect.⁷¹⁹ Questions of fact often arise in the determination of whether the buyer ought to have discovered the defect;⁷²⁰ the buyer's skill is one factor relevant to such a determination.⁷²¹ Subsection (3)(b) does not cover problems associated

requested by seller forfeited any claim based on a discoverable defect (anemia) which such examination would have revealed).

⁷¹⁵ See *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*, 165 W. Va. 292, 268 S.E.2d 886, 30 U.C.C. Rep. 134 (1980).

⁷¹⁶ See, e.g., *W.M. Hobbs, Ltd. v. Accusystems of Georgia, Inc.*, 177 Ga. App. 432, 433, 339 S.E.2d 646, 647, 42 U.C.C. Rep. 1296, 1298 (1986) (no implied warranties where buyer insisted its original order of a copier be made contingent on a trial approval basis and copier left with buyer for a week before buyer purchased it); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 463 n.9, 29 U.C.C. Rep. 75, 80 n.9 (Okla. 1980) ("There are no reported cases dealing with exactly when an examination by the buyer must occur to exclude the implied warranties and interpreting 'before entering the contract.' But in our case, it seems clear that this use and examination by the buyer before payment was early enough in the sale to warn him of obvious defects . . .").

⁷¹⁷ See *J. WHITE & R. SUMMERS*, *supra* note 5, § 8-2, at 296-97.

⁷¹⁸ " 'Examination' as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made." U.C.C. § 2-316 comment 8.

⁷¹⁹ Section 2-316(3)(b) reads in part "which an examination *ought* in the circumstances to have revealed to him" (emphasis added). See, e.g., *Hall Truck Sales, Inc. v. Wilder Mobile Homes, Inc.*, 402 So. 2d 1299, 32 U.C.C. Rep. 440 (Fla. Dist. Ct. App. 1981) (buyer who had grader examined by expert and failed to inspect and test for grader's only function negated implied warranty of merchantability), *review denied*, 412 So. 2d 471 (Fla. 1982). But see *Lafayette Stabilizer Repair, Inc. v. Machinery Wholesalers Corp.*, 750 F.2d 1290, 1295, 40 U.C.C. Rep. 122, 128 (5th Cir. 1985) ("While a more complete inspection of the lathe might have uncovered its hidden defect — of being unable to cut [the type of] connections [for which it was being purchased] — the overall problem with the machine was even more severe . . . [Therefore] [t]he district court's finding that the condition of the lathe 'was not apparent upon ordinary inspection' [was] not clearly erroneous.").

⁷²⁰ See, e.g., *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 111, 41 U.C.C. Rep. 419, 427 (3d Cir. 1985) ("there is a disputed question of fact as to whether Heide ought to have noticed a defect in the trays through its testing procedure"); *Davis v. Dils Motor Co.*, 566 F. Supp. 1360, 1365, 36 U.C.C. Rep. 792, 796 (S.D.W. Va. 1983) ("[F]urther inquiry into the facts is needed in order to clarify . . . whether the Plaintiff's inspection of the tractor 'ought in the circumstances to have revealed [the alleged defects] . . .').

⁷²¹ "The particular buyer's skill and the normal method of examining goods in the

with "latent" defects.⁷²²

2. *By Course of Dealing, Trade Usage, or Course of Performance—
Section 2-316(3)(c)*

An express contract disclaimer is not always necessary to disclaim warranties.⁷²³

Notwithstanding subsection (2)

....

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.⁷²⁴

Course of dealing, trade usage, or course of performance⁷²⁵ may add disclaimers to oral and written contracts or enforce express disclaimers in contracts. For example, in *Standard Structural Steel Co. v.*

circumstances determine what defects are excluded by the examination." U.C.C. § 2-316 comment 8.

⁷²² See, e.g., *Wullschleger & Co. v. Jenny Fashions, Inc.*, 618 F. Supp. 373, 376, 41 U.C.C. Rep. 1213, 1218 (S.D.N.Y. 1985) ("the skew was a latent defect not discoverable through reasonable physical inspection"; implied warranties not waived); *Controltek, Inc. v. Kwieke Enters., Inc.*, 284 Or. 123, 130, 585 P.2d 670, 675, 25 U.C.C. Rep. 421, 426 (1978) ("[T]he trier of fact could properly find that . . . any defects were 'latent' defects and would not have been revealed by the inspection and tests made by defendant upon receiving them from plaintiff."); *Twin Lakes Mfg. v. Coffey*, 222 Va. 467, 473, 281 S.E.2d 864, 867, 32 U.C.C. Rep. 770, 773 (1981) ("[The] defects in manufacture [of mobile home] did not become apparent, even to experienced workmen, until pressure was applied to join the two sections [of the house] Such latent defects are not those contemplated by [section 2-316(3)(b)]."; buyer's inspection did not waive implied warranties as to those defects.).

⁷²³ See J. WHITE & R. SUMMERS, *supra* note 5, § 3-3, at 100-01 (discussing how course of dealing, course of performance, and trade usage may supersede or vary the effect of contractually variable Code provisions).

⁷²⁴ U.C.C. § 2-316(3)(c).

⁷²⁵ Section 1-205 defines course of dealing and trade usage:

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

Id. § 1-205.

Section 2-208(1) defines course of performance:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Id. § 2-208(1); see also J. WHITE & R. SUMMERS, *supra* note 5, § 3-3, at 98-104 (detailed discussion of course of dealing, course of performance, and trade usage).

*Bethlehem Steel Corp.*⁷²⁶ the court found a long course of dealing between parties in which the seller always disclaimed warranties to an extent sufficient to negate implied warranties in an oral contract.⁷²⁷ In *Kincheloe v. Geldmeier*⁷²⁸ the court found minimally sufficient evidence to show buyers at a cattle auction bought livestock "as is" and accepted the risk that the animal was not in good health.⁷²⁹ Trade usage effectively excluded or modified the implied warranty of merchantability. Course of performance may also operate to waive disclaimers.⁷³⁰

In applying section 2-316(3)(c) courts should remember that knowledge or reasonable expectation of knowledge is a mandatory element in the application of disclaimers stemming from course of dealing, trade usage, and course of performance.⁷³¹ Disclaimers produced through carefully defined course of dealing, trade usage, and course of performance should give effect to the parties' reasonable expectations. Failure to limit application of this subsection to instances in which the parties had the requisite knowledge could result in unexpected, unbargained disclaimers and buyer surprise, thus subverting a primary goal of section 2-316.

F. Cumulation and Conflict of Warranties—Section 317

Express warranties often conflict with implied warranties.⁷³²

⁷²⁶ 597 F. Supp. 164, 40 U.C.C. Rep. 1245 (D. Conn. 1984).

⁷²⁷ *Id.* at 185, 40 U.C.C. Rep. at 1252.

⁷²⁸ 619 S.W.2d 272, 31 U.C.C. Rep. 1608 (Tex. Ct. App. 1981).

⁷²⁹ *Id.* at 275, 31 U.C.C. Rep. at 1611; *see also* *Gross v. Systems Eng'g Corp.*, 36 U.C.C. Rep. 42 (E.D. Pa. 1983) (trade usage limits warranties and remedies in contract); *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575, 29 U.C.C. Rep. 399 (8th Cir. 1980) (insufficient course of dealing to disclaim warranties in sale of complex machinery); *United States Leasing Corp. v. Comerald Assocs., Inc.*, 101 Misc. 2d 773, 421 N.Y.S.2d 1003, 27 U.C.C. Rep. 1282 (N.Y. Civ. Ct. 1979) (insufficient course of dealing to exclude warranties from lease arrangement where arrangement included assignment of warranty rights); *Allied Indus. Serv. Corp. v. Kasle Iron & Metals, Inc.*, 62 Ohio App. 2d 144, 405 N.E.2d 307, 29 U.C.C. Rep. 439 (1977) (sufficient course of dealing to disclaim warranties but no implied warranties attached where seller was not seller of goods).

⁷³⁰ *See Oregon Bank v. Nautilus Crane & Equip. Corp.*, 68 Or. App. 131, 139, 683 P.2d 95, 101, 38 U.C.C. Rep. 1163, 1170 (1984) (concluding that course of performance may operate to waive a disclaimer).

⁷³¹ A "common basis of understanding" is an essential element of course of dealing. *See* U.C.C. § 1-205(1). A usage of trade is a practice so regular to "justify an expectation" it will be observed in the particular transaction. *See id.* § 1-205(2). Knowledge of the performance is an integral element of course of performance. *See id.* § 2-203(1).

⁷³² *See, e.g., Ingram River Equip., Inc. v. Pott Indus., Inc.*, 573 F. Supp. 896, 37 U.C.C. Rep. 88 (E.D. Mo. 1983) (express warranty that barges would be constructed in accordance with contract specifications conflicting with implied warranty of merchantability), *aff'd*, 756 F.2d 649 (8th Cir. 1985), *vacated*, 106 S. Ct. 3269 (1986); *Frazier v. Consolidated Equip. Sales, Inc.*, 64 Or. App. 833, 670 P.2d 153, 37 U.C.C. Rep. 710 (conflict between written express warranty of repair and replacement and implied warranty of merchantability), *review denied*, 296 Or. 236, 675 P.2d 490 (1983);

When such a conflict occurs, the question arises whether the express warranty should displace the implied warranty or whether the two warranties should apply cumulatively. Section 2-317 provides:

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.⁷³³

Thus, a court may consider the parties' intent⁷³⁴ only after finding it unreasonable to construe the warranties as consistent.

1. *Consistency Among Warranties*

Although section 2-317 does not enumerate explicitly when warranties are consistent, one comment implies that warranties are consistent if the seller can comply with all of them.⁷³⁵ This test gives the buyer the benefit of all express and implied warranties and puts the burden on the seller, who typically has drafted the sales agreement, to resolve any possible inconsistency.⁷³⁶

In addition to forcing the seller to resolve ambiguities in warranty language, this test effectively places the burden on the seller to disclaim any implied warranties he wishes to avoid. The typical case involves a seller who drafts a sales agreement in which he promises to make free repairs for ninety days. Although the seller may intend to limit his liability to repair only defects that arise within the first ninety days of operation, a court may conclude that the seller delivered the product in an unmerchantable condition if the seller also

Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 29 U.C.C. Rep. 817 (Wyo. 1980) (express 90-day parts and labor warranty conflicting with implied warranty of merchantability).

⁷³³ U.C.C. § 2-317.

⁷³⁴ "The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail." *Id.* comment 2.

⁷³⁵ "To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense." *Id.* § 2-317 comment 2; see Special Project, *supra* note 1, at 207-08.

⁷³⁶ J. WHITE & R. SUMMERS, *supra* note 5, § 12-7, at 462 (because the seller usually drafts the sales agreement and has the opportunity to resolve any possible inconsistencies, it seems reasonable to place the burden of multiple warranties on him).

failed to disclaim the implied warranty of merchantability. Such a finding may require the seller to make repairs long after the ninety-day express warranty period has expired.⁷³⁷ If the seller does not intend such a result, he must disclaim the implied warranty in the sales agreement.⁷³⁸

2. *Consistency Between Express and Implied Warranties*

The consistency problem between express and implied warranties commonly arises in two contexts. The first situation involves a buyer who gives detailed specifications to the seller. One comment states how the Code resolves conflicts between express and implied warranties in contracts involving specifications: “[W]here the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.”⁷³⁹ Courts consistently hold that express warranties by specification negate the implied warranty of merchantability because holding otherwise would place the seller in a hopeless dilemma.⁷⁴⁰ If compliance with the buyer’s specifications exposed the seller to the risk of delivering unmerchantable goods (i.e., the express specifications warranty conflicted with the implied warranty of merchantability), then the seller would have to breach one warranty in order to honor the other.

A seller making an express specifications warranty does not necessarily escape all implied warranty liability, however. If the seller provides the specifications, he still may breach an implied warranty of fitness for a particular purpose, even if he adhered to the specifications. In *Singer Co. v. E.I. du Pont de Nemours & Co.*,⁷⁴¹ for example, the seller recommended and supplied paint specifications to a manufacturer of air conditioners and furnaces for use in a new electrodeposition paint system. Although the paint met contract specifications, metal parts emerged from the paint tanks with blotches and streaks.⁷⁴² The court upheld a jury finding that the

⁷³⁷ See, e.g., *Dickerson v. Mountain View Equip. Co.*, 109 Idaho 711, 710 P.2d 621, 42 U.C.C. Rep. 114 (Ct. App. 1985); see also *infra* notes 744-51 and accompanying text (suggesting that an express 90-day warranty is consistent with implied warranty of merchantability).

⁷³⁸ See *infra* notes 763-78 and accompanying text.

⁷³⁹ U.C.C. § 2-316 comment 9.

⁷⁴⁰ See, e.g., *Ingram River Equip., Inc. v. Pott Indus., Inc.*, 573 F. Supp. 896, 37 U.C.C. Rep. 88 (E.D. Mo. 1983) (express warranty stating that boats in barge construction contract would conform to contract requirements displaced implied warranty of merchantability), *aff'd*, 756 F.2d 649 (8th Cir. 1985), *vacated*, 106 S. Ct. 3269 (1986); *Mahasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234, 14 U.C.C. Rep. 605 (1974) (detailed specifications in contract to purchase carpeting displaced implied warranty of merchantability).

⁷⁴¹ 579 F.2d 433, 24 U.C.C. Rep. 276 (8th Cir. 1978).

⁷⁴² *Id.* at 436, 24 U.C.C. Rep. at 278.

buyer relied on the seller's expertise, creating an implied warranty of fitness.⁷⁴³ To avoid such an unintended result, a careful seller should comply with section 2-316 and disclaim the implied warranty of fitness.

The second situation in which the consistency issue arises involves an implied warranty that reaches a defect that an express warranty does not. This is by far the more difficult of the two situations; courts and commentators disagree whether an express warranty should displace an implied warranty in the absence of a disclaimer.

The typical case involves the sale of goods with a repair warranty of limited duration, typically ninety days. The goods are plagued with defects and require many repairs, which the seller makes at his own expense for ninety days. After the express warranty expires, the seller begins charging the buyer for repair work. The buyer, frustrated with the products' poor performance and furious with the seller for failing to make adequate repairs, brings a suit for breach of the implied warranty of merchantability. The seller argues that the parties intended the express warranty to displace all implied warranties. The buyer argues that the two warranties are consistent and that the court should construe them as cumulative. Judicial decisions support both positions.

In *Dickerson v. Mountain View Equipment Co.*⁷⁴⁴ the court distinguished between the implied warranty of merchantability, which pertains to the goods' condition at the time of delivery, and the express ninety-day warranty, which extends to the future performance of the goods. The court in finding for the buyer held that the two warranties were consistent with each other and noted that the seller could have disclaimed the implied warranty.⁷⁴⁵ However, the court in *Mountain Fuel Supply Co. v. Central Engineering & Equipment Co.*⁷⁴⁶ took the opposite approach. In this case, the parties contracted for the sale of a used gas compressor, including an express ninety-day

⁷⁴³ *Id.* at 444, 24 U.C.C. Rep. at 284-85; see also *Ingram River Equip.*, 573 F.Supp. 896, 37 U.C.C. Rep. 88 (boat builder liable for breach of implied warranty of fitness, even though contract specifications adhered to, because buyer relied on seller's expertise to provide desired results); cf. *Mohasco Indus.*, 90 Nev. 114, 520 P.2d 234, 14 U.C.C. Rep. 605 (where buyer supplied seller with exact specifications for carpet, seller not liable for excessive shading because the contract specifications adhered to, and buyer did not rely on seller's skill or judgment).

⁷⁴⁴ 109 Idaho 711, 710 P.2d 621, 42 U.C.C. Rep. 114 (Ct. App. 1985).

⁷⁴⁵ *Id.* at 716, 710 P.2d at 626, 42 U.C.C. Rep. at 122; see also, e.g., *Morrison v. Devore Trucking, Inc.*, 68 Ohio App. 2d 140, 428 N.E. 2d 438, 32 U.C.C. Rep. 779 (1980) (express warranties do not displace implied warranty of merchantability unless implied warranty is expressly disclaimed); *Frazier v. Consolidated Equip. Sales, Inc.*, 64 Or. App. 833, 670 P.2d 153, 37 U.C.C. Rep. 710 (express 90-day warranty to repair bulldozer not inconsistent with, and did not displace, implied warranty of merchantability), *review denied*, 296 Or. 236, 675 P.2d 490 (1983).

⁷⁴⁶ 611 P.2d 863, 29 U.C.C. Rep. 817 (Wyo. 1980).

parts and labor repair warranty. The seller made two repairs during the ninety-day warranty and a third repair after its expiration. The buyer sued to recover the cost of the third repair.⁷⁴⁷ The court found for the seller, concluding that extending the warranty coverage beyond ninety days was unreasonable because the parties did not intend such a result.⁷⁴⁸

Professors White and Summers favor sellers in these cases on the ground that the parties probably intended the express warranty to displace any implied warranty.⁷⁴⁹ We think courts finding for the buyer have developed the better view. The White and Summers view frustrates the policy of the Code's disclaimer section⁷⁵⁰ by allowing the seller to displace an implied warranty through insertion of a seemingly innocuous express warranty. Moreover, in finding for the seller under these circumstances, courts displace section 2-317's carefully designed presumption of cumulativeness.⁷⁵¹ Absent clear evidence of the parties' contrary intent, courts should construe an implied warranty reaching defects not covered by an express warranty as consistent with any express warranty. A seller who wishes to avoid liability under the implied warranty of merchantability should be forced to disclaim clearly and unambiguously the implied warranty.

3. *Conflicts Among Express Warranties*

Subsections 2-317(a) and (b) govern conflicts among express warranties. The Code attempts to emulate the parties' probable intent by establishing a hierarchy based on the specificity of the express warranties. Exact specifications have priority over inconsistent samples, models, or general descriptions, and in turn, a sample drawn from an existing bulk prevails over inconsistent general descriptions.⁷⁵² However, section 2-317 does not aid in resolving conflicting warranties having the same specificity. In *Heat Exchanges, Inc. v. Aaron Friedman, Inc.*,⁷⁵³ for example, the court confronted two conflicting express warranties in an agreement for the purchase of thirty-eight heat pumps. One warranty obliged the

⁷⁴⁷ *Id.* at 865-66, 29 U.C.C. Rep. at 819-22.

