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Some Thoughts about Warranty Law: Express and Implied Warranties

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SOME THOUGHTS ABOUT WARRANTY LAW:
EXPRESS AND IMPLIED WARRANTIES*

RICHARD A. LORD**

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*The original title of this article was to be *Some Thoughts About Warranty Law in North Dakota, Part Two: Express and Implied Warranties*. Due to the time between the publishing of Part One and this article, and the modified scope of this article, the title has been changed to reflect a treatment of warranty law not limited specifically to North Dakota law.

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I. INTRODUCTION

This article will conclude the author's consideration of warranty law in North Dakota, which began with an explanation of some of the more interesting aspects of the warranty of title.¹ It is the goal of this article to explore some of the problems that occur with respect to express and implied warranties which arise in connection with the sale of goods. To that end, the article will first

1. Lord, *Some Thoughts about Warranty Law in North Dakota, Part One: The Warranty of Title*, 53 N.D.L. REV. 537 (1977).

discuss the way in which these warranties arise, including their history and status, some of the more recent developments in this state, and finally probable future prospects. The practitioner should be aware of relatively recent federal legislation, the Magnuson-Moss Federal Trade Commission Improvement Act,² which will greatly expand the applicability of implied warranties. A full discussion of this federal law is beyond the scope of this article.³ In addition, the recent developments in the law of strict liability and products liability which complement and overlap warranty law are beyond the scope of this article.⁴

II. EXPRESS WARRANTIES

Express warranties have existed longer than any other but the warranty of title.⁵ Because express warranties are usually intentionally created by the parties and are not some accident of fate⁶ or implication of positive law,⁷ their boundaries have remained relatively stable over the years, and the rules of law governing them have changed very little. Nevertheless, the codification of these boundaries and rules, first in the Uniform Sales Act and more recently in the Uniform Commercial Code, has provided some expansion of the use of such warranties as well as some clarification of their hazier applications.

2. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 95-558, 92 Stat. 2130 (1978); Pub. L. No. 94-299, § 2, 90 Stat. 588 (1976); Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified in scattered sections of 15 U.S.C.) [hereinafter cited as the "Act"].

3. The Act gives the Federal Trade Commission the power to require that, when a consumer product is sold with a written warranty, the warranty must be readily understandable as to its terms and conditions, even to the extent of making the warranty available prior to purchase. The Act further requires that all written warranties on consumer products be designated as either "full" or "limited," depending upon whether the warranty meets the federal minimum standards. Whether the warranty is full or limited, no disclaimer or modification of implied warranties is permissible if a written warranty is given. Implied warranties can be limited in duration to the duration of a written limited warranty, if reasonable. The effect is to make the Uniform Commercial Code implied warranties significantly more important, since in many instances they will no longer be disclaimable. The Act encourages informal dispute settlement and requires resort thereto if an informal dispute settlement procedure approved by the Federal Trade Commission is set up prior to the commencement of any civil action. Beyond that, the Act confers a cause of action on any consumer for failure to comply with any obligation of the Act, and gives state and federal courts concurrent jurisdiction, subject to stiff jurisdictional limits for federal courts. The Act also allows for a grant of attorney's fees. The Act, *supra* note 2.

For additional aspects of the Act and the regulations enacted pursuant thereto, see 16 C.F.R. §§ 700.1-703.8 (1980).

4. See, e.g., Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME LAW. 118 (1978).

5. This is true in North Dakota as it is generally. While warranty of title actions existed as early as 1876, see *Cheatham v. Wilber*, 1 Dak. 335, 46 N.W. 580 (1876), the first non-title case was decided in 1885. See *J.I. Case Threshing Mach. Co. v. Venum*, 4 Dak. 92, 23 N.W. 563 (1885). It is surmised that warranty of title actions first arose because they had to do not only with the quality of goods *in futuro*, but also with the purchaser's right to keep the goods *in presenti*.

6. See U.C.C. § 2-313(2) [N.D. CENT. CODE § 41-02-30(2) (1968)]. The provisions of the Uniform Commercial Code are found in title 41 of the North Dakota Century Code. N.D. CENT. CODE tit. 41 (1968 & Supp. 1979). Citations to both the U.C.C. and the North Dakota Century Code will be given in this article, except when referring only to the official comments to the U.C.C., which are not contained in the Century Code.

7. See U.C.C. §§ 2-314, 2-315 [N.D. CENT. CODE §§ 41-02-31, -32 (1968)].

A. CREATION OF THE EXPRESS WARRANTY

1. Creation by Affirmation of Fact or Promise

Express warranties under the Uniform Commercial Code arise in much the same way as they did under the prior statutes and at common law. Section 2-313⁸ envisions the creation of warranties by the seller,⁹ who makes affirmations of fact or promises which relate to the goods being sold.¹⁰ Provided that the affirmation of fact becomes “part of the basis of the bargain,” an express warranty that the goods will conform to the promise or affirmation is thereby created.¹¹

The requirement of an affirmation or promise differs scantily, if at all, from prior law, although it is clear that the Code exacts a clearer articulation of precisely what will create a warranty.¹² All that is necessary is that there be an affirmation of fact or a promise. There will on occasion be difficulty in determining what qualifies as an affirmation of fact, a difficulty not greatly alleviated by the

8. Section 2-313 of the Uniform Commercial Code provides:

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 “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313 [N.D. CENT. CODE § 41-02-30 (1968)].

9. In the ordinary case, the buyer’s “warranties” or promises relate not to quality but generally to payment of the price and preservation of the goods. The only time this would not be the case is when the buyer is also the seller, as with a casual exchange of goods, or, more frequently, in the trade-in situation. It seems clear that when an individual contracts with a car dealer for the sale of an automobile, for example, most people would characterize the dealer as the seller and the individual as the buyer, and focus on the warranties created from that perspective. Where the “buyer” is trading in goods, however, he may also find himself in the position of a seller, and probably should be held liable if he creates any warranties which are subsequently breached. *See Greene v. Hyden*, 273 Ky. 783, 117 S.W.2d 985 (1938). In *Greene*, defendant agreed to put a new boiler extension on the boiler he had traded to plaintiff. Defendant also agreed to put the boiler engine and boiler in good running condition. The court held that the defendant had warranted that the engine and boiler would be in good running condition when he turned them over to the plaintiff.

At least part of the reason for imposing the warranty liability traditionally exists because the seller is in the best position to know the capabilities and limitations of the items sold; when the buyer is trading in goods, he clearly is in such a position.

10. U.C.C. § 2-313(1)(a) [N.D. CENT. CODE § 41-02-30 (1)(a) (1968)].

11. *Id.*

12. In most North Dakota cases, the courts have been called upon to interpret written warranties which were clearly intended to have some effect; to determine whether a warranty had been breached, given that it had been made; or to determine whether the buyer had observed the prerequisites to recovery based upon the warranty, such as giving notice or allowing an opportunity to repair.

admonitions in section 2-313(2) that no specific intention to make a warranty is required¹³ and that affirmations as to value and opinions or commendations do not create warranties.

It is safe to say that certain words, especially those that are promissory in character, will create an express warranty. Thus, there is no question that the use of the words "guaranty," "warranty," "promise," "affirm," even if followed by words of limitation, value, or opinion, will aid a court in imposing warranty liability.¹⁴ It is equally clear that some claims are so clearly based on opinion or assertions of value that reasonable minds could not seriously consider them to create express warranty liability.¹⁵ It is

In the handful of cases dealing with express warranties which arose other than by a writing, the courts had little or no trouble imposing liability (or at least potential liability), although not always under the rubric of express warranty. *See, e.g.,* Dowagiac Mfg. Co. v. Mahon, 13 N.D. 516, 101 N.W. 903 (1904) (dictum that a sample could create an implied warranty); Northwestern Cordage Co. v. Rice, 5 N.D. 432, 67 N.W. 298 (1896) (sale of "7,000 pounds of pure Manilla twine" as a description of goods created an implied warranty that the goods would meet the description); Canham v. Plano Mfg. Co., 3 N.D. 229, 55 N.W. 583 (1893) (oral express warranty creates potential for liability provided plaintiff can prove compliance).

13. *Cf.* Halley v. Folsom, 1 N.D. 325, 48 N.W. 219 (1891). In *Halley*, the first North Dakota decision dealing with a latent defect, the court stated:

It is entirely competent, however, for the vendor, in an executory contract of sale, to make an absolute warranty of the quality of the goods. It is purely a question of intent. If he intend [sic] to extend the warranty beyond the delivery, and make himself responsible for any damages that may result in case the goods are not as represented, and-if the other party so understands it, he is bound. In this respect the law is the same whether the contract of sale be executory or *in praesenti*.

Id. at 327, 48 N.W. at 219-20.

14. The clearest case of warranty being created is found in oral or written warranties denominated as such. But suppose the word "guaranty" is used, followed by a seemingly innocuous phrase: "We guarantee you will be delighted or your money back." Clearly no warranty of quality is given or intended, although certainly some warranty (as to personal satisfaction) is made, and confers certain rights on the buyer. A still closer case exists when the qualities of the product are touted, but in such a fashion as to leave doubt as to exactly what is being promised: "We guarantee that Blammo powder will get your wash cleaner, whiter than the leading powder." Again, it's likely that an express warranty is created, but determining whether the product conforms is again highly subjective.

Finally, there are those phrases which create warranty because of the words used, even though none was intended. *See, e.g.,* Hazelton Boiler Co. v. Fargo Gas & Elec. Co., 4 N.D. 365, 61 N.W. 151 (1894). In *Hazelton Boiler*, plaintiff sold defendant a boiler which was expressly warranted to evaporate ten pounds of water for every pound of coal "which we guaranty to be a saving of at least twenty per cent in fuel over any horizontal tubular boiler." *Id.* at 366, 61 N.W. at 152. The boiler did evaporate ten pounds of water per pound of coal, but did not decrease fuel consumption by twenty per cent compared to defendant's horizontal tubular boiler. The defendant failed to complete payment of the price, urging that the guaranty of twenty percent savings created an express warranty. The plaintiff argued that it was mere puffing. The court reversed a judgment for plaintiff, finding that the "twenty percent" language was designed to convey a distinct and explicit representation, and was not merely puffing. *Id.* at 374, 61 N.W. at 154-55. It is possible that any time numbers are employed this result will occur, or that the use of the word "guaranty" provided the added incentive necessary to declare promotional talk a warranty. *Cf.* Boehm v. Fox, 473 F.2d 445 (10th Cir. 1973) ("guaranty" by affirmation that use of feed additive would increase milk production by twenty-five percent could constitute an express warranty"; *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D.W. Va. 1971) (statements that birth control pills were "virtually 100% effective" creates no express warranty that pregnancy will not occur); *Jorritsma v. Farmers' Feed & Supply Co.*, 277 Or. 499, 538 P.2d 61 (1975) (tag labeled "16% Dairy Feed" insufficient to establish express warranty); *Drier v Perfection, Inc.*, ___ S.D. ___, 259 N.W.2d 496 (1977) (sale of printing press with oral assertion that seller would make press work and "stand behind that one hundred per cent" sufficient to create an express warranty).

in the broad middle ground that problems most often arise, as where a seller describes his used refrigerator as in "good condition" and it turns out to require expensive repairs;¹⁶ or where a horse is said to be "sound," and is in fact ill;¹⁷ or where a barn is said to be of "first rate quality," and is not.¹⁸ While each case will ultimately turn on its peculiar facts, it generally seems safe to say that any statement of fact which is promissory, or which is reasonably believable and likely to be believed by a buyer, will be found to create an express warranty, rendering the seller liable for subsequent breach.

Moreover, the most recent cases suggest that express warranties, like their implied warranty and strict liability counterparts, are expanding, in terms of the types of affirmations which will create express warranties. Thus, for example, advertisement copy has recently been held to create an express warranty,¹⁹ and television advertisements may soon be included. In an interesting case decided by the United States Court of Appeals for the Second Circuit, a distributor who remained silent during a manufacturer's sales pitch was held to have adopted as his own the express warranties created by the manufacturer's pitch, especially since the pitch was part of a joint effort to sell the product.²⁰ It is probably not unreasonable to predict that by the end of this decade express warranty liability will be imposed for what has traditionally been considered puffing or opinion, in spite of the Code's explicit disavowal of the seller's responsibility in those circumstances.²¹

N.E.2d 627 (1976) (description of "75 ton Brownhoist" held not to create warranty that crane would lift 75 tons); *Whitmer v. Schneble*, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975) (oral statement that Doberman was docile held not to create express warranty in light of other written statements and common knowledge); *Carpenter v. Alberto Culver Co.*, 28 Mich. App. 399, 184 N.W.2d 547 (1970) (sales clerk's statement that several friends of the clerk had used a particular dye and that her own hair came out "very nice" and "very natural" created no express warranty); *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972) (guaranty of "perfect condition" does not create express warranty).

The clearest cases are probably those in which the seller hedges, either in response to a buyer's inquiry or of his own motion. A statement that "we do believe that we have the engine that will fill the bill in all categories" would not create express warranty liability when the engine was not suitable. *Matlack, Inc. v. Hupp Corp.*, 57 F.R.D. 151 (E.D. Pa. 1972). A statement by the seller that "maybe" dryer parts "might solve [the] problem" does not create warranty liability when the problem is not solved. *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 472 P.2d 816 (1970). A statement that a product *should* be able to perform a task does not warrant that ability expressly. *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976).

16. *Eddington v. Dick*, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (City Ct. of Geneva, Ontario County 1976) (held warranty created and breached).

17. *Cf. Sessa v. Riegler*, 427 F. Supp. 760 (E.D. Pa. 1977) (held no warranty was created because of equal position of buyer and seller).

18. *Bell v. Harrington Mfg. Co.*, 265 S.C. 468, 219 S.E.2d 906 (1975) (held sufficient affirmation of fact to create warranty).

19. *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo. Ct. App. 1976) (statement in seller's catalogue that floor covering would "absorb considerable flex without cracking"). *But see Salk v. Alpine Ski Shop, Inc.*, 115 R.I. 309, 342 A.2d 622 (1975) (advertisement may be proper ground for warranty, but plaintiff failed to show failure to live up to advertised facts).

20. *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974).

21. To the extent that warranty liability is a policing tool to ensure fairness of the bargain made

When this responsibility attaches, as it surely will, one might question whether it accords with the perception of warranty as resting "on 'dickered' aspects of the individual bargain,"²² or whether the perception has shifted to the use of warranties to prevent any unfairness in the distribution of goods.

Affirmation of fact or promise is perhaps the most complex means of creating an express warranty. It offers the greatest challenges to the ingenious practitioner, not only in discovering the seller's action which forms the warranty, but also in pleading and proving the action. The affirmation of fact or promise method, however, is by no means the only way in which express warranties are created. Two other specific methods of creating warranties exist, and, although they tend to be less troublesome, difficulties occasionally arise.

2. *Creation by Description*

Creation of express warranties by description occurs any time there is a description of goods in a sale. An express warranty is created that the goods will conform to the description.²³ Warranty by description was first recognized in North Dakota in a 1957 case in which the plaintiffs, piano dealers, were held to have breached their warranty that they were selling "new Ludwig pianos" when they were in fact selling second-hand damaged ones.²⁴

Because it is almost impossible to describe goods without also

by the parties, the expansion of liability into such areas seems both fair and consistent. If a seller makes claims about his product, a buyer should be entitled to believe them. Whether private civil litigation is the best solution to this problem is another matter. Because of the increasing sophistication of advertising techniques, and the broad media exposure given to manufactured products, any single episode of warranty creation could yield massive and widespread liability. Furthermore, the costs of individual or even class litigation would be immense in comparison to the likely benefits, both in terms of buyer recovery and judicial economy, at least until such actions gain acceptance on a large scale.

One relatively simple example will suffice. Children's television advertising often depicts activity which is at best misleading and at worst plainly false, and which would traditionally fall within the rubric of "puffing." The Federal Trade Commission and consumer activist groups have spent years and millions of dollars studying the problems of awareness and effect. Solutions, such as declaring all or certain types of advertising unfair trade practices, have not yet been attempted. If one considers children's advertising in terms of warranty, it is not difficult to imagine the characterization of much of children's advertising as an affirmation of fact or as promissory. Certainly there is little question that such advertisements become a part of the basis of the bargains which ensure a breach when affirmations are not fulfilled. Assuming that damages exist, a warranty action could be brought and would likely succeed. Such actions, class or individual, might force a solution more quickly and permanently than Federal Trade Commission fairness rules, but only at some cost of fairness to manufacturers.

22. U.C.C. § 2-313, Comment 1.

23. U.C.C. § 2-313(1)(b) [N.D. CENT. CODE § 41-02-30(1)(b) (1968)]. It is interesting to note that section 2-313 begins by indicating that express warranties can be created by the seller, and follows with subsection (a), which specifically makes promises of affirmations *by the seller* the basis for warranty. Subsection (b), however, dealing with warranty by description, and subsection (c), dealing with warranties created by samples or models, are not solely created through actions by the seller. These warranties will exist regardless of who describes the goods or produces the samples.

24. *Karzen v. Heitzmann*, 86 N.W.2d 514 (N.D. 1957).

making factual affirmations, there is a good deal of overlap between the express warranty by description and the warranty created by affirmation. Thus, when an automobile is sold as a "1980 Ford," there is a description and at least two affirmations of fact.²⁵ If the automobile turns out not to be a 1980 model or a Ford, the express warranty created by description and affirmation is breached. Because there is significant overlap, it is rare that courts will take the time to articulate the distinction between the two modes of creation. A distinction does exist, however, and is useful in those instances in which the description implies only factual representations. Thus, where the specifications for a steel truss on a greenhouse contained the descriptive language "20 PSF Snowload," the court had no trouble finding an express warranty that the structure would withstand pressure of twenty pounds per square foot, although it might have found it difficult to read into that language a promise or affirmation.²⁶ Virtually any description on a label or a container will create an express warranty that the goods will conform to the label description.²⁷ Thus, in a myriad of seed cases, express warranty liability has been imposed when seed is misdescribed and later fails to produce because of this misdescription.²⁸ There are also cases in which, but for the descriptive language, the warranty might fail because it purports merely to puff or opine.²⁹ Even in those cases, however, liability may exist, because the description, coupled with trade usage, is deemed to mean more than would mere words alone.³⁰ This

25. See *Crane v. Wood Motors, Inc.*, 53 Mich. App. 17, 218 N.W.2d 420 (1974) (airplane described as a 1969 model was in fact a 1968 model).

26. *S-C Indus. v. American Hydrophonics Sys. Inc.*, 468 F.2d 852 (5th Cir. 1972).

27. Cf. U.C.C. § 2-314(2) (f) [N.D. CENT. CODE § 41-02-31(2) (f) (1968)]: "Goods to be merchantable must be at least such as . . . conform to the promises or affirmations of fact made on the container or label if any."

28. See *Smith v. Oscar H. Will & Co.*, 51 N.D. 357, 199 N.W. 861 (1924) (alfalfa seed turned out to be sweet clover, held that, even though warranty disclaimed, there was a breach for failure to deliver goods contracted for). But see *Miller v. Klindworth*, 98 N.W.2d 109 (N.D. 1959) (disclaimer held valid when defendant is mere intermediary, and seed mislabeling is relied on by him in good faith). Whether *Miller* retains vitality under the Code is questionable. It is certainly valid to the extent that it allows disclaimer, but to the extent that it invokes the "good faith intermediary" as its rationale it seems inconsistent with the provisions of section 2-314, if not with the express warranty provisions as well.

For seed cases outside of North Dakota, see *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977); *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970); *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

A particularly interesting case from South Dakota suggests that, even where there is neither a true affirmation nor a true description, warranty liability is appropriate because of public policy and the clear implication of words. In this case an insecticide labeled "for control of corn rootworm larvae," and containing an express warranty that the contents conformed to the chemical description, was found to create warranty liability for the effectiveness of the insecticide in controlling rootworm. *Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975). The case probably extends section 2-313 to its outer limits.

29. See, e.g., *Axford v. Gaines*, 50 N.D. 341, 195 N.W. 555 (1923); *Leroy v. Hagen*, 44 N.D. 1, 175 N.W. 718 (1919).

30. *Shepard v. Top Hat Land & Cattle Co.*, 560 P.2d 730 (Wyo. 1977) (livestock sold as

suggests that courts will read contractual language in the manner intended by the parties, at least for purposes of imposing express warranty liability. It also suggests that a warranty by description often exists not because of the description itself but because of the meaning attached to it by the parties. This is consistent with the view that "the whole purpose of the law of [express] warranty is to determine what it is that the seller has in essence agreed to sell"³¹ and the buyer has agreed to buy.

3. *Creation by Sample or Model*

Clearly the easiest way to create an express warranty is by words, although it should now be apparent that often, either because words do not have fixed meanings or because people often use noncommittal words, even that which is easy becomes difficult. This is particularly true when the scope of the warranty is at issue. The question whether a warranty exists is usually factual, while the scope of the warranty, although closer to a legal question, is a mixed one, at least in the sense that in order to determine the scope of a warranty all of the facts and circumstances surrounding the transaction must be addressed.

Both of these questions are made easier when the express warranty arises in accordance with section 2-313(1)(c) by the use of samples or models, which provide a more static anchor on which to attach warranty liability than either descriptive or promissory words. The Code fails to define what is meant by the words sample and model, except in the official comment. That definition, distinguishing between samples, which are drawn from the bulk of the goods, and models, which are representations of the goods not drawn from their bulk,³² has been adopted by the courts to determine whether an express warranty is created.³³ This, however, is only the starting point, for even though material is drawn from bulk or is represented, there will almost always exist the factual question of whether the sample or model is being used to represent the qualities of the goods to be sold. Although the official comment suggests that the use of a sample or model creates a presumption that the parties will deal with the goods on those terms, it also recognizes that often samples or models are used for

"Choice" imports an express warranty by promise). It is questionable whether the description "choice" might also create (or negate) implied warranties by usage of trade. *See* U.C.C. §§ 2-314(3), 2-316(3) (c) [N.D. CENT. CODE §§ 41-02-31(3), -33(3) (c) (1968 & Supp. 1979)]. *Cf.* *Zappanti v. Berge Serv. Center*, 26 Ariz. App. 398, 549 P.2d 178 (1976) (court held that an agreement describing a vehicle as a 1969 model was not an express warranty that the vehicle's component parts were from that year).

31. U.C.C. § 2-313, Comment 4.

32. U.C.C. § 2-313, Comment 6.

33. *See Pacific Marine Schwabacher, Inc. v. Hydroswift Corp.*, 525 P.2d 615 (Utah 1974).

illustrative purposes only.³⁴ This dual function has created practical problems for courts faced with determining whether a warranty has been made.

In one recent case, the court indicated that the overriding factor in each case is not the production of a sample, but whether the parties intend to contract in accordance with the sample.³⁵ The court allowed admission of evidence to show that a sample of coal was not intended to warrant the probable quality of future coal mined but only to demonstrate the past quality. In another recent case,³⁶ a plastic model which was clearly used as representative of goods to be produced was held not to create a warranty of literal description. Thus, when the actual goods failed to meet the specifications exactly, the court nevertheless denied liability, at least absent expert testimony which the plaintiff failed to procure. Moreover, there is disturbing language in the case, apparently suggested by the Code comments, that any presumption which might arise in a sale by sample is significantly weaker when the sale is by model.³⁷ These cases suggest that, although the Code is explicit as to when and whether a warranty will arise, factual patterns do not always accommodate themselves to the statutory language. They also suggest, however, that courts are unwilling to apply the Code literally in this particular circumstance.

There are probably a number of reasons for this unwillingness by the courts, although none appears very satisfactory. The official comment, as noted earlier, purports to give more guidance here than in the other express warranty situations. The comment makes a clear distinction between samples and models which does not exist in the statute, not only by defining the two terms but by pointing clearly to their mercantile differences. Since samples are drawn from the goods themselves, and models are not, courts seem willing to exaggerate the differences, imposing warranty liability in the sample case but not in the case of models. Unfortunately, the comments are not the law, and the Code itself makes no textual distinction between the treatment of samples and models.

The reluctance to apply section 2-313(1)(c) literally probably also stems from the relative harshness of the Code rule when samples or models are at issue. Unlike the spoken or written word, which is capable of expansion, contraction, or interpretation, the tangible sample or model speaks for itself. Thus, a court confronted

34. U.C.C. § 2-313, Comment 6.

35. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977).

36. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975).

37. *Id.* at 1027.

with a sale with warranties created by description, affirmation, or promise is faced with a traditional judicial task: interpret the description, affirmation, or promise, apply that interpretation to the item sold, and determine whether the warranty was breached. With the warranty by sample or model, only the comparison and the determination are necessary, for the sample or model is not subject to interpretation. Either the item sold meets the quality of the sample or model or it does not. Such a rule is sometimes difficult for a court charged to do justice to apply, and still comport with the contract as intended by the parties. Thus the courts read exceptions into the statute, read certain rules out of the statute, or simply fail to find warranty liability because of a failure of proof.

The easiest of these techniques to apply is the failure of proof. As with warranty litigation generally, the burden of pleading and proving the breach of warranty as to goods that have been accepted is on the buyer.³⁸ To the extent that the gauge is not exact conformity, but rather whether the goods themselves lived up to the quality or characteristics of the sample or model, the buyer would be required to show not only a deviation from the sample or model, but also that the deviation caused the product's performance to be inferior to that of the sample or model.³⁹

In a recent case decided by the United States Court of Appeals for the Eighth Circuit, *Plasco, Inc. v. Free-Flow Packaging Corp.*,⁴⁰ although a deviation from sample was proved as to the purity of plastic pellets, the plaintiff's recovery was disallowed because he had failed to show that the damage resulted from the defect and not from miscalculation on his part.⁴¹ Unfortunately, this method of dealing with samples or models is derived from the faulty premise that all that is necessary is substantial conformity.

What makes the rule embodied in section 2-313(1)(c) so harsh is that it requires exact, not merely substantial, conformity. Some courts have apparently ignored this requirement to avoid liability in certain cases. Thus, for example, in *Plasco* the court found that there was no breach of warranty because the plastic delivered "generally conformed" to the sample shown.⁴² This, of course,

38. U.C.C. § 2-607(4) [N.D. CENT. CODE § 41-02-70 (4) (1968)]. As to goods rejected prior to acceptance, the seller has the burden of establishing conformity. See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 142, at 431 (1970) [hereinafter cited as NORDSTROM].

39. Thus, in *Blockhead* the buyer could show the deviation, but failed to demonstrate that the deviation caused the problems. 402 F. Supp. at 1027-29.

40. 547 F.2d 86 (8th Cir. 1977).

41. *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86, 90 (8th Cir. 1977). See also *Herman H. Sticht Co. v. Bradford Equip. Co.*, 8 U.C.C. REP. SERV. 842 (Pa. C.P. Chester County 1970).

42. 547 F.2d at 90.

reads into the statute a word which does not appear. The result is clearly defensible, although perhaps not justifiable, since the law of contracts generally does not require exact conformity, with the possible exception of express conditions. Why should the law of warranty insist on such obedience if the plaintiff gets substantially what he bargained for? The answer, if it is to be found at all, must lie in the fact that the sample (and less so the model) is the thing itself; to the extent that the plaintiff seeks that thing, he should be entitled to it. Once the decision is made that the sample was part of the basis of the bargain, warranty liability created by sample or model should probably be strict, and, because of the definite nature of the model or sample, even more strict than express warranty created by other means.

It has been suggested that one way to view the sample or model to avoid the strict approach is to determine its scope before determining liability.⁴³ The difficulty with this approach is that it requires a determination of not only whether a sample or model was intended to be a sample or model, but also to what extent. Thus, if a person purchasing 10,000 bricks were to be given one brick as a sample, he could not reasonably expect that all 10,000 would conform exactly as to texture, color, shape, and size.⁴⁴ Rather, he could and would expect that all of the bricks would share the common characteristics of brick, and that the sample brick would thus qualify as a "general" sample. The problem with this rationale is that the Code recognizes no distinction between general and specific samples. Here it would probably be better to disregard the use of the brick as a sample altogether and merely state that it was used representatively.⁴⁵ Under this rationale no express warranty liability attaches.

This highly restrictive approach is occasioned by the express language of the statute, for it requires that the "whole of the goods" conform to the sample. Nowhere else in the Code is there such an exact requirement; however, nowhere else do the parties contract along such specific, noninterpretable lines. Thus, any discussion in the cases or by commentators that only the majority⁴⁶ of the goods need conform, or that substantial or general conformity is sufficient, is probably in error, and unquestionably reads the word "whole" out of the Code.⁴⁷

43. NORDSTROM, *supra* note 38, § 72, at 223.

44. *Id.*

45. This is recognized by Nordstrom when he concedes that the one brick is not really a sample at all. *Id.* at 223-24.

46. See *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973) (express warranty by sample that the "bulk" shall conform).

47. The error, again, is at least understandable, if not forgiveable. It probably derives as much

If it is a subterfuge to deny liability on the basis of failure of proof, and error to omit from analysis the conformity of the whole to a sample or model, it is at least as unfortunate to read into the statute exceptions which do not exist. The most notorious of these is the exception to warranty creation based upon an examination of the sample or model by the buyer, which precludes reliance on additional express assertions by the seller. There is substantial surface appeal to the argument that, when the buyer examines a sample, model, or the thing itself as fully as he would like, he cannot thereafter rely upon express assertions made by the seller with respect to the goods. After all, the buyer and the seller have equal opportunity to notice discrepancies in the sample or model. To the extent that the buyer uses his own observations rather than the seller's, the seller should be relieved of some responsibility. The Code, however, confers no disclaimer here by examination, and none should be read into the provision.

The exception is rooted partly in pre-Code law and largely in common sense. "[I]f a presale inspection has revealed that the seller's assertions of fact were untruthful,"⁴⁸ there is no reason to hold him to any express warranty, without regard to whether it was created by affirmation, promise, description, or sample. The primary reason for the rule, however, is that if one has discovered that a thing is not true he no longer relies on its truth. Thus, it may be said that the basis for nonliability in the instance where examination reveals a defect is the buyer's inability to rely on the seller's assertions.⁴⁹ The problem with this rationale is that the Code no longer requires reliance in order to create express warranty liability.⁵⁰ Therefore, the fact that the buyer is no longer relying on the seller's assertions is of no import. Since he never had to rely, his lack of reliance should not prejudice him. Thus, the examination should not be held to undo warranties, since the premise that he need rely on the seller's assertions is faulty.

Beyond the superficial appeal of logic that would refuse to allow reliance on a known falsehood, there is the additional consideration that full inspection or examination explicitly operates to preclude implied warranties.⁵¹ While it is one thing to say that an

from the Code sections dealing with merchantability as from a common-sense feeling that, so long as the buyer gets essentially what he bargained for, no recovery is warranted. Compare section 2-314 and the comments thereto.

48. *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998, 1005 (D.C. Super. Ct. 1973).

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

50. *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966); *Elanco Prod. Co. v. Akin-Tunnell*, 474 S.W.2d 789 (Tex. Civ. App. 1971); *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1973). *See also* U.C.C. § 2-313, Comment 3.

51. Section 2-316(3) (b) provides as follows:

examination should preclude that which is implied to ensure fairness, it is another thing altogether to preclude express warranty formation at the exact moment the seller is urging the buyer forward with abandon. The courts therefore have generally declared that an examination will not undo an express warranty previously created.⁵² There are, however, decisions which are either to the contrary or lean precariously in that direction.⁵³

There may yet be a way to avoid the conundrum of imposing warranty liability when the defect is so obvious in the sample or model as to preclude the buyer's belief that the seller's assertions could be true. This involves a determination that, because the defect was so obvious, the buyer could no longer assert that the false attribute was part of the basis of the bargain.⁵⁴ This may amount to little more than a resurrection of the reliance rationale, but it is at least consistent with the Code language.⁵⁵ At the same time, it appears to allow for a more subjective approach to what is inherently a subjective problem. One must concede, however, that it still involves a large measure of weaseling.

One other item of interest should be noted with reference to the express warranty by sample. While much has been said about the strictness of this express warranty in application, its strictness has been directed solely at the seller. Thus, the earlier portion of this section laments the various methods that courts have employed to relax the harshness when the buyer is alleging breach. Before accusations of pro-buyer bias are made, it would be well to realize that the harshness is often reflected back upon the buyer. The buyer faces a hazard unexperienced elsewhere in contract law, at least since *caveat emptor* began its decline, whenever the sale is by sample. What the buyer sees is literally what he gets. That the goods do not meet the buyer's purpose is irrelevant.⁵⁶ As long as the goods conform to the sample, the seller's express warranty

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

U.C.C. § 2-316(3)(b) [N.D. CENT. CODE § 41-02-33(3)(b) (Supp. 1979)].

52. See *General Elec. Co. v. United States Dynamics, Inc.*, 403 F.2d 933 (1st Cir. 1968); *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1973); *Capital Equip. Enterprises Inc. v. North Pier Terminal Co.*, 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969); *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977); *Shepard v. Top Hat Land & Cattle Co.*, 560 P.2d 730 (Wyo. 1977).

53. See *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (1971); *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W. Va. 818, 156 S.E.2d 1 (1967).

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

55. U.C.C. § 2-313, Comments 6 & 7.

56. *But see* discussion of section 2-315 of the Code, *infra* at notes 417-35 and accompanying text.

obligation created by the sample is fulfilled.⁵⁷ This is true irrespective of whether the buyer's purpose is unique or not.

Thus, in *Mohasco Industries, Inc. v. Anderson Halverson Corp.*,⁵⁸ the court held that no express warranty had been breached when carpet purchased shaded excessively, since the buyer received exactly what he ordered in accordance with the description and sample.⁵⁹ In another case, where the buyer had used two generators for a period of time and ordered additional ones specifying that they should conform to the "samples" already owned, there was no breach of express warranty when there was no showing of nonconformity with the other generators.⁶⁰ In short, what the buyer received was what he ordered in accordance with the sample, and, so long as the parties were dealing on the basis of samples, there could be no liability.

That the strictness which inheres in a sale by sample is part of a two-edged sword may be small comfort to the seller or buyer thereby impaled. Nevertheless, in spite of the fact that the Code apparently fails to distinguish between express warranties created by words and those created by sample, the distinction of strictness in warranty by sample exists, and is in large measure occasioned by the fact that objects tend to be of a more definite nature than words.

The astute reader will notice that throughout the discussion of the creation of express warranties little has been said about what effect the affirmation, promise, description, or sample must have on the transaction. Does it make any difference if the buyer ignores all of the descriptions or promises, or buys without paying the slightest attention to the sample? For example, suppose a seller of polystyrene beads, to be sold to the buyer and formed into terrariums, allows the buyer to "test some samples." Suppose further that the buyer is primarily concerned with the capability of the beads to feed into his machinery, so that the clarity of the terrariums produced with the sample does not attract his attention (although in fact the terrariums so produced are crystal clear). The buyer purchases several thousand pounds of the plastic beads and subsequently learns that the beads do not feed well into his machines because of defects in the machines, although the beads are equal to the sample in size and shape. May the buyer now seek

57. This is where counseling comes in — where the sale is by sample, the watchword is silence. As long as the seller makes no additional promises or affirmations, he warrants only that the goods will conform to the sample.

58. 90 Nev. 114, 520 P.2d 234 (1974).

59. *Mohasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234 (1974).

60. *Herman H. Sticht Co. v. Bradford Equip. Co.*, 8 U.C.C. REP. SERV. 842, 844 (Pa. C.P. Chester County 1970).

to call off the transaction, claiming that the terrariums produced with the actual beads are not clear and that therefore an express warranty has been breached? The answer may be found either by analyzing backward, and asking whether the damages were caused by the defect, or forward, by asking whether the clarity was "part of the basis of the bargain." If clarity was part of the basis of the bargain, there is an express warranty created and breached, and, at the least, the buyer need not pay the full contract price. He may also be able to avoid further liability, and may even recover damages proximately caused by the breach.⁶¹

4. Basis of the Bargain: Effect of Affirmation, Promise, Description, or Sample on the Transaction

The "part of the basis of the bargain" language runs like a thread through the express warranty section, which explains the author's failure to address it directly before. If the affirmation, promise, description, or sample forms part of the basis of the bargain, the warranty is created. The problem, of course, is to define "basis of the bargain." The term is one which is more easily defined in the negative, by declaring what it is not, than in the positive. Thus, a majority of courts have held that the test is not whether the buyer has relied on the promise, affirmation, description, or sample,⁶² as was required by pre-Code law. It is

61. *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86 (8th Cir. 1977). In fairness to the court, their determination that damages were not causally linked was appropriate, and indeed crucial, since the plaintiff was seeking damages due to "down time," and the court found that the down time was not attributable to the defect. *Id.* at 89.

62. There are a number of indications that section 2-313 was intended to supplant the reliance requisite of the Sales Act. The most obvious of these is the fact that the phrase "basis of the bargain" is used in lieu of the word reliance. Additionally, official comment 3 indicates that, because affirmations of fact tend to be seen as descriptive, "no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." Furthermore, official comment 7 suggests that "the precise time when words of description or affirmation are made or samples are shown is not material." Thus, even post-delivery statements can create warranty. It therefore seems apparent that reliance cannot be a factor, since the sale will have been induced by other means and the buyer is not relying on the seller's assertions. Nevertheless, if those assertions are "part of the contract," according to comment 7 the warranty will exist. It should thus be fairly clear that the drafters meant to modify the old reliance test. Still, the area is said to be hopelessly confused, not only as to whether that intent existed, but as to the extent of the change. *See* J. WHITE & R. SUMMERS, *HANDBOOK OF THE UNIFORM COMMERCIAL CODE* 332-39 (2d ed. 1979) [hereinafter cited as *WHITE & SUMMERS*].

Thus, for example, the California Supreme Court, in *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975), after noting the change brought about by the Code, refused to decide whether reliance had been eliminated as a requirement, or whether the change merely reflected a shift of the burden from the buyer to prove reliance to requiring the seller to prove non-reliance. *Compare* *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966) (clearly indicating that reliance is no longer necessary) *with* *Fogo v. Cutter Laboratories, Inc.*, 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977) (indicating reliance is necessary).

The requirement of reliance has apparently been abandoned in favor of the ill-defined basis of the bargain standard in several jurisdictions. The reader should note that North Dakota is not among them. *See* *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (1975); *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974); *Brunner v. Jensen*, 215 Kan.

arguable that reliance should not play much of a role at all in making the determination, except that, if reliance exists and has been shown, a conclusive presumption should exist that the assertion became part of the basis of the bargain. The courts admittedly have not gone this far, although it is interesting to note that in many of the cases where liability has been found reliance has been shown, so that language disclaiming the need for reliance to meet the test is obiter.⁶³ Thus, it would appear that where reliance is demonstrated the basis of the bargain test is met.

The Code, in addition to its disinclination toward requiring the element of reliance, also envisions that basis of the bargain does not require a pre-sale or pre-delivery creation of warranties. In other words, the fact that the first mention of an attribute occurs after rather than before delivery does not, according to the official comment, preclude a warranty based thereon from being part of the basis of the bargain.⁶⁴ Although it is the author's belief that the comment's language should be adhered to, it is not at all difficult to see why it has not had an altogether spectacular reception when urged upon the courts.⁶⁵ Although the comment speaks of weaving the warranty-creating representations "into the fabric of the agreement,"⁶⁶ courts familiar only with the Emperor's old clothes will have (and have had) difficulty seeing the new ones, in spite of the insistence by the buyer that they are there. Still, as the clothes become older and more comfortable, more and more courts will begin to recognize their invisible threads.⁶⁷

416, 524 P.2d 1175 (1974); *Interco, Inc. v. Rاندustrial Corp.*, 533 S.W.2d 257 (Mo. Ct. App. 1976); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); *Elanco Prod. Co. v. Akin-Tunnell*, 474 S.W.2d 789 (Tex. Civ. App. 1971); *Cagney v. Coh*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1973).

The following courts still adhere to a reliance requirement: *Holdridge v. Héyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972). See also *Speed Fasteners Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977) (effect of non-reliance).

In addition, Pennsylvania probably requires reliance of some sort before recovery can be had, although the court framed the reliance more closely in terms of basis of the bargain. See *Sessa v. Riegler*, 427 F. Supp. 760 (E.D. Pa. 1977).

Finally, the Illinois courts have had trouble making up their minds, similar to California. See *Hrosik v. J. Keim Builders*, 37 Ill. App. 3d 352, 345 N.E.2d 514 (1976) (reliance essential); *Alan Wood Steel Co. v. Capital Equip. Enterprises, Inc.*, 39 Ill. App. 3d 48, 349 N.E.2d 627 (1976) (no particular reliance required); *Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976) (basis of the bargain generally equates with reliance).

63. See, e.g., *Brunner v. Jensen*, 215 Kan. 416, 524 P.2d 1175 (1974); *Interco, Inc. v. Rاندustrial Corp.*, 533 S.W.2d 257 (Mo. Ct. App. 1976).

64. U.C.C. § 2-313, Comment 7.

65. *Zoss v. Royal Chevrolet Inc.*, 11 U.C.C. REP. SERV. 527 (Ind. Super. Ct. 1972). But see *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976). See also *Hrosik v. J. Keim Builders*, 37 Ill. App. 3d 352, 345 N.E.2d 514 (1976). But see *Autzen v. John C. Taylor Lumber Sales Inc.*, 280 Or. 783, 572 P.2d 1322 (1977).

66. U.C.C. § 2-313, Comment 3.

67. See *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976); *Autzen v. John C. Taylor Lumber Sales Inc.*, 280 Or. 783, 572 P.2d 1322 (1977).

Having determined that the basis of the bargain does not require reliance, and that assertions made after delivery can meet the test, it is essential to attempt some definition of what it *does* require, or at least give some guidance as to how one can tell whether the "basis of the bargain" test is met. Others have tried to give substance to the concept, with mixed success. Thus, for example, the Code comments discuss the basis of the bargain as its "essence,"⁶⁸ and the comments later suggest that the test is whether the assertion is "fairly to be regarded as part of the contract."⁶⁹ If the reader sees the basis of the bargain test being diluted step by step, one can take small solace that at the comments' end all statements are to be considered bases of the bargain unless good reason suggests that they should not be.⁷⁰ All in all, while courts and lawyers reading the comments get little in the way of definition, there is a clear predilection, at the very least, to shift the burden to the seller to prove that his statements or actions were not intended to form part of the deal.⁷¹

Whether the drafters had difficulty articulating their meaning, or were merely being purposely vague to enable expansion and growth, courts which have dealt with the terminology have had some difficulty determining what the term means. Not wanting to fall too deeply into the "reliance" trap, the test nevertheless has been variously described as "essentially a reliance requirement";⁷² as one which "focuses upon [terms] . . . which clearly go to the essence, or the basic assumption, of the bargain between the parties";⁷³ as one in which the key is whether "the buyers entered the transaction with [the asserted attribute] in mind";⁷⁴ and as a test where the question is whether "[t]he words so used were meant to induce purchases."⁷⁵ Courts must consider the negotiations of the parties as a whole, particularly the buyer's concern⁷⁶ as to specifics which subsequently lead to seller's assurances. Thus, the majority of courts require at least that the buyer be aware of the seller's words or conduct which would create the warranty, although there is disagreement as to exactly what part that awareness

68. U.C.C. § 2-313, Comment 6.

69. U.C.C. § 2-313, Comment 7.

70. U.C.C. § 2-313, Comment 8. The comment explains that "common experience" will guide triers of fact in determining the issue vis-a-vis puffing and opinion.

71. *See* U.C.C. § 2-313, Comments 3-8. Note that this typically requires the seller to prove a negative fact.

72. *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa. 1977).

73. *Alan Wood Steel Co. v. Capital Equip. Enterprises, Inc.*, 39 Ill. App. 3d 48, 53, 349 N.E.2d 627, 632 (1976).

74. *Auto-Teria, Inc. v. Ahern*, 170 Ind. App. 84, _____, 352 N.E.2d 774, 781 (1976).

75. *Interco, Inc. v. Rاندustrial Corp.*, 533 S.W.2d 257, 263 (Mo. Ct. App. 1976).

76. *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977).

must play in the decision to buy.⁷⁷

a. Basis of the Bargain: The Pre-Sale Contribution and Expectation Test

The cases leave one with the impression that the basis of the bargain test is at best unclear, and not really susceptible to much greater clarity. The following test, however, is suggested to determine whether the basis of the bargain element is found: Was the asserted attribute one which contributed to the decision to buy the goods or one which, based upon the transaction as a whole, the buyer could reasonably expect the goods to possess? If the answer to either of those questions is in the affirmative, recovery should be allowed for the failure of the goods to possess the expressed attribute. The offered test has several advantages over those which have generally been articulated. First, it avoids having to characterize any single expression as essential, or more essential than any other. Thus, for example, in the earlier hypothetical dealing with plastic beads,⁷⁸ it seems fairly clear that the buyer was primarily interested in acquiring beads which could be readily fed into his molding machinery. Therefore, the "essence" of the contract was for particularly sized and shaped beads, and not beads of crystal clarity. Using traditional "essence," "root," or "basic assumption" analysis, one would almost be forced into conceding that color was not part of the basis of the bargain, in spite of the fact that the sample was clear. Therefore, even if the "color warranty" was breached, it could not play a role in determining or assessing damages, since it was not part of the basis of the bargain. This would lead almost inexorably to the conclusion that color was of secondary importance, a "loophole" through which the buyer might plunge to escape from a transaction turned sour.⁷⁹ However, such an analysis ignores the fact that the clarity of the sample *contributed* to the decision to purchase. Had the original beads produced an opaque product, and if the buyer's testimony is to be believed, the transaction would not have been entered into.⁸⁰ To that extent, then, the buyer should be able to disengage himself from the transaction and recover damages for the breach when the

77. *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972) (must have relied on the assertions); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973) (must have read the brochure in which the language occurred).

78. See *supra* note 61 and accompanying text.

79. Although not articulated by the court in this fashion, the result of the case suggests that the "color" straw was grasped. *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86 (8th Cir. 1977).

80. This seems clear given the factual background, since the buyer was in the business of producing clear terrariums.

purchased beads produce a cloudy product. Damages might even include "down time" necessitated by buyer miscalculation, since the buyer, no longer bound to the contract because of the breach, would be under no compulsion to attempt to use the remaining beads. While it may be suggested that such an analysis ignores proximate cause and makes the seller in effect an insurer of exact conformity, it is justifiable in that it recognizes that most bargains are based on multiple, rather than single, factors. Moreover, to the extent that the buyer would not have purchased the goods absent the asserted quality, it ensures a greater degree of honesty in the transaction.

Beyond that, the "contribution" aspect of the suggested test for basis of the bargain accords with the realities of exchange transactions. It is all well and good to say that a used car buyer is primarily concerned with whether the subject of the sale will run well, but it is myopic to suggest that, because of that, a seller's statement that the tires are "in good condition" plays little or no part in the bargain.⁸¹ Buyers typically do not purchase solely on the basis of one or even several factors; neither do they distinguish among the myriad of assertions which accompany most sales, so that it is impossible to accurately determine whether a particular assertion was "basic," "important," "meaningful," "useful," or "ignored." Rather, buyers buy on the basis of an overall impression, and to the extent that any assertion by a seller contributes to that overall impression, the buyer ought to be able to expect that the asserted qualities will exist. If they do not, a breach of express warranty should be found.

*b. Basis of the Bargain: Contribution, Expectation,
and the Transaction as a Whole — Recovery in
a Post-Transaction Setting*

To be sure, the suggested "contribution" test has drawbacks, not the least of which is that it requires the use of hindsight to determine whether a particular factor contributed to a sale. Nonetheless, it is generally preferable to a test which requires either affirmative reliance (which will often not exist except in the most general terms) or judicial rankings of the importance attributable to a given assertion.

The alternate test, to view the transaction as a whole and determine whether the buyer could reasonably expect the goods to possess certain attributes, is essential if recovery is to be had in a post-transaction assertion setting or when it is difficult or

81. See *Stang v. Hertz Corp.*, 83 N.M. 217, 490 P.2d 475 (N.M. Ct. App. 1971), *rev'd on other grounds*, 83 N.M. 730, 497 P.2d 732 (1972).

impossible to pinpoint whether a buyer expressly considered the warranted fact. To the extent that "bargain" and "agreement" are synonymous,⁸² whether something is part of the basis of the bargain must be determined with reference to the total transaction, from beginning to end, and should include the parties' reasonable commercial expectations. Thus, an express warranty which incorporates the "usual factory guarantee" when a new mobile home is sold with a written express warranty should be held enforceable,⁸³ even though the plaintiff cannot show that he relied upon the warranty, that the warranty contributed to the decision to purchase, or that he was aware of its contents. Since the reasonable commercial expectation exists that a mobile home sold within a "warranty period" will be warranted, and since the express warranty was in fact made, the buyer should be able to expect the product to fulfill the warranty terms and be able to recover for breach of warranty when it does not.⁸⁴ Lest this be confused with an implied warranty of reasonable expectation, one must bear in mind that the key is that the warranty has been expressly made. In other words, this is not an instance where nothing is said as to warranty, allowing only implied terms to arise; rather, something is said, but only the fact of the communication, rather than its content, is conveyed. Under such circumstances, the buyer should be able to assert that the fact of a warranty, without regard to its terms, created the reasonable expectation that the product would at least conform to what is later found to have been warranted, and that therefore the existence of a warranty was part of the basis of the bargain.⁸⁵

The post-transaction assertion cases also fit well within the reasonable expectation framework. The Code comments make it clear that the drafters considered the time of creation of the

82. U.C.C. § 1-201 (3) [N.D. CENT. CODE § 41-01-11 (3) (Supp. 1979)]. See *Allan Wood Steel Co. v. Capital Equip. Enterprises, Inc.*, 39 Ill. App. 3d 48, 349 N.E.2d 627 (1976).

83. *Winston Indus. Inc. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (1975).

84. This type of situation may present facts which preclude assertion of the position that the plaintiff was aware of the existence of the terms of the warranty. See *supra* notes 58-60 and accompanying text. It is, however, justifiable, because the purchaser is aware of the existence of a warranty and is presumably on notice that the "usual factory guarantee" (whatever it may be) exists. See *Winston Indus. Inc. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (1975). The dissent in *Winston* vigorously argued that no warranty could exist without knowledge of the affirmation or promise, apparently meaning the terms or extent of the warranty. *Id.* at _____, 317 So. 2d at 499 (Wright, J., dissenting). Such analysis, based as it is upon traditional concepts of pure contract, ignores the fact that a warranty was made and that the purchaser under those circumstances could reasonably expect that defects covered by the warranty would be corrected. Interestingly, the dissent apparently reached the same result by urging that the admission by the defendant that a warranty was made estops the defendant from denying its existence, and allows the issue to go to the jury. *Id.* Since ultimately the question is whether the jury should be entitled to hear evidence on the issue, the estoppel alternative is generally acceptable, provided, however, that the mere existence of the warranty is the estopping fact.

85. All this is to say no more than that an assertion that a good is warranted creates certain

warranty immaterial,⁸⁶ and that a post-transaction warranty would operate as a modification of the contract, which requires no consideration under the Code.⁸⁷ It has elsewhere been noted that the modification analysis will be of limited applicability,⁸⁸ and it is because of these limits that the "reasonable expectation" analysis is offered as an alternative. Consider, for example, the struggle which has been taking place in the Indiana courts since 1972. In that year the superior court decided *Zoss v. Royal Chevrolet, Inc.*,⁸⁹ a case which involved the sale, acceptance, and subsequent revocation of acceptance of an automobile. The court had to determine, among other things, whether there had been a breach of warranty justifying invocation of the Code revocation of acceptance rules. The court indicated that that would require determining the scope of the warranty, and thus whether the manufacturer's written warranty, as well as oral express warranties created by the seller, were part of the transaction. In finding that the manufacturer's written warranty was not part of the transaction, the court noted: "Every court considering this issue has held that a written automobile warranty is not part of the contract unless its terms are called to the buyer's attention prior to the signing of the contract."⁹⁰ In making this statement, the court cited four cases,⁹¹ three which involved the effectiveness of disclaimers which were not made available until after the sale, and one which involved inconspicuousness of disclaimers generally.⁹² Until the *Zoss* case, no

expectations that the good will be, at the least, expressly merchantable. This is to be distinguished from a case in which the seller posts a sign declaring that all used cars have a "one year warranty," when in fact no warranty is given. See *Hensley v. Colonial Dodge, Inc.*, 69 Mich. App. 597, 245 N.W.2d 142 (1976). Although it is the author's opinion that such language creates an express warranty of merchantability, it is recognized that courts, such as the *Hensley* court, are likely to be reluctant in imposing it. This should not preclude a finding that, having made the representation and delivered a warranty after the sale, the seller is bound by the written warranty.

86. U.C.C. § 2-313, Comment 7.

87. *Id.* See U.C.C. § 2-209(1) [N.D. CENT. CODE § 41-02-16(1)(1968)].