⁷⁴⁸ *Id.* at 872, 29 U.C.C. Rep. at 830-31; *see also*, Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009, 20 U.C.C. Rep. 873 (Utah 1976) (mobile home retailer could not recover from manufacturer after expiration of one-year express warranty).

⁷⁴⁹ J. WHITE & R. SUMMERS, *supra* note 5, § 12-7, at 459.

⁷⁵⁰ U.C.C. § 2-316 comment 1 explains that the disclaimer section's primary purpose is to "protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."

⁷⁵¹ Special Project, *supra* note 1, at 209-10.

⁷⁵² U.C.C. § 2-317(a)-(b).

⁷⁵³ 96 Ill. App. 3d 376, 421 N.E.2d 336, 32 U.C.C. Rep. 1388 (1981).

seller to make repairs at its own expense for one year. The other warranty limited the seller's liability to furnishing replacement parts for one year.⁷⁵⁴ Because neither warranty was more specific than the other, the court found section 2-317 inapplicable. The court therefore turned to section 2-316(1) to determine which warranty controlled.⁷⁵⁵ Section 2-316(1) states that if an agreement contains both an expanded obligation and a similar but more limited obligation, the more expansive warranty controls. Thus, the court held that the seller was obliged to make repairs at its own expense.⁷⁵⁶

The Code attempts to emulate the parties' intent.⁷⁵⁷ The parties' conduct often makes clear that the strict application of sections 2-317(a) and (b) would contravene their true intent. In *Stewart-Decatur Security Systems, Inc. v. von Weise Gear Co.*⁷⁵⁸ the buyer extensively tested a model gear motor manufactured by the seller. The buyer approved the model but specified a different input speed on the purchase order. The seller made motors conforming to the model, not to the specifications. The court held that the buyer improperly rejected the motors because it found that the parties intended the model rather than the specifications to govern the seller's obligation.⁷⁵⁹ Although the court held section 2-317 inapplicable because the buyer did not accept the goods, it noted that section 2-317's hierarchy only approximates intent and would have been inappropriate because the parties' intentions were clear.⁷⁶⁰

Although the law in this area is still somewhat in flux, several principles regarding cumulation and conflict of warranties emerge from the above discussion. First, the Code makes clear that evidence of parties' intent supersedes application of section 2-317. Therefore, parties should take care to spell out clearly their intent. Second, a seller who makes an express warranty, intending it to displace an implied warranty, should formally disclaim the implied warranty in accordance with section 2-316. Because courts are split over whether an express warranty displaces an inconsistent implied

⁷⁵⁴ *Id.* at 377-79, 421 N.E.2d at 337-38, 32 U.C.C. Rep. at 1389-91.

⁷⁵⁵ *Id.* at 387, 421 N.E.2d at 344, 32 U.C.C. Rep. at 1399.

⁷⁵⁶ *Id.* at 388-89, 421 N.E.2d at 344-45, 32 U.C.C. Rep. at 1400-01.

⁷⁵⁷ U.C.C. § 2-317 comment 2 states in relevant part: "The rules of this section are designed to aid in determining the intention of the parties . . ." Comment 3 states: "These rules are not absolute but may be changed by evidence [of contrary party intent]."

⁷⁵⁸ 517 F.2d 1136, 17 U.C.C. Rep. 24 (8th Cir. 1975).

⁷⁵⁹ *Id.* at 1139, 17 U.C.C. Rep. at 29 ("The circumstances . . . leave little doubt that the parties intended [the model] to serve as the basis for any future dealings between them. [Seller] knew that [buyer] was relying on the test results [of the model] to . . . uncover any defects that would have to be remedied.").

⁷⁶⁰ *Id.* at 1140 n.12, 17 U.C.C. Rep. at 30-31 n.12.

warranty,⁷⁶¹ cautious sellers should avoid the issue entirely by formally disclaiming the implied warranty.

G. Remedy Limitations

1. *Distinguished from Disclaimers*

The Code provides a seller three ways to limit a buyer's potential remedies. As previously discussed, section 2-317 allows certain warranties to override other inconsistent warranties, thereby reducing the buyer's available remedies.⁷⁶² In addition, a seller may limit his liability through disclaimers and limitations.

Section 2-316 authorizes sellers to use disclaimers to prevent warranties from arising. An effective warranty disclaimer completely insulates the seller from all liability under that warranty.⁷⁶³ To be effective against implied warranties, the seller must provide a conspicuous, written disclaimer.⁷⁶⁴

Warranty limitations, on the other hand, do not prevent warranties from arising; rather, they allow sellers to narrow the scope of their potential liability under existing warranties. The procedures for disclaiming warranties and for limiting remedies are entirely distinct. Section 2-316(4) directs sellers to sections 2-718 and 2-719 if they wish to limit remedies for breach of an express or implied warranty.⁷⁶⁵ Section 2-719(1)(a) specifies, without requiring conspicuousness, that "the agreement . . . may limit or alter the measure of damages recoverable under this Article." Thus, although Section 2-316(2) requires that a disclaimer of the implied warranties of merchantability and fitness must be conspicuous, the conspicuousness requirement does not extend to remedy limitations under section 2-719.

Some courts, however, recognize that a remedy limitation can limit a buyer's recovery as effectively as a disclaimer and therefore impose section 2-316's conspicuousness requirements on remedy-

⁷⁶¹ See *supra* notes 744-51 and accompanying text.

⁷⁶² See *supra* notes 732-61 and accompanying text.

⁷⁶³ U.C.C. § 2-316 comment 2 states that one function of this section is to protect the seller from false allegations of oral warranties by its provisions on parol evidence. Thus, proper disclaimers prevent warranties from arising either orally or in writing.

⁷⁶⁴ Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

U.C.C. § 2-316(2).

⁷⁶⁵ "Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719)." *Id.* § 2-316(4).

limitation clauses.⁷⁶⁶ Other courts similarly ignore the distinction by reasoning that if the seller has not alerted the buyer to an inconspicuous remedy limitation, the term is not "bargained for" and consequently is not part of the agreement.⁷⁶⁷ Because section 2-718 requires a written agreement between the parties to effect any limitation of remedies,⁷⁶⁸ these courts refuse to enforce the remedy limitation unless the seller alerts the buyer that the contract includes the limitation. A few courts have found that an inconspicuous remedy limitation may be unconscionable and thus invalid under section 2-719(3).⁷⁶⁹ Nevertheless, the majority of courts recognize the Code's distinction between the requirements for effectuating a warranty disclaimer and for limiting remedies.⁷⁷⁰ In *Island Creek Coal Co. v. Lake Shore, Inc.*,⁷⁷¹ the buyers of a steel mine shaft sued for lost income due to an interruption of their mining business. A clause in the sales agreement declared that "[i]n no event shall any claim for consequential or special damages be made by either party."⁷⁷² The buyer asserted that the language should not protect the seller be-

⁷⁶⁶ See, e.g., *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, 304 N.Y.S.2d 918, 6 U.C.C. Rep. 1246 (N.Y. App. Div. 1969) (holding that remedy limitation was "modification" of implied warranty of merchantability within meaning of section 2-316(2) and was therefore ineffective because it did not mention "merchantability").

⁷⁶⁷ See, e.g., *Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403, 30 U.C.C. Rep. 163 (1980) (lower court should have considered conspicuousness of a clause excluding seller's liability for consequential damages in determining whether clause was bargained for in sales agreement); *Herbstman v. Eastman Kodak Co.*, 131 N.J. Super. 439, 330 A.2d 384 (1974) (inconspicuous clause limiting camera buyer's remedy to repair provided insufficient notice to create an implied agreement respecting the limitations), *rev'd on other grounds*, 68 N.J. 1, 342 A.2d 181, 17 U.C.C. Rep. 39 (1975); *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324 N.E.2d 583, 16 U.C.C. Rep. 671 (1974) (inconspicuous remedy limitation not part of agreement).

⁷⁶⁸ "Damages for breach by either party may be liquidated in the agreement. . . ." U.C.C. § 2-718(1) (emphasis added).

⁷⁶⁹ (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id. § 2-719(3); see, e.g., *Frank's Maintenance & Eng'g*, 86 Ill. App. 3d 980, 408 N.E.2d 403, 30 U.C.C. Rep. 163; *Baker v. Seattle*, 79 Wash. 2d 198, 484 P.2d 405, 9 U.C.C. Rep. 226 (1971). For a further discussion on unconscionability as it relates to liability limitations, see *infra* notes 779-844 and accompanying text.

⁷⁷⁰ See, e.g., *Island Creek Coal Co. v. Lake Shore, Inc.*, 636 F. Supp. 285, 290, 2 U.C.C. Rep. 2d 59, 65 (W.D. Va. 1986) (consequential damages limitation need not meet code requirements for disclaimers), *rev'd in part on other grounds*, 832 F.2d 274 (4th Cir. 1987); *Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co.*, 383 F. Supp. 606, 612, 15 U.C.C. Rep. 650, 653 (N.D. Iowa 1974); *Checker Taxi Co. v. Checker Motor Sales Corp.*, 376 F. Supp. 997, 999, 15 U.C.C. Rep. 371, 374 (D. Mass. 1974) ("question of exclusion of implied warranties is a separate question from that of limitation of implied warranties").

⁷⁷¹ 636 F. Supp. 285, 2 U.C.C. Rep. 2d 59.

⁷⁷² *Id.* at 288, 2 U.C.C. Rep. 2d at 61 (emphasis omitted).

cause it did not meet section 2-316(2) requirements for an effective implied warranty disclaimer. The court rejected the buyer's argument because "the damage limitation clause was exactly that: a limitation on the damages available to either party and not a limitation/disclaimer on the duties created under the implied warranties."⁷⁷³

One commentator has suggested that courts should impose identical controls on disclaimers and remedy limitations because both devices can have the same effect on a seller's liability.⁷⁷⁴ We disagree. The Code recognizes some distinction between disclaimers and remedy limitations.⁷⁷⁵ In the majority of cases, the buyer requires different protection depending upon which form of limitation the seller uses. In the typical remedy limitation case, the seller promises to make repairs and limits the buyer's recovery to the purchase price plus consequential damages. Section 2-718 allows the buyer to resort to the Code's usual remedies if the limited remedy fails of its essential purpose, i.e., if the seller cannot or will not make repairs.⁷⁷⁶ The buyer requires this protection because he presumably agreed to the remedy limitation in reliance on the seller's promise to make repairs. On the other hand, the seller may choose to disclaim the implied warranty of merchantability and explicitly offer in its place to repair the goods for ninety days. The "failure of essential purpose" analysis no longer applies because the buyer does not specifically rely on the seller's ability to repair when he accepts the disclaimer. Section 2-316's requirements that the disclaimer mention "merchantability" and be conspicuous adequately protect the buyer by alerting him to potential problems with the goods and allowing him to negotiate the price with the disclaimer in mind.

Undoubtedly some sellers will attempt to use remedy limitations as disclaimers solely to avoid the conspicuousness requirements of section 2-316. However, if a court determines that the remedy limitation "unfairly surprised" the buyer, the court may re-

⁷⁷³ *Id.* at 290, 2 U.C.C. Rep. 2d at 65.

⁷⁷⁴ Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code*, 63 VA. L. REV. 791, 791-92 & 805-06 (1977). The author observes that the seller can achieve the same allocation of risk by using either a disclaimer ("the warranty of merchantability expires after ten days") or a remedy limitation ("the buyer must assert any breach of the warranty of merchantability within ten days"). *Id.* at 791. Because the two clauses achieve the same effect, the author argues that the Code should apply the same controls to each.

⁷⁷⁵ U.C.C. § 2-316 comment 2 states that "[u]nder subsection (4) the question of limitation of remedy is governed by [§§ 2-718 and 2-719] rather than by this section." (emphasis added).

⁷⁷⁶ See *infra* notes 857-99 and accompanying text (discussing failure-of-purpose doctrine more fully).

fuse to enforce the limitation under the unconscionability doctrine.⁷⁷⁷ Courts also may apply a "substance over form" analysis to recharacterize a limitation as a disclaimer.⁷⁷⁸ These two doctrines suffice to prevent an unscrupulous seller from "sneaking" a disclaimer past an unwary buyer by disguising it as a remedy limitation.

2. *Unconscionability and Liability Limitations*

The Code offers no clear definition of unconscionability, leaving the development of the doctrine to the courts.⁷⁷⁹ Section 2-302 provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.⁷⁸⁰

In this section, we examine the unconscionability doctrine and its application to three types of liability limitations: disclaimers of implied warranties, exclusions of consequential damages, and exclusions or limitations of primary damages.

a. *Warranty Disclaimers.* For a plaintiff's unconscionable disclaimer claim to succeed, the court must affirmatively answer two

⁷⁷⁷ U.C.C. § 2-302; *see, e.g.*, *Haugen v. Ford Motor Co.*, 219 N.W.2d 462, 15 U.C.C. Rep. 92 (N.D. 1974) (buyer of new car was handed booklet containing Basic Warranty and Limitation but signed no papers agreeing to limitation); *see also infra* text accompanying note 779.

⁷⁷⁸ *See, e.g.*, *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 19 U.C.C. Rep. 832 (3d Cir. 1976) (suggesting that complete exclusion of all damages is disclaimer); *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 416 A.2d 394, 29 U.C.C. Rep. 369 (1980) (damages limitation clause must be viewed in context of warranty booklet as a whole).

⁷⁷⁹ Although commentators express varying degrees of dissatisfaction with this approach, they all agree that the Code offers no workable definition. *See* J. WHITE & R. SUMMERS, *supra* note 5, § 4-3, at 151 ("It is not possible to *define* unconscionability.") (emphasis in original); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 761 (1969) (arguing that section 2-302 defers to courts to define unconscionability); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) ("[R]eading this section alone makes nothing clear about the meaning of 'unconscionable.'"); Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHL.[-]KENT L. REV. 199, 215 (1985) ("Neither the Code nor its comments give a specific definition of the word 'unconscionable.'").

⁷⁸⁰ U.C.C. § 2-302.

questions: (1) whether section 2-302 ever applies to implied warranty disclaimers that satisfy section 2-316 tests, and (2) if so, whether the disclaimer is unconscionable under section 2-302.

Commentators disagree whether courts should ever find unconscionable warranty disclaimers that comply with section 2-316.⁷⁸¹ Section 2-316 requirements "protect a buyer from unexpected and unbargained language of disclaimer."⁷⁸² Professors White and Summers⁷⁸³ have noted that this purpose coincides with section 2-302's desire to prevent "oppression and unfair surprise,"⁷⁸⁴ thereby making application of section 2-302 unnecessary. Similarly, Professor Leff has argued that the detailed specificity of section 2-316's disclaimer provisions evidences the drafters' intent to make section 2-316 the sole provision governing implied warranty disclaimers. According to Leff, section 2-316's comments evidence the drafters' "full awareness of the problem at hand."⁷⁸⁵ Leff also has pointed out that although nine sections of Article 2 contain specific cross-references to section 2-302, section 2-316 does not, implying that the drafters consciously omitted any reference to unconscionability.⁷⁸⁶

Nevertheless, neither section 2-316 nor its comments specifically prohibits section 2-302's application to warranty disclaimers. Other Code provisions that also lack cross-references to section 2-302 have applied it to contract terms.⁷⁸⁷ By its express terms, section 2-302 applies to "any clause of the contract." Moreover, comment 1 to section 2-302 describes ten cases, seven of which deny full

⁷⁸¹ See Leff, *supra* note 779, at 520-24 (Section 2-316 compliance eliminates "unfair surprise" of section 2-301, making application of the unconscionability doctrine unnecessary). Professors White and Summers split on this issue. See J. WHITE & R. SUMMERS, *supra* note 5, § 12-11, at 481 ("One of us believes that such courts misread the intention of the draftsmen and that the draftsmen never intended 2-302 to be an overlay on the disclaimer provision of 2-316."); cf. Phillips, *supra* note 779, at 200 ("[S]ection 2-302 should be aggressively applied to invalidate disclaimers of the implied warranties of merchantability and fitness.").

⁷⁸² U.C.C. § 2-316 comment 1.

⁷⁸³ J. WHITE & R. SUMMERS, *supra* note 5, § 12-11, at 475; see also Leff, *supra* note 779, at 516-28.

⁷⁸⁴ U.C.C. § 2-302 comment 1.

⁷⁸⁵ Leff, *supra* note 779, at 523. U.C.C. § 2-316 comment 1 states the drafters' intent to protect buyers from "unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."

⁷⁸⁶ Leff, *supra* note 779, at 523. The nine provisions containing cross-references to section 2-302 are sections 2-202, 2-204, 2-205, 2-207, 2-303, 2-508, 2-615, 2-718, and 2-719. Professor Phillips has argued that section 2-719(3)'s specific textual reference to the possibility of unconscionability, which is conspicuously absent from section 2-316, may support Leff's position. See Phillips, *supra* note 779, at 221-22.

⁷⁸⁷ See J. WHITE & R. SUMMERS, *supra* note 5, § 12-11, at 476 (waiver-of-defense clause, U.C.C. § 9-206(1), and cross-security clauses, U.C.C. § 9-206, lack cross-references to section 2-302); see also Phillips, *supra* note 779, at 221.

effect to disclaimers. White and Summers have pointed out that "[i]t is difficult to reconcile an intent on the part of the draftsmen to immunize disclaimers from the effect of 2-302 with the fact that they used cases in which courts struck down disclaimers to illustrate the concept of unconscionability."⁷⁸⁸ Even if a disclaimer is both conspicuous and actually understood by the buyer,⁷⁸⁹ it may "oppress" the buyer within the meaning of comment 1 to section 2-302 because of unequal bargaining power. Thus, a seller in a strong bargaining position could force a buyer to accept an unconscionable warranty disclaimer that fully complies with section 2-316's requirements. Furthermore, because buyers rarely read and understand implied warranty disclaimers, section 2-316(a)'s conspicuousness requirement probably will not protect buyers from "unexpected" disclaimer language.

A court applying section 2-302 to a disclaimer⁷⁹⁰ must decide whether the disclaimer is in fact unconscionable. This determination is difficult to make because, as White and Summers have pointed out, "[i]t is not possible to *define* unconscionability. It is not a *concept* but a determination to be made in light of a variety of factors not unifiable into a formula."⁷⁹¹ The most common factors that courts consider in implied warranty disclaimer/unconscionability cases include relative bargaining power, extensiveness of negotiations, sophistication of the parties, the parties' prior dealings, and trade customs.⁷⁹² Each case invariably turns on its own set of facts, making generalizations difficult.