88. White and Summers suggest a number of problems, including the basic difficulty of characterizing a post-deal warranty as a "modification." They also detail the possibility of a statute of frauds barrier if the contract as modified falls within the \$500 or more statute of frauds provision. See U.C.C. §§ 2-201, 2-209(3) [N.D. CENT. CODE §§ 41-02-08, -16(3)(1968)]. Additionally, because White and Summers believe in the continuing "vitality" of reliance, they would cut off contract remedies for assertions made more than a very short period after the sale, relegating the plaintiff to his tort alternatives. Nevertheless, they would permit recovery according to the practicalities of the real world in those instances in which the post-sale warranty closely follows the sale, or where a true modification exists. The White and Summers middle ground, although internally inconsistent, is preferable to a pure modification analysis, or the disallowance of recovery altogether. Its disadvantage, stemming apparently from the desire to preclude recovery based on advertising that occurs sometime after the sale which contains warranty language, is the difficulty of determining how close to the sale is close enough. See WHITE & SUMMERS, *supra* NOTE 62, § 9-4, at 332.

89. 11 U.C.C. REP. SERV. 527 (Ind. Super. Ct. 1972).

90. *Zoss v. Royal Chevrolet, Inc.*, 11 U.C.C. REP. SERV. 527, 531 (Ind. Super. Ct. 1972).

91. *Tiger Motors Co. v. McMurry*, 284 Ala. 283, 224 So. 2d 638 (1969); *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969); *Henningens v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968).

92. For purposes of disclaiming implied warranties, the disclaimer must be conspicuous. See

post-Code decision existed which dealt with a post-transaction warranty. The *Zoss* court apparently believed that, since post-transaction warranty disclaimers were ineffective, it logically followed that post-transaction warranties were likewise ineffective. Unfortunately, this misreads the cases and the Code, and, even though done in an effort to reach the correct result, causes further problems.

The theory behind disallowing post-transaction disclaimers is the dislike for unfair surprise. Thus, the Code provides that implied warranties may be disclaimed only by conspicuous action or language on the part of the seller.⁹³ Clearly, action taken or language provided after the sale is inconspicuous, and therefore ineffective to disclaim implied warranties which arose at the time of the sale. This was, at least in part, the rationale of the cases cited by the *Zoss* court. To the extent that the post-sale disclaimer attempts to disclaim express warranties where there is no conspicuousness requirement, the disclaimer should be denied effect as "inoperative," since it is inconsistent with the express warranty and therefore fails under section 2-316(1).⁹⁴ Coupled with the foregoing is the rather specific allowance in comment 7 of post-transaction warranties which can become the basis of the bargain. There is also no unfairness here, for the warranty writer clearly intends to warrant the goods. In short, there is ample justification for disregarding the reverse-logic arguments which result from denying effect to post-sale disclaimers. Had the *Zoss* court merely applied the Code rules it would have reached the same result, yet would not have established such a potentially confusing precedent.

In 1976, the Court of Appeals of Indiana alleviated the confusion somewhat in *Jones v. Abriani*,⁹⁵ a case involving the all-time lemon of mobile homes. The court, in a highly sympathetic opinion, allowed the buyer to reject goods more than a year after their delivery, based in part on breach of a warranty created by a post-sale promise. While the use of this base is probably dictum, inasmuch as there was an express warranty created by sample and implied warranty liability as well, the court nevertheless had little trouble fitting the situation before it into the classic post-transaction warranty mold. When defects became apparent after delivery, the subsequent promise to repair created an express warranty which

U.C.C. § 2-316 [N.D. CENT. CODE § 41-02-33 (Supp. 1979)], and discussion *infra* at notes 370-72 and accompanying text.

93. U.C.C. § 2-316 (2), (3) [N.D. CENT. CODE § 41-02-33 (2), (3) (Supp. 1979)].

94. There may, of course, be parol evidence problems. See U.C.C. § 2-202 [N.D. CENT. CODE § 41-02-09 (1968)].

95. 169 Ind. App. 556, 350 N.E.2d 635 (1976).

became part of the basis of the bargain. The court went so far as to quote the rule contained in section 2-209, which provides that a modification requires no new consideration to bind the defendants.⁹⁶

It is fairly certain that the court was unsure of itself in pressing the post-sale warranty analysis, and that it used it primarily to buttress an already overwhelming case.⁹⁷ Indeed, it is arguable that this type of promise (to repair or cure) does not fit well within comment 7's call for "additional assurance" at all, and that therefore the words were perhaps better left unwritten by the court. On the other hand, there is every reason to believe that a promise to repair post-sale defects would form part of the basis of the bargain and create something very closely akin to warranty, since it is a promise which goes to the quality of the goods and will almost certainly be relied upon by the buyer. Furthermore, it fits nicely into the modification niche. In any case, the decision clearly demonstrates a willingness to expand warranty liability to post-sale assertions, and to that extent it is arguable that *Zoss* would no longer be the prevailing view in Indiana.⁹⁸ Having set the stage for expansion in *Abriani*, the court could clarify its position and set the limits of "post-sale modification" in later cases.

Rather than clarify, the next decision at best froze and at worst obscured those limits. The case was *Auto-Teria, Inc. v. Ahern*,⁹⁹ decided by the same court of appeals approximately one month after *Abriani*. *Auto-Teria* involved a dispute between the buyers and sellers of an automatic car wash system. Express warranties had been made orally, by letter, and by brochures of the seller, although the manufacturer's "warranty" was not delivered to the buyers until after the sale.¹⁰⁰ When the machine failed to work properly the defendant-buyers refused further payment, were sued, and counterclaimed.¹⁰¹ The trial court found for the defendants on their counterclaim, and the court of appeals, in a scattergun opinion, affirmed.¹⁰² Once again it was probably unnecessary to even consider the post-sale warranties, since there was sufficient evidence of express warranties created earlier. Nevertheless, after detailing the fact that express and implied warranties existed and had not been disclaimed, the court, citing *Zoss*, indicated in broad

96. *Jones v. Abriani*, 169 Ind. App. 556, _____, 350 N.E.2d 635, 645 (1976).

97. *Id.* at _____, 350 N.E.2d at 645-46.

98. It is interesting to note that the *Abriani* court failed to cite *Zoss*.

99. 170 Ind. App. 84, 352 N.E. 2d 774 (1976).

100. *Auto-Teria, Inc. v. Ahern*, 170 Ind. App. 84, _____, 352 N.E.2d 774, 777-78 (1976).

101. *Id.* at _____, 352 N.E.2d at 778.

102. *Id.* at _____, 352 N.E.2d at 784.

language that the trial court could have found that the post-sale warranty was not part of the parties' contract.¹⁰³ Once again, the court seemed to indicate that warranties may not be created after the transaction.

The Indiana cases suggest a number of thoughts concerning the reasonable expectation analysis and the post-transaction warranty. It is apparent, for example, that courts will generally differentiate between the effectiveness of warranty and of disclaimer. This is appropriate, but the differentiation should probably be based on the conspicuousness rationale, and not solely on the post-sale nature. Furthermore, one can sense a reluctance on the part of courts to incorporate post-sale contract terms that are to the disadvantage of the buyer. Thus, it is probable that the written warranties in *Zoss* and *Auto-Teria*, unnoticed until after the sale, would have limited the buyers' rights more than the earlier written and oral warranties. Therefore, it is logical for a court to attempt to do justice by holding that the earlier warranties are part of the bargain and the latter are not. Unfortunately, the broad language may actually be to the buyer's disadvantage, at least insofar as he may be unable to take advantage of any beneficial aspects of the post-sale warranty.

The solution seems to be to consider all aspects of the warranty creation language, while disallowing consideration of all language tending to limit or disclaim liability. While this appears at first glance to protect the buyer at some extraordinary expense to the seller, in reality it is consistent with the Code. At the outset, it must be remembered that all promises or assertions are subject to the parol evidence rule. The Code also generally makes disclaimers of express warranties subordinate to the words which create them,¹⁰⁴ so that any inconsistency would ordinarily be resolved in favor of the warranty. Furthermore, disclaimers of implied warranties must be conspicuous, so post-sale disclaimers are clearly ineffective, whereas the comment allows post-sale creation of warranty. Finally, the post-sale written warranty contains the seller's words, arguably intended to be believed by the buyer, and should therefore become part of the deal. While it is possible to assert that the seller's express written warranty is given as a trade off for his ability to limit his other liability, and that it is therefore unfair to impose express warranty liability and at the same time deprive the seller of the right to limit, it is the seller who is largely able to avoid

103. *Id.* at _____, 352 N.E.2d at 782-83.

104. See U.C.C. §§ 2-202, 2-316(1) [N.D. CENT. CODE §§ 41-02-09, -33(1) (1968 & Supp. 1979)].

the problem altogether, at least when the liability is directed at the immediate seller and not the manufacturer. Coupled with the other reasons earlier advanced and the policy embodied in the Code, it is appropriate to open the door to post-sale incorporation of warranty while at the same time closing it to disclaimers and limitations.

In structuring the express warranty case, and without regard to whether the narrow or broad approach to liability is accepted, it is essential to remember that the existence and scope of an express warranty is a question of fact. This means, among other things, that ordinarily the allegation of express warranty will create a jury question, precluding summary judgment. Thus, while the pure law question of the need for reliance or some lesser requirement will eventually become important in jury instructions, the threshold questions of whether the warranty exists and whether it has been breached are more readily answerable.

The reasonable expectation analysis, or something akin to it, has been employed in at least one very well reasoned opinion, *Autzen v. John C. Taylor Lumber Sales, Inc.*¹⁰⁵ The plaintiff bought a used boat from the defendant for \$100,000. The transaction began in September, 1975, and ended with the buyer's revocation of acceptance in March, 1976. During negotiations, plaintiff was proffered a 1970 warranty booklet and a 1972 survey of the boat, which represented the findings of an examination in that year for insect and dry rot infestation. These documents were specifically disregarded by the appellate court, probably because of their age and the difficulty of determining whether they were being offered as current. The plaintiff also offered proof of an oral representation of "A-1 condition," which was refuted by the defendant and disregarded by the court. Finally, there was a survey of the boat conducted at the seller's request, apparently after the contract was formed but before delivery to the buyer. When the seller told the buyer that he would have a survey conducted, the buyer replied that it was not necessary. After the survey was complete, but before it was reduced to written form, the buyer had parted with a \$20,000 down payment check. Two months later, dry rot was discovered, and when further inspection revealed serious problems the buyer attempted to revoke acceptance.¹⁰⁶ It seems clear that the buyer neither wanted nor relied upon the 1975 survey; nevertheless, the court, viewing the transaction as a whole, and comporting with the

105. 280 Or. 783, 572 P.2d 1322 (1977).

106. *Autzen v. John C. Taylor Lumber Sales, Inc.*, 280 Or. 783, . . . , 572 P.2d 1322, 1324 (1977).

reasonable expectations of the parties, upheld the jury's finding of a warranty, and declared that it went to the basis of the bargain.¹⁰⁷

The court, after reviewing the facts and setting forth sections 2-313 (1) and (2), correctly noted that in order for a description to become part of the basis of the bargain it need not be made by the seller.¹⁰⁸ It then detailed the fact that "bargain" under the Code is significantly broader than "contract," so that even if the sale was consummated before the survey was prepared it could become part of the basis of the bargain. Although the court waffled on this point, noting that certain aspects of the sale had not yet occurred, it seems clear that the key for the court was the buyer's reasonable expectation, since the court affirmed on the basis that, although the "description did not induce the actual formation of the contract, the jury might have found that it did induce and was intended by the Seller to induce Buyer's satisfaction with the agreement just made, as well as to lessen Buyer's degree of vigilance in inspecting the boat prior to acceptance."¹⁰⁹ Thus, even though the assertion was after the fact, it could and did become the basis of the bargain. As to the seller's rejoinder that because the buyer neither requested nor considered essential the 1975 survey it could not have been part of the basis of the bargain, the court replied that, since the description goes to the essence of the contract and the jury might have so found, that finding is not to be disturbed.¹¹⁰ In short, although the buyer did not request, rely on, or even consider the description, the warranty thereby made will protect him, since he could reasonably expect that the statements made in the description would be correct. Perhaps, in the final analysis, the way to decide such cases is to ask whether the buyer would be entitled to rescind if he were made aware of the defect at the time of the sale. If the answer to that question is yes, the warranty created should inure to the buyer's benefit.

Above all, as the court notes, the existence and scope of any warranty is a jury question, and a finding by the jury will not be overturned unless there is no substantial evidence to support the verdict.¹¹¹ Thus, it becomes crucial in an action based upon breach of warranty to present *all* relevant evidence as to the existence of the warranty and its scope, even though much of it may be disregarded on appeal. Secondly, it is important to formulate the proper jury

107. *Id.* at _____, 572 P.2d at 1326.

108. *Id.* at _____, 572 P.2d at 1325. *See supra* notes 62-77 and accompanying text.

109. 280 Or. at _____, 572 P.2d at 1326.

110. *Id.*

111. *Id.* *See also* *City of Hazelton v. Daugherty*, 275 N.W.2d 624 (N.D. 1979).

instructions. The model instruction for a warranty plaintiff should be couched in Code terms, preferably with avoidance of reliance language. The jury should be informed as to the definition of "bargain," and, even if instructions relating to "expectation" and "commercial reality" are refused, reference should be made to the transaction as a whole. Because of the jury question presented by the mere suggestion of the existence of a warranty, summary judgment is nearly always inappropriate.¹¹²

The foregoing discussion suggests that the making of any statement or affirmation, whether or not it falls within the purview of the traditional express warranty, is likely to be deemed to create express warranty responsibility. Indeed, it may be that we are witnessing the demise of the classic "express warranty" and the birth of an implied warranty of reasonable expectation or merchantability created by express language, differing from the traditional implied warranty of merchantability which arises without regard to statements by the seller. This new implied express warranty is one which is born of the seller's language and conduct, and exists because the seller's language and conduct implies to the reasonable buyer qualities which the purchased product ought to possess. No longer will it be necessary for the seller's affirmations, promises, descriptions, or samples to expressly state that the product will conform to them; it is enough that the words imply qualities or attributes to the goods. If they do, the express warranty, implied though it may be, will be found to exist.¹¹³

5. Puffing: Statements of Value, Opinion, or Commendation

Given what has already been said about the expansion of express warranty liability, it is unnecessary to do more than briefly mention section 2-313 (2), which absolves the seller of liability for statements of value, opinion, or commendation. The Code drafters recognized that puffing would continue in the commercial world, and opted to relegate policing to the law of fraud rather than to the law of contract.¹¹⁴ The courts, however, have generally been willing to tackle the puffing cases using contract analysis, and, for the most part, liability in warranty has been found in all but the most obvious cases of trade talk.¹¹⁵ The key in the opinion cases

112. See *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. Dist. Ct. App. 1979).

113. *Little Rock School Dist. v. Celotex Corp.*, 264 Ark. 757, 574 S.W.2d 669 (1978).

114. U.C.C. § 2-313, Comment 8.

115. Compare *Gilbert & Bennett Mfg. Co. v. Westinghouse*, 445 F. Supp. 537 (D. Mass. 1977) (phrase "to handle plastisol fumes" does not create warranty) with *Swenson v. Chevron Chem. Co.*,

does not seem to be whether the seller has control over the outcome or attribute asserted,¹¹⁶ although it seems clear that the greater the "unknown" influence is, the less likely a warranty will be found. Thus, for example, the newer or more experimental the technology, the less likely is the imposition of warranty liability, particularly where the language offered to create the warranty is couched in ambiguous terms.¹¹⁷ Likewise, where nature or natural forces are likely to determine the happening of an event, the courts seem unwilling to characterize language as creating warranty liability.¹¹⁸ Finally, although the courts seem willing to give effect to the use of equivocal language in failing to create a warranty, especially where the whole transaction suggests that the seller is merely guessing,¹¹⁹ it is apparent that the mere use of equivocating words will not shield a seller from liability when it is clear from the surrounding facts and circumstances that the seller is actually affirming a fact about which he should be knowledgeable.¹²⁰ In short, the test has been said to be whether the seller "assume[d] to assert a fact of which the buyer is ignorant, or . . . merely express[ed] a judgment about a thing as to which [both seller and buyer] may each be expected to have an opinion."¹²¹ In reality, however, the relative ignorance of the buyer should play a small part, and the test should be whether the seller's assertions, based upon his position relative to the goods, are likely to be accepted by the buyer as true or will substantially contribute to the sale. If so, it seems improper not to impose responsibility when the assertions turn out to be untrue.

B. DISCLAIMER OF THE EXPRESS WARRANTY

Once the express warranty has been made it is virtually

84 S.D. 497, 234 N.W.2d 38 (1975) (phrase "for control of corn rootworm larvae" creates warranty).

116. See *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975) (tires guaranteed for 36,000 miles creates express warranty against blowouts for 36,000 miles).

117. See *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D.W. Va. 1971) (birth control pills said to be "virtually" 100% effective; court found no express warranty against pregnancy); *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 269 N.E.2d 664 (1971) (design formulations characterized as prediction, not warranty).

118. See *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977) (horse said able to "jog home in preferred company"; court held no warranty); *Whitmer v. Schneble*, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975) (doberman described as docile; no warranty liability when dog bites child); cf. *White Devon Farm v. Stahl*, 88 Misc. 2d 961, 389 N.Y.S.2d 724 (Sup. Ct. 1976) (horse described as breeder, which in fact sired 27 foals in 38 outings; court held warranty as breeder breached because sperm count too low). See also *Brunner v. Jensen*, 215 Kan. 416, 524 P.2d 1175 (1974) (statement as to time when cow would calve creates warranty).

119. See, e.g., *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 472 P.2d 816 (1970) (use of words "we think," "maybe," "might solve your problems"; court held no warranty).

120. See *Matlack, Inc. v. Hupp Corp.*, 57 F.R.D. 151 (E.D. Pa. 1972). See Also *Bell v. Harrington Mfg. Co.*, 265 S.C. 468, 219 S.E.2d 906 (1975).

121. *General Supply & Equip. Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Civ. App. 1972).

impossible to disclaim it,¹²² even when the warranty is created by description or sample and the disclaiming language is explicit. The comment to section 2-313 makes it clear that a warranty which is created by description or sample cannot be undone, even by the most explicit language. Nevertheless, and in spite of the rather self-evident notion that because express warranties are expressed they should not be disclaimable after their creation, the Code drafters included an explicit prohibition of unreasonable post-creation disclaimers.¹²³ Thus, section 2-316(1) makes it clear that, where reasonable, language or conduct of warranty is to be construed consistently with language or conduct of disclaimer, but that where such a construction is not reasonable the language or conduct of warranty is to be given effect. The courts have generally complied with the underlying theory expressed by section 2-316(1), and have refused to give effect to attempts to disclaim express warranties after the warranty has been created.¹²⁴ Most courts, however, have attempted no reconciliation between express warranties and disclaimers, but instead have merely paraphrased the Code and given effect to the warranty.¹²⁵ A few courts have even gone so far as to state that a disclaimer of express warranties after the warranty has been created is ineffective as a matter of law.¹²⁶ Few, if any, of the cases have adequately analyzed whether and to what extent warranties and disclaimers can coexist.

While the better rule requires strict construction of the disclaimer against the seller,¹²⁷ this is not generally the starting

122. U.C.C. § 2-313, Comment 4; U.C.C. § 2-316(1) and comments.

123. See U.C.C. § 2-316(1) [N.D. CENT. CODE § 41-02-33(1) (Supp. 1979)]. The drafters may well have foreseen that express warranty law was being expanded, and that to that extent some courts might more liberally interpret exculpatory language, thereby allowing the seller to escape the more easily imposed liability. It is not uncommon to set up, as a trade off, ready liability against ready exculpation. Thus, although we have moved somewhat into the realm of conscience (*i.e.* protecting buyers because it is right to do so), to the extent that we remain in the realm of contract sellers and buyers ought to be free to bargain away liability. See U.C.C. § 2-313, Comment 4.

124. See *Community Television Serv. Inc. v. Dresser Indus.*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Berk v. Gordon Johnson Co.*, 232 F. Supp. 682 (E.D. Mich. 1964); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Young & Cooper Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974); *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977); *Realmuto v. Straub Motors, Inc.* 65 N.J. 336, 322 A.2d 440 (1974); *Drier v. Perfection, Inc.*, _____ S.D. _____, 259 N.W.2d 496 (1977).

125. See, *e.g.*, *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971); *Walcott & Steele Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969); *Auto. Teria, Inc. v. Ahern*, 170 Ind. App. 84, 352 N.E.2d 774 (1976); *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Minn. 1978); *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977). *But see* *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Jordon v. Doonan Truck & Equip. Inc.*, 220 Kan. 431, 552 P.2d 881 (1976).

126. *Chisholm v. J.R. Simplot Co.*, 94 Idaho 628, 495 P.2d 1113 (1972); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Young & Cooper v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974).

127. *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Hauter v. Zogarts*, 14 Cal. 2d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975).

point. Rather, the agreement as a whole is to be viewed to determine whether warranties have been created, what these warranties encompass, whether the alleged breach of the warranty is causally connected to the damages sustained, and, only then, whether the disclaimer should be given validity. Often this will appear to involve stacking the deck against a seller, for he will almost always seek shelter behind a broad disclaimer if one is involved, urging that, given the disclaimer language, no warranty could have been created. Deferring for a moment the parol evidence problems, the short answer must be that, to the extent that express warranties can be made to coexist with words of disclaimer, they should be so construed. The only way to determine whether coexistence is possible is to determine the existence and scope of the warranty. To analyze in any other manner, thus giving blanket effect to the disclaimer, would in many cases substantially destroy the bargain of the buyer, giving him a mere shadow of that which he purchased.

The Code and the caselaw indicate that, where there are internal inconsistencies, those supporting disclaimer must give way to those supporting warranty. On balance such a result is fair, since it seems obvious that the seller of goods would not in one breath create warranties and in the next destroy them. Certainly, even if the seller did intend precisely that, no court would permit it. Furthermore, because of the Code formula, it is unnecessary to do so.

Some recent cases are instructive. The Supreme Court of New Jersey had an opportunity to discuss the effect of a blanket disclaimer on express warranties in *Realmuto v. Straub Motors Inc.*,¹²⁸ and concluded in dictum that the disclaimer would have to give way to the express warranties. The court characterized any other decision as unreasonable, relying on section 2-316(1).¹²⁹

More directly in point, the recent decision in *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*¹³⁰ suggests an appropriate way of handling the problem. In that case, the plaintiff and the defendant had agreed to the sale of a complex piece of machinery for a price of roughly \$150,000 after the plaintiff had read promotional literature concerning the machine. The machine was purchased and installed, with plaintiff paying approximately half the price. The machine was allegedly defective, plaintiff refused to pay, and litigation followed. Among other issues before the court were

128. 65 N.J. 336, 322 A.2d 440 (1974).

129. *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, _____, 322 A.2d 440, 442-43 (1974).

130. 428 F. Supp. 364 (E.D. Mich. 1977).

whether an express warranty had been created by the promotional literature, whether it was affected by an express warranty of merchantability contained in the written contract, and whether a disclaimer of all warranties except the express warranty of merchantability would operate to disclaim the promotional warranties.¹³¹

The court paraphrased section 2-316(1) and “construed” the disclaimer and the express promotional warranty consistently with it. The court ignored entirely any parol evidence problem, and found that the two warranties, read together, meant only that if the machines were free from defect (as warranted) they would meet the specifications in the promotional literature (also as warranted). Therefore, the provisions were consistent. The problem, however, is that the court failed to construe the express warranty with the disclaimer; rather, it construed the two express warranties together.¹³²

The same result could have been reached had the court construed the broad disclaimer to avoid all warranties other than those found to have actually been made. Alternatively, the court could have stated more explicitly what it apparently meant: The express warranty of merchantability is to be measured according to the standard adopted by the parties, in this case according to specifications contained in the promotional literature. The effect is to define “defect in material or workmanship” to be any deviation from specifications contained in the advertising. A final alternative, which is less consistent with the Code, would be to hold that the disclaimer was inconsistent with the express warranty and therefore invalid.

Interestingly, the court ignored the parol evidence problem, treating the case as one with mere internal inconsistencies, rather than as one involving pre-contract warranties which might well have been merged in the written agreement.¹³³ In that posture, the correctness of the result is clear. In addition, rather than relying too heavily upon the specifications contained in the promotional literature, the court instead held the seller to performance expectations usual in the trade. In other words, even though the machine did not operate as promised, “to the extent that deficiencies and corrective service performed were routine for so sophisticated a machine, no breach occurs.”¹³⁴ The court cited as

131. *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977).

132. *Id.* at 372-73.

133. *Id.* at 373.

134. *Id.*

authority for this proposition comment 5 to section 2-313, which purports to read into descriptions of goods any applicable trade usage.¹³⁵ The extent to which that comment applies in this case is unclear, however, for the comment seems to envision comparison between technical specifications and the actual product, and not comparison between an express warranty and deficiencies which would pass without objection. Stated another way, the comment seeks to make specification language comport with trade expectations; the court in *Fargo Machine* used trade expectations as a gauge to determine whether the express warranty of merchantability had been met, disregarding the warranty created by the specifications.¹³⁶ Thus, trade usage is to be employed as an interpretive device when it is unclear what the scope of a warranty is; to the extent that the court in *Fargo Machine* used it without regard to the specifications warranty, it did so in error.

If the *Fargo Machine* court had to struggle to fit a non-internal inconsistency case into the section 2-316(1) mold, the Supreme Court of Minnesota, in *Wenner v. Gulf Oil Corp.*,¹³⁷ had a ready-made fit. The plaintiff's cause of action sprouted from his contention that the defendant's product, a herbicide aerially applied to a corn field in 1974, left a carryover residue which damaged plaintiff's wheat crop in 1975.¹³⁸ Among other issues decided by the court was the question whether a disclaimer provision in small print on the back of the label would operate to render a warranty made on the front of the label ineffective.¹³⁹ The court made short work of defendant's contention that the disclaimer should preempt the express warranty, quoting section 2-316(1) and determining that the two could not reasonably be reconciled. Thus, the disclaimer was ruled ineffective.¹⁴⁰

While there is no doubt that the court reached the correct

135. *Id.*

136. *Id.* At least two cases have applied the comment correctly, using trade usage to interpret the scope of the warranty. See *Indiana Farm Bureau Coop. Ass'n v. S.S. Sovereign Faylenne*, 24 U.C.C. REP. SERV. 74 (S.D.N.Y. 1977) (product sold as "agricultural grade"; held trade usage interprets meaning, and thereafter question of whether warranty was met was for jury); *Zappanti v. Berge Serv. Center*, 26 Ariz. App. 398, 549 P.2d 178 (1976) ("1976 V.W. Dunebuggy"; warranty created by description is interpreted by trade usage so as not to require all component parts to be 1976 vintage).

137. 264 N.W.2d 374 (Minn. 1978).

138. *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 383 (Minn. 1978).

139. *Id.* The warranty on the front of the label arose by the affirmation of fact that the herbicide was "a low carryover herbicide, and when applied at the recommended rate, normal crop rotation is possible the season following." The disclaimer, on the reverse side, issued a warranty of conformity to description and of general fitness, but disclaimed responsibility for "damage to plants and crops to which the material is applied [caused by] critical and unforeseeable factors." According to the disclaimer, the risk of these losses was to fall on the buyer, and they might occur even though the herbicide was generally fit for its intended purpose. *Id.*

140. *Id.* at 383-84.

result, a purist might shudder at the rush to judgment. In actuality, the warranty and the disclaimer could have, and probably should have been construed consistently with one another. In this case, it makes no difference; in another it might. If one changes the facts of *Wenner* slightly, the problem can readily be seen. Were there no express warranty of merchantability in *Wenner*, but only the "low carryover" promise and the disclaimer, the analysis would probably have been as follows: The defendant promised low carryover, thereby creating an express warranty, which was breached when carryover caused damage to a subsequent year's crop. The defendant also disclaimed all warranties. The question thus becomes whether the warranty and the disclaimer can coexist, or whether one must give way. The disclaimer does not address carryover, and is intended to protect defendant from liability if its product is, for example, not merchantable. Thus, if the plaintiff's crop had been damaged upon application, and assuming that the disclaimer passed muster under other Code sections,¹⁴¹ the defendant would be insulated from responsibility. Were that form of liability being asserted, the plaintiff would lose. The disclaimer, however, only reaches the warranties disclaimed, and not the express warranty of low carryover. Since it is the carryover which caused the damage, and low carryover was warranted, the plaintiff prevails. The warranty of low carryover is different from the warranty of merchantability, and is therefore consistent with rendering the disclaimer effective only for the warranty of merchantability. In short, the defendant is entitled to the insulation afforded by the disclaimer; the plaintiff is entitled to the protection afforded by the express warranty.

Failure to analyze in the above manner would potentially deprive the seller of goods the protection which he has ostensibly bargained for. By analyzing in the suggested manner, however, the Code ideal of coexistence is achieved.

C. UNCONSCIONABILITY AND DISCLAIMERS

Related to the problem of whether express warranties and disclaimers can coexist is the concern of the courts with overreaching and unconscionability. Many of the cases which refuse to enforce disclaimers are, expressly or implicitly, affirming the conviction that courts will not enforce grossly unfair bargains. Part of the reason for a court's refusal to devote substantial energy to reconciliation of express warranties and disclaimers, and instead

141. U.C.C. § 2-316(2) & (3) [N.D. CENT. CODE § 41-02-33 (2) & (3) (Supp. 1979)].

hold that the disclaimer is ineffective (as in *Wenner*), is the unarticulated belief that to give with one hand and take away with the other is unfair or unconscionable. The Code, however, allows, and may even encourage, the articulation of that ideal.¹⁴²

It would have been a simple matter to draft a per se rule of unconscionability any time there was both an express warranty and an attempted disclaimer. The drafters of the Code instead invoked a rule of coexistence where possible. The disclaimer will give way when coexistence is not possible. Nevertheless, the Code leaves open the possibility of unconscionability analysis as an alternative, through the use of sections 2-302 and 2-719.¹⁴³ Enough has been written elsewhere about the general application of these two sections of the Code,¹⁴⁴ and our concern here will be solely with the use of the sections in a warranty setting, particularly where disclaimers seek to preclude warranty liability.

142. *Id.* A simple hypothetical might involve yet another modification of the *Wenner* facts. If an express warranty given by the seller is coupled with an equally explicit disclaimer of unavoidable risks, it should be possible to balance the two and reach a reasonable result. Thus, for example, there might be a warranty that "this product will kill weeds," followed by the language "but, even though fit for use, and properly applied, it may also damage plants or crops." In that case, it is fair and reasonable to place the risk on the buyer who is made aware of the possibility of harm. See *Kleven v. Geigy Agricultural Chems.*, 35 Minn. 810, 227 N.W.2d 566 (1975). The key is that the buyer is made aware of the harm under circumstances where the existence and scope of the warranty do not overshadow the limitations thereafter placed on the product's effectiveness.

143. Section 2-302 of the Code 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.

U.C.C. § 2-302 [N.D. CENT. CODE § 41-02-19 (1968)].

Section 2-719 of the Code provides:

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
 - (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
 - (b) 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.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
- (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.

U.C.C. § 2-719 [N.D. CENT. CODE § 41-02-98 (1968)].

144. For further discussion of sections 2-302 and 2-719, see Fahlgren, *Unconscionability: Warranty Disclaimers and Consequential Damage Limitations*, 20 ST. LOUIS U.L.J. 435 (1976); LEFF, *Unconscionability and the Code — The Emporer's New Clause*, 115 U. PA. L. REV. 485 (1967).

1. Unconscionable Disclaimers: The Courts' Options

While section 2-719 is specifically directed at limitations of remedies, and will therefore have special relevance in the disclaimer area, the practitioner should not forget the general unconscionability provision of section 2-302. That section may be invoked any time a contract or any clause therein (*e.g.*, a disclaimer provision) is alleged to have been unconscionable at the time the contract or clause was entered into. At that point, the court is to determine whether the contract or clause is unconscionable as a matter of law, taking into account the commercial setting, purpose, and effect of the clause.¹⁴⁵ In the majority of states, including North Dakota, the claim of unconscionability precludes summary judgment, for the parties are to be given an evidentiary hearing to assist the court in determining the question of unconscionability.¹⁴⁶ Following the hearing, the court makes its determination, and, if the contract or clause is deemed unconscionable, the court has three options: refusal to enforce the contract, enforcement of the contract without the unconscionable clause, or limitation of the offending clause to avoid an unconscionable result.

Although one can imagine situations in which a court, faced with a warranty disclaimer provision, might opt to refuse to enforce the entire contract,¹⁴⁷ most of the cases involve refusal to enforce the offending clause, or construction of the offending clause to avoid an offensive or unconscionable result.¹⁴⁸ The net result may be the same, for the refusal to enforce a clause may give rise to a right to revoke acceptance, or "rescind," thereby entitling the buyer to recover the price paid and cancel the agreement.¹⁴⁹ At the very least, after the clause is preempted the buyer is entitled to breach of warranty damages, the difference between the value of the goods accepted and their value if they had conformed to the warranty.¹⁵⁰

Perhaps the greatest hurdle for the buyer in a warranty-disclaimer-unconscionability case is not the assertion or proof of unconscionability, but rather the fact that section 2-316(1) allows

145. U.C.C. § 2-302(2) [N.D. CENT. CODE § 41-02-19(2) (1968)].

146. *See* Haugen v. Ford Motor Co., 219 N.W.2d 462 (N.D. 1974). *But see* Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Hawaii 466, 540 P.2d 978 (1975).

147. For example, the sale on credit of a new product with all warranties properly disclaimed, where the buyer has made no down payment, followed by the complete loss of the product caused by an undetectable defect, might cause a court to balk at making the buyer pay any of the purchase price. Such a case, although easy to imagine, is highly unlikely to occur.

148. *See* Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972); Oddo v. General Motors, 22 U.C.C. REP. SERV. 147 (N.Y. Sup. Ct. 1977); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

149. *See* U.C.C. § 2-711(1) [N.D. CENT. CODE § 41-02-90(1) (1968)].

150. *See* U.C.C. § 2-714(1) [N.D. CENT. CODE § 41-02-93(1) (1968)].

the disclaimer of express warranties when the disclaiming language is not inconsistent with the language creating the warranty. Thus, in the simplest case, where a used car is sold as a "1970 Chevrolet" and a clause that "there are no express warranties" is conspicuously present, a court would have no trouble construing the two expressions together: the car is expressly warranted to be a 1970 model Chevrolet, and all other warranties are validly disclaimed. If we assume an oral express warranty before the sale (barred from admission by the parol evidence rule), the proper disclaimer of implied warranties, and the loss of the car due to failure to meet the oral express warranty, the buyer has only one contract remedy:¹⁵¹ he must prevail upon the court to declare the disclaimer invalid as unconscionable, thereby resurrecting any express or implied warranties.¹⁵² The few courts which have considered this question, however, have been reluctant to declare unconscionable under the general provisions of section 2-302 that which the Code specifically permits.¹⁵³

2. *Limitation of Remedies*

If the problem is a dispute between a specific and a general statutory provision, one would expect the specific to prevail. But where the disclaimer also serves to limit liability, the clash is between two specific provisions, and, on the whole, the limitation clauses have fared less well than general disclaimers when confronted with an unconscionability challenge.

Section 2-719 is applicable whenever a clause seeks to limit remedies in the event of a breach.¹⁵⁴ Thus, while there is no requirement that the clause include a disclaimer of warranties, in the usual standard form contract a warranty will be given. All other warranties will be disclaimed, and the remedies available for breach of any warranty will be limited, for example, to repair or replacement.¹⁵⁵ Section 2-719 governs the effectiveness of the

151. At this point tort law, rather than contract law, will probably provide the most appropriate answer.

152. The reader should recognize that the invocation of unconscionability does not necessarily remove the parol evidence bar, although, absent the offending clause, the argument can be made that the writing was either not final, or not complete and exclusive. *See* U.C.C. § 2-202 [N.D. CENT. CODE § 41-02-09 (1968)]. *See also* *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1352 (1978).

153. *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973); *Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

154. This is true except as to a limitation by means of a liquidated damage provision, covered in section 2-718. *See Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47 (N.D. 1975).

155. The Magnuson-Moss Act, discussed *supra* at note 2, would be applicable here, but detailed consideration of its provisions is beyond the scope of this article. *See* Lester, *How to Speak Magnuson-Moss: A Primer on the New Federal Warranty Act*, 52 FLA. B.J. 301 (1978); Note, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code*, 62 CORNELL L. REV.

limitation on remedies. Generally speaking, the Code allows the seller not only to disclaim warranties, but also to limit the remedies afforded to the buyer in the event of a breach of the warranty given. Subsection (1)(a) makes it clear, however, that unless "expressly agreed," the limited remedy is optional and cumulative, rather than the sole or exclusive remedy. Thus, the first policing tool for the courts will be a determination that no express agreement was made as to exclusivity,¹⁵⁶ and therefore resort to all potential Code remedies may be had.

As might be expected, the ingenious drafters of form contracts can and do readily prevent policing by this method, merely by inserting a clause indicating an express agreement. The inquiry then becomes whether "an exclusive or limited remedy [fails] of its essential purpose,"¹⁵⁷ for, if it does, the parties can retreat to the general Code remedies. Not surprisingly, this section has been invoked to allow application of the general remedies under circumstances in which it would be unconscionable to limit remedies. The courts, however, invariably rely upon the comment language rather than upon general rules dealing with unconscionability:

[I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. . . . [W]here an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions¹⁵⁸

At least a part of the reason for reliance on the comment to section 2-719 is based upon the time for viewing the transaction. As indicated earlier, unconscionability is to be determined at the time of the making of the contract, whereas section 2-719(2) assumes fairness of the clause at the time of making which becomes unfair due to later circumstances. Nevertheless, just as courts often strike down contract clauses as unconscionable which appear to have been fair at the outset because of later occurrences, so too do they apply section 2-719 to clauses which were doomed to fail of their purpose from the outset.¹⁵⁹ However, the vast majority of courts

738 (1977); Note, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979).

156. *Ralston Purina Co. v. Hartford Accident & Indem. Co.*, 540 F.2d 915 (8th Cir. 1976); *Council Bros. v. Ray Burner Co.*, 473 F.2d 400 (5th Cir. 1973); *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S.2d 677 (1977); *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900 (N.D. 1975).

157. U.C.C. § 2-719(2) [N.D. CENT. CODE § 41-02-98(2) (1968)].

158. U.C.C. § 2-719, Comment 1.

159. See *Majors v. Kalo Laboratories, Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975); *Jacobs v. Merto*

considering claims under section 2-719(2) have either implied or stated that the clause at issue would not be per se unconscionable absent circumstances which arose after the contract was entered into.¹⁶⁰

If the courts prefer to employ the lack of express agreement and failure of essential purpose analysis when the limitation clause speaks solely to direct damages resulting from a breach, when the loss is consequential unconscionability analysis comes to the fore. To the extent that disclaimers of warranty and exclusions of consequential damages both have as their goal the total insulation of the seller (as opposed to limiting the buyer's remedy to predetermined alternatives), a pure unconscionability analysis based upon fairness, either at the time of making the contract or at the time of transaction breakdown, is more appropriate than a purely prospective rule. Thus, section 2-719(3) adopts as the test for limitation or exclusion of consequential damages the gauge of unconscionability of the clause. It is here that overlap between section 2-302 and section 2-719 is most apparent, except that any attempt to limit consequential damages for personal injury caused by consumer goods is prima facie unconscionable.

The section in effect allows, if it does not encourage, claims of unconscionability any time there is a limitation or exclusion of consequential damages. As would be expected, most assertions of unconscionability in commercial transactions have been met with some disdain.¹⁶¹ By the same token, where personal injury has occurred, the fact that goods were not consumer goods, but were commercial goods, has not precluded the imposition of liability, the courts readily finding that the exclusion clauses are unconscionable, even though not on a prima facie basis.¹⁶² Although the drafters specifically provided that limitation of liability for consequential losses in a commercial transaction is not prima facie unconscionable, when the goods are consumer goods and the loss is economic courts will generally be more receptive to

Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972); Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. 1978); Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

160. See, e.g., Kohlerberger, Inc. v. Tyson's Foods, Inc., 265 Ark. 584, 510 S.W.2d 555 (1974); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

161. United States Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975); Cryogenic Equip., Inc. v. Southern Nitrogen, Inc., 490 F.2d 696 (8th Cir. 1974); Posttapes Assoc. v. Eastman Kodak Co., 450 F. Supp. 407 (E.D. Pa. 1978); Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974); Raybond Elecs. v. Glen-Mar Door Mfg. Co., 22 Ariz. App. 409, 528 P.2d 160 (1974); J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976); Willie v. Southwestern Bell Telephone Co., 219 Kan. 755, 549 P.2d 903 (1976); Kansas City Structural Steel Co. v. L.G. Barcus & Sons, 217 Kan. 88, 535 P.2d 419 (1975). But see Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245, 326 A.2d 90 (1974).

162. See Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968).

the consumer who seeks to recover damages than to the non-consumer who seeks the same.¹⁶³

If one considers the creation and scope of warranties, coupled with the ability to disclaim them under section 2-316 and the specific disallowance of unconscionable consequential damage limitation clauses, a problem is readily apparent: Can the seller, by failing to give or by effectively disclaiming warranties, insulate himself from liability for consequential loss which results from consumer (or other) goods? The answer is uncertain, and the two respected authors of the primary treatise in the area are in disagreement.¹⁶⁴

The Code drafters apparently intended section 2-316 to operate independently of section 2-719, thereby enabling sellers to disclaim all warranties and removing any question of consequential damages (for if there is no warranty there is no breach, and there can be no damages, direct or consequential).¹⁶⁵ At the same time, however, if the seller has made a warranty, he cannot thereafter limit consequential damages in certain cases. Thus, the intended scheme would probably allow the seller not to warrant, but if a warranty was given it would disallow the limitation. On the whole, the intended Code scheme is a model of fairness, balancing the seller's rights and responsibilities. The courts have generally frustrated the drafters' intent, however, in effect making it impossible to disclaim warranties where the preclusion of consequential damage recovery for personal injury would thereby result. In applying general unconscionability analysis under section 2-302, the courts have ignored two Code comments,¹⁶⁶ and, more importantly, have answered without fully addressing the question

163. See, e.g., *Morris v. Chevrolet Motor Div.*, 39 Cal. App. 3d 917, 114 Cal. Rptr. 747 (1974); *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972); *McCarty v. E. J. Corvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975); *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

164. See *WHITE & SUMMERS*, *supra* note 62, at 375-97.

165. *Id.*

166. The two comments seemingly ignored are comment 2 to section 2-316 and comment 3 to section 2-719. Comment 2 to section 2-316 provides:

The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

U.C.C. § 2-316, Comment 2. Comment 3 to section 2-719 provides:

Subsection (3) recognizes the validity of clauses limiting or excluding

whether proper disclaimers can be unconscionable.¹⁶⁷

Two recent cases are illustrative. In *Knipp v. Weinbaum*,¹⁶⁸ the plaintiff purchased a used motorcycle from the defendant under contract terms stating that the motorcycle was sold "as is," thereby attempting to exclude or disclaim all implied warranties. Additionally, there did not appear to be any express warranties relevant to the action. Allegedly due to a defective axle weld, the motorcycle went out of control and crashed, injuring the plaintiff. Plaintiff sued, alleging breach of express and implied warranties and negligence. The lower court granted defendant's motion for summary judgment and plaintiff appealed.¹⁶⁹

The court recognized the issue to be whether the "as is" language operated to disclaim the implied warranties, and in light of section 2-316(3)(a) there could be little doubt that it would: "[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is" . . . which . . . [call] the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."¹⁷⁰ The court nevertheless placed emphasis on the language "unless the circumstances indicate otherwise":

To foreclose consideration of his claim by permitting an "as is" disclaimer to operate as an *automatic* absolution of responsibility through the mechanism of summary judgment would belie the policy behind [section 2-719(3)] which states that . . . limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable.¹⁷¹

From there, it was a small step to find circumstances which indicated otherwise. For example, the seller may have intended the "as is" language to refer only to minor defects. Thus, in spite of the fact that the seller has used appropriate language to completely disclaim his liability, the court refused to accord him that right, paying mere lip service to the Code's expressed contemplation that the seller may in fact fully disclaim implied warranties. It is arguable that such a construction does more to "believe the policy"

consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

U.C.C. § 2-719, Comment 3.

167. See WHITE & SUMMERS, *supra* note 62, at 485; Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

168. 351 So. 2d 1081 (Fla. Dist. Ct. App. 1977).

169. *Knipp v. Weinbaum*, 351 So. 2d 1081, 1083 (Fla. Dist. Ct. App. 1977).

170. U.C.C. § 2-316(3) (a) [N.D. CENT. CODE § 41-02-33(3) (a) (Supp. 1979)] (emphasis added).

171. 351 So. 2d at 1084.

behind the Code than would allowing the seller to exculpate himself completely.¹⁷²

If the *Knipp* court ignored the Code's scheme, thereby frustrating the drafters' intent, it at least did so directly. The same cannot be said of the Wisconsin Supreme Court's decision in *Murray v. Holiday Rambler, Inc.*,¹⁷³ involving the sale of a motor home with both a disclaimer of warranties and a limitation of remedies, and a subsequent myriad of problems with the vehicle. The warranty disclaimer specifically and properly excluded all express and implied warranties except an express warranty of freedom from defects in material and workmanship. It also limited the buyer's remedy for breach of that warranty to repair or replacement at the seller's option, and reiterated the exclusion of all other express and implied warranties.¹⁷⁴

The court's result-oriented opinion initially noted the conceptual differences between disclaimers and limitations, and determined that the present contract contained both a disclaimer and a limitation. The court then asserted, without citation or analysis, that general unconscionability rules could operate to restrict the seller's ability to disclaim or exclude warranties, apparently assuming that the potential conflict between sections 2-302 and 2-316 had either never existed or had somehow been fully resolved. It then concluded that the express warranty of freedom from defects in material and workmanship took precedence over the disclaimer, a gratuitous conclusion considering that the contract itself expressly disclaimed only "other" warranties. Turning its attention to the limitation, the court concluded that if the limitation were unconscionable it would be deleted, and cited as authority for this proposition comment 1 to section 2-719.¹⁷⁵ The concession was made, however, that the clause was not unconscionable on its face. The clear implication must therefore be that if it is unconscionable in effect it is equally subject to deletion.

Rather than pursue this rationale, the court based its decision on the failure of essential purpose, holding that where after reasonable opportunities to correct defects a seller cannot or does not do so the limited remedy fails of its purpose.¹⁷⁶ Although one cannot readily quarrel with this holding, one may ask the nagging

172. The stated policy underlying the Code is to allow the seller to disclaim all warranties. See U.C.C. § 2-316, Comments 2, 6-9.

173. 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

174. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 414-17, 265 N.W.2d 513, 518-20 (1978).

175. *Id.* at 418-19, 256 N.W.2d at 520.

176. *Id.* at 421, 256 N.W.2d at 523.

question: Is the court in reality holding that an attempted disclaimer which also limits remedies is in fact unconscionable, since it may leave the buyer dissatisfied, thereby equating unconscionability with failure of essential purpose? If so, it renders much of sections 2-316 and 2-719 mere surplussage; if not, much of the opinion is not only unnecessary but is misleading. The clear impression left by the court is that a seller who properly excludes warranties and properly limits liability may nevertheless find himself saddled with full and unlimited liability because of potential unconscionability. The case is all the more disturbing because it involves only loss of bargain, and no personal injury.

It is suggested that the proper approach to take in such cases is to allow the seller to disclaim all warranties, provided it is done properly, even though the effect is to preclude a buyer from recovering consequential damages for personal injuries. Such a result need not offend anyone's sense of justice; presumably the incidents of the bargain reflect the buyer's willingness to forego any remedy, for if they do not he would not agree to the sale in the first place. To increase the safeguards already afforded the buyer through section 2-316 by engrafting on an unconscionability tendrill would be appropriate only under the most extraordinary circumstances. Merely protecting the foolish but aware buyer does not seem sufficient.

D. EXPRESS WARRANTY DISCLAIMERS AND THE PAROL EVIDENCE RULE

As indicated earlier, it is virtually impossible to disclaim an express warranty after making it, although it is less difficult to set limits on its effect, subject perhaps to doctrines such as unconscionability and failure of essential purpose.¹⁷⁷ Nevertheless, there is one instance in which a disclaimer of an express warranty is readily accomplished without a great deal of judicial inquiry into fairness or effect. Although courts have recently begun to question the propriety of this aspect of the parol evidence rule, it largely remains true that the existence of certain oral warranties which precede or accompany the written document containing other warranties cannot be proved.

Section 2-316(1), as indicated earlier, specifically requires consistent construction between words creating and negating warranties unless such a construction is unreasonable, in which case the words of negation are inoperative.¹⁷⁸ The section,

177. See *supra* notes 122-26 and accompanying text.

178. See *supra* text accompanying note 104.

however, also explicitly subjects evidence concerning the creation of the warranties to the parol evidence rule, thereby allowing or possibly causing the words of negation to take precedence. While it is of course possible that the operation of the parol evidence rule would benefit the buyer, for instance where a written warranty exists and the seller seeks to introduce evidence concerning a prior oral disclaimer,¹⁷⁹ in the usual case the section serves as a seller-protective device.

That there have been only a handful of cases discussing the admissibility of parol evidence of prior oral warranties is testimony to the familiarity of lawyers with the doctrine and the theories behind it. Still, in the age of consumerism it can safely be predicted that more cases are likely to challenge these underlying theories, and more courts are likely to exhibit a willingness to constrict the application of the parol evidence rule or undermine it completely. With that in mind, it is important to examine what the rule, in this context, does and does not do.

1. Exceptions to the Parol Evidence Rule

The traditional parol evidence formulation bars testimony as to prior oral or written agreements and contemporaneous oral agreements which vary or contradict a fully integrated agreement.¹⁸⁰ In most states, including North Dakota, there are several exceptions which have been carved out of the doctrine to avoid unfair or harsh results. Thus, the rule has no application when the writing relied upon or the integrated agreement is shown to be invalid because of fraud,¹⁸¹ lack of consideration,¹⁸² mutual mistake or accident,¹⁸³ or other circumstances which prevented the formation of a binding contract.¹⁸⁴ Nor does the rule bar testimony with respect to subsequent agreements, even though the subsequent agreement contradicts or varies the writing and without regard to whether the subsequent agreement is oral or written.¹⁸⁵ Finally, at common law an agreement's meaning could be explained by parol evidence if the language used by the parties was ambiguous or unclear.¹⁸⁶ Of course, this led to cases in which the

179. *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

180. *See* N.D. CENT. CODE § 9-06-07 (1975).

181. *See* *Schue v. Jacoby*, 162 N.W.2d 377 (N.D. 1968); *Hartford Accident & Indem. Co. v. Anderson*, 155 N.W.2d 728 (N.D. 1968); *Carufel v. Kounts*, 60 N.D. 91, 232 N.W. 609 (1930).

182. *See* *Erickson v. Wiper*, 33 N.D. 193, 157 N.W. 592 (1916).

183. *See* *Larson v. Wood*, 75 N.D. 9, 25 N.W.2d 100 (1946); *Allgood v. National Life Ins. Co.*, 61 N.D. 763, 240 N.W. 874 (1932).

184. *See* *Edwards & McCulloch Lumber Co. v. Baker*, 2 N.D. 289, 50 N.W. 718 (1891).

185. *See* *Johnson v. Auran*, 214 N.W.2d 641 (N.D. 1974) (written); *Quinlivan v. Dennstedt Land Co.*, 39 N.D. 606, 168 N.W. 51 (1918) (oral).

186. *See* *Kennedy v. Falde*, 4 Dak. 319, 29 N.W. 667 (1886).

parties sought, by means of explanation, to vary the terms of the writing. In some cases they were successful¹⁸⁷ and in others they were not.¹⁸⁸

2. *The Parol Evidence Rule and the Code*

With the advent of the Uniform Commercial Code, the parol evidence rule as applied to sales of goods became more flexible, alleviating some of the problems which had arisen under earlier statutes. Although most of the traditional exceptions to the parol evidence rule continue to have vitality under the Code, as a result of its approach certain exceptions, such as the necessity of an ambiguity, no longer plague the courts. The intent of the drafters of the Code was to liberalize the parol evidence rule, theoretically making it easier to adduce the true intentions of the contracting parties in light of their commercial understandings. Nevertheless, tension continues to exist as to the role of written contracts when assertions of oral agreements are made. Although the Code has liberalized the rule, courts have generally continued to refuse to admit evidence of pre-sale warranties, particularly where the writing mentions warranties.

Under the Code, as under previous law, the application of the parol evidence rule requires a two-pronged analysis. The first inquiry is whether the writings of the parties contain the final expression as to the terms included in the agreement.¹⁸⁹ This question has been infrequently considered by the courts, and is raised chiefly when one of the parties insists that the writings of the parties, although appearing contractual in nature, are still in a pre-contractual phase. The question of finality is generally one of fact,¹⁹⁰ and the few cases considering the issue have indicated that the mere fact that terms are embodied in a writing will not create a presumption of their finality.¹⁹¹ Of course, if the issue is resolved by determining that the writings were not intended to be a final expression of the terms, then under both the Code and pre-Code rules parol evidence is admissible, even though it contradicts or varies the writings. Furthermore, even if the writings embody the

187. See, e.g., *Dickinson v. Burke*, 8 N.D. 118, 77 N.W. 279 (1898).

188. See, e.g., *Baird v. Keitzman*, 60 N.D. 317, 233 N.W. 905 (1930); *Routier v. Williams*, 52 N.D. 793, 204 N.W. 678 (1925).

189. U.C.C. § 2-202 [N.D. CENT. CODE § 41-02-09 (1968)].

190. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 400 F. Supp. 273 (E.D. Wis. 1975); cf. U.C.C. § 2-202(b) [N.D. CENT. CODE § 41-02-09(2) (1968)].

191. See, e.g., *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 400 F. Supp. 273 (E.D. Wis. 1975); *Pendleton Grain Growers v. Pedro*, 271 Or. 24, 530 P.2d 85 (1975).

A North Dakota case provides a good example of a court skipping over finality to the second inquiry, that of completeness and exclusivity, when it could merely have determined non-finality. See *Merwin v. Ziebarth*, 252 N.W.2d 193 (N.D. 1977).

final expression of the parties concerning the covered terms (*i.e.*, even though a contract has been formed and its terms are set), under the Code the writings may nevertheless be explained or supplemented through the parties' course of dealing,¹⁹² course of performance,¹⁹³ and through trade usage.¹⁹⁴ Most courts, however, have refrained from admitting contradictory, explanatory, or supplementary usage, dealing, or performance, reasoning that, in spite of the Code's liberalization, the best gauge of the parties' contract is the language used.¹⁹⁵ In so doing, these courts have probably frustrated the Code's scheme, paying mere lip service to the Code drafters' attempt to cut back on the vitality of the parol evidence rule and instead applying section 2-202 consistently with pre-Code law.

In any event, once the determination of finality has been made the inquiry shifts to a consideration of whether the writings embody the complete and exclusive statement of all the terms of the parties' agreement. This, unlike the decision as to finality, is a question of law,¹⁹⁶ and unless the writings are complete and exclusive, consistent additional terms may be admitted into evidence. The determination of completeness and exclusivity depends upon whether the subject matter of the alleged consistent additional term would certainly have been included in the writing.¹⁹⁷ Regrettably, most courts have clung to pre-Code notions that a merger clause will demonstrate completeness and exclusivity, although a few courts have rendered decisions more in keeping with the Code.¹⁹⁸

It is here where the parol evidence rule and the express warranty come into conflict. Typically, the seller makes certain pre-sale warranties. The buyer and the seller then enter into a

192. Course of dealing is a sequence of conduct between the parties under previous contracts, or leading up to the instant contract. *See* U.C.C. § 1-205(1) [N.D. CENT. CODE § 41-01-15(1) (1968)].

193. Course of performance is a sequence of conduct between the parties under the instant contract. U.C.C. § 2-208 [N.D. CENT. CODE § 41-02-15 (1968)].

194. Trade usage is a practice which is regularly observed in the locality, vocation, or trade. U.C.C. § 1-205(2) [N.D. CENT. CODE § 41-01-15(2) (1968)]. Thus, for example, a provision in a contract calling for delivery of five hundred tons of stainless steel could be explained by trade usage to mean up to five hundred tons, thereby raising a factual question as to whether delivery of two hundred tons constituted a breach. *See, e.g.,* Michael Schiavone & Sons v. Securalloy Co., 312 F. Supp. 801 (D. Conn. 1970).

195. *See, e.g.,* Southern Concrete Serv. Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581 (N.D. Ga. 1975) (parties' estimate of 70,000 cubic yards of concrete could not be explained to mean 12,542 cubic yards); Snyder v. Herbert Greenbaum & Assocs., 38 Md. 144, 380 A.2d 618 (1977) (prior course of dealing which demonstrated unilateral cancellation privileges could not "supplement" instant contract with unilateral cancellation term); Peoples Bank & Trust v. Reiff, 256 N.W.2d 336 (N.D. 1977) (alleged oral agreement giving bank priority in secured transaction inadmissible as course of dealing where writing set forth priority scheme).

196. U.C.C. § 2-202(b) [N.D. CENT. CODE § 41-02-09(2) (1968)].

197. U.C.C. § 2-202, Comment 3.

198. Berk v. Gordon Johnson Co., 232 F. Supp. 682 (E.D. Mich. 1964) (words "Kosher operation" in contract for sale of poultry processing equipment would be assumed to be an express warranty, and language of disclaimer in contract would not negate warranty).

written contract, which usually contains both a disclaimer provision and a merger clause. Thereafter the buyer discovers that the product does not meet the standard set by the alleged warranty. If the buyer can show the prior oral agreement, under section 2-316(1) the words of disclaimer will be ineffective and the buyer can take advantage of the warranty. In order for the buyer to prove the alleged warranty, however, he must first overcome the disclaimer and then overcome the merger clause, for even without a disclaimer not even consistent additional terms may be proved if the writing is found to be complete and exclusive. In short, the seller, by virtue of the Code's parol evidence rule, is given complete protection against not only "false allegations of oral warranties,"¹⁹⁹ but also against true allegations of oral warranties.²⁰⁰ With very few exceptions, this has meant that even express warranties are not too difficult to disclaim.

Illustrative of this proposition is *Jordan v. Doonan Truck & Equipment, Inc.*²⁰¹ The plaintiff purchased a used truck from the defendant, allegedly in reliance on certain express warranties made prior to the signing of the contract to the effect that certain costly repairs would not be required for several months. The contract as signed contained a merger clause indicating that it was complete and exclusive, and a clause stating, "as is, where is, no warranty." The plaintiff requested a jury instruction that express warranties could not be disclaimed, but was refused, allowing the court to admit the parol evidence. The jury found for the defendant, the plaintiff appealed, and the Supreme Court of Kansas affirmed.²⁰²

The *Jordan* court recognized the issue to be whether the parol evidence was admissible,²⁰³ for, if it was not, plaintiff's cause of action dissipated. Noting the conflict between sections 2-316(1) and 2-202, the court reconciled the two sections with a literal, and probably correct, reading. The court held that section 2-316 makes disclaimers ineffective to the extent that they are inconsistent with express warranties, but subject to the parol evidence rule.²⁰⁴ Therefore, if the agreement is integrated, the parol evidence rule precludes proof of the oral warranty, notwithstanding the fact that it and the disclaimer are inconsistent. Finally, the court cited the comment to section 2-316, and reasoned that the Code's scheme is designed to accommodate both the seller and the buyer, protecting

199. U.C.C. § 2-316, Comment 2.

200. U.C.C. § 2-202 [N.D. CENT. CODE § 41-02-09 (1968)].

201. 220 Kan. 431, 552 P.2d 881 (1976).

202. *Jordan v. Doonan Truck & Equip., Inc.*, 220 Kan. 431, 436, 552 P.2d 881, 884 (1976).

203. *Id.* at 433, 552 P.2d at 883.

204. *Id.* at 434, 552 P.2d at 883.

the former from untrue allegations and the latter from surprise.²⁰⁵ Thus, to the extent that the buyer knew of and understood the disclaimer language he was not surprised, and the parol evidence rule is applicable.

Although the case is clearly consistent with the Code's approach, it does little to comfort the buyer who asserts that, in spite of having read the disclaimer, he assumed that the oral express warranties were somehow different or not disclaimed. The court leaves open only the traditional escape hatch: if the buyer can prove fraud or some other accepted exception, then and only then can he escape the rigors of the rule.

Other cases have been decided which discuss the two sections, and for the most part the results have been the same.²⁰⁶ Still, some courts, perhaps more sensitive to the position of the buyer and the policy of liberalization embodied in the Code, have concocted ingenious approaches to circumvent the application of section 2-202 to express warranty cases. Thus, although calling or denominating the representation an express warranty, thereby showing an inconsistency, is not likely to afford relief,²⁰⁷ a less direct approach, challenging the finality, completeness, and exclusivity of the agreement, has been employed with some success.²⁰⁸ Even here the terms sought to be admitted cannot contradict any term contained in that part of the agreement which is complete.²⁰⁹ Thus, there can be no disclaimer clause present which the alleged warranty would vary. Or can there be?

Take, for example, the case of *Drier v. Perfection, Inc.*²¹⁰ The plaintiff purchased a printing press from the defendant, who in turn had purchased it from the manufacturer. Upon delivery of the press it was discovered to be defective, and for approximately one month repair efforts were generally unsuccessful. Upon the defendant corporation president's assurance that they would "make it print and . . . stand behind that one hundred percent,"²¹¹ plaintiff kept the machine and signed a security agreement containing a broad disclaimer of warranty provision. Problems with the machine continued and, after seven months, plaintiff purchased another

205. *Id.* at 435, 552 P.2d at 884.

206. *See, e.g.,* Redfern Meats v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975); FMC Corp. v. Seal Tape Ltd., 90 Misc. 2d 1043, 396 N.Y.S.2d 993 (1977); Bakal v. Burroughs Corp., 74 Misc. 2d 402, 343 N.Y.S.2d 541 (1972).

207. *See* Shore Line Properties, Inc. v. Deer-O-Paints & Chem., Ltd., 24 Ariz. App. 331, 538 P.2d 760 (1975).

208. Michael Schiavone & Sons v. Securalloy Co., 312 F. Supp. 801 (D. Conn. 1970); Symonds v. Adler Restaurant Equip. Co., 6 U.C.C. REP. SERV. 808 (Okla. 1969).

209. Hunt Foods & Indus., Inc. v. Doliner, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966).

210. _____ S.D. _____, 259 N.W.2d 496 (1977).

211. Drier v. Perfection, Inc., _____ S.D. _____, _____, 259 N.W.2d 496, 500 (1977).

press, declared the contract with defendant at an end, sued, and recovered a judgment against defendant for \$14,200. On appeal the judgment was affirmed, with the South Dakota Supreme Court focusing its attack on the finality of the parties' contract.²¹²

In *Drier*, the court first determined that the president's assurance was an express warranty, and then addressed the primary question, whether parol evidence was precluded by the security agreement since it specifically disclaimed all warranties, including all express warranties. The court construed section 2-316(1) to mean that "words or conduct to negate or limit an express warranty [are] inoperative, subject to the parol evidence rule." Thus, if the parol evidence rule "does not apply to a writing where no final expression was intended, any words which limit the express warranty . . . are inoperative,"²¹³ and the inquiry must be whether the writing was final. Finality is for the trial court to determine,²¹⁴ and since it did not determine the writing to be final the parol evidence rule, section 2-202, was inapplicable. Section 2-316(1) in this situation presents no barrier: since there was no determination of finality, the parol evidence rule is inapplicable and the inconsistent disclaimer gives way. The only problem with this rationale is that it probably misinterprets the Code.²¹⁵ On the other hand, if what the court is really saying is that the writing was not final with respect to the terms contained therein, here the warranty disclaimer, then perhaps the decision is not really a misinterpretation. In order to reach that result, however, it must either be asserted that the warranty terms had not yet been "ironed out," which is highly unlikely, or that the plaintiff could have and would have insisted on warranties being made, which does not appear to have been the case. Finally, it may be that the court reasoned that since the defendant made inconsistent warranty statements it is precluded from asserting the finality of the agreement as a matter of law. To the extent that this would virtually always be the case, it would vitiate the parol evidence rule entirely. That, in fact, appears to be the result of the court's holding in *Drier*.

Other courts have reached similar results in far less direct and more devious manners. Thus, for example, the Court of Appeals of North Carolina completely ignored the Code in deciding that evidence of an oral agreement was admissible, relying instead on a

212. *Id.* at _____, 259 N.W.2d at 502-03, 508.

213. *Id.* at _____, 259 N.W.2d at 503.

214. *Id.*

215. [1966] 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE (Sales & Bulk Transfers) § 4-08[3], at 252-53.

citation from *Corbin on Contracts* and the somehow divined intent of the parties.²¹⁶

It remains clear that the concepts of completeness and exclusivity can be legitimately used by the courts to avoid the rigors of section 2-202. One such instance of legitimate use is *Centennial Insurance Co. v. Vic Tanny International of Toledo, Inc.*,²¹⁷ a case involving the sale of used sauna equipment. Plaintiffs sought damages resulting from a fire allegedly caused by a defect in the goods. The defendant brought a third party claim against its seller, alleging breach of warranty. The third party defendant was granted summary judgment, based on the fact that the written contract could not be varied by evidence of oral express warranties.²¹⁸ The writing apparently contained neither a disclaimer nor a merger clause. The appellate court held that there existed a genuine issue of material fact which precluded summary judgment, that being whether the alleged oral warranties were consistent additional terms. The court properly recognized that even those terms could not be admitted if the agreement was complete and exclusive, and implicitly found the agreement not to be integrated.²¹⁹ The absence of a merger clause, if not determinative, at least played a significant part in the court's decision.

In addition to those courts which have used the completeness and exclusivity escape hatch, some courts have applied more traditional exceptions to avoid the harshness often mandated by section 2-202. Thus, for example, fraud which induces a party to enter into a contract vitiates the contract's validity, and makes the parol evidence rule unavailable. Illustrative is *Ed Fine Oldsmobile, Inc. v. Knisley*,²²⁰ in which the buyer of a used car was permitted to introduce evidence of prior oral representations that the car had not been raced when, after purchase, it became apparent that it had been.²²¹ In *Leveridge v. Notaras*,²²² the court applied the rule that ambiguous terms may always be explained through parol evidence, holding that where there was a conflict between a printed form warranty disclaimer and a handwritten notation of a thirty-day warranty, parol proof as to the scope of the thirty-day provision was admissible because the internal inconsistencies created an

216. A & A Discount Center, Inc. v. Sawyer, 27 N.C. App. 528, _____, 219 S.E.2d 532, 534-35 (1975) (citing 3 A. CORBIN ON CONTRACTS § 585, at 481 (1960)).

217. 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

218. Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc., 46 Ohio App. 2d 137, _____, 346 N.E.2d 330, 334-35 (1975).

219. *Id.* at _____, 346 N.E.2d at 337.

220. 319 A.2d 33 (Del. Super. Ct. 1974).

221. Ed Fine Oldsmobile, Inc. v. Knisley, 319 A.2d 33, 36 (Del. Super. Ct. 1974).

222. 433 P.2d 935 (Okla. 1967).

ambiguity.²²³ Since a finding of ambiguity is not a prerequisite to the admission of such evidence under the Code, the court could merely have stated that it was permitting course of performance evidence to explain the terms.²²⁴ Interestingly, the buyer, although claiming a warranty, had agreed to pay for certain repairs during the warranty period. Although evidence of this was admissible, according to the court it was not conclusive.²²⁵

If, as indicated in *Leveridge*, an undertaking by the buyer to pay for repairs is not suggestive of the absence of warranty, then it would stand to reason that an undertaking by the seller of the responsibility for repairs should not suggest the existence of a warranty, particularly in the face of a warranty disclaimer. The Court of Appeals of Colorado, however, has indicated that this is not necessarily the case. In *O'Neil v. International Harvester Co.*,²²⁶ the plaintiff purchased a used truck from defendant after reading the purchase contract, which contained both a disclaimer provision and a merger clause. Thereafter, the truck broke down and plaintiff returned it to defendant, at which time defendant allegedly agreed to repair it and split the expense. Repair attempts apparently were unsuccessful, and plaintiff sought to revoke his acceptance. When defendant refused, plaintiff sued, seeking rescission and damages, and defendant counterclaimed for the purchase price.²²⁷ Summary judgment was granted to the defendant, and plaintiff appealed, alleging that summary judgment was improper because an express warranty had been made and breached.²²⁸ Because of the merger clause and the disclaimer, it became necessary to consider whether evidence of the alleged oral express warranty was admissible, for, if so, a question of fact would exist, precluding summary judgment.²²⁹

The court first agreed with the defendant that the disclaimer provision muted implied warranties, and went on to consider whether it also barred testimony concerning express warranties. The court, referring to section 2-316(1), indicated that the alleged express warranties were totally inconsistent with the disclaimer, and that therefore, subject to section 2-202, the express warranties would control.²³⁰ The court then noted the difficulty of reconciling

223. *Leveridge v. Notaras*, 433 P.2d 935, 941 (Okla. 1967).

224. U.C.C. § 2-202(a) [N.D. CENT. CODE § 41-02-09(1) (1968)].

225. 433 P.2d at 941.

226. 40 Colo. App. 369, 575 P.2d 862 (1978).

227. *O'Neil v. International Harvester Co.*, 40 Colo. App. 369, 371, 575 P.2d 862, 864 (1978).

228. *Id.* at 371, 575 P.2d at 865.

229. *Id.* at 373, 575 P.2d at 865.

230. *Id.* at 372, 575 P.2d at 865.

the two Code sections, and explicitly refused to reach the issue of whether the alleged oral warranties were admissible. The court instead held as follows:

Where, as here, the buyer alleges the existence of oral warranties prior to the execution of the written contract, *as well as conduct following the sale (such as a commitment to pay for certain repairs) which tends to show that warranties were in fact made*, there is a material issue of fact for resolution. That issue is whether the parties intended the written contract to be a final expression of this agreement, and if not, what the terms actually agreed upon by the parties consisted of.²³¹

In other words, an exception was carved out of the Code parol evidence rule, providing that allegations of oral warranty, coupled with allegations of subsequent conduct which suggest the existence of the warranty, are sufficient to cast doubt on the finality of the writing. This is true even though a merger clause is present and the admitted testimony directly contradicts the writing. It is suggested that, while it has long been the rule that testimony is generally admissible to demonstrate non-finality, few courts would go so far as this one. In effect, the exception has in this case swallowed the rule, for the court further noted that “under such circumstances, evidence of both oral warranties and the conduct of the parties subsequent to signing the contract is admissible for purpose [sic] of resolving this [fact] issue.”²³²

At this point it should be apparent that, although it is the expressed policy of the Code that express warranties should govern inconsistent disclaimers, because of the application of the parol evidence rule prior express warranties often will not be admissible into evidence. It therefore becomes increasingly possible to in effect disclaim express warranties, even under circumstances where there is little doubt that the warranties were made. One of the reasons for this is the fact that most standard form contracts contain both disclaimer provisions and integration clauses. Disclaimer provisions will render evidence of an express warranty inadmissible as inconsistent, and integration clauses will likely cause a court to consider the agreement not only final but also complete and exclusive. It is interesting to note that few cases have adequately analyzed the completeness and exclusivity criteria. The Code²³³

231. *Id.* at 373, 575 P.2d at 865 (emphasis added).

232. *Id.*

233. See U.C.C. § 2-202, Comment 3

apparently requires that the court determine whether, if the alleged term had been agreed upon, it would certainly have been included.²³⁴ Although it is generally true that parties to a written agreement would consider warranties sufficiently important to include them in a writing, it is obvious that all too often sellers will make promises or affirmations to induce a sale (intending, of course, to keep them) which are never reduced to writing and which are in fact directly contrary to standard form provisions. It is suggested that in this relatively narrow area the underlying Code policies of giving effect to express warranties and relaxing the parol evidence rule can best be furthered by admitting evidence of the warranty.

E. DAMAGES

1. *Damages Under the Code*

The Code damage rules for breach of warranty are relatively straightforward and easy to apply. Where a breach of warranty exists and is discovered at the time of delivery, the buyer may reject the goods.²³⁵ If the buyer rightfully rejects the goods,²³⁶ he may either "cover" by procuring substitute goods and thereafter recover the difference between cover cost and contract price,²³⁷ or he may bring an action to recover the difference between market price and contract price,²³⁸ which in most cases will be the same as cover damages. If the buyer discovers or should have discovered the breach, and it is a breach which would have given him a right to reject the goods, but he nevertheless did not exercise that right, he will be deemed to have accepted the goods.²³⁹ If he accepts the goods, he may still be able to revoke his acceptance if the defect substantially impairs the value of the goods to the buyer and he accepted assuming the defect would be corrected and it has not been.²⁴⁰ This is also the case if he accepted the goods without discovering the defect because the defect was difficult to discover or the seller assured him that the goods were of acceptable quality.²⁴¹

234. See, e.g., *Conner v. May*, 444 S.W.2d 948 (Tex. Civ. App. 1969).

235. See U.C.C. §§ 2-601, 2-612, 2-508 [N.D. CENT. CODE §§ 41-02-64, -75, -56 (1968)]. See generally *WHITE & SUMMERS*, *supra* note 62, at 293-324.

236. See U.C.C. §§ 2-602, 2-603, 2-604 [N.D. CENT. CODE §§ 41-02-65 to -67 (1968)].

237. See U.C.C. §§ 2-711(1)(a), 2-712(1) & (2) [N.D. CENT. CODE §§ 41-02-90(1)(a), -91(1) & (2) (1968)]. The buyer can also recover consequential or incidental damages, but cannot recover for expenses that were avoided by virtue of the seller's breach.

238. See U.C.C. §§ 2-711(1)(b), 2-713(1) [N.D. CENT. CODE §§ 41-02-90(1)(b), -92(1) (1968)].

Again, consequential or incidental damages are recoverable, and costs avoided are not.

239. See U.C.C. § 2-606(1)(b) [N.D. CENT. CODE § 41-02-69(1)(b) (1968)].

240. U.C.C. § 2-608(1)(a) [N.D. CENT. CODE § 41-02-71(1)(a) (1968)]; see *Erling v. Homera*, 298 N.W.2d 478 (N.D. 1980).

241. U.C.C. § 2-608(1)(b) [N.D. CENT. CODE § 41-02-71(1)(b) (1968)].

If the buyer revokes his acceptance, he may recover damages as set out above with respect to rejected goods.²⁴²

When the buyer has accepted goods, he must pay for them at the contract rate.²⁴³ After acceptance, he is obligated to notify the seller of any breach which he has discovered or which he should have discovered.²⁴⁴ If he fails to notify the seller within a reasonable time, the buyer loses any remedy against the seller.²⁴⁵ Once the buyer has accepted the goods, discovered the defect, and notified the seller, he is entitled to damages for the breach of warranty. Section 2-714(2) specifically sets forth the damages for breach of warranty as "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." Subsection (3) of section 2-714 codifies the rule that the buyer is also entitled to recover consequential and incidental damages as defined in section 2-715.²⁴⁶

It is interesting to note that, while section 2-714(2) deals specifically with breach of warranty damages, subsection (1), which is the general damage rule, is, according to the comment to section 2-714, applicable to breaches of warranty as well.²⁴⁷ That subsection provides that recoverable damages are to be "determined in any manner which is reasonable." While no case has been found which explicitly relies on this dichotomy for assessing damages differently than on an "as warranted minus as accepted" basis, a number of decisions exist in which different damages have been awarded.

2. *Direct and Consequential Damages Distinguished*

At the heart of the matter is the fundamental, albeit not always clear, distinction between direct damages and consequential or indirect damages. Direct damages are generally loss of bargain damages, those which arise out of the breach itself. Indirect damages are those which arise as a result of this particular breach because of circumstances contemplated by the parties at the time

242. U.C.C. § 2-608(3) [N.D. CENT. CODE § 41-02-71(3) (1968)].

243. U.C.C. § 2-607(1) [N.D. CENT. CODE § 41-02-70(1) (1968)].

244. U.C.C. § 2-607(3)(a) [N.D. CENT. CODE § 41-02-70(3)(a) (1968)].

245. *Id.*

246. U.C.C. §§ 2-714(2) & (3), 2-715 [N.D. CENT. CODE §§ 41-02-93(2) & (3), -94 (1968)].

Incidental damages are basically costs associated with the care and handling of the goods or their substitutes. Consequential damages are those unavoidable damages which flow from the breach and which the seller could reasonably have expected to flow from the breach. They include personal and property damage caused by breach of warranty.

247. U.C.C. § 2-714, Comment 2.

the contract was entered into.²⁴⁸ Although both are recoverable, for recovery of consequential damages the plaintiff must prove not only the breach and the injury caused thereby, but that the injury was one which could have been foreseen or contemplated by the seller. Thus, for example, lost profits,²⁴⁹ loss of use damages,²⁵⁰ personal injury or property injury damages, and a whole range of other consequential damages will be properly recoverable if they can be proven and if they can be shown to have been foreseeable. These foreseeability questions do not generally arise with direct damages, or, more properly, foreseeability is clearly present with direct damages, because those damages are expected and likely to follow any breach of like character.²⁵¹

3. Measures of Damages: Special Circumstances

Because both types of damages are recoverable, it would not seem terribly important to distinguish between them. The Code scheme has caused some confusion, however, because it allows at least four measures of damage under section 2-714 when a breach of warranty has occurred. By far the most common measure of damages is that suggested in subsection (2), the difference in value rule.²⁵² However, the Code also allows damages to be determined in any other reasonable manner.²⁵³ Moreover, even subsection (2)

248. See *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 329 A.2d 28 (1974); *Kleven v. Geigy Agricultural Chem.*, 303 Minn. 320, 227 N.W.2d 566 (1975).

249. See *Multivision Northwest, Inc. v. Jerrold Elec. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972); *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 250 N.W.2d 185 (1977).

250. See *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 360 N.E.2d 818 (1977).

251. See, e.g., C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 8, at 32-34 (1935). The sale of a car that is defective will result in damages equal to the amount that the defect lowers the value. In other words, if the car without the defect is worth \$5,000, and with the defect only \$4,000, the damages would be \$1,000. Ordinarily the relative values will be determined by market price, which would depend on what costs were associated with repairing the car. This has led many courts to substitute cost of repair for the primary measure of damages set out in section 2-714(2). In any event, if the defect rendered the car unusable, for example, consequential damages might also be recoverable, depending upon what damages could have been foreseen. In brief, the distinction between consequential and general damages may be said to be whether the damages are such as ordinarily flow from a breach of that character, or are less usual.

252. See, e.g., *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. 1977); *Courtesy Motor Sales, Inc. v. Farrior*, 53 Ala. App. 94, _____, 298 So. 2d 26, 34 (1974); *Thompson Chrysler-Plymouth, Inc. v. Myers*, 48 Ala. App. 350, 264 So. 2d 893 (1972); *Union Motors, Inc. v. Phillips*, 241 Ark. 857, 410 S.W.2d 747 (1967); *Ford Motor Co. v. Gunn*, 123 Ga. App. 550, 181 S.E.2d 694 (1971); *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 360 N.E.2d 818 (1977); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972); *Arnold v. Ford Motor Co.*, 90 N.M. 549, 566 P.2d 98 (1977); *Eckstein v. Cummins*, 46 Ohio App. 2d 192, 347 N.E.2d 549 (1975); *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970); *Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975).

253. See *supra* note 247 and accompanying text.

allows the calculation to be based upon a different standard where "special circumstances show proximate damages of a different amount."²⁵⁴ This language has confused courts, leading many to commingle the special circumstance language with the "proper case" language in subsection (3). Subsection (3) provides that, in a proper case, consequential and incidental damages are also recoverable.²⁵⁵

Thus, for example, in *Lewis v. Mobil Oil Corp.*,²⁵⁶ the United States Court of Appeals for the Eighth Circuit ruled that the fact that oil produced by the defendant had been worth what plaintiff had paid for it, but was nevertheless not as warranted, was a special circumstance which made the damages due the plaintiff different from the standard measure.²⁵⁷ The difference in the measure of damages was to be the addition of consequential and incidental damages. The court based its reasoning on the fact that the implied warranty of fitness for a particular purpose had been breached, and that therefore the oil was of good quality but simply not as warranted. It is suggested that this conclusion misses the point of the special circumstances language.

In *Lewis*, the defendant supplied oil for use in plaintiff's machine under circumstances in which the particular purpose warranty was created. The oil did not work in the machine, apparently because it lacked an essential additive. This caused the plaintiff to incur substantial costs. In finding that special circumstances were present and that the standard measure of damages was therefore inapplicable, the court made one fundamental misstatement: that the plaintiff "did not pay a price exceeding the value of the goods delivered."²⁵⁸ In other words, the goods delivered were worth what they would have been worth had they been as warranted. Therefore, a special circumstance was present. Such reasoning is not unattractive, but it misses the mark. Had the oil been as warranted, it would have been worth what the plaintiff paid, but as delivered it was worthless, since it could not be used in plaintiff's machine. Therefore, the standard damages could have been given to plaintiff, and it could then have been determined whether this was a proper case for incidental and consequential damages. The court did allow recovery for consequential and incidental loss, but apparently felt that it could

254. U.C.C. § 2-714(2) [N.D. CENT. CODE § 41-02-93(2) (1968)].

255. U.C.C. § 2-714(3) [N.D. CENT. CODE § 41-02-93(3) (1968)].

256. 438 F.2d 500 (8th Cir. 1971).

257. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 507 (8th Cir. 1971).

258. *Id.*

not have done so absent the special circumstances language.²⁵⁹

Other cases equating special circumstances with a proper case for incidental and consequential damages abound.²⁶⁰ In one jurisdiction, Pennsylvania, the special circumstances-proper case question has come full circle, beginning in 1963 with a case which equated the two, and ending in 1977 with a case which more correctly interprets the Code. *Keystone Diesel Engine Co. v. Irwin*²⁶¹ involved the question whether the buyer of a diesel engine could recover lost profits occasioned by a breach, clearly a question of consequential damages. In holding that the buyer could not recover lost profits, the court indicated that special circumstances would exist where the buyer communicated enough facts to the seller to bring the subsequent damages within the parties' contemplation.²⁶² In other words, special circumstances must exist before consequential damages are recoverable.

This led a number of courts applying Pennsylvania law to conclude that consequential damages would not be recoverable absent special circumstances, thereby reading the "proper case" language of section 2-714(3) out of the Code. Illustrative is *R.I. Lampus Co. v. Neville Cement Products Corp.*²⁶³ In that case, the plaintiff sold cement blocks to the defendant over a period of several years. After switching to a new type of block at the request of the defendant, plaintiff experienced difficulty in manufacturing, which resulted in defective blocks. Defendant refused to pay for them, claiming that plaintiff was responsible not only for the defective blocks but for damages which resulted from their use, and plaintiff sued for the purchase price. Defendant counterclaimed, and at trial plaintiff was awarded the price, offset by defendant's direct damages. The trial court, however, refused to award damages to defendant for six other items of consequential injury, and it was from this refusal that defendant appealed. The Superior Court of Pennsylvania reversed in part, holding that at least four items of damages for which recovery had been denied could in fact be recovered.²⁶⁴

259. *Id.* at 508.

260. *See, e.g.,* *Acme Pump Co. v. National Cash Register Co.*, 32 Conn. Supp. 69, 337 A.2d 672 (C.P. 1974) (special circumstances allow buyer to recover consequential damages for litigation costs); *Murray v. Kleen Leen, Inc.*, 41 Ill. App. 3d 436, 354 N.E.2d 415 (1976); *Adams v. J.I. Case Co.*, 124 Ill. App. 2d 388, 261 N.E.2d 1 (1970) (communication by buyer to seller of particular needs sufficient to show special circumstances and allow buyer to recover consequential damages for lost profits); *General Supply & Equip. Co. v. Phillips*, 490 S.W.2d 913 (Tex.Civ. App. 1972); *Air Prods. & Chem., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

261. 411 Pa. 222, 191 A.2d 376 (1963).

262. *Keystone Diesel Engine Co. v. Irwin*, 411 Pa. 222, _____, 191 A.2d 376, 378 (1963).

263. 232 Pa. Super. Ct. 242, 336 A.2d 397 (1975).

264. *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 232 Pa. Super. Ct. 242, _____, 336 A.2d 397, 398 (1975).

The court first explored briefly the quandary which had existed in Pennsylvania since *Keystone*, noting that *Keystone* could have been decided without any reference whatsoever to the special circumstances language.²⁶⁵ The court also invited the Pennsylvania Supreme Court to clarify what would constitute a proper case for consequential damages.²⁶⁶ In spite of recognizing that use of the special circumstances language would be inappropriate in a consequential damage decision, the court determined again that foreknowledge was a special circumstance which allowed recovery of consequential damages.²⁶⁷ Plaintiff appealed, and the supreme court did in fact clarify the Pennsylvania rule.²⁶⁸

The Supreme Court of Pennsylvania in effect overruled *Keystone*, thereby properly applying the Code. It reasoned that the special circumstances language of section 2-714(2) does not concern itself with consequential damages, but rather is concerned with "value of the goods damages."²⁶⁹ Therefore, one may clearly recover consequential or incidental damages absent a showing of special circumstances, so long as it is a "proper case" for their recovery. Whether it is a "proper case" depends solely upon whether the seller "had reason to know" the buyer's need.²⁷⁰ Since the plaintiff clearly did have such reason to know, he was responsible, and the superior court's decision was affirmed.

It is thus apparent that the "special circumstances" language of section 2-714(2) is not to be equated with the "proper case" language of subsection (3). Unfortunately, in deciding this issue the Pennsylvania court went no further; it did not indicate either what special circumstances might be or when they might alter the general damages rules. There are, however, a few cases in which courts have considered these questions.

Two of the cases, from New York²⁷¹ and North Dakota,²⁷² dealt with breach of the warranty of title, and have been previously discussed by this author.²⁷³ These cases concluded that in a breach of warranty of title case courts would likely invoke the special circumstances language to lower damages, thereby avoiding what appears to be a windfall in favor of the buyer.²⁷⁴ There appears to

265. *Id.* at _____, 336 A.2d at 403.

266. *Id.*

267. *Id.* at _____, 336 A.2d at 404.

268. *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288 (1977).

269. *Id.* at _____, 378 A.2d at 291 (emphasis in original).

270. *Id.* See U.C.C. § 2-715(2)(a) [N.D. CENT. CODE § 41-02-94(2)(a) (1968)].

271. *Itoh v. Kimi Sales Ltd.*, 74 Misc. 2d 402, 345 N.Y.S.2d 416 (Civ. Ct. N.Y. 1973).

272. *Schneidt v. Absey Motors, Inc.*, 248 N.W.2d 792 (N.D. 1976).

273. See Lord, *Some Thoughts About Warranty Law in North Dakota, Part I: The Warranty of Title*, 53 N.D.L. REV. 537, 544-66 (1977).

274. If the seller has no title and sells a chattel valued at \$5,000 to a buyer, the breach of

be only one other case which suggests another circumstance sufficiently special to avoid the general damage rule. In *Downs v. Shouse*,²⁷⁵ decided by the Court of Appeals of Arizona, plaintiffs purchased a used airplane from defendant, relying in part upon certain express warranties regarding the plane's condition and the oil consumption of the plane. The plane was damaged, allegedly due to mechanical problems which amounted to a breach of warranty, and plaintiffs refused to pay defendant a portion of the purchase price still owed (\$1,500). Defendant thereupon removed certain equipment from the plane, and plaintiffs sued to replevy the equipment and to recover damages for breach of warranty. Judgment was rendered for plaintiffs on the breach of warranty claim for \$128.68, and against defendant on its counterclaim for \$1,500. The defendant appealed.²⁷⁶

After determining that there had been a warranty and that it had been breached, the court considered the question of damages. The defendant argued that the record showed no evidence of the market value of the plane, so that the damages awarded were based on an improper calculation.²⁷⁷ The court, however, after noting that damages were ordinarily to be assessed at value as warranted minus value as delivered, indicated that that measure "is not exclusive of the buyer's remedies where the property is not totally destroyed. If by reasonable expenditure goods may be made to conform to the warranty, the amount of such expenditure may be the measure of such damages."²⁷⁸ In other words, special circumstances exist either when no proof of actual value is given, or when the goods have been repaired.²⁷⁹

Therefore, special circumstances, calling for the application of other than the standard damage measure, will be deemed to exist in three or perhaps four situations. First, in warranty of title cases, courts are likely to hold special circumstances extant; second, special circumstances will exist where the loss is occasioned subjectively but not objectively,²⁸⁰ that is, where the objective loss in

warranty would occur at that point, giving the buyer the difference between the value as warranted (\$5,000) and as delivered (\$0). If the buyer has had the use of the chattel for a period of time, however, he has been enriched by that use. Therefore, courts will often give the buyer damages based upon the value of the chattel when the buyer is dispossessed, which in most cases will be significantly lower.

275. 18 Ariz. App. 225, 501 P.2d 401 (1972).

276. *Downs v. Shouse*, 18 Ariz. App. 225, _____, 501 P.2d 401, 403-04 (1972).

277. *Id.* at _____, 501 P.2d at 406.

278. *Id.*

279. See also *S.H. Nevers Corp. v. Husky Hydraulics, Inc.*, 408 A.2d 676, 681 (Me. 1979) (cost of repairs can be used as a yardstick to gauge the difference in value between goods as warranted and as received).

280. Some commentators believe this is the only situation in which special circumstances should be held to exist. See WHITE & SUMMERS, *supra* note 62, at 383.

value is different from the subjective loss in value;²⁸¹ third, special circumstances will exist where there otherwise might be no recovery at all because of a lack of proof; and, finally, special circumstances may be deemed to exist where the goods are repaired, with the repair costs normally being equated with the loss in value.²⁸²

Thus, there are four measures of damage possible in a breach of warranty case, and an effort should be made to keep them distinct.²⁸³ The Code's policy of liberality can be well implemented by assessing damages generally on the basis of value as warranted minus value as delivered. Where, however, such a measure does not adequately compensate or threatens to overcompensate the buyer, other damages are appropriate, measured in any reasonable manner. By invoking the special circumstances language, a court may respond to any particular situation in which it finds itself. Finally, in most cases, the award of consequential or incidental damages will also be appropriate.

4. *The Primary Damage Rule and Cost of Repair*

Although much has been said about the other measures of damage, it is necessary to discuss the primary breach of warranty measure, which is the difference between the value of the goods as warranted and as delivered. The standard is basically objective, and remarkably simple to apply. Nevertheless, a number of cases have shown a marked preference for cost of repair damages.²⁸⁴ As indicated earlier, these two figures may often coincide, and there would thus seem to be little harm in applying the cost of repair standard. This repair figure is particularly useful where there is little or no evidence as to the market value of the goods as

281. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

282. A recent Iowa case has indicated that special circumstances might also exist where the defect is latent and its scope is not feasibly discoverable. In that case, damages are to be assessed at a later time, with reference not solely to difference in value but also to plaintiff's costs in attempting to rectify the problem. *Holm v. Hansen*, 248 N.W.2d 503 (Iowa 1976). In *Holm*, defendant sold plaintiff cattle, some of which were infected with brucellosis, which plaintiff subsequently discovered. Plaintiff, rather than segregate the cattle known to be infected, maintained the herd, attempting to treat all of the cows. *Id.* at 505. The Supreme Court of Iowa held that plaintiff had shown special circumstances which entitled him to other than standard damages. *Id.* at 510. This may suggest another special circumstance, or a combination, where the loss is subjective and "repairs" are attempted. It may also be that the cost of unsuccessful repairs is merely an incidental damage item.

283. While four measures of damage are standard, recent developments in warranty law suggest that a fifth measure, punitive damages, may be allowable under some circumstances, although as a general rule punitive damages for breach of contract are not allowed. When breach of an express warranty for a stepladder resulted in personal injuries, the court in *Cantrell v. Amarillo Hardware Co.*, 226 Kan. 681, 602 P.2d 1326 (1979), found punitive damages awarded in the amount of \$18,500 were not excessive, and upheld the award. Punitive damages may be allowed in cases of gross neglect, or in cases where the goods are so severely defective that an award of punitive damages is reasonable in light of the evidence presented. *Coyle Chevrolet Co. v. Carrier*, _____ Ind. App. _____, 397 N.E.2d 1283 (1979). This type of award suggests yet another special circumstance where punishment or deterrence is a goal.

284. See *infra* note 285.

warranted or as delivered,²⁸⁵ but plaintiffs should be aware that not all courts look favorably upon the use of the repair figure. Thus, for example, in *Bergenstock v. Lemay's G.M.C., Inc.*,²⁸⁶ the trial court directed a verdict for the defendant, holding that plaintiff had failed to demonstrate the proper measure of damages when the primary evidence admitted was directed toward establishing cost of repair. The appellate court reversed, holding that the lower court should have inferred the fair market value of the chattel from the sum received at a forced sale.²⁸⁷ Nevertheless, the case stands as a reminder to future litigants that not all courts will welcome the cost of repair figure.

One of the quirks of the standard measure of damages is that the ascertainment of value is to occur as of the time of acceptance, and not at some earlier point. While ordinarily this will coincide rather closely with the actual delivery date, it need not always. Because acceptance under the Code will generally occur only after the buyer has had a reasonable opportunity to inspect the goods,²⁸⁸ it is possible that the value of the goods might decrease between actual delivery and acceptance. To the extent that the buyer takes advantage of the reasonable opportunity to inspect prior to acceptance, and then decides to accept the goods in spite of a discovered breach of warranty and seek damages instead, he should not be charged with the loss in value caused by his use during the inspection period.²⁸⁹ Similarly, cases which insist upon the buyer demonstrating the existence of the breaching defect at the time of delivery are probably in error, since the critical time frame is probably later.²⁹⁰ Nevertheless, because a determination of the time of acceptance is a question of fact,²⁹¹ and because many courts might balk at the prospect of unjustly enriching a buyer, the time of delivery is often substituted for the time of acceptance.

One other quirk of the Code scheme is worthy of particular

285. See *Tarter v. Monark Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. 1978). See also *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1977); *S.H. Nevers Corp. v. Husky Hydraulics, Inc.*, 408 A.2d 676 (Me. 1979); *Carlson v. Rysavy*, _____ S.D. _____, 262 N.W.2d 27 (1977).

286. 118 R.I. 75, 372 A.2d 69 (1977).

287. *Bergenstock v. Lemay's G.M.C., Inc.*, 118 R.I. 75, _____, 372 A.2d 69, 75 (1977).

288. U.C.C. § 2-606 [N.D. CENT. CODE § 41-02-69 (1968)].

289. Although no cases have been found, one can readily imagine a case where a chattel declines in value immediately upon purchase, such as a car, and declines further with use, so that after an appropriate inspection period the value as accepted is diminished by factors other than merely the defect. Under those circumstances the buyer might be better off rejecting the goods, particularly if he is to be charged with the loss in value attributed to depreciation and use. To the extent that the value of a like chattel without the defect would have declined a like amount, he does, in effect, pay for his use of the chattel. Cf. U.C.C. § 2-608(2) [N.D. CENT. CODE § 41-02-71(2) (1968)] (revocation of acceptance must occur before substantial change in condition of goods not caused by the defect).

290. See, e.g., *Blade v. Sloan*, 108 Ill. App. 2d 397, 248 N.E.2d 142 (1969).

291. See *La Villa Fair v. Lewis Carpet Mills, Inc.*, 219 Kan. 395, 548 P.2d 825 (1976).

note. The damage rule embodied in section 2-714 does not necessarily relate to the contract or list price, but rather is to be applied according to the value of goods as warranted and as accepted.²⁹² Thus, for example, where the buyer of a mobile home purchased it for \$5,300, and it was discovered to be defective and worth only \$2,000, the damage award was not \$3,300. Rather, the award was \$4,000, representing the difference between the value of the mobile home if it had been as warranted and the value as delivered and accepted.²⁹³ The theory behind this award is that the disappointed buyer should not be penalized for having made a good bargain,²⁹⁴ and is therefore entitled to the higher damage figure. The rule seems justifiable if for no other reason than that the buyer, if he is now to seek an equivalent, will in all probability have to expend at least that much on the open market.²⁹⁵ Nevertheless, an argument can be made that, because the buyer in fact made a good bargain, his actual damages are best reflected by the difference between purchase price and value, thereby suggesting yet another "special circumstance" showing proximate damages of a different amount than the standard measure. On the whole, however, most courts have insisted on a determination of fair market value on the relevant dates,²⁹⁶ although some are willing to assert that the purchase price is prima facie evidence of value.²⁹⁷

III. IMPLIED WARRANTIES

Thus far the focus of this article has been on the creation of and consequences attendant to express warranties. As the focus shifts to implied warranties, it should be remembered that what has been said with respect to damages and to remedies and their limitations will apply to implied warranties as well.

Generally there are three implied warranties which may arise from the sale of goods under the Code. The practitioner will undoubtedly be familiar with two of these, but the third may be unfamiliar to many attorneys. The three are the warranty of merchantability (often confusingly called the warranty of fitness or

292. U.C.C. § 2-714(2) [N.D. CENT. CODE § 41-02-93(2) (1968)].

293. *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196 (Tex. Civ. App. 1973). See also *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970); *Carlson v. Rysavy*, _____ S.D. _____, 262 N.W.2d 27 (1978); *Fredrick v. Dreyer*, _____ S.D. _____, 257 N.W.2d 835 (1977).

294. See *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970).

295. Of course, this justification diminishes as the period between original purchase and discovery of the defect shortens. This is presumably so because the buyer could get a "good deal" elsewhere. Likewise, the longer the period between acceptance and judgment, the less likely the buyer will be able to use the damage award to replace the defective good.

296. See *supra* cases cited in note 293.

297. See, e.g., *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970).

general fitness), the warranty of fitness for a particular purpose, and those warranties which arise between the parties from their course of dealing or usage of trade.

A. WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE

1. *Creation of Implied Warranties by Course of Dealing or Usage of Trade*

Probably the most often overlooked implied warranties are those which arise from the parties' course of dealing²⁹⁸ or from trade usage.²⁹⁹ Section 2-314, which also details the general warranty of merchantability, specifically includes the availability of virtually an unlimited number of warranties. Section 2-314(3) provides a panoply of unnamed implied warranties which are capable of being created through dealing or usage, and implies that these warranties are subject to exclusion or modification as permitted by section 2-316.³⁰⁰ While it appears clear that usage and dealing can properly be used to explain or supplement the general warranty of merchantability, thus giving content and form to the seller's obligations generally under section 2-314, it seems equally clear that such a reading of the Code tends to diminish the effect of the specificity of section 2-314(3). In other words, unless there are instances where implied warranties exist other than as an adjunct to the general merchantability warranty, it would seem that subsection (3) is superfluous. Such a reading ignores both the clear language of the statute and the rule of statutory construction which favors interpretation designed to give effect to each word or phrase in a statute.³⁰¹ Nevertheless, either because litigants have failed to

298. U.C.C. § 1-205(1) [N.D. CENT. CODE § 41-01-15(1) (1968)]. Section 1-205(1) defines course of dealing as a "sequence of previous conduct between the parties . . . which . . . [establishes] a common basis of understanding for interpreting their expressions and other conduct." Section 1-205(3) provides that course of dealing is to supplement generally the terms of the parties' agreement. Course of dealing, which involves these same parties against a backdrop of prior contracts or transactions, is not to be confused with course of performance, which envisions conduct within a particular transaction. See U.C.C. § 2-208 [N.D. CENT. CODE § 41-02-15 (1968)].

299. U.C.C. § 1-205(2) [N.D. CENT. CODE § 41-01-15(2) (1968)]. Section 1-205(2) defines usage of trade as "any practice or method of dealing having such regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question." The question whether a usage of trade exists and what its boundaries are is a fact question, and any applicable usage is to be employed to supplement the parties' agreement generally.

300. Section 2-314(3) provides: "Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade." U.C.C. § 2-314(3) [N.D. CENT. CODE § 41-02-31(3) (1968)].

Subsections (b) and (c) of section 2-316(3) deal generally with exclusion of all implied warranties. Section 2-316(3) (c) is of particular note, and provides that "[a]n implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade." U.C.C. § 2-316(3) (c) [N.D. CENT. CODE § 41-02-33(3) (c) (Supp. 1979)]. Interestingly, it appears that course of performance can operate to exclude or modify an implied warranty but not to create one. Cf. *infra* notes 358-60 and accompanying text.

301. See N.D. CENT. CODE § 1-02-07 (1975). See also *Wallenstinson v. Williams County*, 101 N.W.2d 571, 577 (N.D. 1960).

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.³⁰²

Perhaps the best examples of such cases are two lower state court decisions from 1970. *Gindy Manufacturing Corp. v. Cardinale Trucking Corp.*³⁰³ involved the sale of twenty-five new semi-trailers by plaintiff to defendant, a subsequent default on the installment obligation, repossession by the seller, and an attempt to obtain a deficiency judgment against the buyer. The defendant buyer raised a defense of breach of warranty, in spite of a warranty disclaimer indicating that the sale of the trucks was "as is." Among other questions presented to the court were whether there existed a warranty created by trade usage or course of dealing, and whether the "as is" disclaimer would be effective to exclude such implied warranties.³⁰⁴ The defendant claimed that both usage of trade and a course of dealing covering twenty years precluded the inclusion of an "as is" clause in the contract, and in fact created warranties ancillary to the warranty of merchantability. Specifically, the defendant contended that there was a trade usage to the effect that manufacturing defects would be repaired by the seller, and that a course of dealing between the parties had in fact incorporated that usage.³⁰⁵ The court, accepting for the purpose of a motion for summary judgment the truth of the defendant's allegations, indicated:

Repairs undertaken by plaintiff, the usage of trade and prior dealings of the parties offer strong evidence of plaintiff's obligation to make such repairs, whether in satisfaction of an implied warranty of merchantability or in satisfaction of a stricter implied warranty claimed by defendant under [section 2-314(3)] . . . , namely, an implied warranty to repair all defects in manufacture regardless of their seriousness. . . . Accordingly, unless properly disclaimed . . . there arose in this transaction an implied warranty . . . to accept responsibility for defects

302. See *infra* notes 303-22 and accompanying text.

303. 111 N.J. Super. 383, 268 A.2d 345 (1970).

304. *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, ____, 268 A.2d 345, 346 (1970).

305. *Id.* at ____, 268 A.2d at 349. The defendant also alleged a course of performance whereby the plaintiff had undertaken the responsibility of such repairs in this case. The court, rather than answer the more difficult question of whether course of performance could create warranties, see *supra* note 300, responded by stating that course of performance was relevant to interpreting the agreement under section 2-208. 111 N.J. Super. at ____, 268 A.2d at 349.

in manufacture at least to the extent of repair or replacement.³⁰⁶

It is important to note that this warranty, implied by usage of trade and course of dealing, existed without regard to the question of whether the warranty of merchantability existed, had been disclaimed, or had even been breached. The court concluded that, because the "as is" clause was inconspicuous, it did not effectively disclaim this warranty.³⁰⁷

The court then faced an even more perplexing problem, whether, without regard to the inconspicuousness of the "as is" clause as it affected the warranty of merchantability, such a clause could operate to exclude the warranty implied by usage and dealing. Confronted with the clear language of section 2-316(3) (a),³⁰⁸ which specifies that all implied warranties are disclaimed by an "as is" term "unless the circumstances indicate otherwise," and the equally clear statement in section 2-314 that warranties created by usage and dealing are subject to exclusion, the court seemingly had little choice but to concede that the disclaimer should be given effect. With remarkable footwork, however, the court concluded that the trade usage and course of dealing which had initially created the warranties also constituted circumstances which would indicate that the disclaimer was expected not to apply.³⁰⁹ In other words, since usage and dealing created a warranty on the part of the seller to repair new goods, "[a] buyer could reasonably expect that the ["as is" clause] was to apply only when the form contract was employed in the sale of used vehicles."³¹⁰ Thus, not only do usage and dealing create warranties, but they also provide circumstances surrounding the transaction which make it difficult to disclaim those warranties.

This, of course, nullifies the effect of a general or broad disclaimer clause, at least insofar as usage and dealing warranties are concerned. While it appears at first glance to conflict with the explicit language of section 2-316(3) (a), the decision is probably

306. 111 N.J. Super. at _____, 268 A.2d at 349.

307. *Id.* at _____, 268 A.2d at 353-54.

308. Section 2-316(3) (a) provides:

[U]nless 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

U.C.C. § 2-316(3) (a) [N.D. CENT. CODE § 41-02-33 (3) (a) (Supp. 1979)].

309. 111 N.J. Super. at _____, 268 A.2d at 353.

310. *Id.*

legitimate. When one of the parties invokes usage or dealing, what he is saying is that he contracted in reference to those things, as did the other party, justifying the need for something more explicit than a blanket disclaimer to exclude them. On the other hand, it should not be impossible for the seller to exclude trade usage or course of dealing from the specific contract if such an exclusion is in fact intended and bargained for. It seems clear that a specific disclaimer or exclusion, directed at trade usage and course of dealing, would be given effect. Further, if there are other objective indicia that the parties intended to exclude course of dealing and usage of trade,³¹¹ these could be shown to negate any warranty which might otherwise arise. It does seem likely, however, that any true or apparent conflict between the existence of a warranty and its exclusion will be resolved in favor of the existence of the warranty.

In *Adams v. J.I. Case Co.*,³¹² the reference to usage and dealing is less clear. The plaintiff had purchased a tractor from defendant, signing a contract which disclaimed all warranties except an express warranty to repair or replace defective parts, and which excluded liability for all other damages, including consequential loss. Plaintiff's primary contention was that the tractor was defective, and that the defendant was "wilfully dilatory" in making repairs, thereby not only breaching the express warranty but also breaching an implied warranty, created by course of dealing and usage of trade, that repairs would be effected promptly and within a reasonable time.³¹³ Plaintiff also argued that, because of this breach, he was entitled to consequential damages for lost hours, or down time, notwithstanding the express provision barring recovery for consequential loss,³¹⁴ the theory apparently being that the failure to abide by the terms of the express warranty, in breaching the implied warranty, negated the exclusion. The court accepted the plaintiff's arguments.³¹⁵

Aside from the fact that resort to such a complicated argument was probably unnecessary because of section 2-719(2),³¹⁶ the court's approach and reasoning are acceptable, since the case arose

311. For example, factors such as a lower price, used goods, discussions during negotiations, a marked departure in the other contract terms from prior contracts, or a marked departure from industry-wide forms or practices with respect to other aspects of the contract would all be useful in determining whether the parties intended to contract with reference to dealing or usage.