⁷⁸⁸ J. WHITE & R. SUMMERS, *supra* note 5, § 12-11, at 476.

⁷⁸⁹ See *supra* note 764 and accompanying text.

⁷⁹⁰ Despite the split among the commentators, most courts apply section 2-302 to warranty disclaimers. See Phillips, *supra* note 779, at 223-28. Professor Phillips bases his conclusions on his examination of the 35 or so cases dealing directly with the issue. *Id.* at 223 n.181. Phillips found that by and large, the courts simply *assume* that section 2-302 applies without analyzing the question in depth. *Id.* at 227. The exceptions to this generalization include *Martin v. Joseph Harris Co.*, 767 F.2d 296, 299-302, 41 U.C.C. Rep. 315, 318-23 (6th Cir. 1985); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 420, 30 U.C.C. Rep. 496, 503-04 (5th Cir. 1980); *A&M Produce v. FMC Corp.*, 135 Cal. App. 3d 473, 483-93, 186 Cal. Rptr. 114, 119-28, 34 U.C.C. Rep. 1129, 1137-48 (1982). *But see Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686, 13 U.C.C. Rep. 553 (1973); *Avery v. Aladdin Prods.*, 128 Ga. App. 266, 196 S.E.2d 357, 12 U.C.C. Rep. 628 (1973); *R.D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 178 N.W.2d 277, 7 U.C.C. Rep. 1179 (1970); *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 14 U.C.C. Rep. 312 (Tenn.), *cert. denied*, 419 U.S. 870 (1974). Like the cases that apply section 2-302, most decisions rejecting section 2-302's application to disclaimers are poorly reasoned. Of the four cases reaching this conclusion, only *Moulton* cites the primary source of the arguments supporting its position.

⁷⁹¹ J. WHITE & R. SUMMERS, *supra* note 5, § 4-3, at 151 (emphasis in original).

⁷⁹² See *infra* notes 802-07 and accompanying text.

In *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*,⁷⁹³ for example, the court concluded that superior bargaining power is irrelevant in deciding whether the contract was unconscionable if both parties realize that the contract's purpose is to allocate risk.⁷⁹⁴ In comparison, the court in *FMC Finance Corp. v. Murphree*,⁷⁹⁵ a case also involving commercial parties, considered the absence of grossly disproportionate bargaining power a significant factor in determining that a valid warranty disclaimer was not unconscionable.⁷⁹⁶ Although both courts found no unconscionability, they differed on the significance of the parties' bargaining power in reaching their conclusions.⁷⁹⁷

Courts may find disclaimer clauses unconscionable if one party is an unsophisticated businessman. In *A&M Produce Co. v. FMC Corp.*⁷⁹⁸ the plaintiff, a farmer, was the sole shareholder of his farming company. The plaintiff had no experience farming tomatoes when he entered into a contract to buy weight-sizing equipment.⁷⁹⁹ The sales contract contained an implied warranty disclaimer satisfying the requirements of section 2-316(2). After concluding that section 2-302 applies to an implied warranty disclaimer satisfying section 2-316,⁸⁰⁰ the court noted that unconscionability claims by businessmen generally do not find favor with the courts. Nevertheless, in finding the disclaimer unconscionable, the court stated that "courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms . . . and that even large business entities may have *relatively* little bargaining power, depending on . . . the commercial circumstances surrounding the agreement."⁸⁰¹

In sum, there is no easy way to capsule these cases.

⁷⁹³ 358 F. Supp. 449, 13 U.C.C. Rep. 254 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043, 16 U.C.C. Rep. 1 (6th Cir. 1975).

⁷⁹⁴ *Id.* at 460, 13 U.C.C. Rep. at 268. The buyer of machinery used to make cotton pads sued the manufacturer. The contract required very precise specifications for the machine and disclaimed all implied warranties, including the implied warranty of merchantability. *Id.*, 13 U.C.C. Rep. at 268.

⁷⁹⁵ 632 F.2d 413, 30 U.C.C. Rep. 496 (5th Cir. 1980).

⁷⁹⁶ *Id.* at 420, 30 U.C.C. Rep. at 503.

⁷⁹⁷ Both courts considered the nature of the parties important in finding that the disclaimer was not unconscionable. See *U.S. Fibres, Inc.*, 358 F. Supp. at 460, 13 U.C.C. Rep. at 268 ("In the light of the facts and commercial background of this transaction, the contract is neither oppressive nor unfair."); *FMC Fin. Corp.*, 632 F.2d at 420, 30 U.C.C. Rep. at 504 ("While Illinois courts will readily apply the unconscionability doctrine to contracts between consumers and skilled corporate sellers, they are reluctant to re-write the terms of a negotiated contract between businessmen.").

⁷⁹⁸ 135 Cal. App. 3d 473, 186 Cal. Rptr. 114, 34 U.C.C. Rep. 1129 (1982).

⁷⁹⁹ *Id.* at 478, 186 Cal. Rptr. at 117, 34 U.C.C. Rep. at 1132.

⁸⁰⁰ *Id.* at 483-85, 186 Cal. Rptr. at 120-21, 34 U.C.C. Rep. at 1137-39.

⁸⁰¹ *Id.* at 489-90, 186 Cal. Rptr. at 124, 34 U.C.C. Rep. at 1144 (emphasis in original).

"[G]eneralizations are always subject to exceptions and categorization is rarely an adequate substitute for analysis."⁸⁰² While some courts emphasize bargaining power in determining whether a warranty disclaimer is unconscionable,⁸⁰³ others focus on the buyer's ability to seek better terms elsewhere,⁸⁰⁴ and still others look to the sophistication of the aggrieved party.⁸⁰⁵ Although the declaration of White and Summers that "courts have not been solicitous of businessmen in the name of unconscionability"⁸⁰⁶ remains essentially accurate,⁸⁰⁷ *A&M Produce* illustrates an emerging willingness by courts to engage in a more sophisticated inquiry, rendering the results of unconscionability cases between commercial entities even less predictable.

Typically, consumers lack the sophistication, expertise, and bargaining power possessed by business actors. Courts, however, do not invariably find disclaimers unconscionable in consumer cases.⁸⁰⁸ Although courts usually find disclaimers in personal injury situations unconscionable,⁸⁰⁹ in other consumer cases courts generally uphold disclaimers except in extremely one-sided deals.⁸¹⁰

⁸⁰² *Id.*, 186 Cal. Rptr. at 124, 34 U.C.C. Rep. at 1144.

⁸⁰³ *See, e.g.*, *Hanson v. Funk Seeds Int'l*, 373 N.W.2d 30, 41 U.C.C. Rep. 1244 (S.D. 1985) (farmer is in inferior bargaining position with respect to purchase agreement with seed manufacturer); *Durham v. Ciba-Geigy Corp.* 315 N.W.2d 696, 33 U.C.C. Rep. 588 (S.D. 1982) (farmer in inferior position with respect to purchase agreement with herbicide manufacturer).

⁸⁰⁴ *See, e.g.*, *Rozeboom v. Northwestern Bell Tel. Co.*, 358 N.W.2d 241 (S.D. 1984) (plaintiff could obtain yellow-pages advertising from only one source and to limit recovery to amount of charges for advertising is unconscionable).

⁸⁰⁵ *See supra* text accompanying notes 798-801.

⁸⁰⁶ J. WHITE & R. SUMMERS, *supra* note 5, § 4-9, at 170.

⁸⁰⁷ Some courts make the general "business/commercial" label an express factor in their decisions. *See, e.g.*, *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 420, 30 U.C.C. Rep. 496, 504 (5th Cir. 1980) (Illinois courts are reluctant to rewrite the terms of a negotiated contract between businessmen); *Salt River Project Agric. Improvement and Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 374, 694 P.2d 198, 204, 40 U.C.C. Rep. 418, 424 (1984) (findings of unconscionability are rare in commercial settings).

⁸⁰⁸ *See Phillips, supra* note 779, at 232 (of 12 cases examined by Professor Phillips about half found disclaimer unconscionable).

⁸⁰⁹ *See Ford Motor Co. v. Tritt*, 244 Ark. 883, 430 S.W.2d 778, 5 U.C.C. Rep. 312 (1968) (using U.C.C. section 2-719(3) to invalidate a disclaimer); *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 298 N.Y.S.2d 538, 6 U.C.C. Rep. 56 (N.Y. Sup. Ct. 1969) (buyer injured when defective auto went out of control). In *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 14 U.C.C. Rep. 312 (Tenn.), *cert. denied*, 419 U.S. 870 (1974), the court upheld the disclaimer, but only because it held section 2-302 inapplicable to warranty disclaimers.

⁸¹⁰ *See, e.g.*, *Jacobs v. Metro Chrysler-Plymouth Inc.*, 125 Ga. App. 462, 466, 188 S.E.2d 250, 253, 10 U.C.C. Rep. 771, 773 (1972) (court stated that if defective 25-cent nut caused brake failure and collision occurred, it would be reluctant to limit seller's liability to 25 cents); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 33 U.C.C. Rep. 1277 (Ind. Ct. App. 1982) (manufacturer's disclaimer was not so one-sided as to be unconscionable as matter of law).

b. *Consequential Damage Exclusions.* Section 2-718(3) permits sellers to exclude consequential damages.⁸¹¹ Unlike section 2-316, section 2-719(3) expressly states that the limitation is valid *unless it is unconscionable*. Thus, consequential damage exclusions may be unconscionable, although the Code remains neutral as to their conscionability in the commercial context.⁸¹²

Most claims alleging unconscionability in commercial cases fail. For example, in *Kaplan v. RCA Corp.*⁸¹³ a television station brought an action against the seller of a defective antenna. The buyer argued that a clause in the sales agreement excluding the seller's liability for consequential damages was unconscionable.⁸¹⁴ The court held that the limitation-of-remedy clause was not unconscionable for several reasons: the loss was commercial, the buyers were experienced businesspeople, the buyers did not have to deal with this particular seller, and the clause was reasonable considering both the sales price (\$12,000) and the risk of consequential damages (possibly millions of dollars).⁸¹⁵

Although unconscionability claims involving two business entities almost invariably fail, some courts have struck down consequential damage exclusions in the commercial setting. In *A&M Produce Co. v. FMC Corp.*⁸¹⁶ the court found a consequential damages exclusion unconscionable even though both parties were commercial entities. The court found both "unfair surprise"⁸¹⁷ and "une-

⁸¹¹ Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

U.C.C. § 2-719(3).

⁸¹² Limitations of consequential damages in consumer cases are prima facie unconscionable. See *supra* note 811.

⁸¹³ 783 F.2d 463, 42 U.C.C. Rep. 1312 (4th Cir. 1986).

⁸¹⁴ *Id.* at 464, 42 U.C.C. Rep. at 1314.

⁸¹⁵ *Id.* at 467, 42 U.C.C. Rep. at 1318; see also *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 37 U.C.C. Rep. 1076 (10th Cir. 1983) (limitation-of-damages clause in agreement for sale of oil well injection packer sealant not unconscionable because loss was commercial, both parties were business entities, and limitation language was conspicuous); *M/V Am. Queen v. San Diego Marine Constr.*, 708 F.2d 1483 (9th Cir. 1983) (limitation-of-remedy clause in agreement to repair ship was not adhesion contract but rather commercial transaction between two business entities); *Cyclops Corp. v. Home Ins. Co.*, 389 F. Supp. 476, 16 U.C.C. Rep. 415 (W.D. Pa.) (limitation on liability for lost profits in contract to repair an electrical motor was not unconscionable because the loss was commercial and involved large business entities), *aff'd*, 523 F.2d 1050 (3d Cir. 1975).

⁸¹⁶ 135 Cal. App. 3d 473, 186 Cal. Rptr. 114, 34 U.C.C. Rep. 1129 (1982); see also *supra* text accompanying notes 798-802.

⁸¹⁷ The disclaimer and consequential damages exclusion were located in the middle of the back page of a long, preprinted form contract and were not pointed out to the buyer. *A&M Produce Co.*, 135 Cal. App. 3d at 490-91, 186 Cal. Rptr. at 124-25, 34 U.C.C. Rep. at 1144-45.

qual bargaining power"⁸¹⁸ and therefore refused to enforce the limitation clause.⁸¹⁹

In *Durham v. Ciba-Geigy Corp.*⁸²⁰ the court found unconscionable a consequential damages exclusion in a sales contract between a farmer and an herbicide manufacturer. The herbicide sold to the buyer failed to control the growth of foxtail. The court reasoned that (1) enforcing the limitation would leave the buyer without any substantial recourse for his loss, (2) farmers do not have equal bargaining power when dealing with herbicide manufacturers, (3) farmers cannot test pesticides before purchasing them, and (4) allowing sellers to avoid responsibility for the ineffectiveness of a product that has only one purpose contravenes public policy.⁸²¹

Although most commercial cases of unconscionable consequential damage limitations involve parties with unequal bargaining power,⁸²² courts usually do not rely solely upon unequal bargaining power to find such limitations unconscionable.⁸²³ While more courts have found unconscionability in the bargaining process since 1978,⁸²⁴ most claims of unconscionability between commercial parties of equal bargaining power continue to fail.⁸²⁵

⁸¹⁸ The buyer was unfamiliar with the product, and the buyer's company was smaller than the seller's company. In addition, the seller's salesman was not authorized to negotiate terms of the contract. *Id.* at 491, 186 Cal. Rptr. at 125, 34 U.C.C. Rep. at 1145.

⁸¹⁹ *Id.* at 489-91, 186 Cal. Rptr. at 124-25, 34 U.C.C. Rep. at 1143-46.

⁸²⁰ 315 N.W.2d 696, 33 U.C.C. Rep. 588 (S.D. 1982).

⁸²¹ *Id.* at 700, 33 U.C.C. Rep. at 593.

⁸²² See, e.g., *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage*, 709 F.2d 427, 36 U.C.C. Rep. 170 (6th Cir. 1983); *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 20 U.C.C. Rep. 637 (E.D. Mich. 1976); *Hanson v. Funk Seeds Int'l*, 373 N.W.2d 30, 41 U.C.C. Rep. 1244 (S.D. 1985); *Rozeboom v. Northwestern Bell Tel. Co.*, 358 N.W.2d 241 (S.D. 1984); *Durham*, 315 N.W.2d 696, 33 U.C.C. Rep. 588.

⁸²³ In many cases involving defective farm products, courts have stricken down consequential damage exclusions on the ground that the buyer could not discover the defect until after the loss occurred. See, e.g., *Majors v. Kalo Laboratories, Inc.*, 407 F. Supp. 20, 18 U.C.C. Rep. 592 (M.D. Ala. 1975) (sale of defective soybean inoculant); *Durham*, 315 N.W.2d 696, 33 U.C.C. Rep. 588 (sale of defective herbicide). These cases involved small farmers and large manufacturers of farm products, where the parties had unequal bargaining power. A court finding unconscionability based solely on the undiscoverable nature of the defect would be incorrect because the Code does not distinguish between discoverable and latent defects, expressly approving the contractual allocation of unknown risks. See U.C.C. § 2-719 comment 3 (valid clauses which limit or exclude consequential damages are merely allocations of unknown risk).

⁸²⁴ Special Project, *supra* note 1, at 220.

⁸²⁵ See, e.g., *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 35 U.C.C. Rep. 91 (4th Cir. 1982) (limitation of consequential damages clause in contract between experienced farmer with extensive farming operations and manufacturer of herbicide held not unconscionable); *AMF, Inc. v. Computer Automation, Inc.*, 573 F. Supp. 924, 37 U.C.C. Rep. 1583 (S.D. Ohio 1983) (consequential damages exclusion in agreement for sale of computer equipment not unconscionable because both parties were large, sophisticated merchants); *Argo Welded Prods., Inc. v. J.T. Ryerson Steel & Sons, Inc.*, 528 F. Supp. 583, 33 U.C.C. Rep. 1349 (E.D. Pa. 1981) (limitation of liability for consequential damages provision in contract for purchase and fabrication of stainless steel not unconscionable).

c. *Primary Damage Limitations.* In commercial transactions, sellers cannot deprive the buyer of all remedies for breach of a warranty.

[I]t 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 Article 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.⁸²⁶

The "fair quantum of remedy" question most often arises where the express warranty expires after an allotted time but before the buyer could have discovered the defect. For example, in *Trinkle v. Schumacher Co.*⁸²⁷ two commercially experienced companies contracted for fabric, which the buyer intended to use to manufacture Roman shades. The agreement contained a clause stating that the buyer could not initiate a claim after cutting the fabric. While processing the fabric the buyer discovered that the seller improperly applied the fabric's vinyl backing. The buyer could not have discovered the defective condition until processing. The court acknowledged that unconscionability rarely exists in a commercial setting involving parties of equal bargaining power but nevertheless found the damage limitation unconscionable because it "provide[d] neither a minimum nor adequate remedy to [buyer]."⁸²⁸ *Trinkle* represents the paradigm case for unconscionability because the terms of the contract did not allow the buyer any meaningful recovery for the seller's breach.⁸²⁹

In *McCullough v. General Motors Corp.*⁸³⁰ the buyer recovered on a similar, but less favorable, set of facts. The buyer became injured

able even though printed in small, inconspicuous type, because buyer had 19 years experience in steel business); *KKO, Inc. v. Honeywell, Inc.*, 517 F. Supp. 892, 33 U.C.C. Rep. 1373 (N.D. Ill. 1981) (express clause excluding consequential damages in agreement for sale of parts to be incorporated into electric deep fat fryers manufactured by buyer not unconscionable because both parties entered into contract with relatively equal bargaining power); *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75, 26 U.C.C. Rep. 50 (W.D. Pa.) (exclusion of consequential damages in contract for sale of refrigeration units not unconscionable where all parties involved were corporations), *aff'd*, 609 F.2d 503 (3d Cir. 1979).

⁸²⁶ U.C.C. § 2-719 comment 1.

⁸²⁷ 100 Wis. 2d 13, 301 N.W.2d 255, 31 U.C.C. Rep. 39 (1980).

⁸²⁸ *Id.* at 20, 301 N.W.2d at 259, 31 U.C.C. Rep. at 44.

⁸²⁹ See also *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 7 U.C.C. Rep. 81 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (holding that 15-day notice requirement was manifestly unreasonable and ineffective to relieve seller of its warranty obligations with respect to oil, sold for manufacture into resins, which contained chemical contaminant that could not be detected until complex chemical process took place after 15-day notice had elapsed); *Vandenberg v. Siter*, 204 Pa. Super. 392, 204 A.2d 494, 2 U.C.C. Rep. 383 (1964) (seller of tulip bulbs could not bar claims for defective bulbs by requiring notice before bulbs would normally bloom).

⁸³⁰ 577 F. Supp. 41, 37 U.C.C. Rep. 1529 (W.D. Tenn. 1982).

when the collapsible steering wheel on his car failed to collapse in an accident. The vehicle came with an exclusive twelve-month or 12,000-mile warranty, which expired before the accident.⁸³¹ The court refused to grant the seller's motion for summary judgment, stating that the defect was not discoverable until an accident occurred.⁸³² The court reasoned that enforcing the limitation would leave the buyer without the minimum adequate remedy required by comment 1 to section 2-719.⁸³³ The argument for unconscionability was weaker in this case than in *Trinkle* because the defect was not necessarily undiscoverable until after the expiration of the warranty period.

The fact that both parties are commercial entities may influence a court to find a lack of unconscionability even though a defect probably could not be found within the warranty period. In *Tokio Marine and Fire Insurance Co. v. McDonnell Douglas Corp.*⁸³⁴ a sales agreement for the purchase of a DC-8 commercial aircraft included an exclusive express warranty to repair or replace any defective equipment that became apparent within one year or 2,500 flying hours, whichever came first. The seller disclaimed all other warranties and excluded liability for consequential damages. The seller delivered the aircraft with defective spoilers that the buyer did not discover until the airplane crashed after expiration of the warranty.⁸³⁵ The court upheld the contract's validity because the seller would have corrected the defect had the buyer discovered it prior to the warranty expiration date. The court found that the buyer had a "fair quantum of remedy" for the seller's breach of its contractual obligations.⁸³⁶ Although the defect in the spoilers was as undiscoverable as the steering wheel defect in *McCullough*, the *Tokio* court was unsympathetic to the commercial buyer's plight.

When the issue of undiscoverability of a defect within the warranty period does not exist, courts likely will find that the buyer had a "fair quantum of remedy." In *Stan D. Bowles Distributing Co. v. Pabst Brewing Co.*,⁸³⁷ for example, a national brewer entered into a distribution contract with a wholesale distributor. The distributor sued the brewer over a disagreement as to whether the contract included the right to distribute malt liquor as well as beer.⁸³⁸ The court upheld the validity of a clause excluding liability for the distributor's

⁸³¹ *Id.* at 44, 37 U.C.C. Rep. at 1532.

⁸³² *Id.* at 46, 37 U.C.C. Rep. at 1536.

⁸³³ *Id.* at 45, 37 U.C.C. Rep. at 1536.

⁸³⁴ 617 F.2d 936, 28 U.C.C. Rep. 402 (2d Cir. 1980).

⁸³⁵ *Id.* at 938-39, 28 U.C.C. Rep. at 403-04.

⁸³⁶ *Id.* at 940-41, 28 U.C.C. Rep. at 406-07.

⁸³⁷ 69 N.C. App. 341, 317 S.E.2d 684, 39 U.C.C. Rep. 500 (1984).

⁸³⁸ *Id.* at 343-44, 317 S.E.2d at 685-86, 39 U.C.C. Rep. at 501-02.

lost profits despite his claim that the clause left him without "minimum adequate remedies."⁸³⁹ The agreement did not exclude all damages but rather listed the items for which the brewer would not be liable.⁸⁴⁰ Thus, the court found that the contract provided a "fair quantum of remedy."

The term "fair quantum of remedy," like unconscionability,⁸⁴¹ escapes precise definition. Contracts leaving the aggrieved party with no possible means to recover for the other party's breach are clearly unconscionable.⁸⁴² On the other hand, commercial contracts that merely exclude consequential damages are not unconscionable.⁸⁴³ Contracts in between these extremes may be unconscionable depending upon their individual facts. In deciding whether a contract provision is unconscionable, courts should consider the presence or absence of the traditional factors of unconscionability, such as unequal bargaining power or extreme one-sidedness.⁸⁴⁴

3. *Exclusiveness of Remedy—The Language Requirement of Section 2-719(1)(b)*

Although the Code provides sellers with ways to limit their liability through disclaimers and remedy limitations, it also allows sellers to provide more remedies than the Code itself extends.⁸⁴⁵ Often, however, the seller intends his express warranty to serve in lieu of the Code remedies, not in addition to them. To achieve exclusivity, section 2-719(1)(b)⁸⁴⁶ requires the parties to agree expressly that the stated remedy will act as the buyer's sole remedy.

In consumer cases, courts usually give the buyer the benefit of even the slightest doubt as to whether the parties intended the express remedies to be exclusive. In *Williams v. Hyatt Chrysler-Plymouth, Inc.*,⁸⁴⁷ for example, the purchaser of a defective automobile brought an action to recover damages for breach of warranty. The sales agreement stated that Chrysler would repair without charge any defects occurring within the first twelve months or 12,000 miles. The contract further stated that this limited warranty represented

⁸³⁹ *Id.* at 351, 317 S.E.2d at 690, 39 U.C.C. Rep. at 504.

⁸⁴⁰ For instance, the brewer was liable to the distributor for the diminution in the value of the franchise. *Id.*, 317 S.E.2d at 690, 39 U.C.C. Rep. at 504.

⁸⁴¹ *See supra* note 779.

⁸⁴² *See supra* note 829 and accompanying text.

⁸⁴³ Section 2-719(3) allows the seller to exclude consequential damages for a commercial loss. *See supra* note 811.

⁸⁴⁴ *See supra* notes 779-825 and accompanying text.

⁸⁴⁵ U.C.C. § 2-719(1)(a) provides in relevant part that "the agreement may provide for remedies in addition to or in substitution for those provided in this Article."

⁸⁴⁶ *Id.* § 2-719(1)(b) states that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy."

⁸⁴⁷ 48 N.C. App. 308, 269 S.E.2d 184, 30 U.C.C. Rep. 90 (1980).

the sole warranty made by Chrysler, and went on to exclude liability for consequential damages.⁸⁴⁸ The court made available to the buyer all remedies under the Code other than consequential damages, finding that “[t]here is . . . no language in the warranty expressly stating that such a remedy is exclusive.”⁸⁴⁹

In commercial cases, a court more likely will look to the parties’ true intent,⁸⁵⁰ but even in these cases the contract must express an intent to make the remedy exclusive. *Polycon Industries, Inc. v. Hercules, Inc.*,⁸⁵¹ for example, involved a contract for the sale of plastic blowmolding machines. The parties agreed that the buyer could return the machines within ninety days and receive a full refund if they did not meet performance requirements.⁸⁵² The court held that despite this agreement, the buyer’s failure to return the machines within ninety days did not bar it from other remedies under the Code.⁸⁵³ Thus, whether the contract is a consumer or a commercial agreement, the seller should make clear the parties’ intent that express warranty be exclusive to avoid a contrary result.

4. *Scope of Remedy Limitations*

Sellers must carefully draft remedy limitations to cover all warranty breaches. Use of the term “this warranty,” for instance, could backfire because express warranties may lurk elsewhere in the agreement despite disclaimer language. The seller must disclaim each and every warranty he wishes to disable, and sloppy draftsmanship can easily expose the seller to unexpectedly broad liability.

⁸⁴⁸ *Id.* at 315, 269 S.E.2d at 188-89, 30 U.C.C. Rep. at 96.

⁸⁴⁹ *Id.* at 316, 269 S.E.2d at 189, 30 U.C.C. Rep. at 96; *see also* *Ford Motor Co. v. Reid*, 250 Ark. 176, 184, 465 S.W.2d 80, 85, 8 U.C.C. Rep. 985, 990 (1971) (seller’s promise to repair defects in lieu of other warranties or obligations did not make automobile purchaser’s remedy of repair exclusive, permitting him to recover consequential property damages resulting from fire in his car because “[t]here [was] no language . . . ‘expressly’ stating that the remedy of repair or replacement of defective parts [was] to be the exclusive remedy”).

⁸⁵⁰ *In J.D. Pavlack, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243, 20 U.C.C. Rep. 394 (1976), the contract for the sale of meat provided that “seller will allow for excess fat content at invoice price and buyer will accept such as full settlement.” *Id.* at 3, 351 N.E.2d at 245, 20 U.C.C. Rep. at 396. The court found that the parties’ intent was to treat the allowance as the buyer’s exclusive remedy despite their failure to employ the word “exclusive.” *Id.* at 4, 351 N.E.2d at 246, 20 U.C.C. Rep. at 398.

⁸⁵¹ 471 F. Supp. 1316, 26 U.C.C. Rep. 917 (E.D. Wis. 1979).

⁸⁵² *Id.* at 1319, 26 U.C.C. Rep. at 922.

⁸⁵³ *Id.* at 1325, 26 U.C.C. Rep. at 928; *see also*, *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 30 U.C.C. Rep. 201 (D.C. 1980) (fact that specifications for project provided for use of tear-out remedy to repair in-place defective concrete roof did not mean that supplier was entitled to rely on tear-out remedy as only remedy contemplated by parties because nowhere in contract did there appear designation of tear-out as exclusive remedy).

In *Northern States Power Co. v. ITT Meyer Industries*⁸⁵⁴ the seller made four express warranties in "Item 16" of the contract. Immediately following the warranty, the agreement stated that the "[seller's] liability for any breach of *this* warranty shall be limited solely to job site replacement or repair."⁸⁵⁵ The seller's price quote, however, contained detailed technical specifications, which the court found to have created a separate express warranty. Because the lead sentence in the limiting clause spoke only of a breach of "this" warranty, the court held that the clause applied only to the "Item 16" warranties. The limiting clause did not shield the seller from liability for breach of the technical specification warranty.⁸⁵⁶ Careful sellers should therefore use broad, all-encompassing language when drafting remedy limitations.

5. *Failure of Purpose—Section 2-719(2)*

a. *When Applicable.* Section 2-719(2) provides: "Where circumstances cause an exclusive remedy or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."⁸⁵⁷ Remedies ensure that the buyer receives what the seller promised. If a limited remedy fails to achieve that end, it has failed its essential purpose.⁸⁵⁸ Thus, section 2-719(2) applies whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, operates as a result of later circumstances to deprive a party of a substantial benefit of the bargain.⁸⁵⁹ The test for determining whether a limited warranty fails its essential purpose is whether the buyer receives, within a reasonable period of time, goods conforming to the contract.⁸⁶⁰ The most common example of a remedy that can fail its essential purpose is

⁸⁵⁴ 777 F.2d 405, 42 U.C.C. Rep. 1 (8th Cir. 1985).

⁸⁵⁵ *Id.* at 410 n.6, 42 U.C.C. Rep. at 9 n.6 (emphasis added).

⁸⁵⁶ *Cf. Community Television Servs., Inc. v. Dresser Indus., Inc.*, 586 F.2d 637, 640, 24 U.C.C. Rep. 851, 856-57 (8th Cir. 1978) (advertising enlarged warranty created by technical specifications contained in contract; clauses in contract limiting liability of seller applied only to limited warranty of materials and workmanship set forth in contract and not to broader warranty created by advertising), *cert. denied*, 441 U.S. 932 (1979); *Island Creek Coal Co. v. Lake Shore, Inc.*, 636 F. Supp. 285, 290, 2 U.C.C. Rep. 2d 59, 64 (W.D. Va. 1986) (seller adequately protected himself by providing that "in no event" would either party claim consequential or special damages; court rejected buyer's claim that consequential damages exclusion applied only to incidence involving delivery).

⁸⁵⁷ U.C.C. § 2-719(2).

⁸⁵⁸ *See, e.g., Hartzell v. Justus Co.*, 693 F.2d 770, 774, 34 U.C.C. Rep. 1594, 1597 (8th Cir. 1982) (where repairs did not bring house to the promised condition, the limited repair remedy failed its essential purpose).

⁸⁵⁹ *See, e.g., Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814, 40 U.C.C. Rep. 1721 (1984) (failure of repair remedy for sale of a bulldozer).

⁸⁶⁰ *Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1063, 33 U.C.C. Rep. 490, 508 (5th Cir. 1982).

the exclusive remedy of repair or replacement of defective goods.⁸⁶¹ Other exclusive remedies can fail their essential purpose as well. For example, an exclusive refund-of-the-purchase-price remedy could fail its purpose if the seller refuses to refund the price.⁸⁶²

Some limitations, by definition, cannot fail their essential purpose, and thus section 2-719(2) cannot apply. For example, clauses that limit damages to the purchase price, or clauses excluding consequential damages, should never fail their essential purpose.⁸⁶³ These "allocation of risk" clauses accomplish precisely what the parties intend.

Nevertheless, where a limitation-of-remedy clause operates to deny the buyer an adequate remedy, courts sometimes improperly use section 2-719(2) to invalidate an exclusionary clause. For example, in *Phillips Petroleum Co. v. Bucyrus-Erie Co.*⁸⁶⁴ the court faced a seller's limitation of remedies that provided unconscionably low damages. The court concluded that "[t]he essential purpose of any damage award is to make the injured party whole."⁸⁶⁵ Because the limitation of remedies prevented this, it failed its essential purpose. The court applied section 2-719(2) and held that a "'remedy may be had as provided in [the Code].'"⁸⁶⁶ Although the court correctly held for the buyer, it unnecessarily applied section 2-719(2) because unconscionability alone would have sufficed to render the limitation invalid.⁸⁶⁷ Only a "fair and reasonable clause" can fail of its pur-

⁸⁶¹ *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 292, 35 U.C.C. Rep. 91, 98 (4th Cir. 1982) ("failure of essential purchase exception applies most obviously to situations where the limitation of remedy involves repair or replacement that cannot return the goods to their warranted condition"). Professor Eddy has argued that the exclusive remedy of repair or replacement was the only remedy limitation the drafters considered when they wrote section 2-719(2). See Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 39 (1977).

⁸⁶² See, e.g., *Devore v. Bostrom*, 632 P.2d 832, 31 U.C.C. Rep. 984 (Utah 1981) (where automobile seller failed for two months to return purchase price to buyer even though there was no real dispute as to defects in automobile, limited remedy of return of amount paid failed its essential purpose, allowing resort to additional remedies); cf. *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 431-32, 36 U.C.C. Rep. 170, 175 (6th Cir. 1983) (seller's refusal to rescind sale of freezer to buyer did not cause contractual rescission remedy to fail its essential purpose because court could have enforced rescission provision, and thus essence of remedy could have been carried out).

⁸⁶³ Nevertheless, refund remedies and damage ceilings occasionally have been held to fail under section 2-719(2) when defects are undiscoverable before the buyer sustains large losses. See *infra* notes 893-95 and accompanying text.

⁸⁶⁴ 131 Wis. 2d 21, 388 N.W.2d 584, 1 U.C.C. Rep. 2d 667 (1986).

⁸⁶⁵ *Id.* at 39, 388 N.W.2d at 592, 1 U.C.C. Rep. 2d at 676 (citation omitted).

⁸⁶⁶ *Id.* at 40, 388 N.W.2d at 592, 1 U.C.C. Rep. 2d at 677 (citation omitted).

⁸⁶⁷ See *Computerized Radiological Servs. v. Syntex Corp.*, 595 F. Supp. 1495, 1510, 40 U.C.C. Rep. 49, 69 (E.D.N.Y. 1984) (very essence of a sales contract requires that at least minimum adequate remedies be available so limited remedy fails its essential purpose when enforcement of remedy limitation essentially would leave plaintiff with no

pose. The court should have found this clause unconscionable pursuant to section 2-719 because it denied the buyer a fair quantum of remedy.⁸⁶⁸

b. *Failure of an Exclusive Remedy of Repair or Replacement.* The limited remedy of repair or replacement may serve several purposes, but it primarily gives the seller an opportunity to make the goods conform to the sales contract while limiting exposure by excluding liability for other possible damages.⁸⁶⁹ From the buyer's standpoint, the repair remedy ensures that the seller will provide goods that conform to the contract at an appropriate time.⁸⁷⁰ A limited remedy breaks down when it "fails in its purpose or operates to deprive either party of the substantial value of the bargain."⁸⁷¹ Because the exclusive repair or replacement remedy seeks to give the buyer conforming goods, the remedy fails its essential purpose whenever the seller does not perform his obligation.

*Fiorito Brothers, Inc. v. Fruehauf Corp.*⁸⁷² exemplifies a clear case of failure of essential purpose. In *Fiorito Brothers* the manufacturer of dump truck bodies arbitrarily declined to make necessary repairs to bodies sold, causing the limited repair remedy to fail.⁸⁷³ The court of appeals did not hesitate to affirm the district court's summary judgment that the repair or replacement remedy failed its essential purpose. The court reasoned that "[d]enial of responsibility to repair is a failure of a limited remedy in the most basic sense."⁸⁷⁴

Such examples of willful breach are relatively uncommon, however. In most cases, the seller tries to repair the goods but cannot. Although some courts have held otherwise,⁸⁷⁵ in most recent decisions regarding whether a repair warranty failed its essential purpose courts have correctly ignored whether the seller made a good

remedy at all), *rev'd in part*, 786 F.2d 72, 42 U.C.C. Rep. 1656 (2d Cir. 1986); *Wilson Trading Corp. v. David Ferguson Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108, 5 U.C.C. Rep. 1213 (1968) (refusing to enforce remedy limitation by invoking section 2-719(2) when doing so would leave plaintiff with essentially no remedy).

⁸⁶⁸ "If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach" U.C.C. § 2-719 comment 1.

⁸⁶⁹ See *Chatlos Sys., Inc. v. National Cash Register Corp.*, 635 F.2d 1081, 1085, 30 U.C.C. Rep. 416, 420 (3rd Cir. 1980) (citing *Beal v. General Motors Corp.*, 354 F. Supp. 423, 12 U.C.C. Rep. 105 (D. Del. 1973)).

⁸⁷⁰ *Id.*, 30 U.C.C. Rep. at 420.

⁸⁷¹ U.C.C. § 2-719 comment 1.

⁸⁷² 747 F.2d 1309, 39 U.C.C. Rep. 1298 (9th Cir. 1984).

⁸⁷³ *Id.* at 1313, 39 U.C.C. Rep. at 1302-03.

⁸⁷⁴ *Id.*, 39 U.C.C. Rep. at 1302.