312. 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

313. *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 392, 403, 261 N.E.2d 1, 3, 8 (1970). Also raised by plaintiff was the argument that the limitation of remedy clause failed of its essential purpose, thereby allowing resort to Code remedies generally under section 2-719(2). *Id.* at 402-03, 261 N.E.2d at 7-8.

314. *Id.* at 404, 261 N.E.2d at 8.

315. *Id.* at 406, 261 N.E.2d at 9.

316. "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose,

in the context of a motion to dismiss and plaintiff's allegations were therefore accepted as true. Conceding that the defendant could legitimately restrict its liability, the *Adams* court nevertheless had to determine whether the defendant had met its responsibility under the restrictive warranty it gave.³¹⁷ This, in turn, would depend upon whether repair or replacement had occurred within an appropriate time. Since the warranty of repair or replacement contained no time limit within which the defendant was bound to perform, defendant was bound to act within a reasonable time.³¹⁸ In order to determine this reasonable time, resort could be had to course of dealing and usage of trade³¹⁹ to determine what these parties had in fact viewed as an appropriate time frame within which to repair or replace and what others in the trade would consider a reasonable time. This evidence not only establishes the contours of the parties' agreement, thereby acting as an interpretive device, but also implies a warranty or promise that the defendant will in fact repair or replace within the discovered time frame or be liable for breach. Therefore, if the plaintiff can establish that prior dealings resulted in a repair-replacement time frame expectation of one week, or that there was a trade usage that similar repairs would be effected within one week, a warranty would be implied that the defendant would perform within the one-week period. Moreover, this is true regardless of the exclusion, since by failing to live up to the express warranty as interpreted by trade usage and course of dealing the defendant had committed a breach, and the exclusion is invalid, making implication of the warranty permissible.

It should be apparent that usage and dealing therefore carry a dual burden, as interpretive devices and creating implied warranties. It should also be apparent that courts will not take

remedy may be had as provided in this Act." U.C.C. § 2-719(2) [N.D. CENT. CODE § 41-02-98(2) (1968)].

317. 125 Ill. App. 2d at 402-03, 261 N.E.2d at 7-8.

318. *Id.* at 403, 261 N.E.2d at 8. Section 2-309(1) provides: "The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time." See also *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. 1977) (a limited remedy fails of its essential purpose when the seller fails to repair the goods within a reasonable time).

In *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D.C. Del. 1973), the court noted that the purpose of the exclusive remedy is to give the buyer goods that conform to the contract within a reasonable time after a defective part is discovered. When a warrantor fails to correct the defect as promised within a reasonable time, he is liable for a breach of warranty. The limited, exclusive remedy fails of its purpose, and is thus avoided under section 2-719(2) whenever the warrantor fails to correct the defect within a reasonable period. See also *Ford Motor Co. v. Gunn*, 123 Ga. App. 550, 181 S.E.2d 694 (1971) (it is the refusal to remedy within a reasonable time or lack of success in the attempts to remedy which would constitute a breach of warranty).

319. Under section 1-204(2), a reasonable time is to be determined according to "the nature, purpose and circumstances" of the action to be taken. U.C.C. § 1-204(2) [N.D. CENT. CODE § 41-01-14(2) (1968)].

lightly the parties' reliance upon dealing and usage, and will in fact go to great lengths in attempting to reconcile ostensible intentions, as reflected in the prior dealings and trade expectations, with those reflected by general disclaimers. It is to be expected that, absent convincing, clear, and explicit language of exclusion directed at the specific transaction, courts will rule in favor of the warranty.³²⁰ Oddly enough, such reactions by courts tend to elevate these particular implied warranties to a position of eminence equivalent to or higher than³²¹ even express warranties. While such a result is clearly inconsistent with the intent of the Code drafters,³²² it is clearly consistent with modern commercial dealing.

Although trade usage and dealing only infrequently create independent warranties, they exist with somewhat greater frequency as adjuncts to merchantability and as disclaimers of warranties which might otherwise exist. There are apparently three reasons for this. First, at least a portion of the general warranty of merchantability requirements, embodied in section 2-314(2)(a), are framed with reference to "the trade,"³²³ suggesting that trade usage and course of dealing are to be integrated into any consideration of merchantability.³²⁴ This, of course, enables courts to consider dealing and usage as it affects merchantability, and not merely as creative of independent, distinct warranties. Thus, two cases³²⁵ have suggested that usage and dealing are to be viewed not only for the purpose of deciding whether independent warranties other than merchantability exist, but also to determine whether the goods are to be considered merchantable. Second, to the extent that course of dealing and usage of trade can, under section 2-314(3), create independent warranties, so too should evidence of usage and dealing be relevant to demonstrate that no warranties exist, not so

320. See, e.g., *Indiana Farm Bureau Coop. Ass'n v. S.S. Sovereign Faylenne*, 24 U.C.C. REP. SERV. 74 (S.D.N.Y. 1977).

321. Unlike express warranties, which are subject to parol evidence rule exclusion, the implied warranty of usage or dealing will almost always be admissible to explain or supplement even a fully integrated agreement. U.C.C. § 2-202 [N.D. CENT. CODE § 41-02-09 (1968)]. Only where the agreement specifically excludes trade usage or prior dealing would the parol evidence rule be a bar to the admissibility of such evidence.

322. See U.C.C. § 2-314, Comment 12.

323. Section 2-314(2) (a) provides: "Goods to be merchantable must be at least such as . . . pass without objection in the trade under the contract description . . ." U.C.C. § 2-314 (2) (a) [N.D. CENT. CODE § 41-02-31(2) (a) (1968)].

324. Comment 2 to section 2-314 provides:

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 that line of trade under the description or other designation of the goods used in the agreement.

U.C.C. § 2-314, Comment 2.

325. See *infra* notes 327-38 and accompanying text.

much because the usage and dealing operate to disclaim otherwise extant warranties, but because they demonstrate that in this particular transaction no warranty was intended. Finally, implied warranties can be disclaimed by usage and dealing because of inclusion of a specific provision for such exclusion in section 2-316(3)(c), thus leading some courts to confuse the issue by declaring that usage and dealing exclude warranties when in fact they do not.³²⁶

The first line of cases is exemplified by *Fear Ranches, Inc. v. Berry*³²⁷ and *Ambassador Steel Co. v. Ewald Steel Co.*³²⁸ In *Fear*, the plaintiff alleged that a portion of the herd of cattle he had purchased was infected with a disease that made them unfit for breeding purposes, for which they had been purchased.³²⁹ The defendant Berry was in the business of selling cattle to packers and not for breeding, and therefore he was not a merchant with respect to this particular type of goods and could not make a warranty of merchantability.³³⁰ The defendant Perschbacher, however, was held to be a merchant as to breeder cattle and was held to have made such a warranty. The lower court found that the cattle were merchantable, apparently based in part on statistics which indicated a low incidence of the disease in the state where the transaction took place, and in part on trade usage concerning the sale of cattle in that state.³³¹ The trial court did not, however, make findings of fact relative to whether, by virtue of this trade usage, cattle infected with the disease might nevertheless be merchantable, or whether the presence of the disease would render the cattle unmerchantable.³³² Since "[t]he trial court's conclusion could have been based on custom or usage relative to the presence or absence of this disease at the time of sale — 'merchantable' thus meaning that by custom there existed no implied warranty of freedom from brucellosis,"³³³ the case was remanded so that findings regarding usage as it affected merchantability could be made. In other words, usage and dealing were to be considered not in determining

326. See, e.g., *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 445 F. Supp. 507 (D. Me. 1977); *United States Leasing Corp. v. Comerald Assoc., Inc.*, 101 Misc. 2d 773, 421 N.Y.S.2d 1003 (N.Y. City Civ. Ct. 1979). See also *infra* notes 348-57 and accompanying text.

327. 470 F.2d 905 (10th Cir. 1972), *appeal after remand*, 503 F.2d 953 (10th Cir. 1974).

328. 33 Mich. App. 495, 190 N.W.2d 275 (1971).

329. *Fear Ranches, Inc. v. Berry*, 470 F.2d 905, 906-07 (10th Cir. 1972), *appeal after remand*, 503 F.2d 953 (10th Cir. 1974). The disease, brucellosis, did not otherwise render the cattle unfit, so they could still be used for human consumption. Plaintiff, however, was a breeder, not a packer.

330. Generally, only a merchant dealing in goods of the kind can be deemed to make an implied warranty of merchantability. U.C.C. § 2-314 [N.D. CENT. CODE § 41-02-31 (1968)]. For further discussion of this area see *infra* notes 577-906 and accompanying text.

331. 470 F.2d at 907.

332. *Id.* at 908.

333. *Id.*

whether separate implied warranties might exist, but in considering whether goods met a trade standard of merchantability.³³⁴ Although the court did not specify which subsection of section 2-314 controlled, it is clear from its discussion that trade usage was to be viewed primarily, if not solely, with an eye toward general merchantability.

Somewhat more clear in this respect is the opinion in *Ambassador Steel*, for the court in that case at least recognized the availability of both subsections of section 2-314. Plaintiff had sold approximately \$10,000 worth of steel to defendant, and received partial payment of roughly \$4,000. When defendant failed to pay the balance, plaintiff sued, and defendant countered that the steel shipped was defective in that it was not "commercial quality," referring to its carbon content. Defendant further alleged that because of this defect the steel had cracked after resale, causing loss to the defendant. The lower court held for the defendant and on appeal was affirmed.³³⁵

The appellate court treated defendant's claim as one of merchantability, rather than fitness for particular purpose, since there was no indication that defendant had made plaintiff aware of any particular use to which the steel would be put.³³⁶ In discussing merchantability, however, the court noted both subsections 2-314(2) and (3), thus commingling the general trade notions inherent in merchantability with those embodied in other, more specific trade warranties.³³⁷ In addressing the issue of whether there was a trade usage which defined merchantability, the court continued:

[T]here was also ample testimony below to the effect that when an order is placed without specification as to the

334. *Id.* One might make the argument that the warranty sought to be shown was actually not an adjunct to merchantability, but rather a distinct implied warranty of freedom from brucellosis. Viewed in this manner, the goods could be found to be merchantable and yet a breach of the other implied warranty might arise. While ordinarily it would make little difference whether such a warranty were deemed one of merchantability or one of freedom from disease, if merchantability has been disclaimed the other warranty might nevertheless continue to exist. It therefore may become important to distinguish between the two types of implied warranties.

It is to be noted that *Fear* also stands for the proposition that custom and usage can demonstrate the absence of warranty. Thus, if the lower court on remand were to find that by trade usage the existence of brucellosis would not constitute a breach, it would in effect be finding that, under section 2-314(3), the trade provided for no additional warranties. This may fall into the second reason advanced in the text rather than the third, since it requires no finding that trade usage has excluded a warranty which would otherwise exist. This was precisely the court's finding in *Fear* on remand. The district court found that when a buyer selected the cattle a trade usage existed that no implied warranties were given. See *Fear Ranches, Inc. v. Berry*, 503 F.2d 953 (10th Cir. 1974).

335. *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, _____, 190 N.W.2d 275, 277-78 (1971).

336. *Id.* at _____, 190 N.W.2d at 279.

337. *Id.*

particular quality desired, custom and usage of the steel business is that a "commercial quality" steel, that is, steel with a carbon content between 1010 and 1020, is to be used. Further testimony was to the effect that if one desired steel other than "commercial quality" it must be specified in the order, according to local custom and usage Therefore, plaintiff breached the implied warranty of merchantability in selling to defendant steel of a different quality than ordinarily sold in the custom and usage of the steel business³³⁸

It therefore appears fairly certain that when a court is faced with a claim based upon the warranty of merchantability it should appropriately flesh out the warranty with reference to usage and dealing. However, it should also be clear that reference to usage and dealing may impose distinct warranties and not merely provide evidence to serve as an adjunct to the general merchantability requirements. Without direction from counsel, it is likely that courts will resort to a general merchantability analysis. The practitioner should therefore point out the possibility of independent warranties which may arise by trade usage and dealing. To fail to do so invites a court to ignore a possible basis of recovery, particularly when the general warranty of merchantability has been disclaimed.

A second line of cases exists in which courts employ usage and dealing, apparently under section 2-314(3), to discover that other implied warranties have not arisen. One such case, *Fear Ranches, Inc. v. Berry*,³³⁹ has already been discussed, and it should suffice to reiterate that on remand the trial court found that, by usage of trade, no implied warranty of freedom from disease existed. Again, there is often a lack of clarity whether the courts are employing usage and dealing merely to define merchantability or to discover the existence and scope of additional warranties. The distinction will often be unimportant, although it may be significant when a disclaimer exists.

Bickett v. W.R. Grace & Co.,³⁴⁰ one of a number of seed cases which raises questions about implied warranties of merchantability, fitness, and yield,³⁴¹ also illustrates well this

338. *Id.*

339. See *supra* notes 329-34 and accompanying text.

340. 12 U.C.C. REP. SERV. 629 (W.D. Ky. 1972).

341. *Bickett v. W.R. Grace & Co.*, 12 U.C.C. REP. SERV. 629 (W.D. Ky. 1972). See also *Dessert Seed Co. v. Drew Farmers Supply Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970); *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, 304 N.Y.S.2d 918 (1969).

second area of confusion. The plaintiffs had purchased seed corn from the defendant which did not meet their expectations. They brought an action based upon breach of express and implied warranties, alleging, with respect to the implied warranty claims, the existence of warranties of merchantability and fitness for particular purpose, and subsidiary warranties of yield and freedom from disease.³⁴² The court, using a scattergun approach, declared that no such implied warranties existed, on the basis of two theories. The first theory, framed in terms of whether a warranty of merchantability existed, employed trade usage and course of dealing to establish the negative proposition that no warranty of yield or freedom from disease existed.³⁴³ Although not articulated very clearly, a careful reading of the opinion suggests that the court was not determining whether the seed was merchantable under section 2-316(2). The court also was not declaring that, pursuant to section 2-316(3) (c), the trade usage or course of dealing excluded implied warranties.³⁴⁴ Rather, the court was determining whether, under section 2-314(3), there were other implied warranties which existed regarding yield and freedom from disease.³⁴⁵ Finding the existence of either warranty to be contrary both to usage and dealing, the court held that no such warranty existed, and that therefore there had been no breach.³⁴⁶ The court then considered its second approach to non-liability, analysis under section 2-316(3)(c), and found that, in addition to dealing and usage not creating any warranties, they actually excluded the creation of implied warranties of any character.³⁴⁷ In other words, course of dealing and usage of trade could imply certain warranties, but did not do so in this case. That determination, however, by resort to section 2-314(3), is independent of any determination of merchantability or disclaimer.

The importance of the distinction in *Bickett*, although not clearly articulated, is crucial, for the general warranty of merchantability had been disclaimed both by words and by trade and conduct. Thus, if liability were to be imposed at all, it would have to be on the basis of these subsidiary warranties.

The third area of confusion, and by far the one into which most of the cases fall, is caused by the explicit reference in section 2-

342. 12 U.C.C. REP. SERV. at 632.

343. *Id.* at 635.

344. The court did so rule later in the opinion. *Id.* at 644-47.

345. Compare *id.* at 634-36 with *id.* at 642-44.

346. *Id.* at 635.

347. *Id.* at 642-44. Section 2-316(3) (c) provides: "An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade." U.C.C. § 2-316(3) (c) [N.D. CENT. CODE § 41-02-33(3) (c) (Supp. 1979)].

316(3)(c) to usage of trade, course of dealing, and course of performance being capable of excluding all implied warranties.³⁴⁸ Unlike the first two problem areas, which arise primarily because of the interrelationship between, and failure to distinguish among, the warranties of merchantability and those which can arise independently, the confusion exists here because of the introductory language to sections 2-314(1) and (3), "unless excluded or modified."³⁴⁹ Instead of analyzing the creation and disclaimer of warranties separately, the courts have merely considered usage of trade, course of dealing, and course of performance, and asked the question: "What effect does all this have on warranty?"³⁵⁰ It is perhaps useful to try to put the three applicable sections into perspective.

Goods sold by a merchant who deals in such goods must be merchantable, which refers to, among other things, trade standards.³⁵¹ Furthermore, the sale of goods may impose a higher or different warranty liability because of the parties' expectations, based upon prior dealings or trade usage.³⁵² By the same token, however, the parties to a transaction might expect that no implied warranties are to exist because of past dealings or trade usage. It is this third factor which section 2-316(3) (c) seeks to include in any determination, and while it is obvious that the concepts embodied in section 2-316(3) (c) are distinct from, if not incompatible with,³⁵³ those of section 2-314, it is also painfully obvious that some courts considering the distinctions have become hopelessly entangled in the web created by the mystical phrases "usage of trade" and "course of dealing."³⁵⁴

2. *Exclusion or Modification by Usage, Dealing, and Performance*

Generally, the role that usage, dealing, and performance play

348. U.C.C. § 2-316(3)(c) [N.D. CENT. CODE § 41-02-33(3)(c) (Supp. 1979)].

349. See *supra* note 300.

350. See *supra* note 326.

351. U.C.C. §§ 2-314(1), 2-314(2)(a) [N.D. CENT. CODE §§ 41-02-31(1), -31(2)(a) (1968)].

352. U.C.C. § 2-314(3) [N.D. CENT. CODE § 41-02-31(3) (1968)].

353. It is difficult, although not impossible, to hypothesize a case where goods are merchantable, but where other trade or dealing expectations are not met and trade usage or course of dealing might exclude implied warranties. For example, an automobile junk dealer might purchase junked cars for reconditioning, parts, and scrap, and determine the use to be made with respect to each shipment. A course of dealing might exist with respect to a warranty of freedom from rust, and yet the trade usage might be that all junked cars are sold with no other implied warranties, such as suitability of parts or quality of scrap. Thus, virtually any junked car would be "merchantable" provided there was no rust, in spite of the fact that none of the car's parts were in working order or that the metal was of below average quality. It is probably impossible, however, to imagine a case where trade expectations would both create warranties under section 2-314(3) and disclaim them under section 2-316(3)(c), except where one set of expectations was created, for example, by usage, and another set was disclaimed by prior dealings. In that case, section 1-205 would establish a hierarchy as to which expectations would control.

354. See *supra* note 326.

in the exclusion of implied warranties is residual. Section 2-316(3) (c) provides that there may be an exclusion or modification based upon the parties' expectations, even though in a particular transaction the specific rules for disclaiming an implied warranty³⁵⁵ have not been followed, the agreement manifests no general exclusion,³⁵⁶ or the goods have not been examined or there has not been a refusal to examine³⁵⁷ which would bar warranties. The theory behind the section is apparently the same as that behind the general reliance on usage and dealing: since the parties' conduct is fashioned with reference to their trade and past relationship, their expectations which are an outgrowth of such relationships should be given effect. Nevertheless, problems have arisen and are likely to arise in applying the section because of the overlap between it and section 2-314.

Initially, it is unclear why the Code drafters apparently made section 2-316(3) (c) more pervasive than section 2-314(3). Unlike

355. Section 2-316(2) provides the "specific" rules for disclaiming the implied warranties of merchantability and fitness for particular purpose:

(2) Subject to subsection (3) [the general or broad rules], 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."

U.C.C. § 2-316(2) [N.D. CENT. CODE § 41-02-33(2) (Supp. 1979)].

For a more detailed discussion of exclusion of warranties, see *infra* notes 907-1015 and accompanying text.

356. Section 2-316(3) provides the "general" rules for disclaiming implied warranties, methods by which the seller can bring to the buyer's attention that no implied warranties are made without specifically disclaiming them in accordance with section 2-316(2):

Notwithstanding subsection (2):

(a) 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

U.C.C. § 2-316(3) (a) [N.D. CENT. CODE § 41-02-33(3) (a) (Supp. 1979)]. This provision has already been explored in some detail, see *supra* notes 308-11 and accompanying text, and will be considered more fully *infra* at notes 907-34 and accompanying text.

357. The second "general" means of avoiding all implied warranties is set forth in section 2-316(3) (b), which provides for exclusion on the basis of the buyer's examination of or refusal to examine goods. Again, there is no need under these circumstances for the seller to explicitly disclaim using the language required by subsection (2). Section 2-316(3) (b) provides:

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 him

U.C.C. § 2-316(3) (b) [N.D. CENT. CODE § 41-02-33(3) (b) (Supp. 1979)]. This provision will be considered more fully *infra* at notes 935-41 and accompanying text.

section 2-314(3), which indicates that warranties can arise by virtue of trade usage and course of dealing, section 2-316(3) (c) includes not only usage and dealing but also course of performance. Neither the comments nor the legislative history of the two sections reveals any particular reason why course of performance should not be able to create warranties but should be able to exclude or modify them. Furthermore, one is hard pressed to discern any justifiable reason why a warranty could not be created by course of performance when it could thereby be excluded. Perhaps the thought is that the creation of warranties should be more clearly shown than their exclusion, and that course of performance, to the extent that it does not exist long enough to establish a course of dealing, would not offer sufficient justification for altering the parties' expectations. Alternatively, the difference may be based upon the hierarchy set up under the Code scheme for course of performance, course of dealing, and usage of trade.³⁵⁸ Course of performance, since it suggests how the parties are interpreting this particular contract, is generally held to control over inconsistent course of dealing or usage of trade.³⁵⁹ Finally, it might be suggested that if a particular course of performance had created the expectation of warranty it would fit within a general rubric of "course of dealing." This, of course, melds the concept of course of performance into course of dealing, which the Code attempts to distinguish, but would seem justifiable, particularly when the court is confronted with a situation in which there is no real course of dealing but where there has been a course of performance sufficient to suggest the parties' intent.³⁶⁰

A second problem, of more practical concern, is that, either in the creation or the exclusion of warranty liability, the usage,

358. See U.C.C. §§ 1-205(4), 2-208(2) [N.D. CENT. CODE §§ 41-01-15(4), 41-02-15(2) (1968)].

359. Therefore, the thought might go, if these parties in this particular transaction, in the course of multiple performances, are excluding warranties, notwithstanding a course of dealing which had in the past created such warranties, the course of performance should be accorded greater weight. The difficulty with this proposition, however, is that the reverse ought to be equally true. That is, if no warranties had been implied by past course of dealing, but the parties had in this series of transactions established the expectation of warranty, their course of performance, and hence warranty creation, should prevail.

360. To illustrate, suppose a contract is entered into between *A* and *B*, who have never dealt with one another, for the sale of 12 "gizmos," one to be delivered each month for a year. Trade usage would require each gizmo to be suitable for incorporation into a machine without modification. The first six arrive and require modification, which buyer undertakes without objection. Buyer's acquiescence would result in a course of performance which modified the warranties otherwise created by usage of trade.

Likewise, if we assume that *A* and *B*, never having dealt before, enter into this same contract for gizmos and no trade usage concerning modification exists, and seller ships the first six so that no modification is required, buyer could assert that the parties' course of performance created a warranty that the gizmos would be machine ready. Section 2-314(3), since it is silent on the question of whether course of performance can create warranties, could not be applied unless a court were willing to hold that a course of dealing had been established. It is to be hoped that a court would be willing to do so, in spite of the absence of explicit provisions.

dealing, or performance must be shown to exist. This problem, generally applicable any time usage, dealing, or performance are involved,³⁶¹ is equally visible whenever the existence of a warranty is at issue. Thus, for example, in *Georgia Timberlands, Inc. v. Southern Airways Co.*,³⁶² the defendant was held not to be entitled to summary judgment, although he had presented testimony indicating that there was an established trade usage in the sale of used airplanes that no warranties existed (or that the implied warranty of merchantability was excluded), because he had not shown whether the scope of the custom was merely local or universal.³⁶³ Similarly, in *Zicari v. Joseph Harris Co.*,³⁶⁴ the court held that the seller had failed to prove a usage of trade which would disclaim an implied warranty of merchantability because the only evidence tending to support the existence of the exclusion was the lack of customer complaints and the fact that disclaimer clauses appeared in all local seed order forms.³⁶⁵ Thus, although usage, dealing, and performance may exclude or modify implied warranties, they must first be shown to exist.

Another problem involves the interrelationship between disclaimers accomplished by usage, dealing, and performance, and those accomplished in any other manner. This problem was addressed earlier in the discussion of the creation of implied warranties by usage of trade, but there the issue was whether a general "as is" disclaimer could operate to disclaim the warranties created by usage.³⁶⁶ The conclusion was that it should not. Here, on the other hand, the problem is whether a course of performance or dealing can exist which will effectively exclude warranties on the basis of the buyer's acceptance of prior performances which included a written disclaimer. Assuming, for example, that the seller can show that in the past he has dealt with the buyer under contract provisions which excluded warranties, does that establish conduct sufficient to obviate warranty responsibility in this instance? While this problem at first glance appears only to restate the question whether a course of performance or dealing can be shown, in fact it goes beyond that question. It is fundamentally

361. *E.g.*, *Posttapes Assocs. v. Eastman Kodak Co.*, 450 F. Supp. 407 (E.D. Pa. 1978); *Western State Bank v. First Union Bank & Trust Co.*, 172 Ind. App. 321, 360 N.E.2d 254 (1977). See U.C.C. § 1-205(2) [N.D. CENT. CODE § 41-01-15(2) (1968)] ("existence and scope . . . are to be proved as facts").

362. 125 Ga. App. 404, 188 S.E.2d 108 (1972).

363. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, _____, 188 S.E.2d 108, 110 (1972).

364. 33 A.D.2d 17, 304 N.Y.S.2d 918 (1969).

365. *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, _____, 304 N.Y.S.2d 918, 923-24 (1969).

366. See discussion of *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970), at text accompanying notes 304-11.

concerned not with the question of the existence of a course of dealing or performance, but, assuming it exists, whether it is effective. Two cases illustrate the problem, and appear to resolve it in contradictory ways.

In *Geo. C. Christopher & Son v. Kansas Paint & Color Co.*,³⁶⁷ plaintiff had purchased paint primer from defendant to be used to prime structural steel. The defendant knew of the plaintiff's needs and provided primer to meet those needs, thereby creating an implied warranty of fitness for particular purpose.³⁶⁸ The primer, delivered in installments, rusted, cracked, and peeled when applied to the steel. When the contractor for whom the plaintiff had applied the primer objected, the work was redone, at a cost to the plaintiff of \$112,000. Plaintiff sued defendant for breach of warranty, and defendant defended on the grounds that a written disclaimer existed and that, because a series of performances had occurred, the existence of the written disclaimer, even if not effective in its own right to disclaim the implied warranty, should be effective to establish a course of performance which would exclude the warranty. The court disagreed.³⁶⁹

As to the effectiveness of the written disclaimer, the court first noted that the disclaimer appeared on an invoice which was sent to plaintiff after the first shipment of primer. Therefore the written disclaimer itself could not be effective, since it was given after the fact rather than at the time the contract was entered into. Notwithstanding this, however, the seller contended that once the disclaimer was first sent to buyer, and subsequently appeared in all later invoices, its existence, though not effective as a disclaimer per se, established a course of performance which would exclude the implied warranty.³⁷⁰ In response, the court ruled in effect that, because the disclaimer must be conspicuous in order to be valid under section 2-316(2), its existence for purposes of section 2-316(3)(c) to create a course of performance must also be conspicuously brought to the buyer's attention. Since this was not done, no course of performance was created, or, perhaps more properly, it could not be relied upon by the seller.³⁷¹

The court's conclusion has a great deal of initial appeal, and may be defensible in a logical sense. It may, however, fly in the face

367. 215 Kan. 185, 523 P.2d 709, *modified and aff'd*, 215 Kan. 510, 525 P.2d 626 (1974).

368. *Geo. C. Christopher & Son v. Kansas Paint & Color Co.*, 215 Kan. 185, 194, 523 P.2d 709, 715, *modified and aff'd*, 215 Kan. 510, 525 P.2d 626 (1974). *See also infra* notes 417-554 and accompanying text.

369. 215 Kan. at 190-97, 523 P.2d at 713-18.

370. *Id.* at 194-95, 523 P.2d at 715-16.

371. *Id.* at 195-96, 523 P.2d at 718.

of section 2-316(3)(c). The appeal of the court's rule is twofold. First, if the disclaimer is specifically unenforceable under section 2-316(2) because it is not conspicuous, a seller should not be able to resort to the more general and easier method of disclaimer under section 2-316(3)(c). This, however, is explicitly refuted by reference to the introductory language of subsection (3). The clearly expressed thought is that, even though the seller has not met the more rigorous specifics of subsection (2), he can rely on usage, dealing, and performance to insulate himself from liability which otherwise would exist. Second, the court's analysis has appeal as a matter of fairness, since fairness might dictate that the language not be given effect if it is inconspicuous. On the other hand, subsection (3) (c) contains no requirement of conspicuousness, and the whole concept of course of performance (how these parties acted, as opposed to or adjunctive to their words), tends to make conspicuousness relatively less important. Moreover, the "notwithstanding subsection (2)" language in subsection (3) again demonstrates that conspicuousness, although required in order to disclaim by words, is not required for disclaimer by action.³⁷²

Finally, the court's decision may be logically defended. If the disclaimer is not conspicuous, the plaintiff is entitled, under section 2-314(2), to assert that he did not notice it, or that it should not operate against him whether or not he noticed it. Since it is not effective unless it is conspicuous, the fact that plaintiff saw it is of no import;³⁷³ the clause is ineffective. If this is so, it makes no sense to give the language effect for purposes of creating a course of performance but not for purposes of disclaimer. Either language is effective or it is not; it cannot be ineffective for one purpose and effective for others. The difficulty here, of course, is that this analysis has the effect of not merely declaring the language ineffective, but of excising it entirely. It is one thing to say that inconspicuous language will not operate to disclaim warranties; it is quite another to say that it cannot operate at all to demonstrate some other purpose, for example the existence of a course of performance. This is precisely what the Kansas court did, however,

372. The author recognizes that it is possible to "find" a conspicuousness requirement under subsection (3), and this has in fact been done by a number of courts in relation to "as is" disclaimers. See, e.g., *Osborne v. Genevie*, 289 So. 2d 21 (Fla. Dist. Ct. App. 1974); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970). However, it is one thing to say that conspicuousness is a requirement when the seller is relying on words exclusively to show the disclaimer; it is another when conduct is at issue.

373. See, e.g., *Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319 (Fla. Dist. Ct. App. 1972). But see *Tennessee Carolina Transp. Inc. v. Strick Corp.*, 283 N.C. 423, _____, 196 S.E.2d 711, 718 (1973).

for it ruled that the disclaimer was inadmissible, not merely ineffective.³⁷⁴ Thus, even if it could have been shown that the buyer saw the disclaimer and acquiesced therein, this evidence would apparently have been inadmissible, even though it may have created a course of performance.

It appears that the ultimate reasoning of the Kansas court was that, because the disclaimer had not been given until after the sale, it could not have been seen by the buyer. Therefore, it did not create a course of performance. Unfortunately, because the disclaimer was ruled inadmissible the seller was never given the opportunity to prove the existence of the course of performance.³⁷⁵

A better approach to the problem, which is more consistent with the Code and more likely to result in rational, fair decisions, is to consider the existence of a course of dealing, usage of trade, or course of performance separately from the validity of any disclaimer clause on which it might be based.³⁷⁶ This is the approach taken by the United States Court of Appeals for the Sixth Circuit in *Country Clubs, Inc. v. Allis-Chalmers Manufacturing Co.*³⁷⁷

In *Country Clubs*, plaintiff had purchased golf carts from defendant pursuant to an agreement which contained a general warranty coupled with a limitation of liability to repair and replacement. There was, additionally, a disclaimer provision which purported to disclaim all other warranties, statutory or implied.³⁷⁸ When the golf carts broke down defendant agreed to repair them, and performed approximately \$12,000 worth of repairs, for which it billed plaintiff some \$4,600, asserting that that amount represented repairs required because of ordinary wear and tear, and not because of a defect. Plaintiff refused to pay and filed suit, apparently alleging breach of the implied warranty of merchantability and seeking monetary damages.³⁷⁹ The trial court held that by their conduct the parties had excluded implied

374. 215 Kan. at 195-96, 523 P.2d at 718.

375. *Id.*

376. Admittedly, this is easier to do when the conduct of the parties affirmatively indicates a course of performance, as opposed to the *Kansas Paint* case, in which the defendant was apparently attempting to show that the buyer's acquiescence in the existence of the clause, if knowing, established a course of performance.

377. 430 F.2d 1394 (6th Cir. 1970).

378. *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394, 1396 (6th Cir. 1970). The disclaimer provision failed to contain any mention of the word "merchantability," as required under section 2-316(2). Moreover, there was no finding of conspicuousness. The court specifically refused to consider whether the disclaimer was effective under the Code, although it appears certain that it would not have been.

379. *Id.* It is unclear from the report of the case whether plaintiff alleged breach of the implied warranty of merchantability. The court suggests that the district court found both that plaintiff had by his course of dealing or performance excluded the implied warranties, and somehow limited his remedy to repair or replacement. *Id.* Moreover, the court later ruled, citing section 2-316(3), that course of dealing or performance had resulted in a "limitation of implied warranties." *Id.* at 1397.

warranties and adopted the warranty included in the sales agreement, including the limitation of liability to repair or replacement. The Court of Appeals affirmed.³⁸⁰

The Court of Appeals framed the issue as “whether . . . two businessmen in an arm’s-length transaction may in their course of dealing or course of performance exclude or limit the implied warranty of merchantability.”³⁸¹ In ruling that they could, the court noted that as an abstract proposition such exclusion or modification is allowed, and pointed to factors which could lead to such a finding in this case.³⁸² Thus, the fact that plaintiff’s president was an attorney who should have noticed the disclaimer, that he had ordered on the form without signing it, that he had filed claims under the written warranty which provided for repair or replacement, and that he had refused to pay on the basis that the warranty made defendant responsible to repair or replace, all pointed to a pattern of conduct which amounted to acquiescence in the terms of the written warranty, and effectively barred resort to any implied warranty of merchantability. In other words, the course of performance³⁸³ operated to exclude the implied warranty, and had been created by the parties’ actions, which indicated that the written warranty in the sales agreement was the only warranty.

It is crucial to an appreciation of the court’s decision to realize that the disclaimer of warranties which was contained in the contract was probably ineffective, since it did not mention the word “merchantability.” The court specifically noted that its conclusion that course of performance had effectively modified or excluded the warranty of merchantability was not dependent upon a finding of validity of the disclaimer.³⁸⁴ Rather, unlike the *Kansas Paint* case, *Country Clubs* clearly establishes that where the parties act as though there are no warranties (or, more precisely, no other warranties) there are none. Course of performance has eliminated them, even though they would not have otherwise been eliminated. In this sense, the *Country Clubs* case represents the better view.³⁸⁵

380. *Id.* at 1396.

381. *Id.*

382. *Id.* at 1396-97.

383. The court, although recognizing that dealing and performance are not the same, refused to distinguish them. *Id.* at 1397.

384. *Id.*

385. While the cases are readily distinguishable on a variety of grounds, one cannot help but conclude that the Kansas court which decided *Kansas Paint* would analyze *Country Clubs* differently, and arrive at the opposite conclusion. The theory in *Kansas Paint* was that, since the disclaimer provision was ineffective, it could not be the basis for a course of performance. 215 Kan. at 193-94, 523 P.2d at 716. In *Country Clubs*, the disclaimer provision was ineffective, but the court allowed merchantability to be disclaimed by the course of performance. 430 F.2d at 1397. It is not as clear that the *Country Clubs* court would arrive at the same result in the case confronting the Kansas court, although it seems likely.

3. *Limitation of Remedies by Usage, Dealing, or Performance*

While *Country Clubs* was probably decided properly with respect to the role of course of performance, it does raise a question concerning what exactly is meant by the Code language indicating that implied warranties can be "excluded or modified." The Code uses the terms "exclude or modify" throughout section 2-316, and there is no reason to believe that the use of the words in subsection (3) is to be given any different meaning than their use in subsection (2). Simply stated, there is, as noted earlier,³⁸⁶ a distinction between excluding warranties entirely and limiting the remedy for breach. The former is covered by section 2-316, the latter by section 2-719. Similarly, modification of warranties, to the extent that it has an effect on the warranty itself rather than on the remedy, would be governed by section 2-316. Section 2-719 has no explicit counterpart to section 2-316's constant reference to trade, dealing, or performance.³⁸⁷ Because of the overlap between the two concepts, it is necessary to explore them in the abstract, and question whether *Country Clubs* and similar cases have arrived at appropriate results, specifically to the extent that their holdings deal not with exclusion or modification but with limitation.

In a sense, it is probably fair to say that any time there is an exclusion or modification of warranty there is also a limitation of remedy, and vice versa. Thus, for example, if a sale of widgets is without warranty there can be no breach of warranty, and the remedy is thus limited, and in this case nonexistent. Similarly, if the goods are fully warranted but the remedy is limited to repair or replacement, in effect the "full warranty" does not warrant that the goods are necessarily acceptable, but only that if they are not they will be repaired or replaced. As indicated earlier, resort to these subtleties is usually obviated by the inclusion of both disclaimer provisions and limitation clauses in standard contracts.

Given the overlap between exclusion and limitation, the question becomes what is meant by exclusion, modification, and limitation by usage of trade, course of dealing, and course of

386. See *supra* notes 154-76 and accompanying text.

387. Of course, sections 1-205(3) and 2-208(1), to the extent that they allow usage, dealing, and performance to give flesh to the parties' agreement, are implicit in section 2-719, since that section refers to limitations of remedy by agreement. Moreover, the definition of "agreement" in section 1-201(3) explicitly incorporates the concepts of usage, dealing, and performance:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act.

performance. A simple example will illustrate the problem.³⁸⁸ Suppose a retail customer purchases a suit of clothing for \$200. Implied in the sale would be at least a warranty of merchantability, or fitness for ordinary purposes.³⁸⁹ This warranty would probably at least provide that with normal wear and drycleaning the suit would last for a year. If the customer took the suit, wore it once, had it drycleaned, and it fell apart, the warranty would be breached, giving rise to a variety of remedies under the Code. But, if our hypothetical customer is meek (and rich), and instead of complaining returns the following week and purchases another suit, and this pattern continues, a course of dealing might well be established with the effect that the implied warranty has been excluded.

The implied warranty might also be modified in much the same way. Suppose the suit was worn and drycleaned for six months before it fell apart. If again our customer failed to complain and instead purchased another suit, a course of dealing might result which would modify (shorten) the warranty from one year to six months.

Finally, there is no reason why the same course of dealing might not exclude, or at least modify, a limited remedy. Suppose, for example, that the suit was warranted, expressly or impliedly, to be fit for use for one year, with the remedy in the event of a defect exclusively limited to repair or replacement.³⁹⁰ Suppose further that the customer returned with a "defective" suit days after he purchased it and received a refund. If this happened on a number of occasions, the customer and the retailer might be found to have established a course of dealing which modified the limited remedy to include refund. One might even go so far as to say that the course of dealing has excluded the limitation clause, thereby making available a whole range of other remedies.

It would also be possible to limit otherwise unlimited remedies by a course of dealing. Suppose, as would normally be the case, that the suit was sold with nothing said as to warranty or remedy in the event of breach. The warranty of merchantability would be implied, and concomitantly the remedies authorized by the Code would exist. Suppose further that the suit was defective, and the buyer returned it and received a replacement. If this becomes an established pattern, it could easily be urged, and probably correctly

388. The problem ordinarily will not exist when there is a valid written disclaimer.

389. U.C.C. § 2-314(2)(c) [N.D. CENT. CODE § 41-02-31(2)(c) (1968)].

390. Since most clothiers do not warrant their products in writing or limit their liability

so, that a course of dealing had been established to the effect that the parties' agreement included this limitation of remedy.³⁹¹ This is probably similar to what occurred in *Country Clubs*.³⁹²

Assuming that the disclaimer of implied warranty in *Country Clubs* was invalid, there nevertheless apparently existed a valid limitation clause. It would therefore have been a simple matter for the court to find that there existed an implied warranty of merchantability, but that the remedy for breach thereof was limited to repair or replacement. Instead, the court held that the parties' conduct had excluded the implied warranty, and that the buyer, having acquiesced in the seller's offer to repair or replace, had adopted this as an exclusive remedy. The fascinating thing about this result is that, at least in the court's view, the validity of the limitation clause was unimportant.³⁹³

It might be argued that the *Country Clubs* decision was either intentionally vague on this point or unintentionally sloppy. As the court restates the trial court's holding, it appears that the district judge had ruled that course of dealing or performance had excluded implied warranties and that thereafter the limitation agreement was merely given effect.³⁹⁴ However, both in its statement of the issue and in its conclusion the court uses the word "limit," in addition to "exclude."³⁹⁵ Elsewhere in the opinion, when dealing solely with the issue of the existence of the warranty (as opposed to the remedy), the court rather carefully chose the words "exclusion or modification."³⁹⁶ It is arguable that this justifies the conclusion that the court was applying course of performance to limit a remedy, based on the acquiescence of the buyer. It is further suggested that such an analysis is correct, and that the only other case to decide this issue is in error.

The case, *Gates v. Abernathy*,³⁹⁷ involved the purchase of clothes by plaintiff for his wife from defendant's store, under circumstances where there arose an implied warranty of fitness for a particular purpose. When the clothes did not fit his wife, plaintiff returned them, was given a credit, and thereafter, when his wife

expressly, this might in fact arise by usage or dealing. Thus, there might be a "policy" on returns that the store will repair or replace defective garments, but not return the purchaser's money.

391. The only major stumbling block to this analysis is section 2-719(1) (b): "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." U.C.C. § 2-719(1) (b) [N.D. CENT. CODE § 41-02-98 (1) (b) (1968)]. One is hard pressed to assert that by course of dealing there is created an "express" agreement.

392. See *supra* notes 377-85 and accompanying text.

393. 430 F.2d at 1397.

394. *Id.* at 1396.

395. *Id.* at 1396-97.

396. *Id.* at 1396.

397. 11 U.C.C. REP. SERV. 491 (Okla. Ct. App. 1972).

could find no suitable substitutes, demanded a refund. Defendant refused, alleging that an agreement had been made which limited plaintiff's remedy to credit or exchange, and, alternatively, that a trade usage existed which would so limit plaintiff's remedy.³⁹⁸ In affirming the lower court's judgment for the plaintiff, the court correctly cited section 2-719(1)(b) to indicate that resort to an agreed-upon limited remedy is generally optional. The court further ruled that section 2-316(3) (c) had no application:

Appellant pointed to evidence during the trial which showed that the custom of specialty shops such as appellant's is to never make cash refunds. Appellant reasons that such custom should prevent appellees from receiving a cash refund. We do not agree with the contention. Appellant would have the section modify the *remedy* for a breach of warranty. The code does not have any provision for modification of remedy for breach of warranty due to course of dealing or usage of trade. Section 2-316(3)(c) goes to the modification of the warranty itself and not to the remedy.³⁹⁹

Concededly, the result of the case is probably correct, either because of the "optional" rule of section 2-719(1) (b) or because the plaintiff might not appropriately be held to a trade standard emanating from a trade in which he was not engaged.⁴⁰⁰ Moreover, the court is correct in its literal reading of section 2-316(3) (c), in that the section clearly does not apply to remedies at all. As has been seen, however, there is both substantial overlap between sections 2-316 and 2-719, and the implicit recognition in the latter of usage, dealing, and performance. Therefore, if in fact the defendant could have shown a trade usage to which the plaintiff should be subject and that the limited remedy created thereby was agreed to be exclusive, the court would have had to rule that a modification of remedy by usage had occurred. This fact, coupled with the court's denial of even an opportunity to establish those requirements, suggests that the ruling was in error.

4. *Other Cases Successfully Invoking Usage, Dealing, and Performance*

From what has been said in the preceding pages, it should be

398. *Gates v. Abernathy*, 11 U.C.C. REP. SERV. 491 (Okla. Ct. App. 1972).

399. *Id.* at 495 (emphasis in original).

400. See U.C.C. § 1-205(2) & (3) [N.D. CENT. CODE § 41-01-15 (2) & (3) (1968)].

apparent that the creation, exclusion, or modification of warranties (or remedies) by usage of trade, course of dealing, or course of performance is not nearly as simple and problem-free as might be suggested from a reading of the statute or the paucity of reported decisions. Lest one leave with the impression that the complexity outweighs the utility of resort to conduct in the warranty arena, it is appropriate to give some consideration to the cases in which usage, dealing, or performance were successfully invoked. In addition to those already discussed, there are three noteworthy cases.

The first, *R.D. Lowrance, Inc. v. Peterson*,⁴⁰¹ involved the sale by plaintiff to defendant of a number of cattle. Shortly after delivery and acceptance of one lot, the cattle showed signs of disease, and more than half of the lot eventually died. The plaintiff established a trade usage which provided that the buyer was to inspect the cattle on delivery, cut out those which were unsuitable, and thereafter, once the cattle were accepted, the acceptance was final and without warranty.⁴⁰² The court held that this custom effectively excluded any implied warranty of merchantability and that this exclusion was not unconscionable.⁴⁰³

The second case, *Spurgeon v. Jamieson Motors*,⁴⁰⁴ involved the sale of used farm equipment by the defendant to the plaintiff. After delivery, the equipment continually broke down and was repaired by defendant. After a little more than a year of breakdowns and repairs, plaintiff sought to rescind the transaction and filed suit alleging breach of implied warranties. There was a disclaimer which failed to mention merchantability, and the lower court therefore held for plaintiff.⁴⁰⁵ On appeal the decision was reversed, based primarily upon defendant's contention that the warranty was modified by a trade usage.⁴⁰⁶

The record revealed a trade usage to the effect that used farm machinery was not warranted at all, except that with late model equipment there was a "50-50 warranty" under which the parties split repair costs. Moreover, the plaintiff had in fact paid for half the repair costs after the first several breakdowns.⁴⁰⁷ The court ruled that if plaintiff was chargeable with an awareness of this usage he could not assert the implied warranties except as modified

401. 185 Neb. 679, 178 N.W.2d 277 (1970).

402. *R.D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 680-82, 178 N.W.2d 277, 278-79 (1970).

403. *Id.* at 682-83, 178 N.W.2d at 279.

404. 164 Mont. 296, 521 P.2d 924 (1974).

405. *Spurgeon v. Jamieson Motors*, 164 Mont. 296, 298, 521 P.2d 924, 926 (1974).

406. *Id.* at 302, 521 P.2d at 928.

407. *Id.* at 298, 521 P.2d at 926.

by the usage. Based upon his conduct, the court found plaintiff was aware of the usage.⁴⁰⁸

The *Spurgeon* case clearly demonstrates the availability and role of usage, and perhaps course of performance, in the warranty arena. But the case is not without its discrepancies. According to the court, the "50-50 warranty," the only exception to the complete exclusion of warranties, applied only to "late model equipment." The combine at issue was approximately ten years old at the time of purchase.⁴⁰⁹ Although "late model" thus apparently encompassed ten-year-old equipment, it could be argued that, if it did not, this variation would preclude the trade usage from having an effect. On the other hand, notwithstanding any argument by the buyer that the trade usage itself might not apply, it seems clear that the parties' course of performance would modify any implied warranty that might otherwise exist. Thus, even assuming that the plaintiff could have argued that because of the equipment's age the parties did not contemplate the "50-50" usage, he would be hard pressed to avoid an exclusion or modification based upon the course of performance established by virtue of the split repair costs. Therefore, although the court did not consider the age of the equipment or whether course of performance rather than usage of trade might have operated to modify the warranty, appropriate consideration of these issues would have resulted in the same conclusion. Finally, it is interesting to note that the "50-50 warranty" was actually a combined modification and limitation, thereby suggesting both the overlap of the two concepts and the fact that usage can indeed limit the remedies for breach, and is not relegated solely to affecting the warranty. In effect, the warranty given in *Spurgeon* was one of "field readiness," and the "50-50 warranty" in actuality was a limitation of remedy. It might be stated as follows: In the event that this equipment is not field ready, buyer's remedy shall be limited to one-half of the repair costs.⁴¹⁰ *Spurgeon* thus stands for a number of propositions, not the least of which is that usage and performance are helpful guides to the scope of warranties.

The final and most recent case, upholding in concrete form the application of section 2-316(3)(c), is *Lincoln Pulp & Paper Co. v. Dravo Corp.*,⁴¹¹ a complex case arising out of Dravo's agreement to

408. *Id.* at 302, 521 P.2d at 928.

409. *Id.* at 297, 521 P.2d at 925.

410. By now it should be recognized that a hazard exists in this analysis: unless one is willing to also assert that the "50-50 warranty" was by trade usage "expressly agreed" to be the exclusive remedy, see U.C.C. § 2-719(1)(b) [N.D. CENT. CODE § 41-02-98(1)(b) (1968)], one might dig himself into an unfortunate hole. See *supra* note 289.

411. 445 F. Supp. 507 (D. Me. 1977). This portion of the case involves only the third-party

set up a five-million-dollar operation for plaintiff. Dravo subcontracted a portion of the contract to a subcontractor, Babcock & Wilcox [B & W]. After work had progressed there apparently were defects caused by Dravo's and B & W's negligence, and Lincoln sued Dravo, which cross-claimed against B & W.⁴¹² Both the Lincoln-Dravo and the Dravo-B & W contracts contained disclaimer provisions which attempted to insulate Dravo and B & W, respectively. The court held, however, that, although Dravo was not effectively insulated from liability for its negligence under its clause with Lincoln, B & W was so insulated.⁴¹³ The biggest difference between the interpretations given to the two clauses was the existence of a trade usage, stipulated to by Dravo. The usage was evidenced by the following stipulation:

It is an almost universal custom . . . that contracts between the parties contain provisions . . . insulating sellers against liability for consequential damages . . . arising under or in connection with the performance [of these types of contracts].⁴¹⁴

The court was faced with determining whether such custom or usage would operate to protect a seller from liability for its own negligence. The court held that it did.⁴¹⁵

The *Dravo* case is of somewhat less importance than the preceding cases, since it in effect went beyond the rule of section 2-316(3)(c). The court had before it a written disclaimer of implied warranties which it ruled to be valid, and therefore it was unnecessary to determine whether usage could exclude or modify implied warranties.⁴¹⁶ Nevertheless, the case stands for the broad propositions raised earlier, that usage will have an impact not only upon warranties, but also upon remedies. Moreover, *Dravo* takes the Code a step further by holding that trade usage (and presumably course of dealing and performance) can exclude not only warranties and warranty liability, but also other obligations and liabilities which would otherwise exist, such as liability for negligence.

action by Dravo against its subcontractor, B & W. In order to fully appreciate the workings of the decision, one should consult *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977).

412. *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 445 F. Supp. 507, 509-12 (D. Me. 1977).

413. *Id.* at 515.

414. *Id.* at 512.

415. *Id.* at 515.

416. *Id.* at 516 n.8.

B. THE IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE

In moving from implied warranties created by usage of trade, course of dealing, and course of performance to those created by general expectations and particular conduct there is some risk involved. The Code drafters apparently thought that usage warranties bore a closer relationship to the implied warranty of merchantability than to that of fitness for particular purpose, since they separated the former from the latter.⁴¹⁷ Additionally, while one might be tempted to theorize that the three types of implied warranties are well-bounded and discrete, in reality they are often too closely related for separation. Finally, one runs the risk of losing sight of the fact that in dealing with the warranty of fitness for a particular purpose, no less than with those created by usage or merchantability, one is dealing with party expectations.

The Code provision concerning fitness for particular purpose, contained in section 2-315,⁴¹⁸ is far more narrow than those providing for the other warranties, and, as a result, when this warranty is invoked the court is faced primarily with a question of whether the facts alleged fit squarely within the statute. The concepts embodied by the particular purpose rules have been recognized in North Dakota since at least 1920.⁴¹⁹ The existence of the warranty is dependent upon both the buyer and the seller, in the sense that the buyer must have put the seller on notice of his needs and must himself be relying on the seller to meet those needs. Unlike the warranty created by usage or dealing, or that embodied in the concept of merchantability, the particular purpose warranty is peculiarly suited for a "one-shot deal." This is true primarily because there is no requirement that the seller be a merchant with respect to the goods, nor is there any necessity for the buyer and seller to have dealt before or for them to be engaged in any trade. In

417. Compare U.C.C. § 2-314 [N.D. CENT. CODE § 41-02-31 (1968)] with U.C.C. § 2-315 [N.D. CENT. CODE § 41-02-32 (1968)].

418. Section 2-315 provides:

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.

U.C.C. § 2-315 [N.D. CENT. CODE § 41-02-32 (1968)].

419. *Ward v. Volker*, 44 N.D. 598, 176 N.W. 129 (1920). The case involved the sale of lily bulbs which failed to flower. The court held that when the buyer relied upon the seller's skill or judgment, and the seller knew the purpose for which the goods were intended to be used, there was an implied warranty that the goods would be of merchantable quality and fit for the intended use. Because courts, when discussing merchantability, often speak in terms of "fitness for purpose," it is difficult to determine whether a true "fitness" case predated *Ward*.

fact, while the seller is often a merchant and engaged in "the trade," the buyer would almost never be, since by definition he must be "relying on the seller's skill or judgment."