⁸⁷⁵ See Special Project, *supra* note 1, at 235-36 (discussing cases holding that a seller's good faith shields him when a buyer pleads failure of purpose).

faith effort to perform. In *Waters v. Massey-Ferguson, Inc.*⁸⁷⁶ the court recognized that a limited remedy to repair "reveals an unequivocal assumption that [the seller] will be able to correct any mechanical problem . . . but nowhere suggests—much less provides for—the possibility that repair may be impossible."⁸⁷⁷ Thus, the court correctly found for the buyer even though the seller "was able to arrange for prompt service attention within his own shop, but the company-trained service personnel were not able to solve the . . . problem."⁸⁷⁸

Courts must apply this bright-line approach to assure the buyer of a fair quantum of remedy.⁸⁷⁹ A "best efforts" rule easily could deprive buyers of any recovery for breach of remedy.⁸⁸⁰ As one court has recognized, "The detriment to the buyer is the same whether the seller diligently but unsuccessfully attempts to honor his promise or acts negligently or in bad faith."⁸⁸¹

A limited repair warranty also fails if the seller takes too much time to repair the goods. In *Massey-Ferguson, Inc. v. Laird*,⁸⁸² for example, the court awarded damages to the buyer of a combine for breach of warranty to repair or replace when the seller made numerous repairs over an extended time period but failed to repair the machine to the buyer's reasonable satisfaction. Although the seller was willing to continue making repairs, the court correctly held:

[T]he seller does not have an unlimited period of time to repair and/or replace parts under a warranty. Given the numerous attempts at repair over the extended time period, the jury could properly conclude . . . that the combine was not repaired within a reasonable time and that the limited warranty had failed of its essential purpose.⁸⁸³

⁸⁷⁶ 775 F.2d 587, 41 U.C.C. Rep. 1553 (4th Cir. 1985).

⁸⁷⁷ *Id.* at 591, 41 U.C.C. Rep. at 1558.

⁸⁷⁸ *Id.* at 589, 41 U.C.C. Rep. at 1554.

⁸⁷⁹ See *Chatlos Sys., Inc. v. National Cash Register Corp.*, 635 F.2d 1081, 1085, 30 U.C.C. Rep. 416, 420-21 (3d Cir. 1980) (buyer need not show negligence or bad faith on part of the seller because detriment to buyer is same whether seller diligently but unsuccessfully attempted to honor his promise or acted negligently or in bad faith) (citing *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363, 1374-75, 25 U.C.C. Rep. 1066, 1081-83 (9th Cir. 1978)); *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 267 S.E.2d 919, 29 U.C.C. Rep. 1241 (1980) (warrantor must do more than make good-faith effort to repair defects when requested to do so).

⁸⁸⁰ See *Eddy*, *supra* note 861, at 72 (failure of purpose should turn upon results obtained rather than character of warrantor's behavior); Anderson, *Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commercial Code*, 31 Sw. L.J. 759, 780 (1977) (cases focusing on seller's fault generally nonsensical).

⁸⁸¹ *Chatlos Sys.*, 635 F.2d at 1085, 30 U.C.C. Rep. at 421 (citation omitted).

⁸⁸² 432 So. 2d 1259, 36 U.C.C. Rep. 437 (Ala. 1983).

⁸⁸³ *Id.* at 1264, 36 U.C.C. Rep. at 444 (citation omitted); see also *Volkswagen of Am., Inc. v. Harrell*, 431 So. 2d 156, 36 U.C.C. Rep. 553 (Ala. 1983) (limited repair warranty on sale of camper failed its essential purpose where seller, through its authorized dealer-

Such a rule is critical to ensure that the buyer is made whole. A contrary rule would allow an obstinate seller to make patch-work repairs over an extended time period, leaving the aggrieved buyer without the benefit of his bargain.

c. *Effect of Separate Consequential Damage Exclusions After Failure of Purpose.* Most contracts containing an exclusive remedy of repair and replacement also contain a clause excluding consequential damages.⁸⁸⁴ Section 2-719(1) allows the seller to limit the buyer's remedies, and section 2-719(3) explicitly authorizes limitations of consequential damages. However, section 2-719(2) gives the buyer remedies "as provided in this Act" when a limited remedy fails its essential purpose. Thus, the question arises whether section 2-719(2) voids the consequential damages exclusion clause when an exclusive remedy fails.

A majority of cases have answered correctly that the failure of an exclusive remedy voids the consequential damages exclusion clause, although the ways in which courts have reached this conclusion vary tremendously. In most situations, the consequential damages exclusion is inexorably linked to the exclusive remedy provision. The two provisions are interdependent in that the parties use the contract to allocate risk based on the assumption that the seller can and will repair or replace the goods within a reasonable time. If this assumption later proves unfounded, courts should no longer bar the buyer, who has bargained away his right to consequential damages in reliance on the seller's promise to repair or replace, from recovering resultant damages. Several cases explicitly recognize this,⁸⁸⁵ while others seem to do so implicitly.⁸⁸⁶

ships, was given four opportunities to repair or replace defective parts but failed to fix defects in vehicle during a four month period); *Givan v. Mack Truck Inc.*, 569 S.W.2d 243, 24 U.C.C. Rep. 1077 (Mo. Ct. App. 1978) (buyer is not bound to permit warrantor to tinker with article indefinitely in hope that it may ultimately be made to comply; rather, limited remedy fails of its purpose whenever warrantor fails to correct the defect within reasonable period of time).

⁸⁸⁴ See *infra* notes 885-92. An exclusive remedy of repair and replacement suffices in itself to exclude consequential damages. When the remedy fails, however, courts readily award such damages in the absence of a separate exclusion. See, e.g., *Beal v. General Motors Corp.*, 354 F. Supp. 423, 12 U.C.C. Rep. 105 (D. Del. 1973) (consequential damages awarded in breach of contract for sale of tractor).

⁸⁸⁵ See, e.g., *Waters v. Massey-Ferguson, Inc.*, 775 F.2d 587, 41 U.C.C. Rep. 1553 (4th Cir. 1985) (under sales contract for tractor, which limited seller's obligation to repair and replacement of parts and excluded seller's liability for consequential damages, exclusion of consequential damages did not extend to situation where seller failed to repair tractor as required by warranty because contract indicated that parties contemplated certain repair of tractor and thus did not anticipate any need to limit damages from failure of certain repair); *Fiorito Bros., Inc. v. Fruehauf Corp.*, 747 F.2d 1309, 39 U.C.C. Rep. 1298 (9th Cir. 1984) (purpose of parties in agreeing to exclusive-remedy provision was to insure that buyer would not suffer consequential damages from down

Nevertheless, not all courts have held that the consequential damage exclusion necessarily fails when an exclusive remedy fails. Some courts sensibly reduce the inquiry to whether recognizing the consequential damages exclusion is unconscionable.⁸⁸⁷ In the rare instance where the buyer does not rely on the seller's promise to repair in bargaining away his right to recover consequential damages, the exclusionary clause should stand. If, on the other hand, the buyer relies on the repair warranty, courts should consider it unconscionable to allow the seller to avoid all consequential liability by sheltering himself behind one portion of the warranty while ignoring its obligations under another portion.

Most courts that adopt the unconscionability analysis do not, however, follow this reasoning. Instead, these courts look for the traditional aspects of unconscionability, such as unequal bargaining power. For example, in *In re Feder Litho-Graphic Services*⁸⁸⁸ the court upheld the validity of a consequential damages exclusion in a sales contract for an offset press even though the limited repair remedy failed, because the court could find none of the traditional indicia of unconscionability.⁸⁸⁹ A few courts have held that the failure of a repair remedy does not invalidate a consequential damages exclusion but have given no reasons for their finding.⁸⁹⁰ Finally, some

time of trucks; therefore seller's failure to repair trucks voided consequential damages exclusion); *see also infra* note 892 and accompanying text.

⁸⁸⁶ *See, e.g.,* R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 40 U.C.C. Rep. 1283 (8th Cir. 1985) (failure of replacement remedy in sale of glass panels); Matco Mach. and Tool Co. v. Cincinnati Milacron Co., 727 F.2d 777, 37 U.C.C. Rep. 1577 (8th Cir. 1984) (failure of repair remedy in sale of machine); Volkswagen of Am., Inc. v. Harrell, 431 So. 2d 156, 36 U.C.C. Rep. 553 (Ala. 1983) (failure of repair remedy in sale of camper); Caterpillar Tractor Co. v. Waterson, 13 Ark. App. 77, 679 S.W.2d 814, 40 U.C.C. Rep. 1721 (1984) (failure of repair remedy in sale of bulldozer); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 465 N.Y.S.2d 606, 37 U.C.C. Rep. 1147 (N.Y. App. Div. 1983) (failure of repair remedy in sale of harvesting machine).

⁸⁸⁷ *See infra* note 889.

⁸⁸⁸ 40 Bankr. 486, 39 U.C.C. Rep. 495 (Bankr. D. Mich. 1984).

⁸⁸⁹ *Id.* at 489, 39 U.C.C. Rep. at 499; *see also* Frantz Lithographic Servs., Inc. v. Sun Chem. Corp., 38 U.C.C. Rep. 485 (E.D. Pa. 1984) (consequential damages exclusion not unconscionable because buyer could still recover the amount paid under the contract, and therefore was not deprived of all remedies); AMF, Inc. v. Computer Automation, Inc., 573 F. Supp. 924, 930, 37 U.C.C. Rep. 1583, 1589-90 (S.D. Ohio 1983) (consequential damages exclusion not unconscionable even if exclusive repair remedy failed because both parties were sophisticated merchants); Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776, 34 U.C.C. Rep. 857 (E.D. Wis. 1982) (consequential damages exclusion not unconscionable regardless of failure of repair remedy because both parties were of equal sophistication and bargaining power and there was no evidence of haste or undue pressure exerted on buyer to compel it to enter into the contract).

⁸⁹⁰ *See, e.g.,* Stutts v. Green Ford, Inc. 47 N.C. App. 503, 516, 267 S.E.2d 919, 926, 29 U.C.C. Rep. 1241, 1251 (1980); *cf.* Typographical Serv., Inc. v. Itek Corp., 721 F.2d 1317, 37 U.C.C. Rep. 1139 (11th Cir. 1983) (holding without analysis that consequential damages are available when limited remedy fails of its essential purpose); John Deere Co. v. Hand, 211 Neb. 549, 319 N.W.2d 434, 33 U.C.C. Rep. 1369 (1982) (same).

courts treat the limited remedy of repair and a consequential damages exclusion as separate, independent attempts by the parties to allocate risk.⁸⁹¹

We find highly implausible the notion that parties consciously allocate the risk that an exclusive repair remedy will fail completely. A rational buyer would not accept the seller's promise to repair the goods as his sole remedy, agree not to seek consequential damages or a refund of the purchase price, and then agree that in the event seller cannot (or will not) repair the goods the buyer cannot recover damages resulting from the seller's breach. We find it far more likely that the parties never contemplate the possibility of a failure of the repair remedy, and that the buyer agrees to waive his right to consequential damages in reliance on certain repair. Although each case must stand on its own facts, under such an analysis courts will usually void the consequential damages exclusion in cases involving the failure of a repair warranty.⁸⁹²

d. *Failure of Price Repayment Remedies.* An exclusive refund remedy typically requires the seller to return the substantial value of warranted goods while excluding resultant damages. A price repayment remedy would therefore fail its purpose when the seller wrongfully refuses to refund the price.⁸⁹³ Moreover, if the purpose of the price repayment is to enable the buyer to acquire substitute goods promptly, even an immediate refund may cause the remedy to fail; for example, substitute goods might not be readily available,⁸⁹⁴ or the market price may have risen sharply since the time of contracting. Absent an explicit understanding to the contrary, however, courts should not hold that a repayment remedy fails merely because the buyer cannot obtain a substitute within a reasonable

⁸⁹¹ See *Chatlos Sys., Inc. v. National Cash Register Corp.*, 635 F.2d 1081, 1086, 30 U.C.C. Rep. 416, 422 (3d Cir. 1980); *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 457-58, 19 U.C.C. Rep. 1009, 1030-31 (S.D.N.Y. 1976); *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 14-15, 465 N.Y.S.2d 606, 613-14, 37 U.C.C. Rep. 1147, 1155-56 (N.Y. App. Div. 1983).

⁸⁹² See *RRX Indus. v. Lab-Con, Inc.*, 772 F.2d 543, 547, 41 U.C.C. Rep. 1561, 1565 (9th Cir. 1985) ("Neither bad faith nor procedural unconscionability is necessary under [section 2-719(2)]. It provides an independent limit when circumstances render a damages limitation clause oppressive and invalid.").

⁸⁹³ See, e.g., *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899, 22 U.C.C. Rep. 62 (1977) (exclusive remedy of price adjustment for delivery of nonconforming steel failed of purpose when seller refused to comply); *Devore v. Bostrom*, 632 P.2d 832, 31 U.C.C. Rep. 984 (Utah 1981) (automobile sales contract's limited remedy of return of amount paid failed its essential purpose when seller did not return purchase price to buyer for two months even though no real dispute existed as to defects in automobile).

⁸⁹⁴ See *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 56 Hawaii 466, 540 P.2d 978, 17 U.C.C. Rep. 1126 (1975) (buyer could not substitute in time to complete construction contract). Our research uncovered no recent cases in this area.

time. The buyer should foresee the problems of substitution, and unlike the limited repair remedy,⁸⁹⁵ the buyer relies on market condition, not on the seller's performance, in agreeing to an exclusive remedy. Thus, although the prompt acquisition of substitute goods may serve as an important secondary purpose of a repayment remedy, the essential purpose is most likely the return of consideration.

No remedy limitation is foolproof, but a seller can increase greatly the chances that courts will enforce his limitation through careful drafting. Sellers should take particular care that the limitation covers all warranty breaches⁸⁹⁶ and that the contract leaves the buyer with a fair quantum of remedy in the event of the seller's breach.⁸⁹⁷ The agreement also should state explicitly that the parties intend the express warranties as exclusive.⁸⁹⁸ The seller should use consequential damage exclusions, but with the knowledge that courts may not enforce them if the seller fails to honor his express warranties.⁸⁹⁹

VI

DEFENSES TO WARRANTY ACTIONS

A. Privity—Section 2-318

Privity describes the relationship between the parties to a contract: Those who have entered into a contract with one another are "in privity."⁹⁰⁰ Those who have not contracted directly with one another are not in privity. Traditionally, manufacturers owed no duty of care to people not in privity. Consequently, only buyers in privity with the manufacturer could recover for harm caused by the manufacturer's defective or unsafe products.⁹⁰¹ This traditional doctrine reflected fears that remote buyers would subject sellers to unexpected and unrestrained suits.⁹⁰² Recently, however, the doctrine has fallen into decline.⁹⁰³

There are two basic kinds of privity relationships.⁹⁰⁴ "Vertical

⁸⁹⁵ See *supra* text accompanying notes 884-92.

⁸⁹⁶ See *supra* notes 854-56 and accompanying text.

⁸⁹⁷ See *supra* notes 827-45 and accompanying text.

⁸⁹⁸ See *supra* notes 845-53 and accompanying text.

⁸⁹⁹ See *supra* notes 884-92 and accompanying text.

⁹⁰⁰ See J. WHITE & R. SUMMERS, *supra* note 5, § 11-2, at 399 (discussing privity and warranty claims).

⁹⁰¹ See *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842).

⁹⁰² See *id.* at 405 ("Unless we confine the operation of [contracts indirectly affecting third parties] to the parties who entered into them, the most absurd and outrageous consequences . . . would ensue.").

⁹⁰³ See J. WHITE & R. SUMMERS, *supra* note 5, § 11-2, at 399 ("[T]he subject itself is crumbling away.").

⁹⁰⁴ A third form of privity relationship, "diagonal privity," is sometimes discussed. See *infra* notes 905-06.

privity" describes the relationship between parties in the marketing chain, usually the manufacturer, wholesaler, retailer, and ultimate buyer.⁹⁰⁵ In this chain, only parties who have contracted directly with one another are in privity. Typically, the manufacturer is only in privity with the wholesaler and the ultimate buyer only with the retailer. The wholesaler and retailer are in privity with each other as well as with the manufacturer and buyer, respectively. "Horizontal privity" describes the relationship between the retailer and persons other than the ultimate buyer, who use or consume the goods.⁹⁰⁶ For example, horizontal privity describes the relationship between the retailer and a child who uses a lawnmower his grandfather purchased.⁹⁰⁷

Initially, privity protected parties from both tort and warranty liability.⁹⁰⁸ After a period of decline, however, the New York Court of Appeals effectively ended its application to tort claims in *MacPherson v. Buick Motor Co.*⁹⁰⁹ In *MacPherson* the court held that lack of privity between a manufacturer and a consumer does not shield the manufacturer from liability for personal injury and property damage resulting from faulty manufacture of a product where one reasonably could expect the defect to cause the damage that in fact ensued.⁹¹⁰ The demise of privity in contract law has been slower and less uniform.

Four major social policy grounds support the attacks on privity in the products liability field. First, manufacturers and suppliers can best distribute losses caused by unsafe products because they can include the cost of damages or insurance in the price of the product.⁹¹¹ Second, strict liability both compensates injured parties and deters the production of unsafe products.⁹¹² Third, suppliers impliedly represent that their goods are safe by placing them in the

⁹⁰⁵ Hawkland also mentioned "diagonal privity," a combination of horizontal and vertical privity. 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 421.

⁹⁰⁶ *Id.*; see also *Redwine v. Baptist Gen. Convention*, 681 P.2d 1121, 1125, 34 U.C.C. Rep. 883, 887 (Okla. Ct. App. 1982) (Bacon, J., concurring) (need for "diagonal" chain exception to privity rules where no one in vertical chain would ever use product). *But cf.* J. WHITE & R. SUMMERS, *supra* note 5, § 11-2, at 399 (only two types of "non-privity plaintiffs"). We do not separately address "diagonal privity," but rather we implicitly consider it in discussing vertical and horizontal privity.

⁹⁰⁷ See *Chastain v. Fuqua Indus.*, 156 Ga. App. 719, 725, 275 S.E.2d 679, 684, 31 U.C.C. Rep. 79, 82 (1980) (jury question whether injured grandson was member of family entitled to protection of section 2-318).

⁹⁰⁸ See 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 419-20.

⁹⁰⁹ 217 N.Y. 382, 111 N.E. 1050 (1916); see 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 420 ("After *MacPherson v. Buick Motor Co.* the application of the privity doctrine to torts ended in most states . . .").

⁹¹⁰ 217 N.Y. at 391, 111 N.E. at 1053.

⁹¹¹ See 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 423; Special Project, *supra* note 1, at 256.

⁹¹² 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 423.

market, and courts should protect the public's reliance on such representations.⁹¹³ Finally, the purchaser of an unsafe product normally can recover from the retailer who can then recover from the supplier or manufacturer. Abolition of privity avoids the waste involved in this circuitous recovery route.⁹¹⁴

When section 2-318 was first drafted there was no national consensus on the proper scope of warranty protection.⁹¹⁵ Professor Llewellyn initially drafted the section to restrict severely the effect of both horizontal and vertical privity rules.⁹¹⁶ The proposed section, which appeared as section 43 of the Uniform Revised Sales Act, provided:

A warranty extends to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person or property by breach of the warranty. A seller may not exclude or limit the operation of this section.⁹¹⁷

The first official Uniform Commercial Code, however, contained a substantially narrower version of section 2-318. It provided:

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.⁹¹⁸

The official commentary to the section noted that beyond the expressly included beneficiaries, "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 distributive chain."⁹¹⁹

Although the drafters expected some variation in the common law development of the privity doctrine, they did not expect the number of amendments to section 2-318 that were enacted.⁹²⁰ Cali-

⁹¹³ *Id.*

⁹¹⁴ *Id.*; see, e.g., *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 851-52, 28 U.C.C. Rep. 368, 371-72 (Okla. 1979) (abolishing vertical privity requirement because it "results in perpetuating a needless chain of actions" of buyers suing sellers until manufacturer is reached).

⁹¹⁵ See 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 421-22.

⁹¹⁶ *Id.* at 423.

⁹¹⁷ UNIF. REV. SALES ACT § 43 (Proposed Final Draft No. 1, 1944).

⁹¹⁸ U.C.C. § 2-318 (1952).

⁹¹⁹ *Id.* comment 3.

⁹²⁰ See 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 425. Utah omitted section 2-318 from its Code. Alabama, Arkansas, Colorado, Delaware, South Dakota, Virginia,

fornia, for example, criticized the section as "a step backward"⁹²¹ and went so far as to omit the section from its version of the Code.⁹²² To "prevent further proliferation of separate variations in state after state,"⁹²³ the drafters provided two alternatives, Alternative B and Alternative C, to the initial version of section 2-318, which is now Alternative A.⁹²⁴ Alternative B provides:

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. A seller may not exclude or limit the operation of this section.⁹²⁵

Alternative C provides:

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. A 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.⁹²⁶

According to one commentator, the drafters intended the initial version of section 2-318 to codify contemporary case law on horizontal privity while remaining neutral regarding further limitations on the privity doctrines.⁹²⁷ Similarly, the drafters intended the subsequent alternatives to check the trend towards nonuniform statutory rules, not to impede further common law limitations on privity.⁹²⁸ According to this view, courts may develop their own horizontal and vertical privity doctrines without regard to the legislative choice of alternatives.⁹²⁹

and Wyoming all adopted variations of section 2-318. Texas replaced section 2-318 with a statute that was neutral on the question of privity. *Id.* at 425-26.

⁹²¹ PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, Report No. 3, at 13 (1966).

⁹²² *Id.*

⁹²³ *Id.* at 14.

⁹²⁴ Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, Wisconsin, and the District of Columbia have generally adopted Alternative A. 2 W. HAWKLAND, *supra* note 575, § 2-318, at 407-08.

⁹²⁵ U.C.C. § 2-318 Alternative B. Alabama, Delaware, Kansas, South Carolina, South Dakota, Vermont, and the Virgin Islands have adopted this alternative. 2 W. HAWKLAND, *supra* note 575, § 2-318, at 408.

⁹²⁶ U.C.C. § 2-318 Alternative C. Hawaii, Iowa, Minnesota, North Dakota, Utah, and Wyoming have adopted this alternative. 2 W. HAWKLAND, *supra* note 575, § 2-318, at 408.

⁹²⁷ See 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 424.

⁹²⁸ *Id.*, at 426; *see id.* § 2-318, at 408-19 (current variations of section 2-318).

⁹²⁹ *Id.* § 2-318:01, at 426. Hawkland nevertheless has conceded that "the legislative

Under the better view,⁹³⁰ adopted by the majority of courts, the legislative choice of Alternative A limits further common law erosion of the horizontal privity doctrine⁹³¹ while allowing courts to develop their own rules on vertical privity.⁹³² The official commentary supports this position: Alternative A "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 distributive chain*."⁹³³ Courts that exceed "Alternative

choice of alternatives may be important in deciding the social policy of the state on the privity question." *Id.*

⁹³⁰ See J. WHITE & R. SUMMERS, *supra* note 5, at 403 n.17 (endorsing this view); Special Project, *supra* note 1, at 257-60 (same).

⁹³¹ See, e.g., *Hemphill v. Sayers*, 552 F. Supp. 685, 690-93, 35 U.C.C. Rep. 758, 763-66 (S.D. Ill. 1982) (legislative choice of Alternative A neutral as to expansion of vertical privity, but limits horizontal privity; football player using helmet supplied by school barred from bringing suit against manufacturer for breach of warranty because not family member or guest of school); *Teel v. American Steel Foundries*, 529 F. Supp. 337, 345, 33 U.C.C. Rep. 42, 51 (E.D. Mo. 1981) (adoption of Alternative A shows legislature did not intend to extend warranty coverage to buyer's employees); *Curlee v. Mock Enters.*, 173 Ga. App. 594, 600, 327 S.E.2d 736, 743, 41 U.C.C. Rep. 63, 68 (1985) (choice of most restrictive alternative shows legislature did not intend to obliterate privity; therefore, court will not extend guest status to many locations outside house); *Lane v. Barringer*, 407 N.E.2d 1173, 1178, 29 U.C.C. Rep. 1273, 1280 (Ind. App. 1980) (Neal, J., concurring) (injured mother not within family or household of married daughter who had separate family and residence; although mother possibly covered by Alternative B or C, court refused to expand scope of horizontal privity established by legislative adoption of Alternative A); *Williams v. Fulmer*, 695 S.W.2d 411, 414, 41 U.C.C. Rep. 795, 797, 800 (Ky. 1985) (limiting third-party beneficiaries to those expressly mentioned in section 2-318; thus husband could not recover from helmet manufacturer for death of wife who used helmet purchased on resale from private individual); *Davis v. Siloo, Inc.*, 47 N.C. App. 237, 249, 267 S.E.2d 354, 361, 29 U.C.C. Rep. 492, 498 (1980) (section 2-318 does not contemplate extending implied warranties to purchaser's employees); *Redwine v. Baptist Gen. Convention*, 681 P.2d 1121, 1124, 34 U.C.C. Rep. 883, 886 (Okla. Ct. App. 1982) (horizontal privity limited to confines of section 2-318; widow cannot sue for breach of warranty for defective heart-lung machine that caused husband's death in hospital because charging patient for use of machine not "sale").

⁹³² See, e.g., *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 825, 35 U.C.C. Rep. 477, 487 (8th Cir. 1983) (applying Missouri law) (judicial extension of implied warranties to remote purchasers is not improper); *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 265-66, 354 N.W.2d 625, 631-32, 39 U.C.C. Rep. 1637, 1644 (1984) (legislature only addressed horizontal privity in section 2-318; court free to extend vertical privity to ultimate buyer); *Perfetti v. McGhan Medical*, 99 N.M. 645, 654, 662 P.2d 646, 655, 35 U.C.C. Rep. 1472, 1480-81 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983) (vertical privity not controlled by section 2-318; manufacturer of medical equipment liable for breach of implied warranty "without regard to privity of contract between [manufacturer] and either plaintiff or her surgeon"). *But see* *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 315, 37 U.C.C. Rep. 730, 733 (S.D.N.Y. 1983) (applying Michigan law) (section 2-318 does not extend warranty coverage to ultimate purchaser; buyer cannot sue manufacturer of diesel engines with whom he did not contract).

⁹³³ U.C.C. § 2-318 comment 3 (emphasis added). Hawkland argues that comment 2 to section 2-313 also admonishes that the section's drafters did not intend to inhibit case law development that further relaxes privity requirements. 2 W. HAWKLAND, *supra* note 575, § 2-318:01, at 426. Comment 2 states that the Code warranty rules are

A's horizontal limits overstep the judicial role by amending existing legislation, and frustrate the Code's underlying policy of uniformity."⁹³⁴

Two commonly litigated issues involving privity in commercial settings are (1) whether a buyer's employee may recover from the manufacturer or supplier for personal injuries sustained by use of the defective product and (2) whether a buyer may recover for economic loss from a remote manufacturer.

1. *Recovery for Personal Injury by Buyers' Employees*

In jurisdictions embracing Alternatives B and C, buyers' employees should be entitled to recover from the manufacturer or supplier for personal injuries sustained by the use of defective products. Alternatives B and C extend sellers' warranties for personal injuries to buyers' employees because they easily qualify as persons "who may reasonably be expected to use, consume or be affected by" goods purchased by their employers.⁹³⁵

Coverage under Alternative A is more limited. Most courts read section 2-318 strictly: Because employees are not included in the express language of section 2-318, they cannot recover for breach of warranty.⁹³⁶ This strict approach is consistent with the view that the choice of Alternative A represents a legislative prefer-

not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

U.C.C. § 2-313 comment 2. Although the language of this comment is more ambiguous than section 2-318 comment 3, which expressly refers to "other persons in the distributive chain," the comment, when read in conjunction with section 2-318 comment 3, only addresses the extension of vertical privity. The "particular area" of case law development that section 2-318 expressly recognizes is horizontal privity; vertical privity falls "beyond that" and is thus left open to case law.

⁹³⁴ Special Project, *supra* note 1, at 259 (footnotes omitted).

⁹³⁵ See, e.g., *Hansen v. F.M.C. Corp.*, 32 U.C.C. Rep. 828, 830 (D. Kan. 1981) (warranty extends to employee by virtue of Kansas's Alternative B of section 2-318; employee not required to give notice of breach under section 2-607).

⁹³⁶ See, e.g., *Watkins v. Barber-Colman Co.*, 29 U.C.C. Rep. 1271, 1271-73 (5th Cir. 1980) (applying Georgia law) (employee is not member of family, household, or guest within section 2-318 and thus cannot recover for breach of warranty); *Bailey v. ITT Grinnel Corp.*, 536 F. Supp. 84, 89 (N.D. Ohio 1982) (applying Ohio law) (employee has no privity with and thus no breach of warranty cause of action against remote manufacturer); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239-40, 31 U.C.C. Rep. 478, 480 (N.D. Ill. 1981) (applying Illinois law) (section 2-318 does not extend breach of warranty coverage to employees); *Colvin v. FMC Corp.*, 43 Or. App. 709, 716-17, 604 P.2d 157, 160-61, 28 U.C.C. Rep. 375, 380-81 (1979) (employee injured by insecticide cannot recover from manufacturer for defective product).

ence about the applicable extent of horizontal privity. In applying Alternative A, however, Pennsylvania courts extend warranty coverage to buyers' employees harmed by defective products.⁹³⁷

2. Buyer Recovery for Economic Loss from Remote Sellers

Buyer recovery for economic loss from remote sellers involves both vertical privity considerations and public policy choices regarding the breadth of warranty coverage. Courts should develop their own positions on these two issues without regard to legislative choice of alternatives of section 2-318. The official commentary notes that the choice of Alternative A should not affect the development of vertical privity case law.⁹³⁸ Courts adhere to this comment and determine vertical privity policy without regard to legislative choice of section 2-318.⁹³⁹

Although Alternatives A and B provide warranty coverage only to those who suffer personal injury while Alternative C extends coverage to *any* injury caused by a breach of warranty, courts should not and do not consider legislative choice of section 2-318 to be a

⁹³⁷ See, e.g., *Williams v. West Penn Power Co.*, 502 Pa. 557, 570, 467 A.2d 811, 818, 37 U.C.C. Rep. 720, 729 (1983) (employee injured by defective ladder may sue remote manufacturer for personal injury).

⁹³⁸ U.C.C. § 2-318 comment 3; see *supra* note 933 and accompanying text.

⁹³⁹ See, e.g., *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 825, 35 U.C.C. Rep. 477, 487 (8th Cir. 1983) (comment 3 clearly indicates that judicial extension of implied warranties to remote purchasers is consistent with section 2-318); *Flory v. Sivercrest Indus.*, 29 U.C.C. Rep. 832, 833-34 (Ariz. Ct. App. 1980) (section 2-318 does not address question of privity in breach of warranty action for economic loss; better rule allows recovery for economic loss despite lack of privity); *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 659-60, 42 U.C.C. Rep. 462, 473-74 (Del. Super. Ct. 1985) (section 2-318 neutral regarding vertical privity; remote purchaser can recover under implied warranty for purely economic loss); *Spiegel v. Sharp Elec. Corp.*, 125 Ill. App. 3d 897, 899-900, 466 N.E.2d 1040, 1043, 38 U.C.C. Rep. 1624, 1626-27 (1984) (section 2-318 neutral regarding vertical privity; Illinois requires privity to recover for purely economic loss); *Candlelight Homes, Inc. v. Zorues*, 414 N.E.2d 980, 981, 30 U.C.C. Rep. 919, 921 (Ind. Ct. App. 1981) (Indiana's version of the Code does not address whether vertical privity required; courts find privity required to recover for purely economic harm); *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 58, 32 U.C.C. Rep. 35, 43-44 (Mo. Ct. App. 1981) (section 2-318 does not address vertical privity; sound policy supports extension of implied warranty to remote purchasers for purely economic loss); *Spring Motors Distribs. v. Ford Motor Co.*, 98 N.J. 555, 587-88, 489 A.2d 660, 677, 40 U.C.C. Rep. 1184, 1207 (1985) (Code leaves courts to determine whether vertical privity required in action between seller and remote purchaser; New Jersey abolished vertical privity requirement in action by buyer against remote seller for purely economic loss); *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 851-52, 28 U.C.C. Rep. 368, 371-72 (Okla. 1979) (Alternative A neutral as to vertical privity in implied warranty action; abolished by judicial decision); *Dravo Equip. Co. v. German*, 73 Or. App. 165, 168-69, 698 P.2d 63, 65-66, 40 U.C.C. Rep. 1240, 1242-43 (1985) (section 2-318 not meant to limit extension of warranties; Oregon courts require privity for recovery of purely economic loss in breach of implied warranty but not in breach of express warranty).

legislative statement on the proper breadth of warranty coverage.⁹⁴⁰ Courts should consider the relevant public policy concerns and select a rule regarding the proper breadth of warranty coverage based on their evaluations of these concerns.

In abolishing the vertical privity requirement for recovery for solely economic loss, the court in *Industrial Graphics, Inc. v. Asahi Corp.*⁹⁴¹ advanced the primary public policy considerations for extending warranty coverage to economic loss. First, to permit recovery for personal injury but not economic loss is unfair and inconsistent. Second, economic loss can be as devastating as personal injury. Third, and most important, fears about unforeseen and unlimited liability—the primary reason given for limitation of liability—are illusory given the Code's protections.⁹⁴²

Not all courts reach the same result as the *Industrial Graphics* court. For example, in *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*⁹⁴³ the court found personal injury and property damage different interests deserving different treatment.⁹⁴⁴ The court declined to extend warranty coverage to economic loss.

B. Notice

Section 2-607(3)(a) provides that “[w]here a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.”⁹⁴⁵ Thus, notice of breach is a condition precedent to recovery for breach of warranty, even absent prejudice to the seller.⁹⁴⁶

The notification requirement promotes good faith in commer-

⁹⁴⁰ See *supra* note 939. But see *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* 345 N.W.2d 124, 129, 38 U.C.C. Rep. 1177 (Iowa 1984) (section 2-318 does not extend warranty protection to economic loss); *Hole v. General Motors Corp.*, 83 A.D.2d 715, 716, 442 N.Y.S.2d 638, 640, 31 U.C.C. Rep. 1285, 1287 (N.Y. App. Div. 1981) (interpreting statute to provide that plaintiff not in privity with manufacturer may only recover for personal injury).

⁹⁴¹ 485 F. Supp. 793, 28 U.C.C. Rep. 647 (D. Minn. 1980).

⁹⁴² *Id.* at 804, 28 U.C.C. Rep. at 662-63.

⁹⁴³ 234 Kan. 742, 675 P.2d 887, 38 U.C.C. Rep. 69 (1984).

⁹⁴⁴ *Id.* at 754-55, 675 P.2d at 898, 38 U.C.C. Rep. at 77; see also *Hole*, 83 A.D.2d at 716, 442 N.Y.S.2d at 640, 31 U.C.C. Rep. at 1287.

⁹⁴⁵ U.C.C. § 2-607(3)(a).

⁹⁴⁶ See *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 511, 28 U.C.C. Rep. 1249, 1256 (Alaska 1980) (section 2-607(3)(a) “provides for no excuse from notice such as lack of prejudice”). A buyer's failure to meet the Code's notification requirements bars any remedy otherwise available for breach. See, e.g., *Klockner, Inc. v. Federal Wire Mill Corp.*, 663 F.2d 1370, 1378-79, 32 U.C.C. Rep. 1097, 1105-06 (7th Cir. 1981) (failure to notify seller of defects in steel rods barred buyer's suit); *Point Adams Packing Co. v. Astoria Marine Constr. Co.*, 594 F.2d 763, 765-66, 26 U.C.C. Rep. 391, 394 (9th Cir. 1979) (buyer's failure to notify barred recovery of damages resulting from seller's failure to supply safety devices on fishing vessel).

cial transactions.⁹⁴⁷ Section 2-607(3)(a) affords the seller an opportunity to inspect and to repair or supply conforming goods.⁹⁴⁸ It also provides the parties an opportunity to negotiate a settlement or to prepare for litigation.⁹⁴⁹ Finally, the notice requirement protects the seller from stale claims and permits the seller to close its books on past accounts.⁹⁵⁰

Notification to the immediate seller generally satisfies section 2-607(3)(a).⁹⁵¹ In consumer transactions, the buyer is not likely to know who the manufacturer is or which party is legally responsible for the breach.⁹⁵² Jurisdictions that permit consumers to satisfy

⁹⁴⁷ See *Northern States Power Co. v. IIT Meyer Indus.*, 777 F.2d 405, 409, 42 U.C.C. Rep. 1, 8 (8th Cir. 1985) ("the notice requirement [is] 'designed to defeat commercial bad faith'") (quoting U.C.C. § 2-607 comment 4 (1965)).