The time for determining whether the particular purpose warranty is created is "the time of contracting," so it is unlikely that there will often be assertions of warranty existence after the fact. As will be seen in connection with the warranty of merchantability, this significantly narrows the buyer's chances of urging a warranty "created by the sale," for the warranty arises, if at all, only on the front end of the transaction. While this alleviates the problem which might otherwise be created by the buyer asserting reliance after the deal is consummated,⁴²⁰ it causes parol evidence problems, since almost by definition the particular purpose warranty will be created at the start of the transaction, and will often be followed by a disclaimer. It should therefore be apparent that the warranty is excludable. Finally, the quantum and quality of what the parties must know at the time of the sale is expressly narrowed by the section, for the Code requires only that the seller be put on notice.⁴²¹

1. Creation of the Warranty

The starting point for analysis of the implied warranty of fitness for particular purpose is the recognition that it is, in the words of the foremost commentators, "a mature legal doctrine."⁴²² In other words, the problems which arise in connection with the application of the warranty are well-charted and relatively easily handled. There will be few, if any, surprises.

The Code's initial focus is on the seller, for only he can create the particular purpose warranty.⁴²³ The seller need not be a merchant, as is required for the warranty of merchantability,⁴²⁴ although it would be remiss not to point out that virtually all of the reported decisions which have imposed liability do in fact involve merchants.⁴²⁵ The reason is clear and simple: while section 2-315 does not require that the seller be a merchant or deal in goods of the kind, it does require that the buyer rely "on the seller's skill or

420. See U.C.C. § 2-313, Comment 7.

421. Section 2-315 is framed in terms of "reason to know," which is the classic definition of notice. See U.C.C. § 1-201(25) (c) [N.D. CENT. CODE § 41-01-11(25) (c) (Supp. 1979)]. See also U.C.C. § 2-315, Comment 1.

422. See WHITE & SUMMERS, *supra* note 62, at 360. For a discussion of the history of warranty for particular purpose, see Covington & Medved, *The Implied Warranty of Fitness for a Particular Purpose: Some Persistent Problems*, 9 GA. L. REV. 149 (1974).

423. See U.C.C. § 2-313(1)(b) & (c) [N.D. CENT. CODE § 41-02-30(1)(b) & (c) (1968)].

424. See U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)]. But see U.C.C. § 2-314, Comment 4.

425. *Cf.* Prince v. LeVan, 486 P.2d 959 (Alaska 1971) (sellers were not merchants with respect to sale of the vessel).

judgment.” The seller must therefore have skill or knowledge with respect to the goods being sold, and ordinarily such skill or knowledge would be attributable primarily to merchants. Thus, while the comment to section 2-315 recognizes that the particular purpose warranty “can arise as to non-merchants where . . . justified by the particular circumstances,”⁴²⁶ it suggests that “normally the warranty will arise only where the seller is a merchant with the appropriate ‘skill or judgment.’”⁴²⁷ Nevertheless, even in the casual sale of goods, where the seller is familiar enough with the properties of the subject matter to have skill or judgment relative thereto, the warranty might be found to exist. Further, one ought not lose sight of the fact that the Code envisions at least three categories of “merchants,” any one of which might appropriately make the warranty of fitness for particular purpose, whereas only a merchant who deals in goods of the kind will generally be capable of making the warranty of merchantability.⁴²⁸ Thus, for example, while an automobile mechanic selling his personal vehicle might not be held to have impliedly warranted its merchantability, he might well be in a position to make a warranty of fitness for a particular purpose.

As indicated, most of the cases imposing liability under section 2-315 involve a merchant seller,⁴²⁹ and the few cases found which involve a non-merchant seller have, for one reason or another, denied liability.⁴³⁰ In fact, only one case has been discovered in which a non-merchant seller was held liable, and the seller in that case might well have been characterized as a merchant, since she was an interior decorator who made furniture and sold it at a substantial mark-up.⁴³¹

From the foregoing, and the additional requirement contained in section 2-315 that the buyer rely on the seller’s skill or judgment, one might conclude that the buyer would ordinarily not be a

426. U.C.C. § 2-315, Comment 4.

427. *Id.*

428. The warranty of merchantability is implied in any sale by a merchant with respect to goods of the kind sold. One might, however, be a merchant under the Code definition, section 2-104, merely by virtue of holding oneself out as having peculiar knowledge or skill, or hiring someone with such attributes.

429. *See, e.g.*, *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970); *Catania v. Brown*, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); *Woodruff v. Clark County Farm Bureau Coop. Ass’n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Regina Grape Prods. Co. v. Supreme Wine Co.*, 357 Mass. 631, 260 N.E.2d 219 (1970); *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70 (N.D. 1972).

430. The term “non-merchant” in the text is intended here to mean one not engaged in selling goods of the kind. Thus, the following cases would be included: *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971); *Sass v. Spradlin*, 66 Ill. App. 3d 976, 384 N.E.2d 464 (1978); *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (1971); *Samson v. Riesing*, 60 Wis. 2d 698, 215 N.W.2d 662 (1974); *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1973).

431. *Goldberg v. Ziskin*, 12 U.C.C. REP. SERV. 417 (Civ. Ct. N.Y. 1973).

merchant. The cases reveal, however, that often the buyer would also qualify as a merchant, albeit one with significantly less expertise with respect to the particular goods involved than the seller.⁴³² This should not be taken to suggest that the particular purpose warranty has no place in a consumer context, or where the buyer, though engaged in commercial activity, is not a merchant with respect to similar goods.⁴³³ Furthermore, courts have extended the warranty of fitness for a particular purpose to the lease of goods,⁴³⁴ with one court articulating the following rule:

In the absence of an agreement to the contrary, where the lessor has reason to know any particular purpose for which the leased chattel is required and that the lessee is relying upon the lessor's skill or judgment to select or furnish a suitable chattel, there is an implied warranty that the chattel shall be fit for such purpose.⁴³⁵

This extension of the Code rule is fully justified, and comports with the theories underlying the particular purpose warranty.

As has been seen, the initial focus of section 2-315 is on the seller, who may or may not be a merchant so long as he has skill or judgment sufficient to be relied upon by the buyer. The focus then shifts to what the seller must know about the buyer's needs, and when he must become aware of these needs. Not only must the seller be made aware that the buyer has a particular use in mind for the goods, but he must also realize that the buyer is depending upon him to supply suitable goods. In order for the warranty to be created, this awareness must exist at the time of contracting.

As a starting point, the seller need not actually *know* anything, for the statute requires only that he have reason to know the buyer's needs and that the buyer is relying on him. This "reason to know"

432. See, e.g., *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972) (sale of chickens to chicken farmer relatively new to egg farming); *W & W Livestock Enterprises, Inc. v. Denner*, 179 N.W.2d 484 (Iowa 1970) (sale of hogs to hog dealer); *Regina Grape Prods. Co. v. Supreme Wine Co.*, 357 Mass. 631, 260 N.E.2d 219 (1970) (sale of wine to winemaker); *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70 (N.D. 1972) (sale of pipe to harrow attachment manufacturer); *Slemmons v. Ciba-Geigy Corp.*, 57 Ohio App. 2d 43, 385 N.E.2d 298 (1978) (sale of herbicide to farmer); *Controltek, Inc. v. Kwieke Enterprises, Inc.*, 284 Or. 123, 585 P.2d 670 (1978) (sale of electronic equipment to electric step manufacturer).

433. See, e.g., *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970) (sale of diesel truck to commercial user); *Catania v. Brown*, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967) (sale of paint to homeowner); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972) (sale of trucks for hauling); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970); *Lane v. W.W. Grainger, Inc.*, 9 U.C.C. REP. SERV. 832 (Mass. App. Ct. 1971) (sale of air conditioning unit to consumer buyers).

434. *W.E. Johnson Equip. Co. v. United Airlines, Inc.*, 238 So. 2d 98 (Fla. 1970). See also *Fairfield Lease Corp. v. U-Vend, Inc.*, 14 U.C.C. REP. SERV. 1244 (N.Y. Sup. Ct. 1974); *All-States Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177 (1975).

435. *W.E. Johnson Equip. Co. v. United Airlines, Inc.*, 238 So. 2d 98, 100 (Fla. 1970).

standard is a standard of notice, as defined by section 1-201(25), and requires a determination of whether, "from all the facts and circumstances known to him at the time in question he has reason to know that"⁴³⁶ the facts existed. Moreover, this same concept of notice, as opposed to knowledge, is clearly stated by the comment to section 2-315.⁴³⁷ It is probably sufficient to say that, in most cases, whether the seller had reason to know the buyer's needs and that the buyer was relying on him will be fact questions to be determined in each case. Evidence of discussions leading up to the sale, of the parties' relative knowledge and expertise, and of the relationship between the parties will generally be admissible, barring parol evidence objections.

2. Disclaimers

It should make no difference from which direction the court analyzes a particular case: whether the analysis proceeds from a discussion of whether the warranty was created to whether a disclaimer is valid, or whether it proceeds from a discussion of the validity of the disclaimer to the existence of warranty. Because the statute explicitly permits the exclusion or modification of the implied warranty in accordance with section 2-316, one would expect the result to be the same regardless of the analytical approach. On the other hand, one may make the grammatical argument that section 2-315 requires inquiry into the existence of the warranty, and only then may the question whether it has been excluded or modified be addressed.⁴³⁸ This argument may not be as weak as it initially appears. There are at least two good reasons why the drafters might have chosen to view any discussion of disclaimers as secondary to a discussion of the existence of the warranty. First, unlike the implied warranty of merchantability, which arises in all mercantile sales, the particular purpose warranty is less often invoked, and is peculiarly dependent upon the buyer's particular expectations. Therefore, since its existence is less common, it should not be as easily disclaimable. Second, any specific disclaimer under section 2-316(2)⁴³⁹ must be in a conspicuous

436. U.C.C. § 1-201(25) (c) [N.D. CENT. CODE § 41-01-11(25) (c) (Supp. 1979)]. See also U.C.C. § 2-315, Comment 1. *But see* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977) (specific knowledge).

437. See U.C.C. § 2-315, Comment 1.

438. The statute appears to be drafted to require a result favorable to the existence of the warranty where the facts demonstrate such a warranty. Cf. U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)] beginning with the "unless excluded or modified" language).

439. Once again the distinction between specific disclaimers and general disclaimers must be made. Specific disclaimer refers to a section 2-316(2) written disclaimer, as opposed to a section 2-316(3) disclaimer by general words, inspection, or usage. U.C.C. § 2-316(2) & (3) [N.D. CENT. CODE § 41-02-33(2) & (3) (Supp. 1979)].

writing, although, because of the unusual nature of the warranty, it need not mention fitness for a particular purpose.⁴⁴⁰ It would therefore make sense in the ordinary case to first address the issue of creation of this unusual warranty, and only then ask whether it had been effectively disclaimed. Not surprisingly, the courts which have followed this approach have usually upheld the warranty.⁴⁴¹

3. *Parol Evidence Considerations*

In connection with the validity of disclaimers and their effect on what the seller had reason to know at the time of contracting, there is a built-in problem caused by the preceding considerations. If there is a disclaimer provision, and if the contract of the parties is viewed as integrated, parol evidence as to what the seller should have known at the time of contracting would be barred. The problem has already been discussed in the context of express warranties,⁴⁴² and the basic problems will not be reiterated. Primarily, the discussion here will focus on the questions raised by the requirement that the seller know the buyer's needs and that the buyer is relying on him at the time of contracting.

Although the seller need only have notice of the buyer's needs and the buyer's reliance, and these things are to be divined from all the facts and circumstances, it is obvious that in the normal case the best evidence of what the seller knew will be testimony concerning negotiations between the parties. When a court is confronted with a disclaimer provision and a merger clause, however, testimony as to prior agreements would be inadmissible to contradict the express terms of the writing. The assertion of an implied warranty would be directly contradictory to the disclaimer and would therefore theoretically be barred. There are, however, four potential ways around the dilemma.

The first is to employ usage, dealing, or performance to establish that in the context of the agreement the disclaimer was not intended to bar the particular warranty.⁴⁴³ In the usual case this is not satisfactory because, although it accords with the parol evidence rule of the Code, it subverts the ability to disclaim

440. Compare the corresponding rule of section 2-316(2) for merchantability, requiring that merchantability be specifically mentioned. U.C.C. § 2-316(2) [N.D. CENT. CODE § 41-02-33(2) (Supp. 1979)].

441. *See, e.g.,* Boeing Airline Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964); Shofner v. Williams & Pearson Furniture Co., 8 U.C.C. REP. SERV. 48 (Tenn. Ct. App. 1970); *cf.* Massey-Ferguson, Inc. v. Uteley, 439 S.W.2d 57 (Ky. 1969) (court examined disclaimer first but held warranty existed); Thorman v. Polytemp, Inc., 2 U.C.C. REP. SERV. 772 (Westchester County Ct. N.Y. 1965) (court examined warranty first, then applied disclaimer).

442. *See supra* notes 198-205 and accompanying text.

443. *See* U.C.C. § 2-202(a) [N.D. CENT. CODE § 41-02-09(1) (1968)].

warranties, specifically allowed by section 2-316. A second possibility is to allow the evidence to displace the disclaimer. This, however, also subverts the ability to disclaim warranties under the Code. The third means of avoiding parol evidence problems involves a recognition that the implied warranty arises with reference to the parties' actions, but is not an "agreement," or reflection of "agreement," as that term is employed in section 2-202. Thus, testimony of what the buyer made known to the seller before the sale is not to be considered a prior agreement, and is therefore admissible. In a sense, the assertion that it is not an agreement is valid, for no one is attempting to show that the seller agreed to anything. Rather, what is being shown is merely that the buyer and the seller engaged in certain activity, which, if shown, would justify an expectation. On the other hand, to the extent that "agreement" is defined as "the bargain of the parties in fact,"⁴⁴⁴ it is clear that these actions at least imply an agreement prior to integration. Moreover, there is the additional problem that, once the relevant pre-sale actions are admitted, it is uncertain what effect they will have. Even if the testimony would clearly show circumstances which would imply the warranty, if the warranty has been disclaimed it nevertheless does not retain validity. Unless one takes the position that any time the buyer establishes the existence of the particular purpose warranty a disclaimer is ineffective (which flies in the face of section 2-316), merely admitting the evidence solves only half of the problem.

If these three options were the only ones available, one would be forced to conclude that the Code allows the particular purpose warranty only in the extraordinary case where it is both convincingly shown to have existed and where it has not been disclaimed. But a fourth option exists which subtly changes the forced conclusion: this extraordinary warranty exists only where it has been convincingly proved and where it has not been *effectively* disclaimed. To the extent that an effective disclaimer must be both written and conspicuous, this seeks to balance legitimate buyer expectation with legitimate seller protection. Unfortunately, the ideal sought is seldom realized. A cynic might have difficulty accepting the proposition that a buyer who makes known to the seller his needs and his inexperience would thereafter be fully apprised of the seller's limited responsibility by a contract clause which conspicuously points out that "[t]here are no warranties which extend beyond the description on the face hereof."⁴⁴⁵

444. U.C.C. § 1-201(3) [N.D. CENT. CODE § 41-01-11(3) (1968)].

445. U.C.C. § 2-316(2) [N.D. CENT. CODE § 41-02-33(2) (Supp. 1979)].

However, the ideal remains.

The problem, both from a parol evidence standpoint and the standpoint of disclaimer validity, is illustrated well by *Thorman v. Polytemp, Inc.*⁴⁴⁶ *Thorman* presented the standard particular purpose warranty situation. Plaintiff and defendant had a contract for the sale and installation of a heater unit which was to be used in plaintiff's drycleaning establishment. The heater was installed and connected to plaintiff's existing steam boiler. When the heater was on, the steam was insufficient to operate the cleaning and pressing unit. Defendant was alleged to have known plaintiff's particular needs and that plaintiff relied upon defendant's expertise, and plaintiff did in fact rely upon defendant. The contract also contained a disclaimer which excluded "all statutory or implied warranties."⁴⁴⁷ Although the court found that plaintiff had met the burden of establishing the implied warranty of fitness for a particular purpose, it held that because of the disclaimer plaintiff had "waived" the benefit of the warranty. Furthermore, because of a merger clause, evidence of "discussion, survey and negotiations" was excluded by the parol evidence rule.

Other courts have not been so receptive to disclaimers.⁴⁴⁸ For example, in *Boeing Airplane Co. v. O'Malley*,⁴⁴⁹ the court, applying the 1954 version of the Code,⁴⁵⁰ which required a disclaimer to use "specific language" of exclusion to be effective, held that the following clause was not specific enough: "The foregoing warranty is given and accepted in lieu of any and all other warranties, expressed or implied, arising out of the sale of the helicopter."⁴⁵¹ The court buttressed its result by noting that, had the case been decided under the 1959 version of the Code, the clause would have been deemed inconspicuous and therefore ineffective.⁴⁵²

Boeing dealt with the sale of a helicopter under circumstances where the court had no trouble finding the creation of the particular purpose warranty. The difficulty was in deciding whether the warranty had been disclaimed by the preceding clause, and was further compounded by the fact that there was evidence that the sale was "as is — where is."⁴⁵³ Nevertheless, the court had little

446. 2 U.C.C. REP. SERV. 772 (Westchester County Ct. N.Y. 1965).

447. *Thorman v. Polytemp, Inc.*, 2 U.C.C. REP. SERV. 772, 774 (Westchester County Ct. N.Y. 1965).

448. See *infra* notes 449-54 and accompanying text.

449. 329 F.2d 585 (8th Cir. 1964).

450. The 1954 version of section 2-315 is identical to the current version. The 1954 version of section 2-316 differs from the current version in that exclusion could occur only through "specific language." There was no requirement of conspicuousness or a writing.

451. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585, 588 (8th Cir. 1964).

452. *Id.* at 593.

453. *Id.* at 588-89.

trouble declaring that neither mode of disclaimer had the desired effect.⁴⁵⁴

4. *Conspicuousness*

Section 2-316(2) provides that a disclaimer of the particular purpose warranty must be in writing and conspicuous to be effective. No seller would be foolish enough to assert the disclaimer by other than a writing,⁴⁵⁵ so the question of validity will often turn upon whether the disclaimer is conspicuous.⁴⁵⁶ In theory, if the disclaimer is conspicuous the buyer will at least be aware of it. Therefore, if he understands it, and if he has not been lulled into a false sense of security by the seller's actions so that he realizes its impact, he can effectively object to it before signing. Many courts, however, have construed the conspicuousness requirement strictly. Whether a clause is conspicuous⁴⁵⁷ depends on whether, as a matter of law, a reasonable person ought to have noticed it. The Code definition provides specific guidelines as to what is conspicuous, but when a clause does not fall squarely within these guidelines the court is left with few aids in making the determination. Often the determination has been made on the basis of whether the clause meets the guidelines for conspicuousness. If the disclaimer is "in larger or other contrasting type or color," or is under a "printed heading in capitals," it is conspicuous; otherwise it is not.⁴⁵⁸ This, however, clearly perverts the underlying rationale of sections 1-

454. *Id.* at 589, 592-93.

455. The oral disclaimer, even if it were not literally proscribed, would almost certainly be invalid due to inconsistent action, and would likely die in any event from the pro-warranty bias. One ought not forget the availability of other, non-written forms of disclaimer, however, such as those embodied in section 2-316(3). An oral "as is" disclaimer is likely to meet the same fate as that in *Boeing*. Usage, dealing, and performance might work here, but, if the buyer can prove his reliance on the seller and his own lack of expertise, resort to usage, dealing, and performance is not likely to avail the seller. The provision for inspection in section 2-316(3) (b) is another matter; if the buyer in fact examines the goods, he may be held not to have relied on the seller's expertise, at least if the examination would reveal that the goods are not suitable for his particular purpose. On the other hand, to the extent that the buyer lacks sufficient skill or judgment to make a meaningful examination, his examination should not preclude subsequent reliance on the seller. U.C.C. § 2-316(3) (b) [N.D. CENT. CODE § 41-02-33(3) (b) (Supp. 1979)].

456. The buyer could always assert that the clause was unconscionable, but attempts in this direction have been unsuccessful. *See, e.g.,* *Thorman v. Polytemp, Inc.*, 2 U.C.C. REP. SERV. 772 (Westchester County Ct. N.Y. 1965).

457. Section 1-201(10) provides:

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

U.C.C. § 1-201(10) [N.D. CENT. CODE § 41-01-11(10) (Supp. 1979)].

458. *Id. See, e.g.,* *International Harvester Co. v. Pike*, 249 Ark. 1026, 466 S.W.2d 901 (1971); *Koellmer v. Chrysler Motors Corp.*, 6 Conn. Cir. Ct. 478, 276 A.2d 807 (1970); *Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319 (Fla. Dist. Ct. App. 1972); *Glenn*

201(10) and 2-316(2). The test is not whether the seller can fall within specific guidelines, but rather whether the clause ought to be noticed by the buyer. To suggest that the guidelines of section 1-201(10) provide the exclusive means of making a clause conspicuous is to ignore the policy underlying the requirement.⁴⁵⁹ The decisions, however, do point out a clear pro-warranty bias, and, to the extent that the courts mean only to suggest that the requirement of conspicuousness will be taken seriously and strictly enforced, resort to an exclusivity analysis may be justified.

It therefore should be apparent that courts which are faced with a clear conflict between the warranty and the disclaimer, and all of the parol evidence problems which accompany it, have a ready-made escape hatch. What's more, it probably is justifiable that they avail themselves of it, for, except where the clause is truly conspicuous, there is a risk that the buyer will indeed be surprised.

Thus, for example, in *Massey-Ferguson, Inc. v. Utley*,⁴⁶⁰ the court ruled that a disclaimer contained on the back side of the contract was not conspicuous, and therefore was ineffective to exclude the warranty of particular purpose which was found to have been implied.⁴⁶¹ Other cases which hold that language on the back of forms is inconspicuous are legion,⁴⁶² although there are a few which look more to the type of printing than to the placement of the disclaimer.⁴⁶³ Fewer still fall into the *Utley* category, which dealt primarily with the issue of a clear particular purpose warranty followed by an equally clear, albeit inconspicuous, disclaimer. Because of the inconspicuousness, in *Utley* the warranty was given precedence.

In a similar vein, the court in *DeLamar Motor Co. v. White*⁴⁶⁴

Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 541 P.2d 1184 (1975); Overland Bond & Inv. Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); Massey-Ferguson, Inc. v. Utley, 439 S.W.2d 57 (Ky. 1969); Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp., 62 A.D.2d 982, 403 N.Y.S.2d 322 (1978); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974); P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co., 568 P.2d 1273 (Okla. 1977).

In several cases courts have held the clause to be inconspicuous, even though one of the guidelines was met. See *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970) (clause in italics); *Dorman v. International Harvester Co.*, 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (1975); *Volvo of America Corp. v. Wells*, 551 S.W.2d 826 (Ky. 1977) (slightly different print).

459. See *Valez v. Craine & Clarke Lumber Corp.*, 41 A.D.2d 747, 341 N.Y.S.2d 248, *rev'd on other grounds*, 33 N.Y.2d 117, 305 N.E.2d 350, 350 N.Y.S.2d 617 (1973).

460. 439 S.W.2d 57 (Ky. 1969).

461. *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57, 58-59 (Ky. 1969).

462. See *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. Dist. Ct. App. 1972); *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974); *Jerry Alderman Ford Sales, inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972); *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967) (although language was printed in appropriate-size type); *P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co.*, 568 P.2d 1273 (Okla. 1977).

463. See, e.g., *Rye v. International Harvester Co.*, 16 U.C.C. REP. SERV. 966 (Tenn. Ct. App. 1975).

464. 249 Ark. 708, 460 S.W.2d 802 (1970).

found that an implied warranty had been made and then ineffectively disclaimed. Presented with a disclaimer which was italicized, and therefore in "contrasting type," the court nevertheless found that it was not conspicuous. The court reasoned that, although italicized, the disclaimer "was in smaller and lighter type than much of the rest of the printed form."⁴⁶⁵ Again, the "loophole" of conspicuousness saved a buyer from surprise.

Those courts which have been squarely faced with a conflict between a disclaimer and a particular purpose warranty have responded with a justifiable bias in favor of the warranty. Some, as in *Boeing*, have based their holding on the lack of clear language, buttressed by inconspicuousness. Others, as in *Utley* and *DeLamar*, have relied exclusively on the conspicuousness escape hatch. However, the lengths to which a court might go do not end there, as demonstrated in *Shofner v. Williams & Pearson Furniture Co.*⁴⁶⁶

In *Shofner*, the plaintiffs had purchased a television set, expecting to receive a good color picture,⁴⁶⁷ and were sorely disappointed when the set failed to work properly. Accompanying the set, on the back of the instruction booklet, was a disclaimer of all warranties other than an express warranty. Faced with the dealer's claim that no implied warranty could therefore apply, the court could have played the conspicuousness game. Instead, it reasoned that the disclaimer was placed in the booklet solely for the protection of the manufacturer, not the seller.⁴⁶⁸ Thus, by the terms of the Code itself, the dealer could appropriately make other warranties which would affect only his duties. Therefore, the only question was whether the warranty had in fact been created.

The approach of the *Shofner* court seems consistent with the Code, at least when it is the particular purpose warranty which is asserted. Ordinarily, the particular purpose warranty will be dependent upon what the immediate parties say and do, as opposed to, for example, the warranty of merchantability, which emanates both from remote and immediate sellers.⁴⁶⁹ It therefore seems fair to require the immediate seller to disclaim any warranties he might have made if the disclaimer is to be given effect.⁴⁷⁰

465. *DeLamar Motor Co. v. White*, 249 Ark. 708, _____, 460 S.W.2d 802, 804 (1970).

466. 8 U.C.C. REP. SERV. 48 (Tenn. Ct. App. 1970).

467. *Shofner v. Williams & Pearson Furniture Co.*, 8 U.C.C. REP. SERV. 48, 50 (Tenn. Ct. App. 1970).

468. *Id.* at 51.

469. See WHITE & SUMMERS, *supra* note 62, at 357-60, for a discussion of the distinctions between the particular purpose warranty and the warranty of merchantability.

470. It is clear that section 2-318 makes warranties made by the manufacturer applicable to remote purchasers. By the same token, if the manufacturer properly excludes warranties in the sale of the goods, the warranty would not extend to the remote purchaser. Thus, for example, if the action in *Shofner* were based on an implied warranty of merchantability, the Shofners might have lost

The foregoing cases suggest that courts will not take kindly either to disclaimers of particular purpose warranties or to parol evidence defenses, at least where it is more likely than not that the circumstances were such that a particular purpose warranty existed. Thus, most courts, when examining what the seller knew at the time of contracting, will give substantial leeway in an effort to promote the existence of the warranty, notwithstanding that to do so will often exacerbate the conflict between the warranty and the disclaimer.

Before considering other aspects of the particular purpose warranty, it should be reiterated that awareness by the seller must occur at the time of contracting, and not at some later point. Thus, for example, in *Jacobson v. Benson Motors, Inc.*,⁴⁷¹ the plaintiff purchased an automobile from the defendant for the purpose of drag-racing. There was no evidence that, at the time of sale, the defendant had reason to know the particular purpose for which the car had been purchased. Thereafter, the defendant learned of plaintiff's drag-racing activity, and even offered to sponsor the plaintiff. The court held that there was no particular purpose warranty created, since *at the time of contracting* no particular purpose was made known to the seller.⁴⁷²

5. The Buyer's Particular Purpose

Once the timing requirement of section 2-315 is met, the inquiry shifts to the extent of the seller's knowledge. Stated simply, he must be made aware of the particular purpose that the buyer has in mind for the goods. This statement, while retaining its simplicity in the ordinary case, becomes obscured at the fringes. Suppose, for example, that the buyer's particular purpose is one of the ordinary purposes for which such goods are used. Will an implied warranty of fitness for particular purpose exist, or is it subsumed in the more general warranty of merchantability? Further, how great an awareness of the buyer's particular purpose must the seller have?

As to these questions, the Code itself offers little help. The

unless they could have convinced the court that the defendant had not made a valid disclaimer. To the extent that each seller is capable of making a warranty, the *Shofner* analysis probably retains vitality. Therefore, arguably, the only effect of the disclaimer in *Shofner* would be to preclude direct action against the manufacturer, and only if the disclaimer was deemed conspicuous. U.C.C. § 2-318 [N.D. CENT. CODE § 41-02-35 (1968)].

471. 216 N.W.2d 396 (Iowa 1974).

472. *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396, 404 (Iowa 1974). After the car broke down plaintiff returned to the defendant, who contended that the warranty had been voided due to abuse. A compromise was reached, which in part included complete replacement of the engine. By this time, of course, the defendant did know of the particular purpose. The court nevertheless ruled that even as to the replacement engine there was no particular purpose warranty. This portion of the ruling was arguably incorrect, as it failed to take into account what the defendant actually knew.

comment to section 2-315 of the Code suggests that the buyer's use need only differ in degree, not in kind, from the ordinary purpose giving rise to a general warranty of merchantability.⁴⁷³ Thus, the comment provides the example of a shoe customer purchasing a pair of shoes for mountain climbing, and suggests that such a particular purpose would be sufficiently outside the normal or customary purpose to justify the warranty.⁴⁷⁴ Left unanswered is the question whether, if the buyer's particular purpose is the ordinary purpose, an implied warranty of fitness for particular purpose is made. Since the two warranties are often disclaimed by one disclaimer provision, it often will not matter. However, to the extent that the methods of disclaimer differ, the question must be answered. This, of course, initially depends upon whether the two warranties are mutually exclusive, or whether they can coexist. Section 2-317 specifically answers this question in the affirmative: "Warranties whether express or implied shall be construed as consistent with each other *and as cumulative*."⁴⁷⁵ Furthermore, a number of cases have held that both warranties are capable of arising out of a single fact setting.⁴⁷⁶ In fact, it is this capacity for cumulation which may often lead courts to fail to distinguish between the two warranties. Instead, many courts lump the two together into a general warranty of fitness. Because of their differences, however, such lumping is often a critical mistake.

The difficulty created by lumping the two warranties together is that a good may be capable of being merchantable, yet might not be fit for a particular purpose. Thus, for example, an automobile might well be fit for ordinary driving, yet might not be fit for racing.⁴⁷⁷ By the same token, a good might be fit for a particular purpose yet unfit for ordinary purposes.⁴⁷⁸ Finally, a good might be

473. U.C.C. § 2-315, Comment 2.

474. Comment 2 to section 2-315 provides in relevant part:

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. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

U.C.C. § 2-315, Comment 2.

475. U.C.C. § 2-317 [N.D. CENT. CODE § 41-02-34 (1968)] (emphasis added).

476. See, e.g., *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974); *Madison Silos v. Wassom*, 215 N.W.2d 494 (Iowa 1974); *Nelson v. Wilkins Dodge, Inc.*, 256 N.W.2d 472 (Minn. 1977); *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973).

477. See *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974).

478. This would occur less frequently, but it is possible. Thus, a buyer of a television set who bought for the particular purpose of UHF reception might receive a set with acceptable UHF

both unmerchantable and unfit for a particular purpose, based upon separate defects.⁴⁷⁹ Thus, we are brought full circle to the question of whether there can be a breach of both warranties based upon a single defect, or based upon a purpose which, although articulated as particular, is merely an ordinary use. In other words, how particular must a particular purpose be?

The cases are apparently split over the issue, but those which allow assertion of both warranties represent the better rule, for several reasons. First, such reasoning fully comports with the comment to section 2-315, which suggests that the difference may be one merely of degree. Second, in the occasional case where only one warranty is disclaimed, allowance of the dual warranty may be the only means of protecting legitimate expectations. Third, in many cases the use contemplated by the buyer, although known to the seller to be an ordinary use, is thought by the buyer to be a particular use.⁴⁸⁰

In fairness to the courts which have indicated that the implied warranty of fitness for particular purpose is dependent upon some known purpose outside the ordinary use of the goods, it should be pointed out that in all of these cases the assertion is made through dictum. Thus, in *Falcon Equipment Corp. v. Courtesy Lincoln Mercury, Inc.*,⁴⁸¹ the United States Court of Appeals for the Eighth Circuit expressed its doubt that a request for "a quiet, dependable and comfortable automobile which would be suitable for long distance trips on interstate highways"⁴⁸² would qualify as a particular purpose.⁴⁸³ It should be noted, however, that the court was applying Iowa law, which has not yet determined this issue, although there are Iowa cases which suggest that other than ordinary purpose is required.⁴⁸⁴

Similarly, in *Janssen v. Hook*,⁴⁸⁵ the court, in ruling that the trial court's finding of fact that no particular purpose warranty

reception, but with less than acceptable VHF reception. There would, in theory, be a breach of the warranty of merchantability since the set would be unfit for ordinary purposes, yet it would be fit for the buyer's particular purpose.

479. For example, an automobile purchased for racing might be unmerchantable because its engine capabilities are not suitable for ordinary driving, and also unfit for its particular purpose because its tires are standard.

480. This arises often in consumer transactions and in highly specialized commercial transactions. For example, the consumer with poor eyesight might consider it a particular purpose that a television set receive a sharp picture, whereas most people would consider it a characteristic common to all television sets. Or the purchaser of sophisticated computer equipment might consider "on line" capability a particular purpose, while the seller considers it an ordinary use.

481. 536 F.2d 806 (8th Cir. 1976).

482. *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 809 (8th Cir. 1976).

483. *Id.*

484. See *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974); *Madison Silos v. Wassom*, 215 N.W.2d 494 (Iowa 1974).

485. 1 Ill. App. 3d 318, 272 N.E.2d 385 (1971).

existed was not against the manifest weight of the evidence, noted that, although the seller was aware of the buyer's purpose, there was "nothing to show that such use would differ from the ordinary use of [such goods] in general."⁴⁸⁶ Again, the inference is clear that since the ordinary use and particular use were the same, no particular purpose warranty could be created. However, in mitigation of that inference is the fact that at least two other Illinois cases, decided after *Janssen*, have indicated that the ordinary purpose can readily become a particular purpose.⁴⁸⁷

To the same effect is *Blockhead, Inc. v. Plastic Forming Co.*,⁴⁸⁸ involving a contract for the production and sale of hair wiglet cases. When the cases failed to meet the plaintiff's expectations, plaintiff sued, alleging breach of an implied warranty of fitness for particular purpose. In finding that no such warranty had been created, the court stated:

A particular purpose envisages a specific use of the product which is peculiar to the buyer The wiglet cases were never intended for any purpose other than the ordinary purpose of carrying hairpieces and accessories. Thus the court finds that the warranty of fitness for a particular purpose does not apply.⁴⁸⁹

This is perhaps the clearest expression of the rule in the abstract, and it clearly implies that, so long as the ordinary purpose and the particular purpose are the same, no particular purpose warranty will be found. The same general premise was part of the basis for the court's decision in *Bruce v. Calhoun First National Bank*.⁴⁹⁰ In *Bruce*, the court, although acknowledging that the seller knew that the buyer's particular purpose in purchasing certain carpets was for resale, held that this did not constitute a particular purpose under the Code.⁴⁹¹

Without considering the correctness of the results of the foregoing cases, it is apparent that some courts are, perhaps justifiably, uneasy in declaring that some goods' ordinary purpose

486. *Janssen v. Hook*, 1 Ill. App. 3d 318, 321, 272 N.E.2d 385, 388 (1971).

487. See *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444 (1977); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972). *Overland* will be discussed *infra* at notes 502-03 and accompanying text.

488. 402 F. Supp. 1017 (D. Conn. 1975).

489. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975) (citations omitted).

490. 134 Ga. App. 790, 216 S.E.2d 622 (1975).

491. *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790, _____, 216 S.E.2d 622, 625 (1975).

might nevertheless reach the status of a particular purpose in the contemplation of a given buyer. Taken to the extreme, it is possible that failure to recognize the distinction between the two warranties, at least insofar as there seems to be required a difference in degree, might result in a court charging a factfinder that "there is an implied warranty in every sale that the product will perform the purpose for which it was purchased."⁴⁹² Such a charge would clearly be in derogation of the statutory requirements, and it is perhaps out of fear that such results will occur that courts have demonstrated some reluctance to equate ordinary use with particular purpose. The majority of courts which have considered the question, however, have managed to suppress the fear, and, while paying lip service to the need for more specificity to invoke the particular purpose warranty, have allowed particular purpose recovery when an ordinary purpose was at issue. As indicated earlier, it is believed that this analysis is correct, and, so long as the facts justify the decisions, the fine line being drawn is workable.

This fine line is perfectly illustrated in *Shofner v. Williams & Pearson Furniture Co.*,⁴⁹³ which was discussed earlier in connection with disclaimers of implied warranties.⁴⁹⁴ Plaintiffs had purchased a color television set from defendants, complete with a special antenna. The "particular purpose" of the plaintiffs was "to receive a good color picture." When the set did not produce a good color picture defendant attempted several times to repair it, but plaintiffs finally purchased another set, refused to take redelivery of the repaired set, and sued. The lower court held that there was an implied warranty of fitness for a particular purpose,⁴⁹⁵ and the appellate court affirmed.⁴⁹⁶ It is apparent, however, that the particular purpose found was the ordinary purpose for which a color television set is purchased: to receive a good color picture.⁴⁹⁷

One can imagine circumstances in which reception of a good color picture might amount to a particular purpose, as, for example, when the set was being purchased for use in an unusual place (*e.g.*, a mobile home or a rural area without transmitting facilities),⁴⁹⁸ or where the buyer had poor eyesight and needed an

492. *Drilling Accessory & Mfg. Co. v. Kelly*, 7 U.C.C. REP. SERV. 1177, 1178 (Okla. Ct. App. 1970) (reversing the lower court decision because of this charge).

493. 8 U.C.C. REP. SERV. 48 (Tenn. Ct. App. 1970).

494. *See supra* notes 466-70 and accompanying text.

495. *Shofner v. Williams & Pearson Furniture Co.*, 8 U.C.C. REP. SERV. 48, 49 (Tenn. Ct. App. 1970).

496. *Id.* at 53.

497. *Id.* at 51.

498. Although the facts of the case do not indicate where the plaintiffs lived, their attorney was from Madison, a suburb of Nashville. If it can be assumed that they too were from that area, it would clearly not qualify as an "unusual" place.

especially clear picture. However, there is nothing in *Shofner* to suggest such circumstances. It is hard to imagine a case where there could be a closer connection between ordinary use and particular purpose.

Oddly, the Tennessee court apparently did not realize that it had elevated an ordinary use to particular purpose status. Other courts have at least done this much, and their opinions suggest that the fine lines drawn are purposeful. In *Tennessee Carolina Transportation, Inc. v. Strick Corp.*,⁴⁹⁹ the court refused to even draw the line, holding that when the particular purpose warranty is asserted as having been made even though the particular purpose and the ordinary purpose are the same, "[t]hat warranty also protects a buyer when his particular purpose is the general or ordinary purpose."⁵⁰⁰ In other words, there exists clear authority for the proposition that both warranties can exist by virtue of common characteristics of the goods. Thus, it has been held that a funeral home breaches the particular purpose warranty when it supplies a vault too small to house a child's casket, since the funeral home knows of the particular purpose and knows that the purchasers are relying on the funeral home's skill or judgment.⁵⁰¹ By the same token, to the extent that the ordinary purpose of an automobile is to provide dependable transportation, it is hard to imagine how the seller's knowledge that it is to be used by a traveling businessman somehow converts that into a particular purpose. Yet this was precisely what the court found in *Overland Bond & Investment Corp. v. Howard*,⁵⁰² thereby again converting a clearly ordinary purpose into a particular one.⁵⁰³

The foregoing cases amply support the proposition that an ordinary use can, because of a buyer's communication to the seller, become a particular purpose, thereby creating warranties in addition to merchantability. These cases are the clearest examples, for almost everyone would agree that the particular purpose asserted in each case was actually the sole ordinary purpose of the goods involved. But other examples abound where, although the particular purpose asserted is not the *exclusive* ordinary purpose, it is certainly one of the ordinary purposes of the goods.

For example, at least three cases have held that the seller's

499. 283 N.C. 423, 196 S.E.2d 711 (1973).

500. *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, _____, 196 S.E.2d 711, 717 (1973) (emphasis in original) (North Carolina court applying Pennsylvania law).

501. *Caldwell v. Brown Funeral Serv. Home*, 345 So. 2d 1341 (Ala. 1977).

502. 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).

503. *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 354, 292 N.E.2d 168, 173 (1972).

awareness of the buyer's need to haul various items created a particular purpose warranty with respect to the sale of trucks.⁵⁰⁴ While not all trucks are ordinarily going to be used for "hauling," "hauling" is clearly an ordinary use of a truck. Therefore, to find that a particular purpose warranty was created is to admit the probability of overlap, and to accept, at least in theory, that ordinary purpose can, without more, become particular purpose.

It also takes little imagination to realize that an ordinary purpose of a mobile home is use as a residence. Nevertheless, when bugs infested a newly purchased mobile home, the court, in affirming the trial court decision, found that the use of a mobile home as a residence was a "particular purpose," and that bug infestation breached the particular purpose warranty.⁵⁰⁵ Again, it is clear that the particular purpose warranty may exist even though the particular purpose is also one of the ordinary purposes of the goods.

A closer case, and one more reflective of the difference-in-degree analysis, is illustrated in *Woodruff v. Clark County Farm Bureau Cooperative Association*.⁵⁰⁶ In *Woodruff*, the buyer's particular purpose for purchasing chickens was egg production, clearly an ordinary use but sufficiently distinct from other ordinary uses to justify, even under a restrictive reading of the Code, the implication of the particular purpose warranty.⁵⁰⁷ If ever a case paralleled the "shoe-hiking" hypothetical of comment 2 to section 2-315, *Woodruff* did, and the court found that the particular purpose warranty had been created.⁵⁰⁸

The discussion of the previous cases has shown that very often a buyer's particular purpose will be one of the ordinary purposes for which the specific goods are intended, and that therefore both the particular purpose warranty and the more general merchantability warranty will be invocable.⁵⁰⁹ Less frequently, when the goods are specially manufactured, for example, the ordinary purpose and the particular purpose will almost of necessity coincide.⁵¹⁰ It is therefore a mistake to "pigeonhole" the

504. *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972) (rock); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970) (coal); *Roupp v. Acor*, 253 Pa. Super. Ct. 46, 384 A.2d 968 (1978) (timber).

505. *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444 (1977).

506. 153 Ind. App. 31, 286 N.E.2d 188 (1972).

507. *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, _____, 286 N.E.2d 188, 195 (1972).

508. *Id.*

509. See also *Nelson v. Wilkins Dodge, Inc.*, 256 N.W.2d 472 (Minn. 1977) (both warranties can accompany sale of automobile).

510. See, e.g., *Valley Iron & Steel Co. v. Thorin*, 278 Or. 103, 562 P.2d 1212 (1977).

particular purpose and merchantability warranties into any kind of mutually exclusive categories. By the same token, it is obvious that to fail to distinguish between the two at all will potentially result in their total merger, which would also be an unfortunate mistake. The solution seems to be to attempt to draw a very fine line, but with an awareness that when the line is crossed the availability of both warranties is to be favored.

The original questions posed, whether the warranty of merchantability should subsume that of fitness for a particular purpose and how particular the buyer's purpose must be, have thus been answered. Although section 2-315 requires a particular purpose, the buyer's particular purpose may in fact be the ordinary purpose or one of the ordinary purposes for which the goods are used. If facts are presented which lend themselves to implication of both merchantability and particular purpose warranties, both warranties should be held to exist. There is nothing in the Code which prevents it, and there are sound reasons for such a result.

6. *The Buyer's Reliance*

In addition to having reason to know of the buyer's needs, the seller must also have reason to know that the buyer is relying on his skill or judgment to meet those needs. The inquiry concerning reliance is directed at two distinct, although interrelated, activities. First, the seller must be on notice that the buyer is relying on him, and second, the buyer must in fact rely on him. The first inquiry, whether the seller had reason to know of the buyer's reliance, is explicitly required by section 2-315, and in a sense focuses on the relative expertise of the parties. The second requirement is implicit in the first, and depends on a factual determination of whether, once the buyer is shown to be less astute than the seller, he in fact relies on the seller's skill or judgment.

The cases reveal few problems related to the reliance requirements, and one is tempted to explain this phenomenon on the basis that at issue are fact questions, to be resolved on a case by case basis.⁵¹¹ Thus, review at the appellate level will ordinarily be limited to whether the record reveals testimony which would support a factual conclusion that the seller had sufficient expertise

511. See *Gillette Dairy, Inc. v. Hydrotex Indus., Inc.*, 440 F.2d 969 (8th Cir. 1971); *Turnbough v. Schien*, 26 Ill. App. 3d 88, 325 N.E.2d 5 (1975); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978); *Fulwider v. Flynn*, 90 S.D. 527, 243 N.W.2d 170 (1976).

to provide skill and judgment⁵¹² vis-a-vis the buyer,⁵¹³ and whether the buyer relied on that skill or judgment.⁵¹⁴ Yet, even on such limited review, certain significant factors emerge.

For example, it is probably not too bold to assert that a quasi-presumption in favor of reliance arises when the seller is an expert with respect to the goods and the buyer is not. This is true in spite of language in some cases which demands that the reliance be affirmatively shown.⁵¹⁵ The presumption, however, is rebuttable, and will be effectively countered by showing that the buyer was substantially familiar with the particular goods at issue;⁵¹⁶ that the buyer either prepared or required conformity with detailed specifications or descriptions,⁵¹⁷ although there is some disagreement as to how detailed the specifications must be;⁵¹⁸ that

512. See *Jetero Constr. Co. v. South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976); *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537 (D. Mass. 1977); *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976); *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971); *Catania v. Brown*, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967); *Acme Pump Co. v. National Cash Register, Inc.*, 32 Conn. Supp. 69, 337 A.2d 672 (C.P. 1974).

513. Although relatively few cases have articulated well the comparative nature of the expertise, it is implicit in the decisions cited in note 512, *supra*. For cases specifically discussing relative expertise, see *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975); *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971); *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 269 N.E.2d 664 (1971); *Valiga v. National Food Co.*, 58 Wis. 2d 232, 206 N.W.2d 377 (1973). Not surprisingly, in the majority of the cases where the buyer's expertise is discussed at any length the warranty is held not to be created.

514. See *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86 (8th Cir. 1977); *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806 (8th Cir. 1976); *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972); *Aluminum Co. of America v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. 1971); *Gillette Dairy, Inc. v. Hydrotex Indus., Inc.*, 440 F.2d 969 (8th Cir. 1971); *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977); *United States Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972); *Klipfel v. Neill*, 30 Colo. App. 428, 494 P.2d 115 (1972); *Acme Pump Co. v. National Cash Register Co.*, 32 Conn. Supp. 69, 337 A.2d 672 (C.P. 1974); *Sieman v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975); *Garner v. S & S Livestock Dealers, Inc.*, 248 So. 2d 783 (Miss. 1971); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.3d 358 (1978); *Bastiste v. American Home Prod. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977); *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976); *Fulwider v. Flynn*, 90 S.D. 527, 243 N.W.2d 170 (1976); *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 767, 201 S.E.2d 609 (1974); *Lewis & Sims, Inc. v. Key Indus., Inc.*, 16 Wash. App. 619, 557 P.2d 1318 (1976); *Valiga v. National Food Co.*, 58 Wis. 2d 232, 206 N.W. 2d 377.

515. See *United States Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972); *Turnbough v. Schien*, 26 Ill. App. 3d 88, 325 N.E.2d 5 (1975).

516. *Trax, Inc. v. Tidmore*, _____ Ala. _____, 331 So. 2d 275 (1976), *rev'd on other grounds*, _____ Ala. _____, 349 So. 2d 597 (1977).

517. See, e.g., *Klipfel v. Neill*, 30 Colo. App. 428, 494 P.2d 115 (1972); *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 269 N.E.2d 664 (1971); *Mohasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234 (1974); *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976); *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 201 S.E.2d 609 (1974); *Lewis & Sims, Inc. v. Key Indus., Inc.*, 16 Wash. App. 619, 557 P.2d 1318 (1976). As to descriptions, see *Standard Packaging Corp. v. Continental Distilling Corp.*, 378 F.2d 505 (3d Cir. 1967); *Consolidated Supply Co. v. Babbitt*, 96 Idaho 636, 534 P.2d 466 (1975).

By the same token, however, if it is the seller who prepares or recommends the specifications, the seller cannot avoid liability when the buyer subsequently adopts those specifications. See *Singer Co. v. E.I. duPont de Nemours & Co.*, 579 F.2d 433 (8th Cir. 1978).

518. Thus, for example, in *Aluminum Co. of America v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. 1971), the defendant buyer explained its needs to the plaintiff seller by rather specific language: it needed an aluminum floor that was "rigid and lightweight" with "a smooth surface with minimal joints" that would "conduct low-voltage electricity," that had to be "assembled into nine feet by forty feet panels" which would operate both as floors and as side panels. *Id.* at 1117. When the product did not function as desired, defendant refused to pay, seller sued, and buyer

the buyer engaged in independent testing to determine whether the goods would meet his needs,⁵¹⁹ although, again, the tests or inspections would have to be truly independent of the seller;⁵²⁰ or that the buyer had a predisposition toward the *particular* goods.⁵²¹ The fact that the buyer selects a particular seller based upon another buyer's success with a product is not dispositive of the issue,⁵²² and the fact that a buyer selects a "trade name" item should not impede the warranty, so long as he does not insist upon the trade name.⁵²³

If there is a presumption of reliance, it seems reasonable to allow the seller to rebut the presumption on the basis of the foregoing "exceptions." Each of the tools for rebuttal shares a common characteristic: if proven, each will in effect demonstrate that the buyer, rather than the seller, was exercising skill or judgment, and was in fact making the selection of goods. Thus it seems clear that anytime the buyer actually does the selecting (without prodding or inducement by the seller) no particular purpose warranty should attach.⁵²⁴

One of the reasons the quasi-presumption exists is that the commercial seller of goods is presumed to have skill or knowledge with reference to the goods, whereas the buyer does not. The exceptions listed earlier suggest that when, for one reason or

countered. Alcoa attempted to escape liability by asserting that the buyer's specifications had been detailed, and that therefore no particular purpose warranty was created. The court responded by calling the foregoing "general terms," and not specifically detailed plans. *Id.* at 1119.

See also *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971). Plaintiff had specified an oil without additives, at the same time telling defendant for what purposes the oil was required. The court held that particular purpose warranty could exist.

519. See *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86 (8th Cir. 1977) (buyer made own "admittedly inadequate tests"); *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976); *Valiga v. National Food Co.*, 58 Wis. 2d 232, 206 N.W.2d 377 (1973) (buyer conducted his own tests, but failed to administer one which would have shown defect).

520. See, e.g., *Gellenbach v. Sears, Roebuck & Co.*, 59 Mich. App. 339, 229 N.W.2d 443 (1975) (independent report made by factory but supplied by seller to buyer; held implied warranty exists).

521. See *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806 (8th Cir. 1976) (buyer's predisposition toward particular model suggests no reliance on seller); *Bickett v. W.R. Grace Co.*, 12 U.C.C. REP. SERV. 629 (W.D. Ky. 1972) (designation by trade name coupled with no evidence of particular purpose suggests absence of reliance); *Sieman v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975) (buyer attempted to get goods from manufacturer, but when they were unavailable there, buyer purchased same items from private party; held since plaintiff buyer had, before contacting defendant seller, decided on the particular goods, no warranty of particular purpose was created); *Engelbrecht v. W.D. Brennan & Sons*, 501 S.W.2d 707 (Tex. Civ. App. 1973).

522. See, e.g., *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978) (buyer of oven chose seller on basis of friend's recommendation because a similar oven had worked well for friend; held, factual question of reliance not foreclosed).

523. Comment 5 to section 2-315 specifically disavows the validity of any "trade name" exception, stating that the use of a trade name or other designation by the buyer is only one fact to consider. See *Thompson Farms v. Corno Feed Prods.*, 173 Ind. App. 682, 366 N.E.2d 3 (1977). But see *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806 (8th Cir. 1976); *Bickett v. W.R. Grace & Co.*, 12 U.C.C. REP. SERV. 629 (W.D. Ky. 1972); *Engelbrecht v. W.D. Brannon & Sons, Inc.*, 501 S.W.2d 707 (Tex. Civ. App. 1973).

524. See, e.g., *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972); *Garner v. S & S Livestock Dealers, Inc.*, 248 So. 2d 783 (Miss. 1971).

another, the buyer's skill or knowledge is equal or superior to the seller's, the presumption is rebutted. This raises at least the possibility that a seller will urge his own lack of skill in order to escape liability. Ordinarily, such contentions should be ignored, but special circumstances might arise which would justify a finding that the seller is on a par with the buyer, and no warranty therefore attaches. Thus, for example, where the goods involved are so experimental as to be beyond the seller's experience,⁵²⁵ or the use intended by the buyer is so unique that the seller expressly disavows any knowledge as to whether the goods will work,⁵²⁶ the seller should not be held liable. On the other hand, in the ordinary case, even where the seller is custom-manufacturing an item for the buyer, liability should generally attach.⁵²⁷ The distinction is one of degree, and non-liability should exist only where the seller is, in effect, out of his field of expertise.

One other facet of reliance bears particular note. As we have seen, it is the *seller's* skill or knowledge which must be relied upon by the buyer, so that if the buyer requests a particular product or is following the recommendation of one other than the seller, no warranty attaches. This has had a particularly interesting impact in the area of prescription drugs, where at least two cases have held that the pharmacist who fills the prescription is not liable for breach of the implied warranty of fitness for particular purpose.⁵²⁸ The theory behind non-liability, of course, is that the buyer is relying not on the seller's skill or judgment, but on the skill of the prescribing physician. Stated in the abstract, these decisions make a great deal of sense, as the pharmacist probably lacks the authority to make substitutions. It is suggested, however, that no blanket rule should exist to shield pharmacists (or others similarly situated) from making the implied warranty, even with respect to prescription drugs. Responsibility should be imposed on the pharmacist, in spite of the presence of the prescription, anytime the pharmacist, aware of the buyer's needs and the drug's attributes, fails to inform the buyer of potential problems. While it is generally just not to hold the pharmacist responsible, when it appears that the

525. See *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 269 N.E.2d 664 (1971) (goods were semi-experimental, with buyer and seller sharing in design).

526. See *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537 (D. Mass. 1977).

527. See *Aluminum Co. of America v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. 1971) (even though the development of a new system was at issue, since it was within the seller's field of expertise, particular purpose warranty existed); *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70 (N.D. 1972) (plaintiff seller, although he never sold pipe for harrow attachments before, was an expert in pipe; *held*, the warranty attaches).

528. See *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977); *Bichler v. Willing*, 58 A.D.2d 331, 397 N.Y.S.2d 57 (1977).

pharmacist meets the other requirements of section 2-315 it seems unreasonable to allow him to shield himself completely from liability. At the same time, it is recognized that this analysis may more properly be framed in tort than in contract.⁵²⁹

7. *Used Goods and Fitness for Particular Purpose*

Having discussed at length the particular purpose warranty, there remain only two relatively minor points to be made before analyzing the North Dakota contributions to the area. One, largely implicit in the whole concept of fitness for particular purpose, is the warranty's applicability to used goods. Unlike the warranty of merchantability, which makes explicit reference to used goods,⁵³⁰ the particular purpose warranty is silent on the issue. However, the fact that the seller need not be a merchant to make the particular purpose warranty suggests that used goods can appropriately be the subject of the warranty. Moreover, the cases have rather consistently allowed used goods to be covered by the warranty, either expressly recognizing that such coverage is proper⁵³¹ or ignoring the question but imposing liability.⁵³² It would therefore be surprising, and probably unjustified, for courts not to allow used goods to carry the particular purpose warranty.⁵³³

8. *Express Warranty of Fitness for Particular Purpose*

The final consideration before discussing the North Dakota cases is largely pragmatic. Thus far, the particular purpose warranty has been considered from the perspective that the Code suggests, as an implied warranty. Although the cases treat it as implied, as a practical matter it is difficult to imagine circumstances

529. In actuality this is a case of dual reliance, primarily on the doctor and secondarily on the pharmacist. In that sense, it is analogous to the buyer who purchases goods from a seller, relying on both the seller and a third party. If the seller is aware of the buyer's purpose, it may be justifiable to impose a duty on the seller to inform the buyer (and the third party) that the chosen goods will not likely be suitable.

530. Comment 3 to section 2-314 provides: "A contract for the sale of second-hand goods, however, involves only such goods for that is their contract description." U.C.C. § 2-314, Comment 3. Furthermore, comment 4 makes explicit references to "second-hand" goods. U.C.C. § 2-314, Comment 4.

531. See *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. Dist. Ct. App. 1977); *Brown v. Hall*, 221 So. 2d 454 (Fla. Dist. Ct. App. 1969) (comparing pre-Code law with section 2-315); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); *Natale v. Martin Volkswagon, Inc.*, 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (1978); *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

532. See, e.g., *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970).

533. Although the North Dakota courts have not discussed the issue recently, pre-Code case law suggests that used goods are covered by the particular purpose warranty. See *W.J. Dyer & Bro. v. Bauer*, 48 N.D. 396, 184 N.W. 809 (1921) (second-hand fotoplayer sold to defendant who had never seen one, and who relied on the seller's representations; *held* that there was an implied warranty that the fotoplayer should be fit for the purpose of providing adequate orchestral music for a movie theater).

in the real world where the particular purpose warranty, if it exists, could not be characterized as express. To the extent that the seller, after being made aware of the buyer's needs, so much as utters a word (*e.g.*, "this should do it," "try this," or "what you need is this"), he will in effect have promised or affirmed that the goods the seller selects will meet the buyer's needs. To that extent, the seller will have made both an express and an implied warranty of fitness for a particular purpose.⁵³⁴ Similarly, if the seller furnishes specifications for goods to meet the buyer's needs, both an express and an implied warranty will exist.⁵³⁵ The point, of course, is that in most cases where an implied particular purpose warranty would exist there would also be an express warranty, with all its concomitant protections. The buyer will therefore almost always be able to allege at least two bases of recovery. Whether characterized as express or implied, the warranty will be created when the buyer makes known a particular purpose and evidences his dependence on the seller, and the seller responds accordingly.

9. *Fitness for Particular Purpose: North Dakota Cases*

The North Dakota cases dealing with the particular purpose warranty are rather atypical and deserve discussion. The first case to discuss section 2-315 was *Northern Plumbing Supply, Inc. v. Gates*,⁵³⁶ which involved the sale of some pipe from the plaintiff to the defendant. Apparently after payment was due, plaintiff and defendant jointly borrowed the purchase price from a bank, co-signing a note to evidence the loan, and plaintiff received the proceeds. When the note became due, defendant refused to pay it, claiming breach of warranty; the plaintiff paid it and sued the defendant. The lower court held for the plaintiff, and the North Dakota Supreme Court reversed.⁵³⁷

The defendant was both a farmer and a manufacturer of harrow attachments, and in the manufacturing process he made substantial use of pipe.⁵³⁸ The plaintiff was a pipe supplier. The plaintiff seller was aware of the purpose for which defendant was buying the pipe,⁵³⁹ and, although the buyer had given the seller a "sample" of pipe and had requested the same type of pipe,⁵⁴⁰ his

534. *See, e.g.*, *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970).

535. *See* U.C.C. § 2-313(1)(b) [N.D. CENT. CODE § 41-02-30(1)(b) (1968)].

536. 196 N.W.2d 70 (N.D. 1972).

537. *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70, 74 (N.D. 1972).

538. *Id.* at 71.

539. *Id.* at 71, 73.

540. *Id.* at 72. At this juncture it is probably appropriate to point out that, as indicated above, an express warranty might have been created. To the extent that the seller undertook to supply pipe according to the "sample" (albeit the buyer's sample), an express warranty that it would comply

order was for "standard" pipe. Unknown to the buyer, "standard" pipe could vary in wall thickness from .116 to .133 inches, and the plaintiff supplied pipe with a wall thickness of .120 inches, clearly within the definition of "standard," but not sufficiently thick for the buyer's needs.⁵⁴¹ The seller, however, knew of the variations within the definition, and knew that pipe of the thickness supplied was more appropriate for jobs which generated internal, as opposed to external, pressure.⁵⁴² Nevertheless, the plaintiff asserted that since the goods supplied met the contract definition of "standard" there could be no breach of warranty. The court disagreed.⁵⁴³

Ignoring the possibility that an express warranty might have been created by the sample,⁵⁴⁴ the court cited North Dakota's version of section 2-315 and noted that the seller knew of the buyer's particular purpose.⁵⁴⁵ Furthermore, the parties' comparative knowledge with respect to pipe made it clear that the delivery of pipe "wholly unfit for such purpose"⁵⁴⁶ constituted both the existence and breach of the implied warranty of fitness for particular purpose.⁵⁴⁷ Thus, the judgment was reversed.

In a dissenting opinion, Justice Teigen suggested that the seller should not have been found to have made the implied warranty of fitness for a particular purpose, for two reasons.⁵⁴⁸ First, the buyer, as a manufacturer who dealt with pipe, had knowledge and experience with respect to pipe, had specified a particular type of pipe ("standard" according to sample), and had therefore not relied at all upon the seller's skill or knowledge to supply appropriate pipe.⁵⁴⁹ Second, the buyer made no allegation of breach of the implied warranty, but had countered on the ground that he had ordered standard pipe and received substandard pipe.⁵⁵⁰ Therefore, the dissent felt that no implied warranty was at issue.⁵⁵¹

At least two aspects of the dissent's view are worthy of consideration. As noted earlier, the buyer must make the seller

therewith might have existed. Since the defect complained of amounted to a failure to meet the sample, liability could have rested on express warranty grounds as well.

541. *Id.*

542. *Id.* at 73-74.

543. *Id.* at 74.

544. *Id.* See *supra* note 540.

545. 196 N.W.2d at 74.

546. *Id.*

547. *Id.*

548. *Id.* at 74 (Teigen, J., dissenting).

549. *Id.* at 75.

550. *Id.*

551. *Id.* at 75-76.

aware of his needs and that he is relying on the seller's expertise. To the extent that the dissent based its argument on non-reliance and equivalent expertise, it bears closer scrutiny. The facts of the case clearly demonstrate that the defendant ordered a particular type of pipe, and, unless other circumstances suggest that the warranty should nevertheless be implied, the dissent would be correct. However, other circumstances justifying the implication did exist.

The dissent's view of the transaction is summarized as follows:

[T]he defendant showed [the plaintiff's representative] through his factory and . . . he looked at some of the attachments being manufactured. There is, however, no evidence that the defendant sought [plaintiff's representative's] opinion or his recommendation in regard to the type, quality, size or grade of pipe which should be used in the manufacturing process. . . . I find no evidence whatever that the defendant relied on or sought the benefit of whatever skill or knowledge [plaintiff's representative] might have in this field. He certainly did not rely on [plaintiff's representative's] skill in making a choice for him.⁵⁵²

The dissent, however, overlooked two factors. First, there is no requirement that the buyer be completely ignorant with respect to the transaction, and none that the buyer rely completely on the seller's skill or judgment. Where, as in this transaction, the buyer has been using a good which suits his needs, and the seller is asked to provide a good which will also suit the buyer's needs, the warranty should apply in spite of the fact that the buyer requests similar goods (based on his own experience) and furnishes the seller with the general specifications of the goods which currently meet his needs. The reason for the "specification exception" (that the buyer by giving specifications is requesting goods based *entirely* on his own expertise) has no application when the specifications are given only as an example of what will meet the buyer's needs. Arguably, this is what occurred in *Gates*, although it would be possible to view the transaction more literally.⁵⁵³ Second, and more importantly, section 2-315 by its literal terms implies the warranty

552. *Id.* at 75.

553. If the transaction is viewed literally, the specification would readily supply the basis for an express warranty. Thus, if the buyer gave the seller specifications, as in *Gates*, of "standard pipe with a wall thickness of .133," and the seller supplied standard pipe with a lesser thickness, an express warranty would be breached.

where the seller knows "that the buyer is relying on the seller's skill or judgment to select *or furnish suitable goods*."⁵⁵⁴ The dissent entirely ignored the emphasized portion of the statute. Although the facts of *Gates* may indicate that the buyer did not rely on the seller to select or choose the product, they equally indicate that the buyer was relying on the seller to *furnish* suitable pipe. Therefore, the particular purpose warranty was properly invoked in *Gates*.

Furthermore, the dissent's narrow construction of section 2-315 would largely eviscerate the section's applicability in all but a handful of commercial transactions. In all sales where particular purpose is at issue, the buyer clearly knows his own needs. In many, as in *Gates*, he will know what is currently meeting his needs, and yet be seeking a less expensive or otherwise more attractive alternative. To allow a seller who is specifically requested to furnish or supply that alternative, and who undertakes to do so, to avoid particular purpose liability on the basis of the buyer's knowledge or expertise is to undercut severely the buyer's legitimate expectations, and in effect deprives the buyer of the benefit of his bargain.

A year later the North Dakota Supreme Court, in a different context, addressed clearly the question of the specificity of buyer specifications, and what would and would not prevent the implication of a particular purpose warranty. *Dobler v. Malloy*⁵⁵⁵ dealt not with the sale of goods but with the construction of a house. Notwithstanding that major distinction, the rule adopted by the court clearly demonstrates the direction which the implied warranty will take in the context of a sale of goods.

The plaintiff in *Dobler* had contracted to construct a house for the defendant, the defendant anticipatorily repudiated the contract on the basis of certain defects, the plaintiff sued, and the defendant counterclaimed.⁵⁵⁶ A first trial resulted in a verdict for defendant, and a new trial was ordered when the supreme court determined that the defendant had indeed anticipatorily breached the contract.⁵⁵⁷ On retrial, defendant was allowed to amend his pleadings to include defects discovered after the first trial, and, to the chagrin of the plaintiff, was awarded an even greater sum on his counterclaim in the second action.⁵⁵⁸ Plaintiff appealed, alleging that defendant had caused his own damages by furnishing

554. U.C.C. § 2-315 [N.D. CENT. CODE § 41-02-32 (1968)] (emphasis added).

555. 214 N.W.2d 510 (N.D. 1973).

556. *Dobler v. Malloy*, 214 N.W.2d 510, 513 (N.D. 1973).

557. *Id.*

558. *Id.*

inadequate plans and specifications for the house.⁵⁵⁹ Further, plaintiff asserted that because the defendant owner had provided the plans there could be no warranty liability on the plaintiff's part.⁵⁶⁰

The court had no trouble in countering plaintiff's arguments. The court first noted that the builder had undertaken to build according to the written plans and specifications, and others which were to be orally agreed upon.⁵⁶¹ If those plans and specifications were inadequate, the plaintiff-builder, as the experienced party, "should have been aware of the facts and should have declined to enter into the contract."⁵⁶² Next, the court recognized the existence of an express warranty on the basis of the contract language, and indicated its belief that the use of less-than-detailed specifications in a home building contract was the norm.⁵⁶³ The court then considered the issue of whether "an implied warranty of fitness for purpose"⁵⁶⁴ existed, and what effect the buyer's specifications would have on it. The court stated:

[T]he doctrine of implied warranty of fitness for [a particular] purpose applies to construction contracts under circumstances where (1) the contractor holds himself out . . . as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, designs, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience or skill of the contractor, after making known to him the specific purposes for which the building is intended.⁵⁶⁵

One can readily see that this test encompasses all of the elements of a section 2-315 implied warranty under the Code, including reliance, prior notice of purpose, and comparative skill or expertise. It is equally apparent that the test differs significantly. With specific reference to the third element, and the fact that the defendant buyer had furnished certain plans, the court continued:

The owner here furnished a floor plan to an architect,

559. *Id.* at 516.

560. *Id.*

561. *Id.*

562. *Id.* See *supra* notes 528-29 and accompanying text.

563. 214 N.W.2d at 516.

564. *Id.* From what follows in the opinion it is clear that the particular purpose warranty was at issue.

565. *Id.* (citing *Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co.*, 274 Minn. 17, 143 N.W.2d 622 (1966)).

who drew expanded floor plans of the first floor and the basement. Such floor plans were submitted to contractors for the purpose of securing bids [Plaintiff] was one of those who submitted such a bid, and his bid was accepted. The furnishing of a floor plan is not the furnishing of plans, designs, specifications, details, or blueprints.⁵⁶⁶

The court elaborated no further, but it is clear that it ruled as it did because the plans in *Dobler*, like the pipe in *Gates*, did not reflect the essence of what the buyer was buying. Rather, the plans reflected the buyer's expression of what would meet, or had met, his needs. Such an expression of expectation by the buyer should foster an impression of reliance, not of non-reliance. Although the buyer clearly knows his own particular needs, he is still depending upon the seller to meet them.

The final case in the North Dakota trilogy is *Air Heaters, Inc. v. Johnson Electric, Inc.*,⁵⁶⁷ an unremarkable case except in one respect. The case involved the sale and installation of an electrical system by the defendant in the plaintiff's building. A subsequent fire was allegedly caused by either the negligence of the defendant or a defect in the components.⁵⁶⁸ The plaintiff was awarded damages based on breach of warranty, and the North Dakota Supreme Court affirmed.⁵⁶⁹ Initially, the court confronted the issue of whether section 2-315 applied, since the contract was both for the sale of goods and the performance of services.⁵⁷⁰ The court adopted the test espoused by the United States Court of Appeals for the Eighth Circuit in *Bonebrake v. Cox*.⁵⁷¹ Briefly stated, the issue hinges upon whether the predominant factor or thrust of the transaction is for goods or services, with the other merely incidental.⁵⁷² The court concluded that, since the plaintiff had failed to demonstrate that the contract at issue had involved predominantly a sale of goods, it could not rely on section 2-315.⁵⁷³ Nevertheless, the plaintiff could invoke the non-sale of goods particular purpose warranty earlier made a part of North Dakota law in *Dobler*.⁵⁷⁴ Thus, to the extent that the evidence indicated that

566. 214 N.W.2d at 516.

567. 258 N.W.2d 649 (N.D. 1977).

568. *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649, 651 (N.D. 1977).

569. *Id.* at 656-57.

570. *Id.* at 651. Ironically, the North Dakota court had a year earlier missed the opportunity to address this question in a case more clearly raising the issue. See *Eichenberger v. Wilhelm*, 244 N.W.2d 691 (N.D. 1976).

571. 499 F.2d 951 (8th Cir. 1974).

572. *Bonebrake v. Cox*, 499 F.2d 951, 957 (8th Cir. 1974).

573. *Id.* at 958.

574. *Dobler v. Malloy*, 214 N.W.2d 510 (N.D. 1973).

the plaintiff had met the *Dobler* test, plaintiff was entitled to prevail.

Oddly, the importance of *Air Heaters* lies not so much in the recognition of the sales-service dichotomy (although that is clearly important) as in the extension of the implied warranty of fitness for a particular purpose to a non-goods, non-construction contract. Although perhaps a majority of courts willingly imply a warranty of habitability in construction contracts for dwellings,⁵⁷⁵ and although the North Dakota court was careful to emphasize that the defendant's undertaking was "part of the construction process,"⁵⁷⁶ the *Air Heaters* case establishes nothing less than the availability of the particular purpose warranty in any type of transaction, whether it be sale, service, or construction. In this respect, the North Dakota Supreme Court has been more innovative than its counterparts in other states. It is therefore probably safe to predict that a North Dakota court, when confronted with any transaction which raises an opportunity for implication of the warranty of fitness for a particular purpose, will enthusiastically imply it. This, it is suggested, is how it should be.

C. THE IMPLIED WARRANTY OF MERCHANTABILITY

The final warranty to be considered, and by far the most important of the implied warranties, is the warranty of merchantability embodied in section 2-314(1) and (2).⁵⁷⁷ This is perhaps the most familiar warranty to attorneys. The warranty arises by implication in any sale of goods by a merchant unless it is disclaimed by appropriate words or conduct. For the purposes of section 2-314, both food and drink are specifically included within the scope of the warranty.

575. See, e.g., *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.3d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Moore v. Werner*, 418 S.W.2d 918 (Tex. Civ. App. 1967).

576. 258 N.W.2d at 654.

577. Section 2-314(1) provides:

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. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)].

Section 2-314(2) provides:

Goods to be merchantable must be at least such as

- (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

Section 2-314(2) sets forth minimum standards⁵⁷⁸ for merchantability. The most important and basic minimum standard, embodied in subsection (2) (c), is that the goods "are fit for the ordinary purposes for which such goods are used."⁵⁷⁹ Two points deserve special mention at this juncture: First, the six minimum standards are stated in the conjunctive, indicating that all standards appropriate under the circumstances must be met. Thus, for example, the warranty would be breached if the goods are fit for ordinary use but are inadequately packaged. Second, ordinary purpose is determined not by what the seller or manufacturer envisions, but by what the ordinary (reasonable) person would consider an ordinary use. Thus, while a wooden chair might be intended to be used for sitting, an ordinary purpose might include standing on it, so that if it collapsed when used in that manner the warranty would be breached. One of the most common misstatements in warranty law is to equate merchantability with "intended" use. It is not the intention which controls, but the ordinary use to which like goods are put.

The warranty of merchantability may be disclaimed, in accordance with section 2-316, and as a practical matter all standard form contracts will contain disclaimers, which have generally been given effect. As indicated earlier, inroads occasioned by recent federal legislation⁵⁸⁰ have had and will continue to have an impact in this area.

1. *Merchants and Merchantability*

One of the most significant differences between the particular purpose warranty and the warranty of merchantability is that for the former there is no requirement that the seller be a merchant, whereas for the latter the statute specifically requires mercantile status. Although it has been noted that generally a seller held liable for breach of the implied warranty of fitness for a particular

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- (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.

U.C.C. § 2-314(2) [N.D. CENT. CODE § 41-02-31(2) (1968)].

578. The introductory language to section 2-314(2) specifies that merchantable goods "must be at least such as," thereby suggesting that higher standards might apply and that the enumerated standards are not exhaustive of the concept of merchantability. U.C.C. § 2-314(2) [N.D. CENT. CODE § 41-02-31(2) (1968)]. The comments indicate that other factors to be considered include usage and conduct. See U.C.C. § 2-314, Comment 6.

579. U.C.C. § 2-314(2) (c) [N.D. CENT. CODE § 41-02-31(2) (c) (1968)]. See *Erling v. Homera, Inc.*, 298 N.W.2d 478, 480-81 (N.D. 1980), for a recent discussion of section 2-314(2) (c) by the North Dakota Supreme Court.

580. See *supra* note 2 and accompanying text.

purpose will be a merchant,⁵⁸¹ it was also noted that section 2-315 does not require merchant status. Conversely, section 2-314 explicitly requires that the seller be "a merchant with respect to goods of that kind,"⁵⁸² and, although the comment suggests circumstances in which a non-merchant might be held to have made a warranty of merchantability,⁵⁸³ the cases are uniform in requiring that the buyer demonstrate the seller's merchant status.

The initial question, of course, is who qualifies as a merchant for purposes of section 2-314, a question both complicated and simplified by the Code. It is simplified by the fact that merchant is defined in section 2-104 of the Code:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁵⁸⁴

The question is complicated by the fact that section 2-314(1) specifies that the merchant must be "a merchant with respect to goods of that kind."⁵⁸⁵ The question therefore arises whether

581. *See supra* notes 418-21 and accompanying text.

582. U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)].

583. U.C.C. § 2-314, Comment 4. As indicated, merchant status is generally considered a prerequisite to merchantability recovery. It would therefore be an easy matter to ignore the possibility that a non-merchant could be held to have made the warranty. However, three reasons compel the recognition that the possibility of non-merchant merchantability should not be overlooked. First, from an adversarial standpoint, it may often occur that in dealing with a "non-merchant" seller a buyer would, absent implication of the warranty, have no remedy. Thus, cases may arise where it becomes important, in order to vindicate a client's rights, to explore the possibility of arguing the warranty of merchantability in a non-traditional context. Second, comment 4 to section 2-314 indicates that there are times when even a non-merchant should be held to have made the warranty:

Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee."

U.C.C. § 2-314, Comment 4. Because of this language, one would expect courts to be sympathetic to claims of merchantability "guarantees" even though no merchant is involved. Third, the fact that the Code is to be liberally construed has led some courts to conclude that a warranty may be found by stretching the definition of merchant, thereby doing indirectly what they perceive cannot be done directly. However, it arguably is better to expand the concept of merchantability than to emasculate the definition of merchant.

584. U.C.C. § 2-104(1) [N.D. CENT. CODE § 41-02-04(1) (1968)].

585. U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)].

section 2-314 is intended to include *all* merchants or only those merchants who "deal in goods of the kind" under section 2-104. Unfortunately, the cases do little to clarify the question, and an examination of the Code and its policies is therefore helpful.

At the outset, it would have been a simple matter to draft section 2-314 to reflect an intention that it apply only to merchants who deal in goods of the kind, a particular subcategory of the general category of merchants. Since section 2-314(1) by its terms does not so limit itself, but rather includes in its coverage merchants *with respect* to goods of that kind, it is probable that the drafters meant to include not only merchants who regularly deal in such goods, but also those with skill or knowledge as to such goods. Thus, for example, the manufacturer, wholesaler, and retailer, who would ordinarily be thought of as "merchants," would clearly be held to imply the warranty. However, by the same token, the "expert" with respect to such goods could also make the warranty, so that even in an isolated sale by an expert the warranty would exist. Thus, for example, the car dealer or mechanic selling his personal car might be held to have made the warranty, since he is presumably sufficiently skilled and knowledgeable with respect to cars, even though it is a casual sale. The yachtsman who is knowledgeable with respect to boats might be held to have made the warranty in the sale of a personal boat. While this accords well with the broad definition of merchant and with the Code's directive for liberal administration,⁵⁸⁶ it goes substantially beyond the commonplace application of the concept. However, as long as courts require a literal reading of the "with respect to goods of that kind" language, even this broad reading of the term "merchant" in section 2-314 is probably too narrow to incorporate the third subcategory of merchants, those held to be merchants because of their employment of skilled persons.⁵⁸⁷

Cutting against a construction of section 2-314 which broadly applies the definition of "merchant" is the phrase "with respect to goods of that kind." While it is true that the drafters did not use the words "who deals in goods of the kind," the expression in section 2-314 comes close enough to suggest that only merchant-dealers were intended to be covered. Moreover, had the intent been to construe the phrase broadly, it would have been a simple matter to omit the modifying phrase entirely and imply the warranty whenever a seller was a merchant, with an appropriate cross-

586. U.C.C. § 1-106 [N.D. CENT. CODE § 41-01-06 (1968)].

587. See U.C.C. § 2-104, Comment 2.

reference to section 2-104(1). Further, the warranty developed primarily in a commercial context, where the seller was a dealer,⁵⁸⁸ and that fact, coupled with the concepts of the trade suggested by the comments to section 2-314, suggests that the merchant seller must be a dealer in goods of the kind. Finally, the somewhat cryptic comment to section 2-104 supports this view, explaining the various types of merchants and detailing when each aspect of the definition is likely to apply:

[I]n 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." Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods.⁵⁸⁹

Thus, the narrow interpretation of merchant under section 2-314 has support as well.

It is suggested that, notwithstanding the reasons just enumerated, courts should read section 2-314 to include at least the first two types of merchants, those who deal in goods of the kind and those who are knowledgeable or skillful with respect to such goods. In addition, those who are classified as merchants only because they employ someone with skill or knowledge should be included in appropriate circumstances. North Dakota has already begun to move in this direction,⁵⁹⁰ and such a movement is justifiable both in terms of policy (liberal administration of remedies, party expectations, and logical development of case law)

588. Comment 2 to section 2-104 states:

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 the merchant status is indicated by the nature of the provisions.

U.C.C. § 2-104, Comment 2. See also Annot., 91 A.L.R.3d 876 (1979).

Historically, the implied warranty of merchantability was imposed on the merchant seller, as it was the commercial merchant who possessed superior skill and knowledge regarding the goods themselves. See Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 34, 69-74 (1978). However, the warranty of merchantability has been implied in non-sales transactions which are considered analogous to the sale of goods, such as the bailment for hire, the contract for services or for work, labor, and materials, and the exchange of goods for services. See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 667-69 (1957).

589. U.C.C. § 2-104, Comment 2.

590. See *Eichenberger v. Wilhelm*, 244 N.W.2d 691 (N.D. 1976).

and in terms of literal construction of the Code.⁵⁹¹

The cases exploring the above question are interesting, and predictably reflect judicial uncertainty in dealing with what is facially a simple problem but which upon examination becomes complex. Initially, there is clearly a requirement that the seller be a merchant of one kind or another; if he is not, no merchantability warranty attaches to the sale.⁵⁹² Thus, the isolated or casual sale will ordinarily not create a warranty of merchantability, provided that the seller has no peculiar skill or knowledge that might otherwise create the warranty.⁵⁹³ However, the mere fact that the seller can be classified as a merchant for some purposes will not automatically cause him to be classified as a merchant for purposes of creating the warranty of merchantability. Thus, a bank, which might qualify as a merchant under some circumstances,⁵⁹⁴ is clearly not a merchant when it sells a repossessed boat, and therefore makes no warranty of merchantability with respect to the boat.⁵⁹⁵ Similarly, a cattle dealer who always sold to packers would be a merchant as to that type of cattle, but would not qualify as a merchant when he sold cattle for breeding purposes, since each type of cattle is considered a different good.⁵⁹⁶

591. Probably the largest impediment to the broad construction is the comment language set out in text, *supra* at note 589. In context, however, the comment reflects an intention by the drafters to broaden the definition of merchant to include virtually all enterprises, under certain circumstances. Thus, the comment suggests that banks and universities might be deemed merchants, and cases have gone even further, indicating, for example, that governmental units and hospitals would qualify as merchants in appropriate circumstances. See *Milwaukee v. Northrop Data Sys.*, 602 F.2d 767 (7th Cir. 1979). With specific reference to section 2-314, however, this breadth must be tempered with a realization that the merchant must be one with respect to the goods at issue. Thus, although a hospital might qualify as a merchant under certain circumstances, unless it was knowledgeable with respect to goods being sold by it, it would not be held to have created a warranty of merchantability.

In *Seattle Flight Serv., Inc. v. City of Auburn*, 24 Wash. App. 749, 604 P.2d 975 (1979), the city was held to be a merchant for purposes of the warranty of merchantability. *Id.* at 751, 604 P.2d at 977. The city owned and operated the sole fuel service available at the city airport. The court held that because the city was in the business of selling aircraft fuel it was a merchant. *Id.*

As a practical matter, the problem is likely to be avoided by disclaimers, but when it is not courts should focus on policy and expectations. For example, a hotel or motel selling used televisions or bedding would clearly be a merchant under section 2-104, but, largely because of expectations, would not make a section 2-314 warranty. However, compare comment 3 to section 2-314:

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. His 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 on good faith, impose an obligation that known material but hidden defects be fully disclosed.

U.C.C. § 2-314, Comment 3.

592. See *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971) (isolated sale of boat); *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972) (seller arguably not a merchant could not be held to implied warranty, but capable of making express warranty).

593. See *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971); *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1973).

594. See U.C.C. § 2-104, Comment 2. See also *supra* note 591.

595. *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976).

596. *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972), *aff'd on rehearing*, 503 F.2d 953 (10th Cir. 1974).

The foregoing cases suggest, and the statute clearly requires, that the test is whether the seller can be classified as a merchant as to the particular transaction at issue. Because this determination will of necessity depend upon the facts surrounding the transaction, it will generally be determined by the factfinder⁵⁹⁷ and subject to reversal only if clearly erroneous.⁵⁹⁸ However, just as the mere fact that a seller is a merchant for some purposes does not automatically create the warranty, the mere fact that he does not ordinarily deal in goods of the kind should not automatically preclude the warranty. Courts which have considered this issue have disagreed, but probably the better view would be to impose the warranty, notwithstanding the fact that the seller did not regularly sell goods of the kind, as long as he was skilled or knowledgeable with respect to the goods sold.

Courts which have suggested unavailability of the warranty when the seller was not one who customarily sold goods of the kind have apparently done so on the ground that the transaction at issue was outside the ordinary course of the seller's business. While this appears to be a serious misreading of the Code, the decisions are not terribly surprising. In fact, if they are to be criticized, it is primarily because their rules are framed broadly, so that their impact is likely to be felt in later cases in which the facts do not as readily support non-liability.

For example, in *Sieman v. Alden*,⁵⁹⁹ the Court of Appeals of Illinois held that the seller of a multi-rip saw was not a merchant with respect to saws for purposes of implying the warranty of merchantability, notwithstanding the seller's skill and knowledge relative to saws. He had never before sold a saw, and his expertise was the product of his engagement in the sawmill business.⁶⁰⁰ The facts of the case support the result, since the seller was not in the business of selling saws, the buyer approached the seller only after being unable to procure the saw from a regular source, the saw at issue was both old and inoperable, and the buyer probably recognized these factors at the time of sale.⁶⁰¹ On the other hand, it was undisputed that the seller was knowledgeable and skillful with respect to saws generally, and would therefore qualify as a

597. *Storey v. Day Heating & Air Conditioning Co.*, 56 Ala. App. 81, _____, 319 So. 2d 279, 281 (1975).

598. Findings of fact in a bench trial will not be set aside unless they are clearly erroneous. A finding is clearly erroneous only when, although there is some evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. See *In re Estate of Elmer*, 210 N.W.2d 815, 820, (N.D. 1973); N.D.R. Civ. P. 52(a).

599. 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975).

600. *Sieman v. Alden*, 34 Ill. App. 3d 961, 963, 341 N.E.2d 713, 715 (1975).

601. *Id.* at 964, 341 N.E.2d at 715.

merchant under section 2-104. The court, confronted with the buyer's assertion that the seller had therefore made a warranty of merchantability, reasoned that sellers who were merchants by virtue of their skill and knowledge were not included in the meaning of section 2-314.⁶⁰²

This test . . . is not the standard for determining who is a merchant within the meaning of § 2-314. [The Code comments] make it clear that the definition of merchant within § 2-314 is a narrow one and that the warranty of merchantability is applicable only to a person who, in a professional status, sells the particular kind of goods giving rise to the warranty.⁶⁰³

The court concluded that, because this was an isolated sale, section 2-314 did not apply.⁶⁰⁴

Although the *Sieman* court may have reached the correct result, its articulation of the policy behind section 2-314 was clearly too narrow. The Code rather liberally imposes warranty responsibility, rather than narrowly restricting it. Additionally, if the *Sieman* court's language were taken literally, only professional sellers of a particular kind of goods could create the warranty. Finally, *Sieman* appears to be inconsistent with an earlier decision of the same court.⁶⁰⁵

Courts which adhere to the *Sieman* approach, that a sale removed from the ordinary course of the seller's business should not imply a merchantability warranty, will generally justify their decisions by resort to the language of comment 3 to section 2-314, which purports to exempt from the section's coverage "isolated" sales.⁶⁰⁶ Such reliance is misplaced for two reasons. First, the comment applies only in the very narrow case (perhaps presented in *Sieman*) where the sale is characterizable only as a casual sale, and by no stretch of the imagination could the seller be deemed to

602. *Id.*

603. *Id.* The language is drawn from comment 2 to section 2-104.

604. 34 Ill. App. 3d at 964, 341 N.E.2d at 715.

605. *Mutual Serv. of Highland Park, Inc. v. S.O.S. Plumbing & Sewerage Co.*, 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968). The report of this case is abbreviated, and it is therefore difficult to draw too many inferences from it. What can be gleaned from the brief ruling is that the plaintiff was a building materials supplier who regularly sold products manufactured by a particular manufacturer. *Id.* Among the products he did not ordinarily sell were a particular type of hammer and bit. On the occasion in question he sold this particular type of hammer and bit, and it was defective. The appellate court summarily affirmed the holding that an implied warranty of merchantability existed. *Id.*

606. See *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976); *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971).

deal in the goods.⁶⁰⁷ Second, and more importantly, the comment language supports, rather than precludes, warranty responsibility:

A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. 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. His 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 on good faith, impose an obligation that known material but hidden defects be fully disclosed.⁶⁰⁸

A careful reading of the comment suggests that liability could easily have attached in *Sieman*, and, since *Sieman* is clearly one of the most difficult cases likely to arise under the section, liability would ordinarily arise in a case less reflective of a casual sale.

Initially, although it is not fully clear, comment 3 appears to cover sales of used goods, such as the saw in *Sieman*. The first sentence of the comment, directed at specific designation by the buyer, is apparently intended to refer to the warranty of fitness for particular purpose, and indicates that in spite of such specificity the seller warrants fitness for general purposes.⁶⁰⁹ The second sentence, specifically directed at used goods, makes it clear that they need only meet the standard of similar used goods; for example, a saw should cut wood without injury to the person using it. The scope of liability is in essence dependent on the "contract description," which reflects not only the used nature of the goods, but also their age, character, and the price at which they were sold. In *Sieman*, the saw was sold for \$2,900, and the likely expectation was that, for that price, the buyer would get a saw which would work after any necessary repairs.⁶¹⁰

The third sentence is the crux of the comment, purporting as it

607. Compare the *Sieman* case with *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971), and *All-States Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177 (1975).

608. U.C.C. § 2-314, Comment 3.

609. It is likely that such designation by the buyer would preclude the existence of the warranty of fitness for a particular purpose. See *supra* notes 417-576.

610. *Sieman v. Alden*, 34 Ill. App. 3d 961, 962, 341 N.E.2d 713, 714 (1975).

does to exempt the isolated sale. The careful reader will note that the purported exemption is from "the full scope of" the section.⁶¹¹ The casual (but skillful and knowledgeable) seller should perhaps be exempted from the entire section except for subsection (2) (c), which provides that goods sold must be fit for their ordinary purpose. In other words, if the sale is an isolated one by a seller who does not deal in goods of the kind but who is nevertheless a merchant, the full scope of section 2-314 is not invoked. The more limited scope of only section 2-314(2) (c), however, should apply. The final sentence suggests that if defects are known to even the casual seller he must reveal them. Thus, a careful reading of the Code and its comments indicates that liability probably should have attached in *Sieman*.

As indicated earlier, one can readily understand the *Sieman* court's reluctance to impose liability upon the seller. No such justification exists, however, for two other cases which relied on the "non-ordinary course," "isolated sale" analysis. The two cases are *Rock Creek Ginger Ale Co. v. Thermice Corp.*⁶¹² and *All-States Leasing Co. v. Bass*,⁶¹³ each holding that no warranty of merchantability could be implied with respect to clearly commercial transactions.⁶¹⁴

Thermice involved the sale of approximately 20,000 pounds of liquid carbon dioxide, used in carbonated beverage production, from Schaefer, a beer brewer, to Thermice, which resold it to a soft drink producer.⁶¹⁵ The carbon dioxide was surplus in Schaefer's hands, and Schaefer had sold 700,000 pounds to Thermice over a period of time. This particular shipment was defective, and produced a foul-smelling soft drink which could not be sold. The soft drink producer sued Thermice, which in turn sued Schaefer for breach of express and implied warranties.⁶¹⁶ As to the implied warranty of merchantability, the court ruled that Schaefer was not a merchant with respect to carbon dioxide and therefore made no such warranty.⁶¹⁷ Furthermore, the court held that Thermice's failure to inspect the carbon dioxide precluded the existence of the warranty.⁶¹⁸

The court cited comment 3 to section 2-314, and indicated that, although Schaefer had sold more than 700,000 pounds of

611. See U.C.C. § 2-314, Comment 3.

612. 352 F. Supp. 522 (D.D.C. 1971).

613. 96 Idaho 873, 538 P.2d 1177 (1975).

614. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522, 528 (D.D.C. 1971); *All-States Leasing Co. v. Bass*, 96 Idaho 873, _____, 538 P.2d 1177, 1183 (1975).

615. 352 F. Supp. at 523.

616. *Id.*

617. *Id.* at 528.

618. *Id.*

carbon dioxide, it was not a merchant for purposes of the sale of 20,000 pounds.⁶¹⁹ There is no indication that the court considered whether Schaefer might have qualified under the skill or knowledge test. However, given the fact that Schaefer, in the course of its own brewing business, dealt with carbon dioxide, it would clearly have qualified as a merchant under either merchant test. Moreover, if 20,000 pounds was a representative delivery, at least thirty-five sales would have occurred. Even if fewer than thirty-five sales took place, surely this was not an isolated transaction. The court's conclusion is therefore unsupportable.

If *Thermice* presents a clear picture of a court misinterpreting the Code, *All-States Leasing* demonstrates judicial caution in an uncertain area. *All-States Leasing* involved a lease transaction between the defendant and the plaintiff which was arranged through the manufacturer of a car wash system.⁶²⁰ The manufacturer, through a pre-arranged plan with the defendant, sold the car wash system to the plaintiff, which in turn leased it to the defendant.⁶²¹ The plaintiff was a lessor financier, in the business of purchasing equipment for its lessees and thereafter leasing it to them. When the car wash system did not generate the profits anticipated, the defendant failed to pay the rental fee and the plaintiff sued.⁶²² The defendant counterclaimed, alleging that the system was defective and that the plaintiff was responsible under an implied warranty of merchantability.⁶²³ The lower court held for the defendant, finding that the implied warranty had been made and breached.⁶²⁴ The Supreme Court of Idaho reversed.⁶²⁵

Initially, the court faced the question of whether the Code warranty provisions should apply in a lease transaction. The court held that extension of the Code by analogy was appropriate.⁶²⁶ However, the court then held that the implied warranty of merchantability should not apply in this case, since the plaintiff-lessor was not a merchant as to the leased equipment.⁶²⁷

At first glance, the ruling is compatible with notions of party expectation and fairness. The equipment lessor is in effect a financier, an entity which purchases equipment for the sole purpose of leasing it to those who prefer not to purchase it themselves. In

619. *Id.*

620. 96 Idaho at _____, 538 P.2d at 1179.

621. *Id.* at _____, 538 P.2d at 1179-80.

622. *Id.* at _____, 538 P.2d at 1180.

623. *Id.*

624. *Id.*

625. *Id.* at _____, 538 P.2d at 1185.

626. *Id.* at _____, 538 P.2d at 1181.

627. *Id.* at _____, 538 P.2d at 1185.

some respects it thus serves the function of a lender, and should no more be held liable than a bank or other financial intermediary.⁶²⁸ Unlike a bank, however, the lessor is the owner of the property, and not merely the financier of its acquisition. Therefore, the appropriate questions to ask are whether the lessor engages in leasing a specific type of goods with sufficient frequency to constitute dealing in like goods, or whether the leasing activity is so highly specialized as to justify a conclusion that the lessor possesses the requisite skill or knowledge.⁶²⁹ If the answer to either question is yes, the lessor should be deemed a merchant with respect to goods of that kind for the purpose of implying the merchantability warranty.

The *All-States Leasing* court did not ask either question. Rather, it analyzed the lessor's role according to a traditional sales model, notwithstanding that it had earlier recognized that in this case leasing was merely analogous to selling. Thus, the question propounded was whether the lessor built, manufactured, or sold any equipment or machines.⁶³⁰ The question, however, presumes the answer. A lessor, by definition, leases rather than builds, manufactures, or sells. Although it is clear that what the court was attempting to do was distinguish the "pure lessor" (whose only business is leasing) from the "convenience lessor" (whose business, depending on the client, may be to lease, sell, or manufacture the product),⁶³¹ there is probably no basis for making the distinction. If the fear is that a novice lessor will be trapped in the merchantability web, the two-question test proposed above probably affords sufficient protection. Moreover, the distinction affords too much protection: the lessor in *All-States Leasing* had "handled between forty to fifty transactions over a period of six to eight months, concerning the same" product.⁶³² Therefore, the lessor clearly dealt in goods of the kind, and should have been held to be a

628. *But cf.* Federal Trade Commission holder in due course rules, Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2 (1980). These rules tend to place the burden on lenders for the action of their borrowers, in the sense that buyers are able to assert claims and defenses valid against their sellers as against assignees of sellers.

629. The former question is directed at the number of transactions in which the lessor engages, as well as the type of goods. The latter is directed primarily at the type of goods. The reason for the distinction is simple. Courts might balk at imposing responsibility on a "general lessor" (one who will acquire virtually any product for a client) on the basis of one or two leases dealing with such goods. If, however, the lessor leases a substantial number of goods of like kind, he should be deemed to deal in them. Similarly, if the leasing activity is relatively narrow, such as computer equipment, the fact that this transaction is the first one dealing with a particular type of computer should not insulate the lessor from responsibility because, through prior leasing, the lessor has become skilled or knowledgeable with respect to computer equipment generally.

630. *See* 96 Idaho at _____, 538 P.2d at 1184.

631. Examples of "convenience lessors" might include automobile dealers who also lease goods and typewriter or copy machine manufacturers who will lease or sell.

632. 96 Idaho at _____, 538 P.2d at 1184.

merchant for merchantability purposes.

The dissent in *All-States Leasing* recognized the difficulty with the majority's opinion.⁶³³ Since the court was split 3-2, it is hoped that other courts will be hesitant in adopting the *All-States Leasing* view. Certainly, if that view is adopted, it should only be after the most thoroughly reasoned and articulated analysis. Upon such analysis, the view denying liability under similar circumstances will not stand up.⁶³⁴

It is tempting to consider the foregoing cases as aberrations, both because of their relatively unique facts and because of their holdings. That there are a number of contrary decisions makes the temptation even greater.⁶³⁵ The fact that the North Dakota Supreme Court has read section 2-314 broadly makes the temptation almost overwhelming.⁶³⁶

The first case to consider whether a "casual" merchant could exist was *Regan Purchase & Sales Corp. v. Primavera*.⁶³⁷ *Regan* involved the sale of used restaurant equipment by the plaintiff, an auction house, to the defendant. The defendant failed to pay the price, plaintiff sued, and defendant counterclaimed on the basis of breach of warranty.⁶³⁸ Among the questions discussed by the court were whether an auctioneer could qualify as a merchant for purposes of making the warranty of merchantability, and, if so, what the scope of that warranty would be.⁶³⁹ As to the first question, the court felt compelled to subdivide auctioneers into two categories: those who "regularly [sell] merchandise of a particular kind" and those who "sell different kinds of goods on an ongoing basis under circumstances that imply the likelihood of repetition with regard to

633. *Id.* at _____, 538 P.2d at 1185 (Shepard, J., dissenting).

634. One other case, denying liability, deserves mention. In *Storey v. Day Heating & Air Conditioning Co.*, 56 Ala. App. 81, 319 So. 2d 279 (1975), the court affirmed a jury decision in favor of the defendant, who had sold and installed a heating and air conditioning system with a condensation pump for the plaintiff. *Id.* at _____, 319 So. 2d at 280. The pump was defective and malfunctioned, resulting in water damage to the plaintiff's house. The record failed to indicate whether the defendant had ever sold condensation pumps before, and the court ruled that the jury was therefore entitled to find either that other sales had occurred, or that this was an isolated sale. *Id.* at _____, 319 So. 2d at 281. Since the jury found for the defendant, the court concluded that they must have found the sale to be isolated and the defendant not to be a merchant. *Id.* Although the case may stand narrowly for the proposition that the plaintiff failed to meet his burden of proving merchant status, it may have been appropriate for the court to rule that the jury's finding was clearly erroneous. Whether defendant had ever sold a like pump before would not matter if he possessed skill or knowledge relative to it. That the court did not reverse suggests a willingness to restrict merchant status under section 2-314. It also provides a warning to buyers' counsel that the question of merchant status is one of fact, and will not readily be overturned on appeal.

635. See *infra* notes 637-59 and accompanying text.

636. See *infra* notes 660-76 and accompanying text for a comprehensive discussion of the North Dakota Supreme Court's holding in *Eichenberger v. Wilhelm*, 244 N.W.2d 691 (N.D. 1976).

637. 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. N.Y. 1972) (consideration of the individual transaction was tangential to the issue).

638. *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, _____, 328 N.Y.S.2d 490, 491 (Civ. Ct. N.Y. 1972).

639. *Id.* at _____, 328 N.Y.S.2d at 492, 493.

the goods in question."⁶⁴⁰ The test applied by the court to determine whether an auctioneer is a merchant is quite similar to that suggested earlier for lessors.⁶⁴¹ Applying that test, the court had no trouble finding that the plaintiff auctioneer qualified as a merchant and thus could have made the warranty of merchantability.⁶⁴²

Regan correctly suggests that even one who does not regularly deal in goods of the kind may qualify as a merchant for section 2-314 purposes, as long as there is some basis upon which to premise mercantile responsibility.⁶⁴³ To the same effect is *McHugh v. Carlton*,⁶⁴⁴ which held that a service station operator who sold recapped tires to a customer, at the customer's specific request, was a merchant for merchantability purposes, even though he ordinarily did not deal in recapped tires.⁶⁴⁵ In *McHugh*, plaintiffs were involved in an automobile accident, allegedly caused by driver negligence and a defect in the recapped tires. They sued the owner and operator of the vehicle, as well as the manufacturer and the seller of the recapped tires.⁶⁴⁶ The seller of the recapped tires denied that he was a merchant as to them, and therefore asserted that no warranty of merchantability had been made. The seller reasoned that since he did not stock recaps, but only procured them at specific customer request, he did not deal in them and could not be considered a merchant with respect to them. Rather, argued the seller, this was an isolated sale of used goods. The court disagreed.⁶⁴⁷

The court reasoned that, since the seller dealt in tires, batteries, and accessories, he was therefore broadly characterizable as a merchant.⁶⁴⁸ Further, the court specifically noted that, although the seller did not ordinarily sell or even stock recaps, he did sell and stock new and used tires.⁶⁴⁹ Most compelling, however, was the fact that the seller, even though he claimed to sell recaps solely as a customer service, made a profit on the sale. Therefore he

⁶⁴⁰ *Id.* at _____, 328 N.Y.S.2d at 492.

⁶⁴¹ See *supra* note 629 and accompanying text.

⁶⁴² 68 Misc. 2d at _____, 328 N.Y.S.2d at 492. As to the scope of the warranty, the court retreated somewhat from its broad reading of section 2-314, indicating that with used goods of a commercial nature, purchased at substantial discount, the fact that they did not work on delivery did not establish breach. *Id.* at _____, 328 N.Y.S.2d at 493. In the context of the case, such an observation might have merit; but even used goods, to be merchantable, would presumably have to work when purchased.

⁶⁴³ *Id.* at _____, 328 N.Y.S.2d at 492.

⁶⁴⁴ 369 F. Supp. 1271 (D.S.C. 1974).

⁶⁴⁵ *McHugh v. Carlton*, 369 F. Supp. 1271, 1277 (D.S.C. 1974).

⁶⁴⁶ *Id.* at 1272.

⁶⁴⁷ *Id.* at 1277.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.*

was within the scope of section 2-314.⁶⁵⁰

McHugh may go further than is necessary or desirable in relying so heavily upon the seller's profit as a criterion for determining merchant status, for even non-merchants, in truly isolated transactions, might realize a profit from the sale of goods. Although an expansive reading of section 2-314 is preferable and the result in *McHugh* is justifiable, profit alone, although clearly relevant, should not be the controlling factor. Rather, the fact that the seller was a dealer in tires, coupled with the fact that he occasionally would upon request supply recaps, should be sufficient to warrant the imposition of responsibility.

It should be apparent that even a casual seller, under some circumstances, may qualify as a merchant. In both *Regan* and *McHugh*, however, the sellers might have qualified as merchants under a liberal reading of the "deals in goods of the kind" definition. It becomes necessary to consider the cases which have indicated that, even though one does not deal in goods of the kind, he will nevertheless qualify as a merchant for section 2-314 purposes under the "skill or knowledge" definition.

*Blockhead, Inc. v. Plastic Forming Co.*⁶⁵¹ was discussed earlier in connection with the particular purpose warranty.⁶⁵² The plaintiff had contracted with the defendant for the production of wiglet cases, and the cases turned out to be unsatisfactory. Plaintiff sued, alleging breach of warranty, and one of defendant's defenses was that no warranty of merchantability was implied, since it was not a merchant with respect to wiglet cases. Defendant's principal argument was that it had never produced wiglet cases before, and was a merchant only with respect to plastic blow-molding equipment and only for custom molding purposes.⁶⁵³ The court, relying on the broad definition of merchant contained in section 2-104, rejected defendant's contention:

The implication . . . is that manufacturers who produce a variety of goods would never fall within the broad scope intended for [Section 2-314]. That contention must be rejected where unmerchantability results from defects in the production process with which the manufacturer is familiar. This conclusion is implicit in the Code's definition of "merchant" The term "practices"

650. *Id.*

651. 402 F. Supp. 1017 (D. Conn. 1975).

652. See *supra* notes 488-89 and accompanying text.

653. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975).

indicates that one may be a merchant of goods by virtue of his involvement in the process by which those goods are produced as well as by sale of the finished goods from inventory.⁶⁵⁴

Blockhead, then, establishes that the broad definition of merchant contained in section 2-104 should have some undefined applicability under section 2-314.⁶⁵⁵ So long as the seller can be said to have the requisite skill or knowledge, he should be capable of creating the warranty of merchantability.

The Supreme Court of Oregon reached a similar result in *Valley Iron & Steel Co. v. Thorin*,⁶⁵⁶ holding that the plaintiff, although it had never before manufactured a particular product, could be held to have implied a warranty of merchantability.⁶⁵⁷ The product, hoedad collar castings, was one with which the plaintiff had no familiarity whatsoever. Nevertheless, since the plaintiff was skilled with metal castings and had previously assisted customers in selecting types of metals for jobs, the court held plaintiff to be a merchant with respect to goods of the kind.⁶⁵⁸ The presumed expertise justified application of the stricter merchant standard.⁶⁵⁹

Blockhead and *Thorin* represent what is believed to be the clearly preferable view that one who is skilled or knowledgeable with respect to goods should be held to imply the warranty of merchantability, notwithstanding that the sale represents the first or only transaction in such goods. The Supreme Court of North Dakota has apparently adopted this view, and taken it a step further, in *Eichenberger v. Wilhelm*.⁶⁶⁰

The *Eichenberger* case deserves special consideration for three reasons. First, it demonstrates that merchants, for purposes of section 2-314, can be so characterized either by dealing in goods or by virtue of their skill or knowledge.⁶⁶¹ Second, it establishes without question the liberality of the North Dakota Supreme Court with respect to warranty law.⁶⁶² Finally, it presented the court with the opportunity to discuss and settle the sales-service dichotomy question, an opportunity which the court failed to grasp until a year later in *Air Heaters, Inc. v. Johnson Electric, Inc.*⁶⁶³

654. *Id.*

655. *See id.*

656. 278 Or. 103, 562 P.2d 1212 (1977).