⁹⁴⁸ See, e.g., *Northern States Power Co. v. IIT Meyer Indus.*, 777 F.2d 405, 409, 42 U.C.C. Rep. 1, 7 (8th Cir. 1985) (one policy of notice requirement is "to enable the seller to make adjustments or replacements or to suggest opportunities for cure"); *Parker v. Bell Ford, Inc.*, 425 So. 2d 1101, 1103, 35 U.C.C. Rep. 1171, 1173 (Ala. 1983) (one policy objective of notification requirement is "to enable the seller to make adjustments or replacements, or to suggest opportunities for cure, to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer"); *General Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262, 1264, 28 U.C.C. Rep. 1031, 1034 (Fla. Dist. Ct. App. 1980) (notice requirement "protects the seller's right to inspect the goods").

⁹⁴⁹ See, e.g., *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 826, 25 U.C.C. Rep. 65, 85 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) ("express notice opens the way for settlement through negotiation between the parties"); *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 512, 28 U.C.C. Rep. 1249, 1258 (Alaska 1980) ("The overriding purpose of the notice requirement is to encourage consistent business practices and early settlement of disputes."); *White v. Mississippi Order Buyers*, 648 P.2d 682, 684, 33 U.C.C. Rep. 1303, 1305 (Colo. Ct. App. 1982) (notice requirement "provides the seller with an opportunity to correct any defect, to prepare for negotiation and litigation, and to protect itself against stale claims asserted after it is too late for the seller to investigate them").

⁹⁵⁰ See, e.g., *Courtesy Enters. v. Richards Laboratories*, 457 N.E.2d 572, 577, 37 U.C.C. Rep. 765, 770 (Ind. Ct. App. 1983) ("The final policy consideration involved is that notice is required to discourage the assertion of stale claims in the same way as, and for the same reasons as, do statutes of limitation."); *Petro-Chem, Inc. v. A.E. Staley Mfg. Co.*, 686 P.2d 589, 591, 39 U.C.C. Rep. 139, 141 (Wyo. 1984) (one policy consideration "is to enable the seller to make adjustments, to afford the seller an opportunity to arm himself for litigation, and to allow the seller to close the book on goods which have been sold in the past").

⁹⁵¹ *Owens v. Glendale Optical Co.*, 590 F. Supp. 32, 36, 39 U.C.C. Rep. 903, 907 (S.D. Ill. 1984) (notification to immediate seller sufficient); *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661, 29 U.C.C. Rep. 1507, 1512 (Colo. 1980) (same); *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 118, 452 A.2d 192, 198, 34 U.C.C. Rep. 1564, 1574 (1982) (same), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888-89, 27 U.C.C. Rep. 403, 406 (Tex. Civ. App. 1979) (same).

⁹⁵² Professors Prosser and Keeton addressed this concern:

Both the Sales Act and the Commercial Code contain provisions which prevent the buyer from recovering on a warranty unless he gives notice to the seller within a reasonable time after he knows or should know of the breach. As between the immediate parties to the sale, this is a sound

section 2-607(3)(a) by notifying the immediate seller presume that the immediate seller will in turn notify the legally responsible party.⁹⁵³ Some courts, however, construe the section as requiring direct notice to the ultimate manufacturer,⁹⁵⁴ in part out of concern that the immediate seller will not adequately apprise the manufacturer of the alleged defect in time for it to inspect and cure the defect.⁹⁵⁵ Rather than follow either of these approaches, courts should resolve the question of whom the buyer must notify on a case-by-case basis by examining whether the buyer reasonably believed that the notice provided would reach the responsible parties and whether the manufacturer justifiably believed that the immediate seller would relay any notice of breach. Moreover, a buyer who works closely with the other parties to the manufacture, distribution, and sale of a product should provide notice directly to the manufac-

commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom "steeped in the business practice which justifies the rule," and at least until he has legal advice it will not occur to him to give notice to one with whom he has had no dealings."

W. KEETON, *supra* note 182, § 97, at 691 (footnotes omitted); cf. Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212, 36 U.C.C. Rep. 82 (1983) (notice to seller's former agent sufficient because buyer never received notice of termination of former principal-agent relationship and former agent had apparent authority).

⁹⁵³ See Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 378 N.E.2d 1083, 24 U.C.C. Rep. 888 (1978).

[W]hether one or more of those upstream of the consumer in the distributive chain is ultimately sued for breach of implied warranty by the consumer, the Code envisions that when the consumer's notice of breach is given to his immediate seller, such person to preserve any right of action he may have for breach of implied warranty will give notice to his immediate seller, and so on upstream until the seminal point of the distributive chain is reached.

Id. at 348, 378 N.E.2d 1083, 1087, 24 U.C.C. Rep. 888, 892-93; see also Palmer v. A.H. Robbins Co., 684 P.2d 187, 206, 38 U.C.C. Rep. 1150, 1158 (Colo. 1984) ("This sequential notice requirement is thus calculated to provide the remote manufacturer with notice and an opportunity to correct the defect, where possible, and to investigate claims that might eventuate in litigation.").

⁹⁵⁴ Wilcox v. Hillcrest Memorial Park, 696 S.W.2d 423, 424, 42 U.C.C. Rep. 169, 171 (Tex. Ct. App. 1985) (section 2-607(3)(a) requires buyer to "notify any seller, including a remote seller such as the manufacturer, of the product's alleged defect"), *writ ref'd n.r.e.*, 701 S.W.2d 842, 42 U.C.C. Rep. 1303 (Tex. 1986); see also Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660, 40 U.C.C. Rep. 1184 (1985) (holding that buyer cannot sue remote seller in common law negligence or strict liability—reserving determination of whether buyer must notify remote seller).

⁹⁵⁵ See Wilcox, 696 S.W.2d at 424, 42 U.C.C. Rep. at 171 ("It would be untenable to allow a buyer . . . to recover damages for breach of warranty from a remote seller or manufacturer who was never even made aware that the product in question was defective and who, consequently, never had an opportunity to remedy the defect to the buyer's satisfaction before litigation was commenced or even to inspect the product to ascertain if indeed a defect existed.")

turer.⁹⁵⁶ In such a situation, the dealer can reasonably assume that the buyer will also inform the manufacturer of the defect. Thus, the reasons for limiting the notification requirement to the immediate seller do not apply.⁹⁵⁷

A buyer who notifies the proper party must also establish that the content of the notice was sufficient and that notice was provided within a reasonable time.

1. *Content*

Section 2-607(3)(a) does not require a particular form of notice: written notice, oral notice, or in some situations, action may suffice.⁹⁵⁸ The parties can set general notice requirements by contract.⁹⁵⁹ Where the contract is silent, however, courts split as to whether the buyer must merely inform the seller that "the transaction is still troublesome and must be watched,"⁹⁶⁰ or whether the

⁹⁵⁶ See *Carson v. Chevron Chem. Co.*, 6 Kan. App. 2d 776, 785, 635 P.2d 1248, 1256, 32 U.C.C. Rep. 834, 844 (1981) ("where the buyer and the other parties to the manufacture, distribution and sale of the product are closely related, or where the other parties actively participate in the consummation of the actual sale of the product, the reasons for the exclusion of such other parties from the . . . notice provision cease to exist").

⁹⁵⁷ See *id.*, 635 P.2d at 1256, 32 U.C.C. Rep. at 844.

⁹⁵⁸ *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 37 U.C.C. Rep. 429 (11th Cir. 1983) (oral complaint sufficient to establish that transaction was troublesome and had to be watched); *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 359, 30 U.C.C. Rep. 865, 893 (5th Cir. 1980) (notice need not be written); *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575, 29 U.C.C. Rep. 399 (8th Cir. 1980) (consistent and repeated notices of dissatisfaction over two year period adequate notice of breach); *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 38 U.C.C. Rep. 469 (D. Del. 1984) (buyer's oral complaint within month after acceptance of goods, coupled with seller's unsuccessful attempts to repair defect over six to eight month period and written demand for refund six to twelve months later sufficient notice); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 38 U.C.C. Rep. 1150 (Colo. 1984) (patient-buyer presenting herself to physician-seller of intra-uterine device in life-threatening condition resulting from device constitutes sufficient notice); *Stelco Indus. v. Cohen*, 182 Conn. 561, 438 A.2d 759, 31 U.C.C. Rep. 86 (1980) (buyer and worker's oral complaints to seller sufficient); *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 473 N.E.2d 1066, 40 U.C.C. Rep. 93 (1985) (oral complaints followed by halt in buying and negotiations with seller sufficient notice).

⁹⁵⁹ See U.C.C. § 1-204(1) ("Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.").

⁹⁶⁰ The analysis on the loose/strict content standard relies heavily on Note, *Notification of Breach Under Uniform Commercial Code Section 2-607(3)(a): A Conflict, a Resolution*, 70 CORNELL L. REV. 525 (1985). Courts adopting the looser standard rely on the language of comment 4, which states that "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched." U.C.C. § 2-607 comment 4. See, e.g., *Royal Typewriter Co.*, 719 F.2d at 1102, 37 U.C.C. Rep. at 441-42 (complaint sufficient if reasonable jury could infer that it was both sufficient and timely enough to notify seller transaction was troublesome); *Continental Forest Prods. v. V.S. & Bros.*, 34 U.C.C. Rep. 1578, 1579 (9th Cir. 1982) (request that seller "fulfill[] . . . all orders" sufficient notification that transaction was troublesome);

buyer must expressly notify the seller that the buyer intends to hold the seller liable for damages for breach.⁹⁶¹

Some courts that apply the lenient "troublesome nature" standard have held that the buyer need not notify the seller of the late delivery of goods because a reasonable seller should realize that failure timely to deliver goods will be "troublesome" to the buyer.⁹⁶² Similarly, in continuing-use cases, a buyer who initially notifies the seller of the troublesome nature of the transaction, but subsequently continues to deal with the seller without further mention of the breach, may nevertheless satisfy this notice standard.⁹⁶³

On the other hand, courts applying the stricter standard have held that the buyer must notify the seller of the late delivery of goods.⁹⁶⁴ In *Roth Steel Products v. Sharon Steel Corp.*⁹⁶⁵ the Sixth Circuit noted that the seller may believe that the buyer will accept a tender that does not strictly comply with the contract. Moreover,

Wilson v. Marquette Elecs., Inc., 630 F.2d 575, 584, 29 U.C.C. Rep. 399, 412-13 (8th Cir. 1980) (complaints of malfunctioning computer); *AES Technology Sys. v. Coherent Radiation*, 583 F.2d 933, 937-38, 24 U.C.C. Rep. 861, 866 (7th Cir. 1978) (phone call from buyer expressing unhappiness with laser's performance); *Kirby v. Chrysler Corp.*, 554 F. Supp. 743, 752, 35 U.C.C. Rep. 497, 508 (D. Md. 1982) (complaints that manufacturer was delivering vehicles in violation of the contract); *Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771, 780, 35 U.C.C. Rep. 102, 114-15 (D.S.D. 1982) (complaint that aircraft engine was not working properly), *rev'd on other grounds*, 714 F.2d 862, 36 U.C.C. Rep. 1207 (8th Cir. 1983); *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 522-23, 319 N.W.2d 855, 860, 34 U.C.C. Rep. 146, 156 (1982) (notice that grain drying equipment was not performing as expected).

⁹⁶¹ Not all courts adopting the strict standard require the seller to notify the buyer of an intention to seek legal action; all agree, however, that mere communication that the transaction is "troublesome" does not satisfy section 2-607(3)(a). See Note, *supra* note 960, at 534-37; see also, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 153, 35 U.C.C. Rep. 1435, 1462 (6th Cir. 1983) (rejecting "troublesome and must be watched" standard); *K & M Joint Venture v. Smith Int'l, Inc.*, 669 F.2d 1106, 1112-13, 33 U.C.C. Rep. 1, 10 (6th Cir. 1982) (same); *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 359-60, 30 U.C.C. Rep. 865, 894-95 (5th Cir. 1980) (same); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 970-73, 19 U.C.C. Rep. 353, 362-66 (5th Cir. 1976); *United Cal. Bank v. Eastern Mountain Sports, Inc.*, 546 F. Supp. 945, 957-58, 34 U.C.C. Rep. 806, 823-25 (D. Mass. 1982), *aff'd mem.*, 705 F.2d 439 (1st Cir. 1983).

⁹⁶² See *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 254, 15 U.C.C. Rep. 832, 841-42 (N.D. Ill. 1974) (notification not required where seller did not deliver adequate quantities of liquid oxygen in timely manner), *aff'd on other grounds*, 522 F.2d 469 (7th Cir. 1975); *Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F. Supp. 1198, 9 U.C.C. Rep. 680 (E.D. Mo. 1971) (notification not necessary where seller makes late delivery of goods under contract specifying that time was of essence); see also Note, *supra* note 960, at 533.

⁹⁶³ See *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 509, 8 U.C.C. Rep. 625, 638-39 (8th Cir. 1971) (buyer's complaints to seller that oil was improper for use in machine constituted sufficient notice despite buyer's continued purchase of oil following seller's assurances that it was fit).

⁹⁶⁴ See *Roth Steel Prods.*, 705 F.2d at 152, 35 U.C.C. Rep. at 1461; *Eastern Air Lines*, 532 F.2d at 971-73, 19 U.C.C. Rep. at 373.

⁹⁶⁵ 705 F.2d 134, 35 U.C.C. Rep. 1435.

The statute, by its terms, requires notice with regards to "any breach" and the same policies which support a rule requiring notice of breach when a latent defect is discovered also support a rule requiring notice of breach when performance does not conform to time or price terms of the contract.⁹⁶⁶

A seller who delivers goods late may realize, without the benefit of separate notice, that the transaction is "troublesome." Nevertheless, the seller may not know whether its tardiness caused the buyer any reliance damages or whether the buyer considers the late delivery sufficiently serious to seek damages for breach.

Similarly, courts applying the stricter approach in continuing-use cases emphasize the seller's reliance interests. In *K & M Joint Venture v. Smith International, Inc.*⁹⁶⁷ the buyer continued to use a tunnel-boring machine after informing the seller of the machine's problems.⁹⁶⁸ The court held that the buyer failed to meet the notification requirement because it had continued to order repair and replacement parts for the machinery without protest.⁹⁶⁹

Several factors favor application of the strict standard. First, section 2-607(3)(a) requires the buyer to notify the seller of "breach."⁹⁷⁰ Second, under the strict standard, the buyer must threaten legal action, which may encourage the seller to make greater efforts to conform or to enter into settlement negotiations.⁹⁷¹ Finally, the strict standard reduces the potential for misleading behavior because the buyer must allege breach in unambiguous terms.⁹⁷² These observations, however, have yet to be confirmed by empirical evidence, and it is equally possible that the strict standard discourages settlement because it may lead parties to take inflexible bargaining positions.

Rather than adopt a lenient or strict approach for all transactions, courts should tailor the standard to different classes of cases. In late delivery cases, for example, courts should hold buyers to a strict notification standard because a lenient standard that excuses a buyer's failure to notify the seller of breach is inconsistent with sec-

⁹⁶⁶ *Id.* at 152, 35 U.C.C. Rep. at 1462; see also *Eastern Air Lines*, 532 F.2d at 973, 19 U.C.C. Rep. at 365 (purposes of section 2-607 compel application of notice requirement to late delivery cases).

⁹⁶⁷ 669 F.2d 1106, 33 U.C.C. Rep. 1 (6th Cir. 1982).

⁹⁶⁸ *Id.* at 1114-16, 33 U.C.C. Rep. at 11-14.

⁹⁶⁹ *Id.*, 33 U.C.C. Rep. at 11-14.

⁹⁷⁰ U.C.C. § 2-607(3)(a).

⁹⁷¹ A credible threat may increase the chances of settlement. On the other hand, it may cause the other party to take an inflexible position. The evidence is inconclusive on this point. The strict standard may be superior, however, at providing the seller an incentive to cure the breach because it makes a lawsuit more imminent. See Note, *supra* note 960, at 547.

⁹⁷² See *id.* at 545.

tion 2-607(3)(a)'s policies.⁹⁷³ The seller may not know that the goods arrived late, that "time is of the essence," or that the buyer suffered harm. In continuing-use cases, on the other hand, initial notice that the transaction is troublesome should suffice. Such notice would provide the seller with the opportunity to inspect the goods, to enter into settlement negotiations, or to supply conforming goods.

2. Reasonable Time

The timeliness of notice depends upon the commercial context of the transaction, the past conduct of the parties, and the discoverability of the defect.⁹⁷⁴ Although the reasonable time requirement turns upon the facts of each case, the policies behind the Code's notification requirement provide some indication of the requirement's boundaries.

Comment 4 takes the position that consumers should have more time than commercial buyers because "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."⁹⁷⁵ Thus, the Code's "reasonable time" requirement turns initially not upon the conduct and circumstances of the case, but upon the status of the parties.

Beyond this initial distinction, the Code provides few guidelines other than those derived from the policies behind the notice requirement. For example, where the goods are perishable, the buyer must often provide notice in time to allow the seller an opportunity to inspect.⁹⁷⁶ Additionally, good faith and the policy of encouraging the parties to cure defective goods suggest that the buyer should have more time to notify the seller of breach where the parties have attempted to remedy the defect.⁹⁷⁷ Furthermore, although some courts have allowed consumers to satisfy the notice requirement by filing a complaint,⁹⁷⁸ the majority apparently reject such a view.⁹⁷⁹

⁹⁷³ See *supra* notes 947-50 and accompanying text for discussion of the policies underlying the notification requirement.

⁹⁷⁴ See U.C.C. § 2-607 comment 4.

⁹⁷⁵ *Id.*

⁹⁷⁶ Cf. *Willmar Cookie Co. v. Pippin Pecan Co.*, 357 N.W.2d 111, 39 U.C.C. Rep. 1249 (Minn. 1984) (notice within four or eight days of discovery of moldy pecans sufficient).

⁹⁷⁷ See *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 277-78, 38 U.C.C. Rep. 469, 473-75 (D. Del. 1984) (notice of six to eight months subsequent to installation of defective buffing machine sufficient if delay in notice resulted from efforts by both parties to find solution to the machine's defects).