657. *Valley Iron & Steel Co. v. Thorin*, 278 Or. 103, _____, 562 P.2d 1212, 1215 (1977).

658. *Id.* at _____, 562 P.2d at 1215-16.

659. *Id.*

660. 244 N.W.2d 691 (N.D. 1976).

661. *Eichenberger v. Wilhelm*, 244 N.W.2d 691, 696 (N.D. 1976).

662. *Id.* at 696-97.

663. 258 N.W.2d 649 (N.D. 1977).

In *Eichenberger*, the plaintiff was a farmer who contracted with the defendant to spray his wheat crop to rid it of wild oat infestation. At the time of contracting plaintiff expressed concern that, since his crop had emerged more than fourteen days earlier, Carbyne, the only herbicide available, might damage the wheat.⁶⁶⁴ Defendant allayed plaintiff's fears, partly by his own words and partly by referring plaintiff to another farmer for whom defendant had applied Carbyne as a post-emergent herbicide.⁶⁶⁵ The plaintiff then agreed to the spraying, the field was sprayed, and the wheat crop was allegedly damaged. The yield was six bushels per acre, compared with sixteen bushels per acre from plaintiff's other fields. Plaintiff sued defendant, alleging negligence.⁶⁶⁶ The trial court apparently determined that the cause of the damage was not late spraying, but rather a defect in the Carbyne.⁶⁶⁷ The court nevertheless found for the plaintiff. The Supreme Court of North Dakota affirmed.⁶⁶⁸

The supreme court reviewed the evidence, concluded that the trial court had found no negligence, and affirmed that conclusion.⁶⁶⁹ Because the plaintiff had alleged only negligence and not breach of warranty, however, the supreme court first had to determine whether breach of warranty, proven though not pleaded, could serve as the basis of the decision. The court, in an extraordinarily liberal pronouncement, applied rule 15(b) of the North Dakota Rules of Civil Procedure to enable plaintiff to, in effect, amend his pleadings to conform to the evidence. The court ruled that, since the defendant was not prejudiced or surprised by the breach of warranty issue and had failed to object to trying the issue, he had impliedly consented to it.⁶⁷⁰ Therefore, the court treated the issue as if it had been properly raised.⁶⁷¹ It therefore seems clear that the North Dakota Supreme Court has adopted a rational, expansive view of warranty law in the merchantability area.

664. 244 N.W.2d at 693.

665. *Id.*

666. *Id.* at 694.

667. *Id.* at 695.

668. *Id.* at 698.

669. *Id.* at 695.

670. *Id.* at 696.

671. *Id.* The *Uniform Commercial Code Reporting Service* editorial comment to the case indicates that "only by a liberal construction of the North Dakota rules of procedure did the court transmute [the action from one in negligence] into a breach of warranty action." 20 U.C.C. REP. SERV. at 64. The tone of the editorial comment is disparaging. The North Dakota Supreme Court, however, should be commended, not criticized, for its forward-looking approach to warranty law. Too many courts would have summarily reversed the trial court, thereby either denying plaintiff the deserved relief or contributing further to judicial inefficiency by requiring a new trial.

Once the determination had been made that the case was appropriately before the court, the focus should have turned to whether the Uniform Commercial Code governed the transaction. The defendant was engaged to perform a service, crop spraying, and not to sell goods. The question was clearly presented and ignored. Furthermore, given the test set forth in *Air Heaters* a year later, it seems fairly clear that the conclusion would likely have been that a service, not a sale, was involved. Although factors not known might have suggested that the transaction was a sale coupled with a service (for example, if defendant's bill had set forth the herbicide as a separate item), the overall indication was that the Code should not have applied. That the court did apply the Code suggests that North Dakota will not only liberally construe its procedural rules in favor of warranty, but also that it will apply the Code either directly or by analogy in non-sales transactions. Although it is not entirely clear, one is tempted to assert that *Eichenberger* establishes that there is a general, non-sales warranty of merchantability in North Dakota, applicable to any transaction where one with expertise is involved.⁶⁷² In other words, when an experienced individual deals with another he warrants that his product, be it goods or services, will be fit for ordinary use or purposes. If this is true, North Dakota's interpretation of the Code's warranty provisions would be among the most liberal in the country. Unfortunately, one can only speculate as to its truth, since the court failed to address directly the sales-service dichotomy.

The court instead considered whether the plaintiff had met his burden under the Code of proving the existence of the warranty of merchantability, its breach, and damage caused thereby.⁶⁷³ To do this, the plaintiff was required to establish that the defendant was a section 2-314 merchant, for only such a merchant may create the warranty of merchantability. The court apparently assumed that dealers in goods and those who are merchants by virtue of their skill or knowledge are capable of making the warranty, for it stated: "By his own testimony relating to his decades of experience in aerial spraying, his licensing by state and federal authorities, and his training in the use of Carbyne, Wilhelm established himself as a 'merchant.'"⁶⁷⁴ Thus, in North Dakota expertise translates into the ability to make the implied warranty of merchantability. To that extent, *Eichenberger* stands as an example of the better, more expansive reading of section 2-314. As a *caveat*, however, one

672. 244 N.W.2d at 696.

673. *Id.* at 697.

674. *Id.* at 696.

should not read *Eichenberger* as establishing a complete relaxation of the Code rules or requirements governing merchantability. This is evident in the court's language expressing discontent with the ambiguous theories upon which the case was pleaded.⁶⁷⁵ Although it may be safe to rely on *Eichenberger* with regard to its liberal reading of section 2-314, counsel should take care to ensure that their pleadings and proof correspond more closely to the required elements.

2. Goods and Merchantability

The foregoing cases involved the threshold question in merchantability analysis: Who qualifies as a merchant? A related issue is whether the goods themselves are appropriate to the determination of merchantability. After it is determined that the seller in a given case is a merchant, the question becomes whether the warranty should attach if the goods at issue are of an unusual nature. In North Dakota, unlike other jurisdictions, the answers are relatively clear.⁶⁷⁶ Although the North Dakota courts have exhibited liberality, however, the legislature has been far more conservative in dealing with these unusual goods.⁶⁷⁷ In general, the controversial items have been food and drink, animals, and human products, primarily blood.⁶⁷⁸

At the outset, it is clear that all three types of products may be considered "goods" under the Code definition, which includes "all things . . . movable at the time of identification to the contract" other than money, securities, and things in action.⁶⁷⁹ Also included are "the unborn young of animals and growing crops."⁶⁸⁰ It should be noted that food and drink which is served for value and meant to be consumed either on the premises or elsewhere is explicitly considered a sale.⁶⁸¹ This provision was

675. *Id.* at 697. The court stated:

We note . . . that this claim might also be sustained on grounds of strict liability in tort. . . . We also advise that complaints in the future make clearer reference to the alternate theories of negligence, warranty, and strict liability, where the claim for relief may be predicated upon one or more of these theories. Such reference alerts the opposing party to the nature and sequence of evidence . . . and allows the trial court to better categorize its findings. In turn, as an appellate court, we will be presented with more orderly, less scattered findings.

Id.

676. U.C.C. § 2-316(3)(d) & (e) [N.D. CENT. CODE § 41-02-33(3)(d) & (e) (Supp. 1979)].

677. *Id.*

678. See *infra* notes 692-704 and accompanying text.

679. U.C.C. § 2-105(1) [N.D. CENT. CODE § 41-02-05(1) (1968)].

680. *Id.*

681. U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)].

specifically included because of pre-Code difficulty in determining the proper classification of these items.⁶⁸² The role of animals and human products has been somewhat less clear, but the majority of courts have held that the implied warranty attaches to them as well.⁶⁸³ The difficulty with animals is that in certain areas of the country there is a reluctance to saddle sellers with liability for diseases unknown to them at the time of sale. With human products, there is a dual reluctance at work. First, to characterize blood, tissue, or organs as goods is to demean and dehumanize them. Second, to impose seller liability upon medical practitioners may be perceived as equating the rendition of professional services with mere merchandising. Because the three types of products raise distinct problems, they will be discussed separately. The reader should keep in mind, however, that the central issue in each case is whether the warranty of merchantability should attach.

a. Food and Drink

On its face, food and drink present the easiest type of product with which to deal. The statute expressly provides coverage,⁶⁸⁴ and one would expect that the courts would merely have to apply the merchantability standard. However, one perceives a judicial reluctance to be too critical with respect to food when the defect is not substantial. The Code clearly makes the seller of food or drink liable when the food or drink is adulterated, spoiled, poisonous, or otherwise not fit for human consumption.⁶⁸⁵ However, when the defect is not as serious the results are not as clear. A number of courts have considered the problem, and the results break down into the application of two tests, the "foreign versus natural substance" test and the "reasonable expectation" test.⁶⁸⁶ As their names suggest, the tests determine merchantability by asking

682. See U.C.C. § 2-314, Comment 5. See also *Ray v. Deas*, 112 Ga. App. 191, 144 S.E.2d 468 (1965); *Sofman v. Denham Food Serv., Inc.*, 37 N.J. 304, 181 A.2d 168 (1962).

683. See, e.g., Annot., 83 A.L.R.3d 694 (1978) (implied warranty attaches to "merchantable" goods).

684. U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)].

685. *Id.* See also *Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. 3, 193 A.2d 610 (1963) (food not fit for human consumption).

686. See *Nadeau v. Bostonian Fishery Inc.*, 30 U.C.C. REP. SERV. 119 (Conn. Super. Ct. 1980) (reasonable expectation); *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964) (foreign versus natural substance); *Martell v. Duffy-Mott Corp.*, 15 Mich. App. 67, 166 N.W.2d 541 (1968) (reasonable expectation); *Woods v. Cabash Restaurant Inc.*, 8 U.C.C. REP. SERV. 192 (N.Y. Sup. Ct. 1970) (foreign versus natural substance); *Stark v. Chock Full O'Nuts*, 77 Misc. 2d 553, 356 N.Y.S.2d 403 (N.Y. Sup. Ct. 1974) (reasonable expectation); *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976) (foreign versus natural substance); *Williams v. Braun Ice Cream Stores, Inc.*, 534 P.2d 700 (Okla. Ct. App. 1974) (reasonable expectation); *Hunt v. Ferguson-Paulus Enterprises*, 243 Or. 546, 415 P.2d 13 (1966) (reasonable expectation); *Jeffries v. Clark's Restaurant Enterprises, Inc.*, 20 Wash. App. 428, 580 P.2d 1103 (1978) (reasonable expectation).

whether the food or drink was fit for human consumption according to either the nature of the defect or the extent of compliance with the buyer's reasonable expectation. The reasonable expectation test represents the majority approach, and will more often result in implication of the warranty. Facially, however, the tests are quite similar. Thus, under the natural-foreign substance test, the existence of a turkey bone in a turkey sandwich,⁶⁸⁷ a fish bone in a bowl of fish chowder,⁶⁸⁸ or an unshelled nut in a jar of shelled nuts⁶⁸⁹ would all be natural substances. They would therefore not result in a breach of the warranty of merchantability, since one might assume that a buyer could reasonably expect those substances to exist in those products. However, most of the courts applying the reasonable expectation analysis have not viewed the question so narrowly.⁶⁹⁰ Rather, they have framed the question in terms of general expectation, for example, whether a buyer of food would reasonably expect it to be edible without the need for examination. Framing the issue in this manner has two effects: First, it almost certainly precludes summary judgment, since the question will almost always be one of fact. Second, and partly as a result of the first effect, it makes liability significantly more likely.

The liberality engendered by the reasonable expectation test is justified both because food is at issue and because the Code specifically includes food and drink in its coverage.⁶⁹¹ To the extent that the foreign versus natural test makes liability dependent not upon the existence of the defect but upon its nature, it is not acceptable.

b. Animals

The remaining two types of unusual products, animals and human products, must be analyzed in a slightly different manner. With respect to animals, the vast majority of courts would probably imply the warranty of merchantability in their sale, and a number of courts have already done so. Thus, for example, the warranty has been held to be implied in the sale of livestock generally,⁶⁹² sheep,⁶⁹³ chickens,⁶⁹⁴ cattle,⁶⁹⁵ hogs,⁶⁹⁶ dogs,⁶⁹⁷ and horses.⁶⁹⁸

687. *Woods v. Cabash Restaurant, Inc.*, 8 U.C.C. REP. SERV. 192 (N.Y. Sup. Ct. 1970).

688. *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964).

689. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

690. *See, e.g.*, Annot., 83 A.L.R.3d 694 (1978), and cases cited therein.

691. U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)].

692. *S-Creek Ranch, Inc. v. Monier & Co.*, 509 P.2d 777 (Wyo. 1973) (sheep).

693. *Id.*

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

695. *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972), *aff'd on rehearing*, 503 F.2d 953 (10th Cir. 1974).

696. *Ruskamp v. Hog Builders, Inc.*, 192 Neb. 168, 219 N.W.2d 750 (1974).

697. *Salcetti v. Tuck*, 27 U.C.C. REP. SERV. 679 (D.C. Sup. Ct. 1979).

698. *Sessa v. Riegler*, 427 F. Supp. 760 (E.D. Pa. 1977), *aff'd mem.*, 568 F.2d 770 (3d Cir. 1978).

Moreover, there is every reason to believe that under appropriate circumstances courts will imply the warranty as to any animal, domestic or not. The only question which remains concerns the scope of the warranty. In the broad middle ground, the general merchantability definition may be applied to determine the scope of the warranty. Thus, an animal is merchantable if it is fit for the ordinary purposes for which like animals are used. For example, this would require delivery of animals generally free from debilitating disease,⁶⁹⁹ and, if the purpose is narrower, such as packing cattle, free from diseases which would render them unfit for human consumption. By the same token, an animal purchased as a pet would carry with it some warranty of fitness, so that if it became sick or died the warranty would be breached. At the fringes, however, the warranty's scope is blurred. For instance, would a dog be unmerchantable if it attacked its owner or if it failed to perform watchdog functions? The answer probably depends upon party expectations, and this may explain why so few cases have been decided concerning the question. To the extent that the expectations of the buyer are made known, the warranty involved would probably shift from a general merchantability warranty to either an express warranty or to a warranty of fitness for particular purpose.

c. Human Products

As indicated earlier, the major problems in the area of implied warranties as they pertain to human products seem to be a reluctance to equate human organs with goods, and a further reluctance to equate medical professionals with merchants. The history of the disputes governing the provision of human products is far too cumbersome to be detailed fully here.⁷⁰⁰ It is sufficient to note that the vast majority of states which have considered the issue have held either that the provision of human products is not a sale,⁷⁰¹ or that the provider is not a merchant.⁷⁰² The reasoning has been based primarily upon the professional service nature of the transaction. Many states have, however, distinguished between the

699. *Id.* (horse with tendonitis and claudication still merchantable since in spite of diseases it won three of thirteen races).

700. See generally Brams, *Transplantable Human Organs: Should Their Sale be Authorized by State Statutes?*, 3 AM. J.L. & MED. 183 (1977-78); Note, *Pricing Bad Blood: Reassessing Liability for Post-Transfusion Hepatitis*, 15 HARV. J. LEGIS. 557, 588 (1978).

701. See *Foster v. Memorial Hosp. Ass'n*, 219 S.E.2d 916 (W. Va. 1975), and cases cited therein; cf. *Reilly v. King County Central Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (1971) (sale of blood by blood bank is a sale).

702. See *Schuchman v. Johns Hopkins Hosp.*, 9 U.C.C. REP. SERV. 637 (Md. Super. Ct. 1971), and cases cited therein.

supply of human products by a commercial donor bank and the supply of those products by a hospital to a patient, treating the former as a sale and the latter as a service.⁷⁰³ While most of the cases have dealt with blood, it is likely that other human products would be analyzed in the same manner.

One of the problems with broad preclusion of the warranty on the basis that the provider is not a merchant, or on the basis that a professional service is at issue, is that non-human commodities will likely be covered by analogy. Thus, for example, a New York court recently held that a physician who furnishes a defective intrauterine device is not a merchant but rather one who renders a professional service.⁷⁰⁴ Although it is probably appropriate to insulate furnishers of human products from warranty responsibility, the medical professional rubric should not foster wholesale freedom from responsibility in non-human product cases.

d. Unusual Goods in North Dakota

The foregoing discussion, both with reference to animals and human products, has special significance in North Dakota. The North Dakota enactment of section 2-316, the exclusion of warranties section, is non-uniform. Implied warranties will not be applicable to the sale of certain animals or human products. While several other states have similarly excluded human products from coverage,⁷⁰⁵ few have done so with animals.⁷⁰⁶ Furthermore, the human products exclusion in North Dakota is exceedingly broad. The two provisions, sections 41-02-33(3) (d) and (e) of the North Dakota Century Code, provide:

d. The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other

703. See cases cited in notes 701-02 *supra*.

704. *Ruybe v. Gordon*, 18 U.C.C. REP. SERV. 889 (N.Y. Sup. Ct. 1976).

705. ALASKA STAT. § 45.02.316 (e) (1980); ARIZ. REV. STAT. ANN. § 36-1151 (1974); ARK. STAT. ANN. § 85-2-316(3) (d) (Supp. 1979); COLO. REV. STAT. § 13-22-104 (1973); DEL. CODE ANN. tit. vi, § 2-316(5) (1975); FLA. STAT. § 672.2-316 (5) (Supp. 1980); GA. CODE § 109A-2-316 (5) (Supp. 1980); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West Supp. 1980); NEB. REV. STAT. § 71-4001 (1976); N.M. STAT. ANN. § 24-10-5 (1979); N.D. CENT. CODE § 41-02-33(3) (d) (Supp. 1979); S.C. CODE § 44-43-10 (1977); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1980); TENN. CODE ANN. § 47-2-316(5) (1979); TEX. BUS. AND COM. CODE ANN. tit. 1, § 2.316(e) (Vernon 1968); UTAH CODE ANN. § 26-29.1 (1976); WIS. STAT. ANN. § 146-31 (West Supp. 1980); WYO. STAT. § 34-21-233(c) (iv) (1979).

706. IND. CODE ANN. § 26-1-2-316(3)(d) (Burns Supp. 1980) (cattle, hogs, or sheep); MONT. REV. CODES ANN. § 30-2-316(3) (d) (1979) (cattle, hogs, and sheep); N.D. CENT. CODE § 41-02-33(3) (e) (Supp. 1979) (cattle, hogs, sheep, and horses); OR. REV. STAT. § 72.3160(3) (1979) (livestock, meaning equines, cattle, sheep, goats, and swine); TEX. BUS. & COM. CODE ANN. tit. 1, § 2.316(f) (Vernon Supp. 1980) (livestock or its unborn young).

tissues or organs. Such blood, blood plasma, or tissue or organs shall not for the purposes of this chapter be considered commodities subject to sale or barter, but shall be considered as medical services.

- e. With respect to the sale of cattle, hogs, sheep, and horses, there shall be no implied warranty that cattle, hogs, sheep, and horses are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller that all state and federal regulations pertaining to animal health were complied with.⁷⁰⁷

Although there have been no cases decided under either provision, a few observations are in order. Initially, under both sections express warranty responsibility can still attach. In the case of animals, express warranty provisions are fairly common. The same, however, cannot be said with respect to human products. Furthermore, whereas many jurisdictions have distinguished between commercial blood or organ banks and non-commercial ones⁷⁰⁸ and imposed liability only on the former, the North Dakota provisions explicitly cover contracts for sale "from a blood bank or reservoir of such other tissue or organs."⁷⁰⁹ While it might be possible to argue that non-commercial suppliers, such as a hospital, would be covered, such an argument hardly seems plausible in view of the second sentence of section 41-02-33(3) (d). Thus, in North Dakota the sale of human products is not subject to implied warranties.

It is somewhat curious that only the four listed animals are included in subsection (e). Presumably, the court would not extend the section's coverage to the sale of other animals, including, for example, domestic pets, chickens, and honey-producing bees. Furthermore, a strict reading of the statute reveals exclusion of the warranty only insofar as sickness or disease is concerned. Animals listed which are sold for relatively special purposes and which fail to meet those purposes for reasons other than sickness or disease might still be the subject of implied warranties. Thus, breeder cattle which fail to breed would be unmerchantable, unless the failure is attributable to sickness or disease. This, of course, may create other problems, including categorization of defects as

707. N.D. CENT. CODE § 41-02-33(3)(d) & (e) (Supp. 1979).

708. See Note, *Pricing Bad Blood: Reassessing Liability For Post-Transfusion Hepatitis*, 15 HARV. J. LEGIS. 557 (1978) (the strong correlation between the use of blood from paid donors and the occurrence of hepatitis in the recipients of that blood has prompted increased federal involvement in blood banking).

709. N.D. CENT. CODE § 41-02-33(3)(d) (Supp. 1979).

emanating from sickness or disease.⁷¹⁰ Finally, an allegation of breach of implied warranty would place the burden on the seller to demonstrate that he had complied with relevant federal and state health regulations, thereby precluding summary judgment.

Many of the questions raised by the North Dakota provisions will have to await judicial clarification. It is hoped that when such cases arise, the courts will construe the exclusions strictly, since they may be in derogation of the parties' expectations. If that course is followed, the approach to warranty law can remain rational in spite of a legislative aberration.

3. Criteria for Merchantability

The foregoing discussion has focused on the seller, the buyer, and the type of goods involved in the transaction. However, while it is one thing to determine that the warranty has been made, it is quite another to define its content. This section of the article will consider the scope of the undertaking when the seller is held to have implied that the goods are merchantable.

As indicated earlier, the Code itself does not define merchantability. Rather, it sets minimum requirements which the goods must meet in order to qualify as merchantable.⁷¹¹ The most important of these is contained in section 2-314(2)(c), which requires that the goods must be fit for ordinary purposes. In order to understand the full impact of this requirement on the entire section, it will be useful to first consider the other criteria briefly.

a. Passing Without Objection.

Section 2-314(2)(a) provides that in order for goods to be considered merchantable they must, at the least, be capable of passing without objection in the trade under the contract description.⁷¹² This first minimum criterion incorporates two factors for determining merchantability: the trade and the "contract description." A court confronted with a case questioning merchantability under this subsection would have to consider both the contract description and its meaning in the particular industry involved. If the factfinder is satisfied that the goods described in the contract would be acceptable in the trade, the threshold level of merchantability is met.

710. One might question whether sterility is a sickness or disease. Also unclear is whether contamination by a chemical rendering cattle sold for packing unfit for human consumption would qualify as a sickness or disease. The better view would be to construe the statute strictly, so that the warranty would be made.

711. It is worth repeating that the mere fact that the goods at issue meet one or more of the minimum standards does not of itself ensure a finding of merchantability.

712. U.C.C. § 2-314(2)(a) [N.D. CENT. CODE § 41-02-31(2)(a) (1968)].

Because the operation of the subsection is dependent upon a contract description, ordinarily both an express warranty and an implied warranty will exist.⁷¹³ The warranties, although they may coexist, will not necessarily be coextensive. Thus, the express warranty will ordinarily be that the goods conform to the description, while the implied warranty of merchantability will be that the goods are fit for ordinary use or would pass without objection in the trade. Two cases will illustrate the operation of the subsection.

Klein v. Asgrow Seed Co.,⁷¹⁴ decided under the Uniform Sales Act, involved the sale of tomato seeds described in the contract as "VF-36," an early maturing seed according to trade meaning.⁷¹⁵ The seed, as delivered, contained a significant amount of non-early maturing seed ("rogues"), and plaintiff suffered crop loss as a result.⁷¹⁶ Applying the forerunner of section 2-314(2) (a), the court ruled that both express and implied warranties were breached, since the product neither corresponded to the description nor would pass without objection within the seed trade under the contract description.⁷¹⁷ Although a very small percentage of rogue seeds might be tolerable under the contract description, a large percentage would not be. Hence, the seed was not merchantable.⁷¹⁸

The second case, *Indiana Farm Bureau Cooperative Association v. S.S. Sovereign Faylenne*,⁷¹⁹ better illustrates the thrust of section 2-314(2) (a). The plaintiff had purchased a large quantity of Calcium Ammonium Nitrate (CAN) fertilizer from one of the defendants. The fertilizer was shipped by another defendant.⁷²⁰ The contract description called for "agricultural grade" CAN.⁷²¹ According to trade usage, agricultural grade meant CAN in granular form, capable of being machine spread or applied.⁷²² The calcium is included to prevent moisture from causing the fertilizer to agglomerate or become a solid mass.⁷²³ When the CAN arrived it was in an agglomerated condition, and plaintiff sued, alleging breach of express and implied warranties.⁷²⁴ The court ruled for the

713. See *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966) (pre-code); *Indiana Farm Bureau Coop. Ass'n v. S.S. Sovereign Faylenne*, 24 U.C.C. REP. SERV. 74 (S.D.N.Y. 1977).

714. 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

715. *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

716. *Id.* at _____, 54 Cal. Rptr. at 612.

717. *Id.* at _____, 54 Cal. Rptr. at 615-17.

718. *Id.* at _____, 54 Cal. Rptr. at 619-20.

719. 24 U.C.C. REP. SERV. 74 (S.D.N.Y. 1977).

720. *Indiana Farm Bureau Coop. Ass'n v. S.S. Sovereign Faylenne*, 24 U.C.C. REP. SERV. 74, 77 (S.D.N.Y. 1977).

721. *Id.*

722. *Id.* at 79.

723. *Id.*

724. *Id.* at 77-78.

plaintiff, applying sections 2-314(2) (a) and (c) and holding that, since the contract description required the CAN to be in granular form, it would not pass without objection and was not fit for ordinary purposes.⁷²⁵ It was therefore unmerchantable.⁷²⁶

That there have been only a handful of cases⁷²⁷ which rely upon section 2-314(2)(a) is readily explainable through the preceding decisions. The implied warranty created under the section is always accompanied by an express warranty which will almost always be breached as well, making resort to the implied warranty unnecessary or superfluous. Furthermore, if the goods are objectionable in the trade, it is probably because they are unfit for ordinary purposes under section 2-314(2)(c), and courts, familiar with equating merchantability with fitness for general purpose, tend to prefer to apply section 2-314(2)(c). Nevertheless, the implied warranty embodied in section 2-314(2)(a) may, on occasion, be invoked independently. In those cases it remains a useful guide to the scope of the warranty.⁷²⁸

The foregoing observation, that goods might be fit for ordinary purposes yet not be merchantable because they fail to pass without objection under the contract description, points up an important, yet easily overlooked, aspect of section 2-314(2). The minimum standards are, as indicated earlier, stated in the conjunctive.⁷²⁹ Therefore, it is possible that goods might meet one or several of the minimum standards, yet not meet another, and for that reason fail the merchantability test. The practitioner faced with a merchantability case should therefore consider all of the relevant standards to determine whether the goods involved are, in fact, merchantable.⁷³⁰

725. *Id.*

726. *Id.* at 80.

727. *See also* *Jetero Constr. Co. v. South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976); *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 269 N.E.2d 664 (1971) (no "trade" as to experimental goods); *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, 190 N.W.2d 275 (1971) (amalgam of warranties).

728. The facts of *Jetero Constr. Co. v. South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976), may provide an example of the independent use of section 2-314(2)(a). In that case the contract called for "No. 2 spruce studs," to be used by plaintiff in a construction project in Memphis. *Id.* at 1349. A substantial quantity of the studs "warped," "twisted," and "buckled" after being used, and therefore did not pass without objection in the trade under the contract description. *Id.* at 1350. Although the court found that the goods were also unfit for ordinary purposes, *id.* at 1353, the studs might have been deemed generally fit for ordinary purposes and still have been unmerchantable under § 2-314(2)(a). In other words, if they could have been used in other construction projects the studs would have been generally fit for ordinary purposes and yet still have been unmerchantable under section 2-314(2) (a).

729. *See supra* notes 578-80 and accompanying text.

730. There is language in at least one case, *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975), which suggests that goods can be merchantable if they pass without objection even if they are not fit for ordinary purposes. To the extent that that suggestion is made, it is believed to be erroneous. One might nevertheless pause to consider whether a court might not be

b. Fungible Goods: Fair Average Quality

The second general minimum standard to be considered is embodied in section 2-314(2) (b), and requires that, at a minimum, fungible goods must be of fair average quality (FAQ) within the contract description.⁷³¹ The official comment indicates that sections 2-314(2) (a) and (b) are to be read together, and that the FAQ reference is particularly applicable to agricultural bulk products, requiring that the goods center “around the middle belt of quality, not the least or the worst . . . in the particular trade . . . but such as can pass ‘without objection.’ ”⁷³² The comment further buttresses what has already been said about the conjunctive nature of the minimum standards, and points out the particular applicability of this subsection in agricultural areas.⁷³³ Somewhat surprisingly, the cases discussing FAQ have not generally dealt with agricultural products; in fact, they have not, on the whole, dealt with what would commonly be considered “fungible goods.”⁷³⁴

This may be a reflection of the Code’s very broad definition of fungible goods, which provides:

“Fungible” with respect to goods . . . means goods . . . of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.⁷³⁵

The effect of this definition is to make parts of the Code such as section 2-314(2) (b) applicable, even though by their terms they do not apply, when the parties’ agreement manifests that non-fungible units are treated as equivalents. Goods as diverse and technically non-fungible as steel,⁷³⁶ sheetrock,⁷³⁷ and linoleum⁷³⁸ have all been the subject of an FAQ analysis, the courts reasoning that the products delivered have not centered around an acceptable belt of

justified in creating a hierarchy of criteria. Such a creation has initial appeal, since it would reflect party expectations, but may in the long run be unacceptable.

731. U.C.C. § 2-314 [N.D. CENT. CODE § 41-02-31 (1968)].

732. U.C.C. § 2-314, Comment 7.

733. *Id.*

734. *See, e.g.,* Robert H. Carr & Sons v. Yearsley, 1 U.C.C. REP. SERV. 97 (Pa. Ct. C.P. 1963).

735. U.C.C. § 1-201(17) [N.D. CENT. CODE § 41-01-11(17) (1968)].

736. *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, 190 N.W.2d 275 (1971).

737. *Tractor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d 446 (Tex. Civ. App. 1972).

738. *Mindell v. Raleigh Rug Co.*, 14 U.C.C. REP. SERV. 1124 (Mass. Housing Ct. 1974).

quality, but have fallen below it. Given the broad definition, one can hardly quarrel with the analysis, either originally or by analogy. Furthermore, if one keeps in mind the fact that the standards are minimum acceptable thresholds, and not the only possible guidelines, it becomes clear that merely because goods are not fungible is no reason to preclude FAQ analysis. Finally, it should be noted that few, if any, of the cases discussing FAQ have relied solely on subsection (2) (b), suggesting that courts are reading "fair average quality within the description" more as a component of merchantability than strictly as a standard of FAQ analysis.

Beyond the fungibility aspect discussed above, application of the subsection appears to involve little difficulty. Whether the goods are of fair average quality within the description depends, of course, upon the description. It may also to a large extent depend upon trade usage, which will give additional substance to the parties' expectations. Determination of fair average quality will raise a factual question to be decided by the trier of fact, and one would expect to see few appellate reversals when the decision is based upon FAQ analysis.

Of the cases which have employed an FAQ analysis, three⁷³⁹ have equated fair average quality with a general understanding of merchantability and have not considered the fungibility of the goods at all. The focus of those cases has been on whether the goods were acceptable in the trade under the contract description. A fourth case, which deals with what appears to be a fungible product,⁷⁴⁰ applied a scattergun approach to the facts, holding that coal delivered under the contract description was merchantable since it was fit for ordinary purposes (fuel), met the contract description, was within the variations permitted by the agreement, was of fair average quality, and was of even kind, quality, and quantity.⁷⁴¹ It is thus apparent that, although the subsection causes few problems, it will not often be expressly invoked, and even less often will be independently applied.

c. Even Kind, Quality, and Quantity

The third minimum standard to be discussed is that contained in section 2-314(2) (d), that merchantable goods must at least be of even kind, quality, and quantity within each unit and among all

739. See *supra* cases cited in notes 736-38.

740. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977) (bulk coal).

741. *Id.* at 95.

units.⁷⁴² This may be varied within limits permitted by the agreement, and will include usage, course of dealing, and course of performance. If few cases have dealt with the FAQ concept of merchantability, fewer still have discussed section 2-314(2) (d). In fact, other than cases which apply a scattergun approach to merchantability, no case has been found which directly discusses the subsection. This is unusual in light of the official comment to the section, which indicates that the provision "follows case law."⁷⁴³ However, given the relatively narrow confines of the standard, one can readily understand the scarcity of judicial opinions referring to it.

This standard is one of the least complex of the warranty standards, in the sense that what it requires is governed almost exclusively by the agreement. Once the contours of the agreement are known, it becomes a matter of merely asking whether each unit and all of the units fit within those contours in terms of quality, quantity, and kind. If they do, the goods have met the standard; if not, they are unmerchantable. It is difficult to imagine a case which would focus precisely on the subsection. It is suggested, however, that the section may be employed in a manner similar to the fair average quality (FAQ) approach discussed earlier. The section may be particularly useful in determining whether non-fungible goods are merchantable, if one reads the "evenness of kind, quality, and quantity within variations of the agreement" to be equivalent to an FAQ analysis. Thus, the issue is whether, within the contours of the agreement, each unit and all the units represent a fair middle belt of kind, quality, and quantity. To this extent, the warranty would be breached if the goods delivered, although "even," centered at the lowest variation permitted. The warranty would also be breached if the goods, although averaging out at the middle of the agreement's variation, were "uneven." In short, this standard seems to require both "evenness" and "fair averageness." If the foregoing discussion seems confusing, it might well indicate why the standard has been little used.

d. Adequacy of Containers, Packages, and Labels

The next minimum standard applies to the packaging and labeling of the goods. If goods are to be merchantable, they must, at a minimum, be adequately packaged and labeled.⁷⁴⁴ Again,

742. U.C.C. § 2-314(2)(d) [N.D. CENT. CODE § 41-02-31(2)(d) (1968)].

743. U.C.C. § 2-314, Comment 9.

744. U.C.C. § 2-314(2)(e) [N.D. CENT. CODE § 41-02-31(2)(e) (1968)].

what will be adequate is dependent upon the parties' agreement, which in turn will encompass usage, dealing, and performance.

The majority of cases which have addressed this subsection have, not surprisingly, involved exploding bottles, usually containing carbonated beverages.⁷⁴⁵ If a bottle explodes under normal circumstances, the warranty of merchantability is breached, even though the product contained in the bottle is merchantable. This is clearly the intent of the Code, and most courts have had little difficulty in applying the standard.⁷⁴⁶

There are, however, certain observations which are worthy of mention. Initially, the subsection is by no means limited to bottles. Thus, for example, the warranty of adequate packaging has been invoked with respect to a package of automobile parts,⁷⁴⁷ to a chemical reactor,⁷⁴⁸ to the packaging of calcium ammonia nitrate fertilizer,⁷⁴⁹ and to cartons which hold beverage bottles.⁷⁵⁰ An attempt has also been made to invoke the warranty with respect to steel tension straps surrounding a package which, when cut, flew up and injured the cutter.⁷⁵¹ Although the court denied liability, it did so without reference to the Uniform Commercial Code and on the basis of prior state law.⁷⁵² The case might well have been decided differently under the Code. Other fact settings exist in which the warranty, although not directly applicable, might nevertheless be applied.⁷⁵³ In short, the section will have applicability whenever the container, package, or label is inadequate under the circumstances. Adequacy is thus a factual question to be determined on the basis of the surrounding

745. See, e.g., *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. Dist. Ct. App. 1973); *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976); *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd sub nom. Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975); *Harris v. Great Atlantic & Pacific Tea Co.*, 23 Mass. App. Dec. 159 (1963) (milk); *Lucchesi v. H.C. Bohack Co.*, 8 U.C.C. REP. SERV. 326 (N.Y. Sup. Ct. 1970); *Gillispie v. Great Atlantic & Pacific Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

746. See *infra* notes 757-74 and accompanying text.

747. *Pugh v. J.C. Whitney & Co.*, 9 U.C.C. REP. SERV. 229 (E.D.N.Y. 1971) (employee who opened package and cut himself on a sharp projection could recover on breach of warranty theory).

748. *Standards Brands Chem. Indus., Inc. v. Pilot Freight Carriers, Inc.*, 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (1971) (glass-lined vessel with metal agitator; impliedly warranted that packaging would be adequate to prevent glass from being struck by metal).

749. *Indiana Farm Bureau Coop. Ass'n v. S.S. Sovereign Faylenne*, 24 U.C.C. REP. SERV. 74 (S.D.N.Y. 1977) (packaging should prevent agglomeration caused by moisture).

750. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. Dist. Ct. App. 1973).

751. *Stubblefield v. Johnson-Fagg, Inc.*, 379 F.2d 270 (10th Cir. 1967).

752. *Id.* at 273.

753. One such setting may be illustrated by *Anderson v. Associated Growers, Inc.*, 11 Wash. App. 774, 525 P.2d 284 (1974). The decedent had been bitten by a "banana spider" while reaching for a carton of radishes which was under a carton of bananas. *Id.* at 775, 525 P.2d at 284. His wife, as administratrix of the estate, sued for breach of warranty, and summary judgment was granted for the defendant. *Id.* at 775-76, 525 P.2d at 285. Although the court indicated that neither the product nor the container was defective, it spent little time discussing whether proper packaging included the absence of dangerous insects. *Id.*

circumstances. Therefore, summary judgment without submission to the jury of the question of adequacy would be improper.⁷⁵⁴

The packaging standards of section 2-314(e) may also affect the other merchantability criteria. Thus, the fact that the container is inadequate has been held to render the product itself unfit for ordinary purposes.⁷⁵⁵ This is an important tenet, particularly when a court is confronted with a defendant who contends that the product itself was merchantable or that the plaintiff failed to show a defect in the product. It should be sufficient for the plaintiff to merely demonstrate that the container was inadequate in order to recover.

Additionally, it should be remembered that the warranty of merchantability is generally applicable only to contracts for the sale of goods. Two problems arise in connection with this requirement: First, the sale may be viewed as encompassing only the product itself, and not its container. Second, the timing of the transaction may be critical in determining the existence of the warranty. For example, a question may arise as to whether the warranty attaches prior to the actual sale when a potential purchaser is injured by an exploding bottle while carrying it to the checkout counter. Theoretically, no sale has occurred, and the warranty might therefore have not yet attached.

As to the first issue, whether the contract for sale encompasses the container or only the contained item, the Code itself would seem to include the container within the contract.⁷⁵⁶ Thus, the merchantability of the goods is to be tested not only by their quality, but also by the adequacy of the container. Nevertheless, two cases exist which contradict this conclusion.

The first, *McKone v. Ralph's Wonder Market, Inc.*,⁷⁵⁷ appears to be inconsistent with an earlier case decided in the same jurisdiction,⁷⁵⁸ and its precedential value is therefore questionable. The case involved a glass bottle of milk which exploded after the milk had been purchased and was being carried to the purchaser's car.⁷⁵⁹ A piece of glass became imbedded in the purchaser's forehead and she sued.⁷⁶⁰ The lower court held for the plaintiff on the theory of breach of implied warranty of merchantability, and on appeal the case was reversed.⁷⁶¹ The appellate court held that there

754. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901, 903 (Fla. Dist. Ct. App. 1973).

755. *See, e.g., Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S. E.2d 691 (1976).

756. *See* U.C.C. § 2-314(2) (e) [N.D. CENT. CODE § 41-02-31(2) (e) (1968)].

757. 27 Mass. App. Dec. 159 (1963).

758. *Harris v. Great Atlantic & Pacific Tea Co.*, 23 Mass. App. Dec. 169 (1963).

759. *McKone v. Ralph's Wonder Mkt., Inc.*, 27 Mass. App. Dec. 159, 160 (1963).

760. *Id.* at 162.

761. *Id.* at 164-65.

had not been a sale of the bottle as required by section 2-314, and therefore no implied warranty of merchantability attached.⁷⁶² The dissent, stressing subsection (2)(e), would have held that the warranty was created and breached, since the goods were not "proper goods, properly contained."⁷⁶³ Clearly, the dissent's view is more consistent with the Code.

One can speculate as to why the majority ruled as it did and suggest two justifications, both advanced in the opinion. First, milk is not an inherently dangerous product,⁷⁶⁴ in the sense that it is not generally packaged under pressure, as are other soft drinks. However, the likelihood of explosion should not enter into the consideration. The fact that the explosion occurred should control. Second, the court believed that the seller should not be deemed an insurer of its customers.⁷⁶⁵ Such logic would preclude liability for sellers of carbonated soft drinks, however, and since it ordinarily does not, the court was apparently again focusing on the nature of the bottle's contents. It thus appears that the court was unwilling to impose liability primarily because a relatively harmless product, milk, was involved. As the plaintiff discovered, however, the milk was by no means harmless.

The second case, *Shaffer v. Victoria Station, Inc.*,⁷⁶⁶ presented a more fascinating and far more difficult fact setting. The plaintiff had ordered a glass of wine from the defendant's restaurant, and while he was drinking it the glass shattered in his hand, allegedly causing injury.⁷⁶⁷ Plaintiff sued, and raised the issue of merchantability.⁷⁶⁸ The court dismissed his breach of warranty claim, and plaintiff appealed.⁷⁶⁹ The appellate court affirmed, holding that the wine glass was not part of the sale of food or drink, since title to it did not pass.⁷⁷⁰ Again, it is believed that the result is incorrect, although not as clearly so as in the preceding case.

The plaintiff in *Shaffer* argued that, since the serving of food and drink is a sale under section 2-314(1), accompanying the sale was a warranty that the food or drink would be adequately packaged or contained.⁷⁷¹ The court referred to the argument as "creative . . . [but] illogical,"⁷⁷² since it would require that the

762. *Id.*

763. *Id.* at 168 (Allen, J., dissenting).

764. 27 Mass. App. Dec. at 165.

765. *Id.*

766. 18 Wash. App. 816, 572 P.2d 737 (1977).

767. *Shaffer v. Victoria Station, Inc.*, 18 Wash. App. 816, 817, 572 P.2d 737, 738 (1977).

768. *Id.* at 818, 572 P.2d at 739.

769. *Id.* at 817, 572 P.2d at 738.

770. *Id.* at 818, 572 P.2d at 739.

771. *Id.* at 822, 572 P.2d at 739.

772. *Id.* at 822, 572 P.2d at 740.

glass be considered part of the sale.⁷⁷³ One need only ask whether the sale of the wine could have been accomplished without a container to see the fault with the court's reasoning. Had the wine been brought to the table in a bottle which exploded, the court probably would not have ruled that the wine itself was merchantable merely because the bottle was not sold. The fact is that the goods sold, here food or drink, must be contained or packaged. Therefore, when the container, be it a glass or a bottle, shatters, the goods are not adequately contained and the warranty is breached.⁷⁷⁴

If the cases which deny liability on the ground that the product and not its container is the subject of sale are in error, they at least arise with relative infrequency. Far more important are the cases involving the second question previously raised: whether the plaintiff is barred from recovery when the container explodes, causing injury, before payment. The majority of cases indicate that the plaintiff will not be barred.⁷⁷⁵

One method of reaching the conclusion that the plaintiff may recover, albeit an unacceptable one, is to ignore the question of whether a sale has occurred.⁷⁷⁶ Two other methods exist which have been used by the courts. The first is to read the Code provisions governing "contract for sale," "offer and acceptance," and "termination"⁷⁷⁷ literally. This analysis interprets the Code as implying the warranty of merchantability whenever there is a contract for the sale of goods. A "contract for sale" includes, under

773. *Id.*

774. A cynic might suggest two "policy" reasons for the *Shaffer* decision. First, the court might have felt that to allow recovery would have created an impossible standard for future cases. While in the bottle cases the plaintiff's observable activities in handling the container will be clear (e.g., did the plaintiff shake the bottle, drop it, or handle it roughly), his actions as to a wine glass may be unclear (e.g., a not-so-gentle squeeze could result in breakage, and hence injury and liability). Unobservable actions by the plaintiff might lead a court to fear "staged" or intentional breakage, enacted for the purpose of lawsuits. The short but unsatisfactory response is that this will be a matter of proof. In this regard, the case suggests that the court disbelieved the plaintiff. Second, if liability is imposed here, a difficult question arises as to the further scope of liability. For example, would the adequate packaging warranty extend to food served on a hot metal plate which burned the restaurant patron?

775. See *infra* notes 776-84 and accompanying text.

776. See, e.g., *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. Dist. Ct. App. 1973). See also *Lucchesi v. H.C. Bohack Co.*, 8 U.C.C. REP. SERV. 326 (N.Y. Sup. Ct. 1970).

777. It is necessary to define the term "contract for sale" because the warranty of merchantability is implied only "in a contract for . . . sale." U.C.C. § 2-314(1) [N.D. CENT. CODE § 41-02-31(1) (1968)]. Under the Code, a "contract for sale includes both a present sale of goods and a contract to sell goods at a future time." U.C.C. § 2-106(1) [N.D. CENT. CODE § 41-02-06(1) (1968)] (formation of contract in general); U.C.C. § 1-201(11) [N.D. CENT. CODE § 41-01-11(11) (1968)] (defining "contract").

For Code provisions defining "offer and acceptance," see U.C.C. § 2-206 [N.D. CENT. CODE § 41-02-13 (1968)] (offer and acceptance in formation of contract), and U.C.C. § 2-606 [N.D. CENT. CODE § 41-02-69 (1968)] (what constitutes acceptance of goods). See also U.C.C. § 2-607 [N.D. CENT. CODE § 41-02-70 (1968)] (effect of acceptance); U.C.C. § 2-608 [N.D. CENT. CODE § 41-02-70

section 2-106, both a present and a future sale of goods.⁷⁷⁸ In determining when the contract for sale arises, one must view the transaction from a traditional contract perspective, in terms of offer and acceptance as embodied in the Code. When the merchant retailer places goods on the shelf he is offering them for sale, to be accepted by the buyer under section 2-206 in any reasonable manner. When the buyer selects goods from the shelf, or when he brings them to the checkout counter, he impliedly promises to pay for them, thereby accepting the retailer's offer. Therefore, the "contract for sale" is entered into as soon as the buyer selects the goods, and the warranty attaches at that time. Moreover, the fact that the buyer can return the goods if he changes his mind amounts only to an implied right of termination, and does not indicate that the contract had not yet been entered into. The two cases which have applied this analysis⁷⁷⁹ have, not surprisingly, found for the buyer.

This highly formalistic reading of the Code is neither without objection nor entirely laudable, since it depends upon attenuated analysis and is largely result oriented. On the other hand, it is probably justifiable, since to deny the existence of a warranty merely because the buyer has yet to complete payment is to allow form to govern over substance.

The other method of dealing with the issue is also highly formalistic, and is subject to criticism because its validity is based upon the passage of "title," a concept which the Code drafters attempted to de-emphasize.⁷⁸⁰ The one case which has applied a "title" analysis⁷⁸¹ reached the conclusion that a sale had occurred when the buyer picked up the bottles, reasoning that the seller's delivery had occurred at that time and title had therefore passed.⁷⁸² Furthermore, even though the buyer could change his mind, the contract was considered to have been entered into at the time of selection, since the change of mind would merely re-vest title in the seller.⁷⁸³

The foregoing cases suggest that the courts which address the question of whether a sale has occurred will strive to find a sale, and its concomitant warranty, when it accords with the commercial

(1968)] (revocation of acceptance in whole or in part). The definition of "termination" is set forth in U.C.C. § 2-106(3) [N.D. CENT. CODE § 41-02-06(3) (1968)].

778. U.C.C. § 2-106(1) [N.D. CENT. CODE § 41-02-06(1) (1968)].

779. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976); *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd sub nom. Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

780. *See* U.C.C. § 2-401 [N.D. CENT. CODE § 41-02-46 (1968)].

781. *Gillispie v. Great Atlantic & Pacific Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

782. *Id.* at _____, 187 S.E.2d at 444.

783. *Id.* (citing U.C.C. § 2-401(4)).

realities of the setting in order to ensure a fair, just result. The results of the cases are apparently correct, but one might hope that such results could in the future be achieved in a more straightforward manner. It is suggested that some form of strict warranty liability, either judicial or legislative, might be applied to cover the exploding bottle cases to avoid the exacting requirement that there be a contract for the sale of goods. Such an approach would be dually advantageous, as it would preclude the necessity for formalistic interpretation, and at the same time extend coverage to injured parties who are clearly beyond even the most attenuated contract for sale analysis.⁷⁸⁴

Incidental to the preceding observations, and of more than passing interest, is the fact that when the adequacy of the container is at issue the plaintiff may not have a cause of action against the remote seller. Generally, under the Code a seller's warranty, once given, extends to those persons "who may reasonably be expected to use, consume or be affected by the goods,"⁷⁸⁵ even in the absence of privity of contract. Both the retailer and the remote seller are ordinarily liable for any breach of warranty of merchantability. In the exploding bottle cases, however, the buyer's cause of action will generally be limited to the immediate seller, primarily because of problems of proof associated with demonstrating a breach at the time of the remote sale.⁷⁸⁶ Since the question will turn upon whether the container was inadequate at the time the remote supplier initially sold the goods, and since there will have been a significant break in the chain of control, the ultimate purchaser will have difficulty demonstrating the causal connection required. As long as the buyer has a remedy against the immediate seller there is little difficulty with this interpretation. Furthermore, when the buyer can demonstrate the causal connection the remote seller should be held liable as well.

One final observation about section 2-314(2)(e) is in order. The section makes merchantability dependent in part upon the adequacy of the package, container, or label.⁷⁸⁷ The focus thus far has been exclusively on packages and containers. The fact that goods may be unmerchantable if they are inadequately labeled

784. For example, consider a buyer in the process of reaching for a bottle when the bottle explodes. Although clearly no contract for sale has been entered into, arguably some warranty protection or something similar ought to exist. *But cf.* *Lane v. Barringer*, _____ Ind. App. _____, 407 N.E.2d 1173 (1980) (court assumed a sale but held no breach of warranty absent privity).

785. U.C.C. § 2-318 (alt. c). This is the alternative adopted by North Dakota, and is the most liberal of the alternatives available. *See* N.D. CENT. CODE § 41-02-35 (1968).

786. *See, e.g.*, *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975); *Lucchesi v. H.C. Bohack Co.*, 8 U.C.C. REP. SERV. 326 (N.Y. Sup. Ct. 1970).

787. U.C.C. § 2-314(2)(e) [N.D. CENT. CODE § 41-02-31(2)(e) (1968)].

would seem to be equally important. Surprisingly, relatively few cases have considered adequacy of labeling as a basis for determining merchantability. This may, however, be more the result of the fact that there are more easily invoked theories of liability than that courts are unwilling to interpret section 2-314(2) (e) to impose responsibility.

A careful reading of the section reveals that, at a minimum, goods to be merchantable must be adequately labeled as determined by the agreement.⁷⁸⁸ The comment indicates that the warranty arises "where the nature of the goods and of the transaction require a certain type of . . . label."⁷⁸⁹ If this means anything, it should mean that certain goods, particularly inherently dangerous ones, require adequate labels indicating their dangerous propensities. Courts should have no hesitancy in reading the section to provide that goods are not merchantable if they do not have adequate labels which give the buyer appropriate warnings as to what the goods can and cannot do, and as to dangers which might be expected.

As indicated, few courts have employed the section for the above suggested purpose, and have instead relied upon a strict liability or a duty to warn analysis.⁷⁹⁰ The fact that few courts have made use of the section should not, however, lead one to the conclusion that it should not be so used. Furthermore, it may be particularly useful in those circumstances where strict liability is not available, as where the product is not "in a defective condition unreasonably dangerous to the user."⁷⁹¹ Thus, for example, a bottle of poison, even though in no way defective, might be unmerchantable if it were not adequately labeled. Likewise, cattle feed, not unreasonably dangerous to the user, might be unmerchantable if it contained a chemical which caused bred cattle to abort or breeder bulls to become sterile, and was not adequately labeled.⁷⁹² The point, of course, is that within the contours of an agreement the goods may require appropriate labels to make them merchantable, and the practitioner who fails to raise label adequacy as an issue may invite the denial of recovery in a case which does not readily fit within an alternative theory.

788. *Id.*

789. U.C.C. § 2-314, Comment 10.

790. *See, e.g.*, *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782 (Minn. 1977); *Wolfe v. Ford Motor Co.*, _____ Mass. App. _____, 376 N.E.2d 143 (1978) (cases cited therein).