⁹⁷⁸ See *Shooshanian v. Wagner*, 672 P.2d 455, 37 U.C.C. Rep. 55 (Alaska 1983).

We . . . are of the opinion that a complaint filed by a retail consumer within a reasonable period after goods are accepted satisfies the statutory notice requirement. The filing of a complaint is certainly not a bar to the negotiation and settlement of claims. To the contrary, the prospect of

Allowing a party to satisfy the notice requirement by filing a complaint removes the seller's incentive to inspect the allegedly damaged goods and discourages negotiated settlement.

Beyond these general observations, the timeliness of notification will turn upon the facts of the case. The Code's notice provision is in general enough terms to adapt to a variety of circumstances. Given the open-endedness of section 2-607(3)(a), the parties may wish to specify in the sales contract whom the buyer must notify, what the notice must contain, and when the notice must be provided.⁹⁸⁰

C. The Statute of Limitations—Section 2-725

Section 2-725 of the Code governs the period of limitations for commercial warranties.⁹⁸¹ Application of this section typically

going to trial is often a powerful incentive to a defendant to investigate the claims against it and to arrive at a reasonable agreement. A defendant may more easily and effectively prepare for either settlement or trial when it may compel discovery and so determine for itself the basis for a plaintiff's claims of liability. Allowing a consumer's complaint to serve as notice will not prevent a defendant manufacturer from raising the issue of timeliness if it has been prejudiced by an unreasonable delay.

Id. at 462, 37 U.C.C. Rep. at 59-60. Whatever the merits of this argument, the court failed to address the policy of providing the seller an opportunity for cure prior to litigation. *See also* Pace v. Sagebrush Sales Co., 560 P.2d 789, 792, 21 U.C.C. Rep. 490, 493-94 (Ariz. 1977) (filing of complaint can but does not always satisfy notice requirement).

⁹⁷⁹ *See, e.g.,* Voboril v. Namco Leisure World, Inc., 24 U.C.C. Rep. 614 (Conn. Super. Ct. 1978) (filing of complaint does not satisfy section 2-607(3)(a)); Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507, 512-13, 28 U.C.C. Rep. 1249, 1258-59 (Alaska 1980) (same); *see also* 3 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 22-11, at 308-10 (4th ed. 1974) ("The notice of the breach of warranty that is contemplated by § 2-607(3) does not contemplate the buyer delivering a summons and complaint to the seller as constituting notice. Section 2-607(3) provides no remedy for a breach of warranty until the buyer has given notice, therefore, summons and complaint cannot constitute notice."); *cf. Shooshonian*, 672 P.2d at 462, 37 U.C.C. Rep. at 59 (view that pleadings satisfy notice requirement is minority view).

⁹⁸⁰ *Cf. T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 364-66, 30 U.C.C. Rep. 865, 902-05 (5th Cir. 1980) (contract provision requiring notice of breach to be sent within ten days by registered mail and requiring sample of the nonconforming goods to be sent within twenty days reasonable under section 1-102(3)). The parties may agree to a stricter notice requirement than that imposed by the Code, provided such a requirement is not unreasonable. *See Prompt Elec. Supply Co. v. Allen-Bradley Co.*, 492 F. Supp. 344, 347-48, 29 U.C.C. Rep. 1287, 1289-90 (E.D.N.Y. 1980) (notice insufficient as matter of law where buyer failed to provide written notice upon discovery of defect as required by contract).

⁹⁸¹ (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery

poses few problems: it simply bars a buyer from bringing an action for breach of warranty more than four years after tender of delivery. This straight-forward rule forces buyers to sue when evidence is most readily available and allows sellers to continue with their businesses without fear of suit after a reasonable definite period.⁹⁸² Nevertheless, two complications to the rule's application sometimes develop: determination of the timing of accrual and modification of the limitations period.

1. *Timing of Accrual*

Subsection 2-725(2) provides that the "cause of action accrues when the breach occurs." Breach usually occurs upon tender of delivery, "presumably because the condition of the goods at the time of delivery is central."⁹⁸³ Where products obviously breach a warranty at the time of delivery, section 2-725 applies in a straightforward manner.⁹⁸⁴

Unfortunately, not all breaches are apparent, or even discoverable, at the time of delivery.⁹⁸⁵ In such cases, buyers have argued for application of the "discovery rule,"⁹⁸⁶ under which the limitations period does not begin to run until a buyer could discover the

of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

U.C.C. § 2-725.

⁹⁸² The drafters' comment states that section 2-725 provides needed uniformity and declares the four-year period "the most appropriate to modern business practice" because it "is within the normal commercial record keeping period." U.C.C. § 2-725 comment. *But see Kleiderfabrik v. Peters Sportswear Co.*, 483 F. Supp. 1228, 1235, 29 U.C.C. Rep. 534, 543-44 (E.D. Pa. 1980) (does not permit destruction of records after four years in all cases, and particularly not in case of ongoing dispute involving goods owned by third parties).

⁹⁸³ Special Project, *supra* note 1, at 270.

⁹⁸⁴ *See, e.g., Anderson v. Deere & Co.*, 622 F. Supp. 290, 293, 42 U.C.C. Rep. 460, 461 (D. Colo. 1985) (warranty claims of parties not involved in initial sale barred because limitations period accrued at time of initial tender of equipment).

⁹⁸⁵ *Cf. Spring Mills, Inc. v. Carolina Underwear Co.*, 87 A.D.2d 524, 525, 448 N.Y.S.2d 10, 11, 33 U.C.C. Rep. 597, 598 (N.Y. App. Div. 1982) (statute of limitations for claim involving fabric treated with banned chemical began to run when fabric delivered, not when treatment banned).

⁹⁸⁶ *See, e.g., H. Hirschfield Sons, Co. v. Colt Indus. Operating Corp.*, 107 Mich. App. 720, 723-24, 309 N.W.2d 714, 715, 32 U.C.C. Rep. 140, 142 (1981) (rejecting argument for discovery rule absent specific warranty of future performance); *Coody v. A.H. Robins Co.*, 696 S.W.2d 154, 156, 41 U.C.C. Rep. 1735, 1737 (Tex. Ct. App. 1985) (discovery

breach. Although section 2-725(2) expressly rejects this interpretation, some courts have nevertheless circumvented the section's language by delaying accrual under subsection (4)'s tolling provision.⁹⁸⁷

Subsection (2) excludes from the general rule any warranty that "explicitly extends to future performance of the goods [where] discovery of the breach must await the time of such performance."⁹⁸⁸ In such a case, the limitations period begins to run not at tender of delivery, but rather "when the breach is or should have been discovered."⁹⁸⁹ This exception applies only to an explicit future performance extension,⁹⁹⁰ and the "basic tension between the words 'implied' and 'explicit'"⁹⁹¹ usually leads courts to bar causes of action for "future" implied warranties.⁹⁹² "An implied warranty, by

rule inapplicable because it "speaks only of discovery of the injury" by IUD not of plaintiff's discovery that IUD was a defectively designed Dalkon Shield).

The discovery rule commonly refers to the point at which the breach was reasonably discoverable, not necessarily the time at which the plaintiff actually discovered it. *Id.*, 41 U.C.C. Rep. at 1735.

⁹⁸⁷ See *Richardson v. Car Lot Co.*, 10 Ohio Misc. 2d 32, 462 N.E.2d 459 (Mun. Ct. 1983) (limitations period tolled while seller kept automobile for repair for unreasonable period of time; warranty only runs while buyer had use of vehicle). Some states have changed subsection (2). See U.C.C. § 2-725(2), 14 U.L.A. 525-26 (1976) (in Alabama and Maine, cause of action accrues at time of injury; in South Carolina, cause of action accrues when breach is or should have been discovered); see also *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 692-93, 399 N.E.2d 1355, 1362, 28 U.C.C. Rep. 336, 347 (1980) (Simon, J., concurring) ("In determining whether to apply the discovery doctrine to a statute of limitation, competing interests must be balanced: the increased difficulties of proof which accompany the passage of time against the hardship to the injured plaintiff who neither knows nor should have known of the right to sue. Because we are dealing with the Uniform Commercial Code, we should also consider the important interests of uniformity of result and commercial certainty.") (citations omitted).

⁹⁸⁸ U.C.C. § 2-725(2).

⁹⁸⁹ *Id.* Cf. *Knox*, 80 Ill. App. 3d at 692, 399 N.E.2d at 1361, 28 U.C.C. Rep. at 346 (Simon, J., concurring) (in implied warranty of fitness for a particular purpose case, statute of limitations not tolled to time of discovery or repair because "[t]he covenant to repair was not an explicit guarantee of future performance").

⁹⁹⁰ See, e.g., *O'Brien v. Eli Lilly & Co.*, 668 F.2d 704, 32 U.C.C. Rep. 1502 (3rd Cir. 1981) (DES-induced cancer claim barred by four year statute of limitations because no showing of warranty explicitly extending to future performance); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 821, 25 U.C.C. Rep. 65, 77-78 (6th Cir. 1978) (seller's express warranty of machine explicitly extended to future performance so limitations period did not begin to run until defect was or should have been discovered; nevertheless, suit barred because brought after limitations period ended), *cert. denied*, 441 U.S. 923 (1979); *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S.2d 888, 30 U.C.C. Rep. 1014 (N.Y. App. Div. 1980) (contract for computer sale subject to buyer's final approval of programming extended to future performance to the extent that the contract was not performed until plaintiff approved programming).

⁹⁹¹ *City of Carlisle v. Fetzer*, 381 N.W.2d 627, 629, 42 U.C.C. Rep. 1676, 1678 (Iowa 1986).

⁹⁹² See *Stoltzner v. American Motors Jeep Corp.*, 127 Ill. App. 3d 816, 469 N.E.2d 443, 39 U.C.C. Rep. 907 (1984) (future performance warranties require explicit exten-

its very nature, cannot *explicitly* extend to future performance."⁹⁹³

Because the timing of accrual turns on tender of delivery, the determination of when tender occurs is critical. For example, when the seller agrees to install a good, tender of delivery usually occurs when the seller completes installation.⁹⁹⁴ Similarly, when the seller agrees to replace goods or parts, the cause may accrue upon tender of delivery of the replacement.⁹⁹⁵ Additionally, complete tender of delivery goods when the seller delivers in multiple shipments must often await the final delivery.⁹⁹⁶

2. *Period of Limitation*

A buyer normally has four years from the time the cause of action accrues to commence litigation.⁹⁹⁷ Section 2-725(1) permits the parties to shorten the statutory period in their original agreement, but not to extend the period.⁹⁹⁸

sion and implied warranties by definition not explicit); Safeway Stores, Inc. v. Certainteed Corp., 687 S.W.2d 22, 24, 41 U.C.C. Rep. 46, 47 (Tex. Ct. App. 1984) (cannot explicitly extend to future performance warranty limited from roofing supplier's advertisement of product as "bondable up to 20 years"), *rev'd on other grounds*, 710 S.W.2d 544, 1 U.C.C. Rep. 2d 1237 (Tex. 1986); *see also Knox*, 80 Ill. App. 3d at 692, 399 N.E.2d at 1362, 28 U.C.C. Rep. at 347 (Simon, J., concurring) ("the interests of equity do not favor the application of the discovery rule to breaches of implied warranties").

⁹⁹³ *Safeway*, 687 S.W.2d at 24, 41 U.C.C. Rep. at 47 (emphasis in original).

⁹⁹⁴ *See Dowling v. Southwestern Porcelain, Inc.*, 237 Kan. 536, 544, 701 P.2d 954, 960, 41 U.C.C. Rep. 127, 132 (1985) (under contract for sale of completed silo, tender of delivery not complete until silo installed); *Unitron Graphics, Inc. v. Mergenthaler Linotype Co.*, 75 A.D.2d 783, 428 N.Y.S.2d 243, 29 U.C.C. Rep. 129 (N.Y. App. Div. 1980) (tender of delivery of equipment occurred when installation was complete); *Jandreau v. Sheesley Plumbing & Heating Co.*, 324 N.W.2d 266, 271, 34 U.C.C. Rep. 785, 790 (S.D. 1982) (under contract for sale and installation of irrigation system, tender of delivery for section 2-725 purposes occurred when installation complete).

⁹⁹⁵ *See Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 36 U.C.C. Rep. 87 (4th Cir. 1983) (glass originally installed in 1974 replaced by seller in 1977, but replacement also discolored; buyer's breach of implied warranty claim accrued when replacement glass tendered). *But see Gillette Dairy, Inc. v. Mallard Mfg. Corp.*, 707 F.2d 351, 36 U.C.C. Rep. 860 (8th Cir. 1983) (action barred even though final replacement, which took place three years after original tender, occurred two years before suit).

⁹⁹⁶ *See Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261, 1266, 36 U.C.C. Rep. 1222, 1227 (D. Del. 1983) (where 40 expansion joints ordered, statute of limitations began to run upon delivery of last of them to job site); *cf. U.C.C. § 2-307* ("Delivery in Single Lot or Several Lots"); *Id.* § 2-612 ("Installment Contract"; Breach").

⁹⁹⁷ Mississippi and Wisconsin use a six year period of limitations; Oklahoma substitutes a five year period. U.C.C. § 2-725, 1A U.L.A. 525-26 (1976).

⁹⁹⁸ *See, e.g., Snyder v. Gallagher Truck Center*, 89 A.D.2d 705, 453 N.Y.S.2d 826, 34 U.C.C. Rep. 185 (N.Y. App. Div. 1982) (parties could limit period of limitation to one year); *Jandreau v. Sheesley Plumbing & Heating Co.*, 324 N.W.2d 266, 267, 34 U.C.C. Rep. 785, 786 (S.D. 1982) (limited by parties to one year period). *But see Commissioners of Fire Dist. No. 9 v. American La France*, 176 N.J. Super. 566, 424 A.2d 441, 31 U.C.C. Rep. 583 (1980) (section 2-725 prohibits extending limitations period beyond four years in original agreement, but not in subsequent agreements between the parties); *Suntogs of Miami, Inc. v. Burroughs Corp.*, 433 So. 2d 581, 36 U.C.C. Rep. 557 (Fla. Dist. Ct.

In addition to enforcing express agreements, several courts apply a "repair estoppel" doctrine to alter the statutory period.⁹⁹⁹ The doctrine tolls the period when the defendant offers to repair the breach. For example, a court would apply the doctrine if the buyer of an item could prove that the seller had represented that repairs would cure its defect.¹⁰⁰⁰ However, "mere attempts to repair are not sufficient. There must be representations made by defendant as to the curing effect of the repairs."¹⁰⁰¹

Other courts reject the repair estoppel doctrine.¹⁰⁰² For example, in *Kemp v. Bell-View, Inc.*¹⁰⁰³ a Georgia court rejected the argument that the seller's repeated promises to repair or replace certain windows tolled the statute of limitations for the buyer's claim for property damage allegedly caused by the defective windows. The court reasoned that, regardless of the promises of the seller to remedy the situation, "[t]he windows were part of the initial construction of the home. Therefore, the cause of action would have accrued at the time of the allegedly defective construction."¹⁰⁰⁴

Section 2-725 and its exceptions may dramatically affect individual warranty lawsuits. Nevertheless, they do not affect the war-

App. 1983) (Florida law prohibits shortening section 2-725 limitations period by contract), *quashed*, 472 So. 2d 1166, 41 U.C.C. Rep. 498 (Fla. 1985).

Several states have altered the modification rule. See U.C.C. § 2-725, 1A U.L.A. 525-26 (1976 & Supp. 1987) (Colorado, North Carolina, South Carolina, South Dakota, and Wisconsin).

⁹⁹⁹ See, e.g., *Colorado-Ute Elec. Ass'n, Inc. v. Envirotech Corp.*, 524 F. Supp. 1152, 33 U.C.C. Rep. 965 (D. Colo. 1981) (cause of action for breach respecting emission control equipment tolled due to promises and efforts to repair); *Little Rock School Dist. v. Celotex Corp.*, 264 Ark. 757, 574 S.W.2d 669, 25 U.C.C. Rep. 666 (1978) (statute tolled so long as vendor insists defect is reparable and attempts to repair), *reh'g granted sub nom.* *Little Rock School Dist. v. Matson, Inc.*, 264 Ark. 768, 576 S.W.2d 709 (1979); see also *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S.2d 888, 30 U.C.C. Rep. 1014 (N.Y. App. Div. 1980) (contract required repair by defendant, hence cause of action did not accrue until defendant admitted he could not repair).

¹⁰⁰⁰ See *Laurita v. International Harvester*, 32 Pa. D. & C.3d 563, 41 U.C.C. Rep. 133 (Ct. C.P. 1983).

¹⁰⁰¹ *Id.* at 565, 41 U.C.C. Rep. at 134. The *Laurita* court embraced the repair estoppel doctrine after first noting that the Pennsylvania appellate courts had yet to rule on it. *Id.* at 564, 41 U.C.C. Rep. at 134. Since *Laurita*, one appellate court has rejected the doctrine without citing the lower court decision. See *Ranker v. Skyline Corp.*, 342 Pa. Super. 510, 517, 493 A.2d 706, 709-10, 41 U.C.C. Rep. 476, 480 (1985) ("The statute of limitations will not be tolled or extended by good faith efforts made by a seller to correct alleged defects in his product. Any other rule would discourage attempts to correct defects in products sold pursuant to warranty.") (citations omitted).

¹⁰⁰² See, e.g., *Kemp v. Bell-View, Inc.*, 179 Ga. App. 577, 346 S.E.2d 923, 2 U.C.C. Rep. 2d 178 (1986) (claim for window damage barred despite repeated promises of repair); *Poppenheimer v. Bluff City Motor Homes*, 658 S.W.2d 106, 38 U.C.C. Rep. 167 (Tenn. Ct. App. 1983) (dealer's attempts to repair motor home did not toll statute of limitations).

¹⁰⁰³ 179 Ga. App. 577, 346 S.E.2d 923, 2 U.C.C. Rep. 2d 178 (1986).

¹⁰⁰⁴ *Id.* at 578, 346 S.E.2d at 925, 2 U.C.C. Rep. 2d at 179.

warranties themselves because a statute of limitations affects only the timing of suits and not their substance. Consequently, in the majority of situations, applying section 2-725 to commercial warranty actions remains a relatively straightforward matter.

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