791. RESTATEMENT (SECOND) OF TORTS § 402(A)(1) (1965).

792. *See Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968) (court relied on breach of warranty that goods be fit for an ordinary purpose for which the goods are used under section 2-314(2)(c)).

e. Conformity with Affirmations on the Label or Container

Closely related to the preceding minimum standard is the fifth standard, that goods must conform to the promises or affirmations set forth on the container or label.⁷⁹³ Furthermore, the probability is that any promises or affirmations of fact contained on the label or container would be deemed to create express warranties under section 2-313.⁷⁹⁴ It is not altogether clear why the drafters of the Code thought it necessary to include subsection (2)(f), in light of the earlier provision for express warranties in section 2-313.⁷⁹⁵ One can only speculate that the drafters may have wanted to make it clear that, even though the implied warranty might be disclaimed, the express warranty would remain. Additionally, the drafters may have sought to indicate to courts that, even though label promises or affirmations might not go to the "basis of the bargain"⁷⁹⁶ under section 2-313, they were so fundamental to the parties' expectations that they would create implied warranties.⁷⁹⁷ In any event, because of the overlap of the two sections the problems likely to arise under one will to a large extent mirror those arising under the other.

Only a handful of cases have made express reference to subsection (2)(f).⁷⁹⁸ The clearest cases concerning failure to meet the standard involve undisputed mislabeling, as where seed is labeled as one thing and turns out to be another.⁷⁹⁹ Slightly less clear are the cases which involve puffing. As has already been noted in connection with express warranties, puffing or sales talk may not give rise to express warranty liability. In cases involving puffing, the question becomes whether it should give rise to implied warranty liability when the "puff" is contained on the label. Logically, the result should be the same as in the express warranty cases, although there is some authority to the contrary.⁸⁰⁰

Finally, there are cases in which warranty liability remains unclear, as where the label contains no express promises or affirmations of fact relevant to the dispute, but the container itself

793. U.C.C. § 2-314(2)(f) [N.D. CENT. CODE § 41-02-31(2)(f)(1968)].

794. See *supra* notes 18-22 and accompanying text.

795. U.C.C. § 2-313 [N.D. CENT. CODE § 41-02-30 (1968)].

796. U.C.C. § 2-313(1)(a) [N.D. CENT. CODE § 41-02-30(1)(a)(1968)].

797. See U.C.C. § 2-314, Comment 10.

798. See *Agricultural Serv. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977); *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); *Farmers Union Coop. Gin v. Smith*, 9 U.C.C. REP. SERV. 823 (Okla. Ct. App. 1971); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968); cf. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

799. See, e.g., *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977); *Farmers Union Coop. Gin v. Smith*, 9 U.C.C. REP. SERV. 823 (Okla. Ct. App. 1971).

800. See *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975) (package labeled "completely safe," product caused injury; held implied warranty of complete safety breached, express warranty breached as well).

may infer some.⁸⁰¹ The case of *Coffer v. Standard Brands, Inc.*⁸⁰² is illustrative. Plaintiff purchased a clear glass jar filled with nuts and labeled only "Planters Dry Roasted Mixed Nuts, no oils or sugar used in processing."⁸⁰³ The jar in fact contained mixed nuts, although plaintiff had the misfortune to find an unshelled nut among the shelled nuts, which damaged his teeth.⁸⁰⁴ The court declared that no express warranties were breached, and addressed the question of whether the "clear glass jar revealing only shelled nuts was a 'promise or affirmation of fact' "⁸⁰⁵ under section 2-314(2)(f). The court ruled that such an approach would be inconsistent with the general concept of merchantability.⁸⁰⁶ Although the question seems to be a close one, there apparently is no reason why the buyer's observations could not infer the affirmation of fact, thereby creating the warranty. Had the label contained the word "shelled," the warranty arguably would have existed. Since the subsection provides that affirmations on the label *or container* may imply the warranty,⁸⁰⁷ there is every reason to imply it when the product is visible through the container and the buyer infers a fact from what he actually sees. On the other hand, there are good reasons for caution before making liability depend upon the clarity of the packaging.

f. Fitness for Ordinary Purpose

By far the most important and most often invoked minimum standard for determining whether goods are merchantable is contained in section 2-314(2)(c), which provides that at a minimum merchantable goods must be "fit for the ordinary purposes for which such goods are used."⁸⁰⁸ In fact, many people refer to the standard as a synonym for merchantability. The subsection has been described as the heart of the concept of merchantability,⁸⁰⁹ and there can be little doubt that this description is appropriate.

Fitness for ordinary purpose does not mean perfection,⁸¹⁰ nor

801. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

802. 30 N.C. App. 134, 226 S.E.2d 534 (1976).

803. *Id.* at _____, 226 S.E.2d at 536.

804. *Id.* at _____, 226 S.E.2d at 535.

805. *Id.* at _____, 226 S.E.2d at 537.

806. *Id.*

807. U.C.C. § 2-314(2) [N.D. CENT. CODE § 41-02-31(2) (1968)].

808. U.C.C. § 2-314(2)(c) [N.D. CENT. CODE § 41-02-31(2)(c) (1968)].

809. *Wisniewski v. Great Atlantic & Pacific Tea Co.*, 226 Pa. Super. Ct. 574, 323 A.2d 744 (1974).

810. *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982, 403 N.Y.S.2d 322 (1978); *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 296 A.2d 269 (1972).

does it mean that the goods will be fit for all purposes.⁸¹¹ Additionally, fitness for ordinary purpose does not turn on whether the seller or manufacturer intended the goods to be used in a particular way, but rather depends upon whether the use to which the buyer put the goods was an ordinary one.⁸¹² Whether the buyer has used the goods in an ordinary manner will be a question of fact for the jury.⁸¹³

The huge number of pure warranty cases, coupled with the enormous overlap of both standard negligence law and strict liability in tort, makes it impossible to detail all of the variations existing in this area. A few observations are, however, in order.

i. Ordinary versus Extraordinary Use

At the outset, it is crucial to keep in mind two related aspects of fitness for ordinary purpose. First, by definition, ordinary purpose, and hence fitness, is dependent on whether goods are actually used in an ordinary manner. Thus, if the buyer's use is an extraordinary one, and the goods would have been capable of performing an ordinary use without malfunction, no warranty liability follows.⁸¹⁴ However, merely because a buyer uses goods in a manner not intended by the manufacturer or seller does not demonstrate an extraordinary use. The intent of the seller is not the key; rather, it is whether the buyer's use is ordinary. Thus, a chair is intended to be used for sitting, but if the buyer stands on it, as buyers often do, the chair, to be merchantable, must not break. One of the most common misstatements by courts is to refer to the warranty of merchantability as one of fitness for "intended use."⁸¹⁵

These two aspects of the warranty of fitness for ordinary purpose are readily illustrated. The earliest post-Code case which discusses these aspects of ordinary purpose is *Robert H. Carr & Sons v. Yearsley*,⁸¹⁶ which held that defendant's demurrer to a breach of implied warranty claim could not be sustained on the allegation that the ordinary purpose for which a "log chain" was used did not

811. See *Wisconsin Elec. Power Co. v. Zallea Bros.*, 443 F. Supp. 946 (E.D. Wis. 1978), *aff'd*, 606 F.2d 697 (7th Cir. 1979); *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537 (D. Mass. 1977); *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969).

812. See, e.g., *Kelly v. Hanscom Bros.*, 231 Pa. Super. Ct. 357, 331 A.2d 737 (1974).

813. See *Brickman-Joy Corp. v. National Annealing Box Co.*, 459 F.2d 133 (2d Cir. 1972).

814. On the other hand, the mere fact that the buyer's use is an extraordinary one should not preclude liability if the buyer can prove that the goods were unfit even for ordinary purposes. See *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, 190 N.W.2d 275 (1971); cf. *Texsun Feedyards, Inc. v. Ralston Purina Co.*, 311 F. Supp. 644 (N.D. Tex. 1970), *aff'd in part and rev'd in part*, 447 F.2d 660 (5th Cir. 1971) (contributory negligence not a defense when buyer proves that goods were not otherwise fit for ordinary purposes).

815. See, e.g., *Butterfield v. Pepsi-Cola Bottling Co.*, 210 Kan. 123, 499 P.2d 539 (1972).

816. 1 U.C.C. REP. SERV. 97 (Pa. Ct. C.P. 1963).

encompass towing a Mack truck.⁸¹⁷ Thus, the defendant was required to affirmatively show that towing a truck was outside the ordinary purposes for which a log chain would be used.⁸¹⁸ Since it did not do so, plaintiff was found to have stated a cause of action.⁸¹⁹

To find that the buyer's use will defeat a demurrer, absent proof that it is an extraordinary use, answers only one part of the question. The second part is how to determine an ordinary use. In addressing this question, courts have fashioned various tests. One, articulated in *Brickman-Joy Corp. v. National Annealing Box Co.*,⁸²⁰ asks whether the buyer's use accords with that of "an appreciable number" of like users.⁸²¹ If it does, it is an ordinary use, notwithstanding that other users would not have so used the product, or that the buyer's use was not completely in conformity with standard industry codes or practices.⁸²²

A second test may have been advanced by the court in *Kelly v. Hanscom Bros.*,⁸²³ which involved a cross-claim by a defendant retailer against its supplier. In discussing whether the warranty of merchantability which accompanied a child's toy was breached,⁸²⁴ the court concluded that the "universal penchant"⁸²⁵ of children to put things in their mouths, including toys, would qualify it as an ordinary use, even though it might not be an intended use.⁸²⁶ Presumably, any use of a product which could fairly be described as embodying a "universal penchant" would create the warranty, since it would then amount to an ordinary purpose.

One of the most fertile areas of the case law articulating tests for ordinary use and distinguishing intended use has been the automobile crashworthiness, or second collision, cases. Although the problems involved and the sheer number of cases preclude extended discussion here,⁸²⁷ the tests advanced and the logic behind them deserve mention.

The second collision cases involve what is a deceptively simple question: Must the manufacturer of an automobile design the

817. *Robert H. Carr & Sons v. Yearsley*, 1 U.C.C. REP. SERV. 97, 99 (Pa. Ct. C.P. 1963).

818. *Id.*

819. *Id.*

820. 459 F.2d 133 (2d Cir. 1972).

821. *Brickman-Joy Corp. v. National Annealing Box Co.*, 459 F.2d 133, 136 (2d Cir. 1972).

822. *See Handrigan v. Apex Warwick, Inc.*, 108 R.I. 319, 275 A.2d 262 (1971) (ladder user who deviated from standard code for ladders was not barred from merchantability recovery).

823. 231 Pa. Super. Ct. 357, 331 A.2d 737 (1974).

824. *Kelly v. Hanscom Bros.*, 231 Pa. Super. Ct. 357, 331 A.2d 737 (1974). *Kelly* involved the choking death of a small child. *Id.*

825. *Id.* at _____, 331 A.2d at 739.

826. *Id.*

827. For discussions of this area, see Cousins, *Second Impact — Principles of Crashworthiness*, 11 TRIAL LAW. Q. 18 (1976); Golden, *Automobile Crashworthiness — The Judiciary Responds When*

vehicle so that, in the event of accident, the passengers will not be further injured by defects inherent in the automobile? This may depend upon a variety of questions, including whether the manufacturer was negligent, whether strict liability in tort should be imposed, and, finally, whether the automobile is merchantable. Merchantability, of course, depends upon whether a collision is an ordinary use of an automobile.

The obvious, impulsive answer is that one does not ordinarily use an automobile for purposes of crashing into other objects. Equally obvious, however, is the fact that "appreciable numbers" of people do unintentionally use cars in that fashion, and that there is a "universal penchant" for cars to be involved in accidents. Thus, the question arises whether, given the fact that cars are often involved in accidents, this may amount to an ordinary use, so that the car is unmerchantable when it fails to protect the passengers from increased injuries in the event of a crash. There has been anything but unanimity on this issue in the courts.

What is important here is not whether a car must offer total safety or whether liability may exist apart from warranty; the primary inquiry for the purposes of this discussion is what tests have been advanced for determining whether a crash is an ordinary purpose. Clearly the test could not be based upon intended use, for no one would argue that crashes were intended uses. Rather, the courts have expressed the test as whether the use could be "anticipated,"⁸²⁸ and whether it was "foreseeable or inevitable."⁸²⁹ This would imply as part of the warranty that there is "a reasonable measure of safety"⁸³⁰ when a collision occurs. Perhaps the best test combines both the intended purpose and the foreseeable use,⁸³¹ and makes the determination of merchantability a factual question for the jury.

The thrust of the second collision cases is clear, and their impact in determining what constitutes an ordinary use of goods cannot be underestimated. While courts often speak in terms of the intended use of the product,⁸³² their opinions cannot be read to mean that manufacturer or seller intent is controlling, for if it were the second collision cases could not have arisen. Rather, the courts

Manufacturers Improperly Design Their Cars, 46 INS. COUNSEL J. 335 (1979); Sklaw, "Second Collision" Liability: The Need for Uniformity, 4 SETON HALL L. REV. 499, 507-24 (1973).

828. *Isaacson v. Toyota Motor Sales, U.S.A., Inc.*, 438 F. Supp. 1 (E.D.N.C. 1976).

829. *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974).

830. 272 Md. at _____, 321 A.2d at 745.

831. *Back v. Wickes Corp.*, _____ Mass. _____, 378 N.E.2d 964 (1978).

832. See *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970); *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975).

which equate intended use with merchantability either do so only to demonstrate that the use of the goods was clearly abnormal or misspeak themselves entirely.

From the foregoing it is readily apparent that ordinary use will be dependent upon a number of factors, including some which appear more frequently in tort law than in contract law. To add to the confusion, the author would propose the following test for whether a use is ordinary: Could the seller have reasonably foreseen that a substantial number of persons in the position of the plaintiff would have made use of the goods in the manner in which he did? If so, the use is an ordinary one, and the failure of the goods to satisfactorily perform that use results in a breach of warranty.

Closely related to the question of ordinary use is the fact, implicit in section 2-314(2) (c), that goods can be merchantable and not capable of performing an extraordinary use. Merchantability does not require that goods perform abnormal, extraordinary uses, or that they perform well when they are misused. Although courts occasionally equate abnormal or extraordinary use with misuse, the concepts are distinct, and their distinctions should be kept intact. Furthermore, to the extent that misuse involves some affirmative inappropriate use of the goods, the "misuse defense" often becomes tantamount to a defense of contributory negligence or assumption of risk, which should be kept distinct from the abnormal use warranty case.

ii. Abnormal Use

An abnormal use, as distinguished from misuse, is involved when goods are being used to perform a function different from that which the seller could have reasonably foreseen.⁸³³ Defined in that manner, abnormal use might include misuse, as where the buyer uses a power lawnmower to trim hedges. However, when the seller asserts that abnormal use has occurred, he is not necessarily attempting to deny liability for damages caused to the buyer. Rather, he is asserting that the concept of merchantability does not embrace the use to which the buyer put the goods. When the seller asserts misuse, he is attempting to show that the buyer, because of the way in which he used the goods, caused or contributed to the injury received, and therefore that merchantability ceases to be an issue. In this light, abnormal or extraordinary use will generally be urged as a defense when the claim of the buyer is based on loss of

833. See, e.g., *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975).

bargain. Misuse will be urged defensively when the loss is consequential.

Thus, for example, where the buyer of a small car asserts unmerchantability when the car is incapable of towing a large trailer, the seller could defend on grounds of abnormal use.⁸³⁴ If the small car exploded, the seller might defend on grounds of misuse. The point, of course, is that there is a difference between a buyer asserting that the goods do not adequately perform the function he desires and asserting that the goods are unmerchantable. Few cases, however, have articulated this difference, in part because of the equation of abnormal use with misuse.

Illustrative is *Gilbert & Bennett Manufacturing Co. v. Westinghouse Electric Corp.*,⁸³⁵ which involved the commercial sale of a Precipitron, a pollution control device, by the defendant to the plaintiff.⁸³⁶ The plaintiff, a metal fence manufacturer, coated the metal with plastisol, a plastic covering.⁸³⁷ The plastisol coating process emitted noxious smoke and odor, and required the use of a pollution control device.⁸³⁸ Plaintiff had previously used a thermal oxidizer to control the smoke and odors, but this was more expensive than the Precipitron.⁸³⁹ Plaintiff ordered and received a Precipitron, and it failed to remove the smoke and odors effectively.⁸⁴⁰ Plaintiff ran afoul of local pollution control laws, and eventually had to replace the Precipitron with a thermal oxidizer.⁸⁴¹ Plaintiff sued defendant for breach of express and implied warranties.⁸⁴²

The district court found that there were no express warranties and that the implied warranties had been effectively disclaimed.⁸⁴³ Nevertheless, because it reached that conclusion on the basis of questionable authority, the court felt compelled to determine whether the Precipitron was merchantable.⁸⁴⁴ The court stated:

“Merchantable quality” means that the good shall be

834. Other examples of abnormal use are readily imaginable. An air conditioner which is too small to cool a given room may be merchantable, but incapable of performing to the buyer's satisfaction; the child's toy designed for one age group may not fit a child even within the age group and yet still be merchantable; the ladder which will hold a 175 pound man, but not a 250 pound man, might nevertheless be merchantable.

835. 445 F. Supp. 537 (D. Mass. 1977).

836. *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537 (D. Mass. 1977).

837. *Id.* at 539.

838. *Id.* at 540.

839. *Id.*

840. *Id.*

841. *Id.*

842. *Id.* at 543.

843. *Id.* at 547.

844. *Id.*

reasonably suitable for ordinary uses for which goods of that kind and description are sold. . . . The Precipitron is ordinarily used "for normal air cleaning or for oil mist control. . . ." The fact that the Precipitron . . . was not designed to control the large quantity of plastisol particulate matter and odors emanating from G & B Co's . . . plant does not mean that the Precipitron was not merchantable.⁸⁴⁵

Thus, the mere fact that the product does not live up to the buyer's expectations does not render it unmerchantable, so long as the product would have performed its usual or ordinary functions.⁸⁴⁶ Thus, pipe which meets industry standards has been held to be merchantable even though it corrodes when subjected to some unknown, highly corrosive element.⁸⁴⁷ Also, a hoist which is overloaded and falls is not thereby deemed unmerchantable, since the hoist would have worked properly under normal use.⁸⁴⁸ The results are dictated by good sense and party expectation, since the buyer can only expect that the goods will perform ordinary purposes (absent particular purpose warranty circumstances), and not that they will perform all purposes.

iii. Misuse

It will often occur that the buyer is not merely using the goods for purposes beyond their capabilities, but that he is abusing or misusing them, under circumstances where the misuse causes injury. If it can be said that the misuse is the cause of the inability to perform, and not that the goods themselves were unfit, the seller should not be responsible. Again, the concept of merchantability does not require that the goods be indestructable, or that they will not cause injury if abused. The questions in these cases will be whether the use is ordinary, whether the goods were otherwise fit for ordinary uses, and whether it was the buyer's use of the goods or the goods themselves which created the risk of harm. These considerations have led many courts to speak in terms more properly considered in tort law, such as contributory negligence

845. *Id.* at 548.

846. *See also* Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp., 62 A.D.2d 982, 403 N.Y.S.2d 322 (1978) (cement trucks merchantable even though they were unfit for particular purpose of buyer, and even though they occasionally broke down).

847. Wisconsin Elec. Power Co. v. Zallea Bros., 443 F. Supp. 946 (E.D. Wis. 1978), *aff'd*, 606 F.2d 697 (7th Cir. 1979). *See also* Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33 (10th Cir. 1975) (decided without reference to U.C.C.).

848. Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1975) (court speaks of misuse; abnormal use probably more likely).

and assumption of risk. While one can readily appreciate why courts would feel the need to express themselves in those terms, to do so is to invite confusion, since, as long as the claim is breach of warranty and not negligence, the buyer's negligence should play no part in the analysis. What causes courts to refer to contributory negligence and assumption of risk is the belief that a buyer should not be allowed to knowingly use unfit goods to his detriment and then shift the risk of his unreasonable actions to the seller. Unfortunately, the articulation of this belief in traditional tort terminology has created an incredibly confusing array of cases which yield little clarity, even upon close examination.

The crucial question is "whether the causal connection between the defendant's act and the plaintiff's injury is sufficiently close to justify liability."⁸⁴⁹ In Code terms, the question is whether the loss resulted "in the ordinary course of events from the seller's breach,"⁸⁵⁰ whether "special circumstances show proximate damages"⁸⁵¹ beyond diminution in value, and, where there has been injury to person or property, whether it "proximately result[ed] from any breach of warranty."⁸⁵² All of these concepts are embodied in the comment to section 2-314, which provides:

In an action based on breach of warranty, it is of course necessary to show . . . that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. . . . Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.⁸⁵³

Because of conflicting decisions, it cannot be said categorically that contributory negligence does not operate to bar the buyer's action. Clearly, however, the doctrine has no application in the initial determination of whether the goods are merchantable. That is not to say that the buyer's actions have no bearing on his recovery. Only if the buyer's actions, and not the breach of warranty, caused the damage should the buyer be denied recovery.

849. WHITE & SUMMERS, *supra* note 62, at 411.

850. U.C.C. § 2-714(1) [N.D. CENT. CODE § 41-02-93(1) (1968)].

851. U.C.C. § 2-714(2) [N.D. CENT. CODE § 41-02-93(2) (1968)].

852. U.C.C. § 2-715(2)(b) [N.D. CENT. CODE § 41-02-94(2)(b) (1968)].

853. U.C.C. § 2-314, Comment 13.

The North Dakota Supreme Court has not yet addressed this issue. A number of other jurisdictions have, however, and their rulings range from absolute denial of the efficacy of contributory negligence⁸⁵⁴ to acceptance of the doctrine entirely.⁸⁵⁵ Other courts have accepted the doctrine only insofar as it relates to assumption by the buyer of a known risk.⁸⁵⁶

The only suitable way for the courts to resolve this confusion is to avoid the use of imprecise phrases such as contributory negligence and assumption of risk, and to address the central question of whether the breach or the buyer's actions caused the injury. This is the approach taken by the Supreme Court of Texas in *Signal Oil & Gas Co. v. Universal Oil Products*,⁸⁵⁷ in assessing the buyer's right to consequential damages. Presented with both an unmerchantable product and seller negligence, the court adopted a "concurring proximate cause" test, which allowed the plaintiff to recover that portion of the damages attributable to the breach of warranty, but not those damages proximately caused by his own acts or omissions.⁸⁵⁸ Such allocation is suggestive of a form of comparative negligence, but the court specifically delineated the differences between the two approaches.⁸⁵⁹ One of the most important differences is that a seller may still be liable for breach of warranty when he has not been negligent in any way.⁸⁶⁰ If the courts undertake a concurring proximate cause analysis, they will readily be able to allocate damages justly, and at the same time accord a disappointed buyer the degree of protection he legitimately expected from the implied warranty accompanying the product.

In fairness to the courts which have struggled with this issue, most of them have been sufficiently aware of the incongruity of

854. *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Pioneer Hi-Bred Corn Co. v. Northern Ill. Gas Co.*, 16 Ill. App. 3d 638, 306 N.E.2d 337 (1973); *Hubert v. Federal Pac. Elec. Co.*, 208 Kan. 720, 494 P.2d 1210 (1972); *Young v. Coca-Cola Bottling Co.*, 109 R.I. 458, 287 A.2d 345 (1972) (under section 2-315); *Imperial Die Casting Co. v. Civil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975); *Fredrick v. Dreyer*, _____ S.D. _____, 257 N.W.2d 835 (1977).

855. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 271 A.2d 744 (1970); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Minn. 1978); *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970).

856. *See Phillips v. Allen*, 427 F. Supp. 876 (W.D. Pa. 1977) (assumption of risk); *Hensley v. Sherman Car Wash Equip. Co.*, 33 Colo. App. 279, 520 P.2d 146 (1974) (contributory negligence not a defense unless it amounts to assumption of risk); *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, *rev'd on other grounds*, 237 Ga. 554, 229 S.E.2d 379 (1976) (contributory negligence per se not a defense, but goes to issue of causation); *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1975) (assumption of risk); *Goblirsch v. Western Land & Roller Co.*, 311 Minn. 512, 246 N.W.2d 687 (1976) (assumption of risk); *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971) (assumption of risk).

857. 572 S.W.2d 320 (Tex. 1978).

858. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 328 (Tex. 1978).

859. *Id.*

860. *Id.* at 329.

applying standard tort doctrine to temper their opinions.⁸⁶¹ Thus, a number of cases indicate that contributory negligence will be a defense, but couch their rulings in terms of assumption of risk, proximate causation, or encountering a known risk.⁸⁶² Still, only a very few courts are sufficiently aware of the problem to analyze beyond the convenient catchwords.⁸⁶³ Until the courts clearly define what it is that they are doing and clearly articulate why they are doing it, the area will likely remain confused.

Questions concerning the proximate cause of the buyer's damages may arise in a variety of settings. The first of these occurs when a buyer discovers or should have discovered a defect, but continues to use the goods in spite of his discovery.⁸⁶⁴ The question of proximate cause may also arise where the seller foresees a risk of harm from an unintended use of the product and the buyer is thereby harmed.⁸⁶⁵ Similarly, the problem may arise when the buyer has been warned of the risk but fails to read or ignores the warning.⁸⁶⁶ In all other settings proximate cause analysis will be unnecessary, since the goods are either merchantable or not. If the product is merchantable the injury is not caused by unmerchantability, and there is thus no basis for recovery under the Code. If the goods are not merchantable, the plaintiff's actions could not be a concurrent cause of his injuries. Thus, for example, a chemical which is by nature poisonous or inflammable is not thereby unfit or unmerchantable, so that if the plaintiff is injured his injury is not traceable to the merchantability of the product.⁸⁶⁷ Similarly, a power saw which is capable of severing a hand is not

861. See, e.g., *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Pioneer Hi-Bred Corn Co. v. Northern Ill. Gas Co.*, 16 Ill. App. 3d 638, 306 N.E.2d 337 (1973); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Minn. 1978).

862. See *supra* notes 854-56 and accompanying text.

863. See *Herman v. Midland AG Serv., Inc.*, 200 Neb. 356, 264 N.W.2d 161 (1978) (proximate cause).

864. *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971); *Phillips v. Allen*, 427 F. Supp. 876 (W.D. Pa. 1977); *Hensley v. Sherman Car Wash Equip. Co.*, 33 Colo. App. 279, 520 P.2d 146 (1974) (express warranty); *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 271 A.2d 744 (1970); *Buttrick v. Arthur Lessard & Sons*, 110 N.H. 36, 260 A.2d 111 (1969); *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (Tex. 1978); *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

865. It is here that the second collision cases enter. By definition, the use of the buyer is ordinary, since it is foreseeable and engaged in by substantial numbers. Yet the buyer's unreasonable action in, for example, speeding, becomes a concurring proximate cause. See *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974); *Phillips v. Allen*, 427 F. Supp. 876 (W.D. Pa. 1977); *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1972); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

866. Again, by definition, this is an ordinary purpose, but here the unfitness is known by the seller and communicated to the buyer. If the buyer fails to heed the communication, his actions become a concurring cause. See *Phillips v. Allen*, 427 F. Supp. 876 (W.D. Pa. 1977); *McCleskey v. Olin Mathieson Chem. Corp.*, 127 Ga. App. 178, 193 S.E.2d 16 (1972); *Chisholm v. J.R. Simplot Co.*, 94 Idaho 628, 495 P.2d 1113 (1972).

867. See *Wilhelm v. Globe Solvent Co.*, 373 A.2d 218 (Del. Super. Ct. 1977).

thereby unmerchantable, and the plaintiff who in ordinary use loses a hand will have no remedy.⁸⁶⁸ However, an unmerchantable saw which in ordinary use kicks back, thereby injuring the plaintiff, is not made merchantable or less defective by the fact that the plaintiff exercised less than ordinary care.⁸⁶⁹

It has been suggested that traditional tort defenses have no place in a pure warranty case, other than as an adjunct to proof of proximate cause. To the extent that the theory of the lawsuit is other than pure warranty, the tort concepts do retain validity and will undoubtedly continue to be invoked. So long as courts recognize that the validity of the defenses depends upon the type of action brought, no great harm will occur. However, failure to keep the actions distinct will invariably lead to recovery where none should lie, or to inappropriate insulation of defendants.

Beyond the questions of whether the goods are merchantable and whether, if they are not, the buyer has concurrently caused his injury, there are questions which will arise as to how one measures merchantability. This is necessary to insure that the buyer gets what he bargained for and that the seller is held responsible for no more than what he legitimately agreed to provide. It must be remembered that merchantability as a concept does not arise in the abstract. Rather, it arises relative to goods, and different goods will have to meet different standards of merchantability, depending upon their characteristics and the characteristics and expectations of the parties. For example, a new car is expected by virtue of its character as a new car to provide "reasonable safety, efficiency and comfort."⁸⁷⁰ However, the degree of safety, efficiency, and comfort is dependent on factors other than newness, such as "the size, model and power of the vehicle."⁸⁷¹ Thus, while everyone would agree that an automobile would not be merchantable if it burst into flames, not everyone would agree that an automobile could not be merchantable if it required extensive repairs.

iv. Used Goods and Second Quality Goods

The foregoing observations are so obvious that their importance is often overlooked. When that happens there is significant risk that an inappropriate view of merchantability will be taken and liability will attach where none should, or exculpation

868. See *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970) (court found breach of implied warranty under the Code, assuming existence of "merchantable" product).

869. *Id.*

870. *Berg v. Stromme*, 79 Wash. 2d 184, _____, 484 P.2d 380, 386 (1971) (pre-Code).

871. *Id.*

will exist where responsibility should lie. Nowhere is the risk greater than in the area of used goods, or goods known to be of second quality. The courts have avoided the risk by focusing on the "operative qualities" of the goods, and by inquiring into the legitimate expectations of the parties.⁸⁷² This appears consistent with the Code and its comments, which indicate that, although used goods are covered by section 2-314, the scope of that coverage is limited to the legitimate expectations of the parties.⁸⁷³

Three cases, *Testo v. Russ Dunmire Oldsmobile, Inc.*,⁸⁷⁴ *Tracy v. Vinton Motors, Inc.*,⁸⁷⁵ and *Sylvia Coal Co. v. Mercury Coal & Coke Co.*,⁸⁷⁶ are illustrative of the Code's coverage of used goods and goods known to be of second quality. Since automobiles are frequently the subject of second-hand sales, many of the cases discussing used goods involve cars, and *Testo* and *Tracy* are neither isolated nor unique in this regard.⁸⁷⁷ They are, however, two of the more recent cases, and clearly demonstrate the typical approach of the courts.

In *Testo*, the plaintiff and his wife purchased a used car from the defendant.⁸⁷⁸ Unknown to the plaintiff purchaser, but known to the seller, the car had been used for racing and had been modified for those purposes.⁸⁷⁹ Although the car was fitted with substantial amounts of "racing equipment," the court found that there was nothing to put the plaintiff on notice that it had been raced.⁸⁸⁰ Shortly after the purchase, the car overheated and would not restart until it was completely cooled, a pattern which continued in spite of plaintiff's minor repair efforts, and which was caused by the racing modifications.⁸⁸¹ Defendant offered to repair the car and split the cost with the plaintiff.⁸⁸² Plaintiff refused, and eventually brought suit to revoke his acceptance. The court held that the acceptance could be revoked, because there had been a breach of the implied

872. See *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975).

873. U.C.C. § 2-314, Comment 3. The focus on expectation should also yield correct results when the goods possess certain characteristics known to be possessed by all like goods, as where shoes are known to get slippery when they are wet, or a bathtub is known to be slippery when wet. See *Rupee v. Mobile Home Brokers, Inc.*, 124 Ga. App. 86, 183 S.E.2d 34 (1971) (showers with sharp edges); *Fanning v. LeMay*, 38 Ill. 2d 209, 230 N.E.2d 182 (1967) (shoes, Code not relied on).

874. 16 Wash. App. 39, 554 P.2d 349 (1976).

875. 130 Vt. 512, 296 A.2d 269 (1972).

876. 151 W. Va. 818, 156 S.E.2d 1 (1967).

877. See also *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).

878. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 41, 554 P.2d 349, 352 (1976).

879. *Id.*

880. *Id.* at 45, 554 P.2d at 354.

881. *Id.* at 42, 554 P.2d at 352.

882. *Id.* at 42, 554 P.2d at 353.

warranty of merchantability.⁸⁸³

In order to reach that conclusion the court had to first determine whether the warranty accompanied used goods, and, if so, the extent of its scope.⁸⁸⁴ The court concluded that the warranty did exist, and, citing two earlier cases⁸⁸⁵ from other jurisdictions, stated:

The obligation appropriate to the sale of used goods is primarily directed at the operative essentials of the product Thus, the measure of a used car's merchantability turns not so much on aesthetic items which, of necessity, must yield to age and previous use, . . . but on its operative qualities. The price at which a merchant is willing to sell an item is an excellent index of the extent of quality warranted and the nature and scope of his obligation.⁸⁸⁶

In other words, operative qualities, functional utility, and party expectation based upon objective factors such as price, age, and prior use will determine the scope of warranty responsibility. Although not significantly different from the factors employed in the determination of the scope of the warranty with respect to new goods, in that area these factors are often overlooked. With respect to used goods, failure to consider these objective factors would be a critical mistake.

In *Testo*, the car's ability to function as an "ordinary" vehicle was so central to the operative qualities as to make the failure a breach of warranty.⁸⁸⁷ In *Tracy v. Vinton Motors, Inc.*, the court, employing the same tools and analysis, found that the defect did not seriously affect the operative essentials. Therefore, since the goods were used goods, no breach was found.⁸⁸⁸

In *Tracy*, the plaintiffs purchased a two-year-old Oldsmobile and, after the thirty-day express warranty had expired, requested that the defendant repaint it, since they were dissatisfied with the existing paint job.⁸⁸⁹ Repainting the car would have cost \$400, and the defendant refused.⁸⁹⁰ Plaintiff sued, alleging breach of the

883. *Id.* at 46-47, 554 P.2d at 356.

884. *Id.* at 44, 554 P.2d at 354.

885. *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968), quoting *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967).

886. 16 Wash. App. at 43-44, 554 P.2d at 354 (citation omitted).

887. *Id.* at 44, 554 P.2d at 354.

888. *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, _____, 296 A.2d 269, 272 (1972).

889. *Id.* at _____, 296 A.2d at 270.

890. *Id.*

implied warranty of merchantability.⁸⁹¹ The court found that the express warranty had expired, but that the defendant had not properly disclaimed the implied warranty.⁸⁹² The court assumed the existence of an implied warranty of merchantability for used cars and reasoned that, since merchantability as it pertains to new cars is directed primarily at “ordinary use,” “operative essentials,” and “operational safety,” it should certainly not be broader as it pertains to used cars.⁸⁹³ Therefore, the court held that even if a warranty existed it would not embrace “the exterior finish on a two year old used car.”⁸⁹⁴ Again, it is clear that with respect to used goods the focus will be on functional utility, objectively measured, rather than on aesthetic characteristics.⁸⁹⁵

If the correct focus of merchantability in the used goods context is on operative quality, essentials, and objective expectations, it is even more appropriate when the subject of the sale is second quality goods. Like the cases involving used goods, where the scope of the warranty is circumscribed by age and prior use, those involving new but second quality goods of necessity deal with warranty responsibility from a more narrow perspective. Here the focus must be on the reasonable expectations of both parties. This suggests that merchantability will be based not on operative essentials, but rather on other objective criteria, including price, expected quality, and trade usage.

*Sylvia Coal Co. v. Mercury Coal & Coke Co.*⁸⁹⁶ provides an interesting example. Plaintiff had sold over 1,400 tons of coal to the defendant for the alleged price of \$2.50 per ton.⁸⁹⁷ The defendant had seen much of the coal in piles at plaintiff’s mine, and intended to use it for coking. When the coal was delivered, its ash content was found to be too high for coking, and the defendant attempted to reject it.⁸⁹⁸ Plaintiff, in turn, sued for the price of the coal and was awarded \$1,000 by the jury.⁸⁹⁹ The Supreme Court of Appeals of West Virginia affirmed the jury award.⁹⁰⁰

At issue was whether there were express and implied warranties, and much of the court’s opinion merely reiterates the

891. *Id.* at _____, 296 A.2d at 272.

892. *Id.* at _____, 296 A.2d at 271-72.

893. *Id.* at _____, 296 A.2d at 272.

894. *Id.*

895. For a case applying similar analysis (albeit probably too broadly) to a situation involving used goods other than automobiles, see *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. N.Y. 1972).

896. 151 W. Va. 818, 156 S.E.2d 1 (1967).

897. *Id.* at _____, 156 S.E.2d at 3.

898. *Id.* at _____, 156 S.E.2d at 4-5.

899. *Id.* at _____, 156 S.E.2d at 3.

900. *Id.* at _____, 156 S.E.2d at 8.

proposition that questions of warranty existence are for the jury. The court indicated that the evidence was in serious dispute, and therefore the controversy was particularly appropriate for jury resolution.⁹⁰¹ Beyond that, however, the court considered the scope of the warranty of merchantability in this sale.

The court noted that trade testimony existed as to party expectations in a sale of this character.⁹⁰² This included trade usage which allowed buyers to reject coal with excessive ash content, and usage which curtailed the right of rejection in the event the buyer had previously seen the coal. The court also commented on the plaintiff's testimony that he had told the defendant that the coal was substandard, which, if believed, would reduce expectations.⁹⁰³ Finally, the best objective criterion of all was the fact that the standard price for coking coal ranged from \$4.50 to \$7.00 per ton, whereas the price agreed to here was \$2.50 per ton.⁹⁰⁴ Citing comment 7 to section 2-314, the court ruled that in determining the expectations of the parties relative to particular goods, the price at which the goods were sold was an excellent indicator of the expected quality.⁹⁰⁵ Since the price here was half the normal price, the jury was entitled to find that the warranty of merchantability was limited accordingly.⁹⁰⁶

901. *Id.*

902. *Id.* at _____, 156 S.E.2d at 5.

903. *Id.* at _____, 156 S.E.2d at 4.

904. *Id.*

905. *Id.* at _____, 156 S.E.2d at 7.

906. *Id.* As indicated, these same tests will play a role in regard to new goods, but their impact in that area is often overlooked. By similar analysis, most other questions regarding warranty scope can be resolved both rationally and fairly. Among the other questions regarding warranty scope are whether the warranty attaches at all to transactions, and whether the warranty extends beyond the physical properties of the goods. The former question was previously discussed in connection with the sales-service dichotomy. The question appears occasionally in other contexts, for example, whether non-traditional things are goods, or whether the warranty should apply in a clearly non-goods setting. Because most courts interpret the Code broadly, one would expect that the warranty sections would cover almost any transaction. *See, e.g.,* Public Finance Corp. v. Furnitureland of Youngstown, Inc., 17 Ohio App. 2d 213, 245 N.E.2d 740 (1969) (warranty held to apply to seller of security agreement); A.L. Bell v. Harrington Mfg. Co., 265 S.C. 468, 219 S.E.2d 906 (1975) (warranty held to apply to seller of bulk tobacco curing barns).

At the present time, the courts are much less likely to impose warranty responsibility when there is a question whether the warranty extends beyond the physical properties of the goods. In the future, however, it is likely that courts will impose such responsibility. Viewed broadly in terms of either expectation or risk spreading, liability is probably appropriate. Narrowly considered, as in terms of operative essentials, liability will be slow in developing. *See, e.g.,* Flipppo v. Mode O'Day Frock Shops, 248 Ark. 1, 449 S.W.2d 692 (1970) (spider which was concealed in slacks in retail store and bit customer did not breach warranty of merchantability, since not within the physical characteristics of the goods); Cardozo v. True, 342 So. 2d 1053 (Fla. 1977) (seller of cookbook not liable to customer who was injured when recipe prepared therefrom caused illness; author, however, might be liable). An additional inquiry is whether the imposition of liability in such cases could have the desired effect of avoiding the harm caused, one of the goals of warranty law. If not, the question may become whether that alone is sufficient justification for not imposing liability. *Cf. Haralampopoulos v. Capital News Agency, Inc.*, 70 Ill. App. 2d 17, 217 N.E.2d 366 (1966) (retail seller whose liquor license was revoked for selling obscene magazines could not recover in warranty from distributor of magazines, in spite of the fact that license revocation was on ground that he knew or should have known of the obscene character).

The courts of North Dakota may in the future have occasion to consider the merchantability issues raised by used or second quality goods. They should have little difficulty in finding that the warranty exists, but that it is far narrower than the concomitant warranty which attaches to new goods. As a guide in determining the scope of the warranty, courts will be safe in employing an analysis based upon the objective factors surrounding such sales. With used goods, the controlling factors should be operative essentials, operative quality, functional utility, and price. With second quality goods, price, trade usage, and expectations of quality resulting from the appropriate commercial surroundings should control.

4. *Disclaimer of the Warranty of Merchantability*

As indicated earlier,⁹⁰⁷ all implied warranties under the Code are capable of being disclaimed, and the implied warranty of merchantability is no exception. Subsections (2) and (3) of section 2-316 govern such disclaimers. Subsection (2) provides that a written disclaimer of the warranty must mention "merchantability" and be conspicuous. As noted earlier, courts which look with disfavor on disclaimers generally will construe the conspicuousness requirement strictly, so that only disclaimers which clearly bring home their impact will be held to be effective. The requirement that "merchantability" be specifically mentioned is straightforward, and the cases rather consistently apply it so that failure to mention merchantability is fatal, even if equally clear language is used.⁹⁰⁸ At least one court has ruled that even where merchantability was mentioned it was ineffective, since it was directed at new goods, whereas the contract dealt with used goods.⁹⁰⁹

Unlike disclaimers of warranties for a particular purpose, which must be written, a disclaimer of merchantability could

907. See *supra* notes 298-354 and accompanying text for a detailed general discussion of disclaimers of implied warranties.

908. See *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976) ("There are no warranties express or implied" held ineffective because merchantability not mentioned). See also *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. 1977) (merchantability must be mentioned); *Orrox Corp. v. Rexnord, Inc.*, 389 F. Supp. 441 (M.D. Ala. 1975) (same); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972) (same); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972) (same); *Pearson v. Franklin Laboratories, Inc.*, ___ S.D. ___, 254 N.W.2d 133 (1977) (same). Cf. *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977) (merchantability not mentioned, but course of dealing excluded merchantability); *P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co.*, 568 P.2d 1273 (Okla. 1977) (indication that mere failure to mention merchantability, standing alone, might not vitiate disclaimer); *Recreatives, Inc. v. Myers*, 67 Wis. 2d 255, 226 N.W.2d 474 (1975) (court applied section 2-314(3) (a) to determine mention of "merchantability" unnecessary).

909. *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 296 A.2d 269 (1972).

presumably be made orally if the seller mentioned merchantability. This would be subject, of course, to parol evidence problems. Obviously, there is no conspicuousness requirement if the disclaimer is oral and the seller mentions merchantability, since by definition the oral disclaimer would be conspicuous.⁹¹⁰

Courts which examine specific disclaimers of merchantability do not have a difficult task. Whether the disclaimer mentions merchantability is either observable or a question of fact, and whether it is conspicuous will be a question for the court.⁹¹¹ Furthermore, as has already been noted, some states, including North Dakota, have legislatively resolved some of the more difficult questions likely to be raised, including those relating to human products and animals of certain kinds. The range of problems is thereby considerably narrowed.

a. "As Is" Clauses and Language Equivalents

The primary problems with disclaimers will arise under section 2-314(3), and in North Dakota under a unique statute passed in the heyday of the populist movement. Under section 2-314(3) there are, in addition to the specific means of disclaiming mentioned above, three general means of excluding all implied warranties. These may be effected without a writing, and without the mention of merchantability. They are the "as is" disclaimer, the buyer's examination, and usage of trade or course of dealing. Because all of these have been previously discussed at length, they will be only briefly considered here.

Subsection (3)(a) indicates that, in addition to the specific means of exclusion authorized by 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."⁹¹² This section is designed to enable parties to avoid the strictures of subsection (2), as long as the disclaimer of the implied warranty is stressed to the buyer and the parties' expectations are that no warranty has attached. Obviously, the first test of the language used is whether it would be commonly understood to exclude warranties. Thus, even if a seller used the

910. Cf. *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. N.Y. 1972) (oral statement of "as is" at start of auction not sufficient to put buyer on notice of disclaimer).

911. See U.C.C. § 1-201(10) [N.D. CENT. CODE § 41-01-11 (10) (Supp. 1979)].

912. U.C.C. § 2-314(3) [N.D. CENT. CODE § 41-02-31(3) (1968)].

prescribed "as is" or "with all faults" language, if it is not likely under the circumstances to be "commonly understood" as removing warranty responsibility, it should not be given that effect.

Most of the courts which have approached the issue of effectiveness of an "as is" clause have not, however, addressed this question directly. Rather, they have split the inquiry, asking first whether the language was placed in the agreement so as to draw attention to itself, and only then asking whether the buyer would have understood the language's impact. The courts have thus generally held that before language can commonly be understood to have an exclusionary meaning it must be conspicuous. This analysis effectively makes the initial question of disclaimer validity one of law and not of fact. Moreover, although conspicuousness is not explicitly required by the Code, the vast majority of cases correctly recognize that judicial engraftment of a conspicuousness requirement accords with the intent of the disclaimer section of the Code, in that it protects the buyer from surprise.⁹¹³

The premier case holding that conspicuousness is required before an "as is" clause will be given effect is *Gindy Manufacturing Corp. v. Cardinale Trucking Corp.*,⁹¹⁴ involving a commercial transaction. Using little authority, but with distinct and pressing logic, the court ruled that conspicuousness should be a condition precedent to an effective disclaimer.⁹¹⁵ Well-reasoned opinions following *Gindy* have been rendered by courts in Maryland,⁹¹⁶ Florida,⁹¹⁷ and Indiana.⁹¹⁸ In addition, Texas has apparently adopted a conspicuousness rationale under the subsection as well.⁹¹⁹

Only two jurisdictions, on the other hand, have indicated that an "as is" disclaimer need not be conspicuous, and one of these, Oklahoma, suggested that if the buyer has not read the disclaimer or alleges a misunderstanding the conspicuousness requirement might be imposed. Because the buyer had read and understood the clause, however, and the clause clearly stated that no warranty was made, the court held that the disclaimer was effective.⁹²⁰ The other

913. See U.C.C. § 2-316, Comment 1.

914. 111 N.J. Super. 383, 268 A.2d 345 (1970).

915. *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, _____, 268 A.2d 345, 351 (1970).

916. *Fairchild Indus. v. Maritime Air Serv., Inc.*, 274 Md. 181, 333 A.2d 313 (1975) (commercial transaction).

917. *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. Dist. Ct. App. 1977) (consumer transaction); *Osborne v. Genevie*, 289 So. 2d 21 (Fla. Dist. Ct. App. 1974).

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

919. *MacDonald v. Mobley*, 555 S.W.2d 916 (Tex. Civ. App. 1977) (real estate contract; court held that Code applied at least by analogy, and that conspicuousness requirement accompanied it).

920. *Smith v. Sharpsteen*, 521 P.2d 394 (Okla. 1974). Interestingly, the language did not

jurisdiction to hold that the disclaimer need not be conspicuous, Alabama, is represented by two cases. In *DeKalb Agresearch, Inc. v. Abbott*,⁹²¹ the court considered the issue, and with little authority or reasoning held that the language "notwithstanding subsection (2)" did away with the need for conspicuousness.⁹²² In *Gilliam v. Indiana National Bank*,⁹²³ the court discussed a conspicuous "as is" clause and approved the holding in *DeKalb*.⁹²⁴

The question of whether an "as is" clause need be conspicuous is best answered affirmatively, for the simple reason that the buyer can have no common understanding of the meaning of words when they are hidden from his view. It is not too burdensome to require sellers to clearly indicate to the buyer that no warranty is given.

Of course, ruling that conspicuousness is required does not settle the overwhelming question of what will satisfy the conspicuousness requirement. Nor will it always render the seller liable. Both points are aptly demonstrated in *Houck v. DeBouis*.⁹²⁵ The court, after noting that in Maryland "as is" clauses must be conspicuous, held that boldface language on the back of a form met the requirement, since the buyer was referred to the reverse side by clear language on the front of the form.⁹²⁶

Before becoming mired in the debate over whether conspicuousness should be required, a court would be well advised to keep in mind the purpose of section 2-316: to allow sellers who desire to avoid responsibility to do so, provided they give the buyer fair warning of their intent. The conspicuousness controversy has been spawned by the question of what constitutes fair warning. To the extent that fair warning is present, conspicuousness really becomes a matter of subsidiary concern. Thus, when the seller refuses to sell unless an "as is" term is included, and the buyer has a realistic opportunity to negotiate the term,⁹²⁷ the "as is" term should be given effect. Additionally, when the buyer testified that he knew the sale was "as is" and that the seller had cautioned him

mention merchantability, and a later Oklahoma case, *P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co.*, 568 P.2d 1273 (Okla. 1977), suggested that an inconspicuous disclaimer failing to mention merchantability would be ineffective. A question might be raised whether a disclaimer, not using the magic words "as is" or "with all faults," or expressly stating that it applied to merchantability, might nevertheless pass muster under section 2-316(3) (a) as clearly indicating that there are no warranties. Probably the better view would be that it could not.

921. 391 F. Supp. 152 (N.D. Ala. 1974).

922. *DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152, 155 (N.D. Ala. 1974).

923. 337 So. 2d 352 (Ala. Civ. App. 1976).

924. *Gilliam v. Indiana Nat'l Bank*, 337 So. 2d 352, 355 (Ala. Civ. App. 1976).

925. 38 Md. App. 85, 379 A.2d 765 (1977).

926. *Houck v. DeBouis*, 38 Md. App. 85, 379 A.2d 765 (1977).

927. *See Crown Cork & Seal Co. v. Hires Bottling Co.*, 254 F. Supp. 424 (N.D. Ill. 1966).

against buying without an inspection, the court could justifiably find the "as is" term effective.⁹²⁸ Similarly, when the buyer actually reads the disclaimer and understands it he should not be allowed to allege that it was inconspicuous.⁹²⁹

A related question is what alternative language will effectively disclaim the warranty when the seller fails to use the specified "as is" or "with all faults" language. In spite of apparent conflicts among the courts, and the fact that the Code seems to authorize the use of other language, it appears to be the better view to insist that any other language, before it is given effect, meet two tests in addition to conspicuousness. First, the language must be clear and unequivocal, and second, it must be equatable with "as is" or "with all faults." Thus, the phrase "in its present condition" would not ordinarily be sufficient, since it is neither unequivocal nor equatable with "as is" or "with all faults."⁹³⁰

The reasons for this insistence are simple and twofold. First, unless the language is both unequivocal and equatable by the buyer with "as is" or "with all faults," the seller is able to sidestep the specific rule of section 2-316(2), which requires the mention of merchantability, in favor of the more relaxed rule of section 2-316(3)(a). While subsection (3)(a) is designed to allow sidestepping, it is only available when the shorthand terms used are customarily understood to mean that no warranty of merchantability or fitness for purpose is intended.⁹³¹ Second, and equally important, the accepted shorthand terminology is effective precisely because it is universally understood to eliminate warranties. Unless the language used shares that characteristic, at least as to the particular buyer,⁹³² it should not be given the same effect. Thus, language

928. See *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976).

929. See *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967); *O'Neil v. International Harvester Co.*, 40 Colo. App. 369, 575 P.2d 862 (1978); *Smith v. Sharpsteen*, 521 P.2d 394 (Okla. 1974).

930. See *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973) ("in its present condition" equals "as is"). *Contra*, *Hull-Dobbs, Inc. v. Mallicoat*, 57 Tenn. App. 100, 415 S.W.2d 344 (1966).

931. An illustration points this out clearly. Suppose the seller has a form which contains the following disclaimer, prominently displayed: "There are no warranties express or implied which extend beyond the face hereof." Such a disclaimer, although effective to disclaim the implied warranty of fitness for particular purpose under section 2-316(2), is ineffective under that same section to disclaim the warranty of merchantability, since it fails to mention merchantability. Yet it is unequivocal, and, if the seller were in a "relaxed" jurisdiction, he would urge that under section 2-316(3)(a) such language would be commonly understood as eliminating all warranties. Such a reading of subsection (3)(a) clearly vitiates subsection (2), and is therefore to be discouraged.

932. The buyer's familiarity with the universal meaning of the term used is of course critical. This retains flexibility in the subsection, so that trade buyers, accustomed to different shorthand terminology with the same impact as "as is," are put on notice by its use. Thus, for example, if in the coal industry the phrase "where it stands" carries the meaning of "as is" it should be given effect, although that same phrase would not be effective when used by a furniture retailer selling to a customer.

such as "in its present condition," "as and where it stands," or "what you see is what you get" would be ineffective, either because it is more equivocal or because it is not commonly understood as a disclaimer, or both. By the same token, however, if it is shown that such phrases have acquired an "as is" meaning in a particular trade or locale, they should be given effect to the extent that the buyer is aware of the meaning.

Since the first case discussing an "as is" clause was decided,⁹³³ the vast majority of courts which have dealt with the issues raised by section 2-316(3)(a) have had little trouble reaching sensible results. Those which have reached less commercially reasonable results, including the Alabama courts, have done so by resorting to the section without serious scrutiny.⁹³⁴

b. Disclaimer by Examination

The second general means of disclaiming implied warranties is for the buyer, prior to entering the contract, to examine goods or refuse to examine them. Thereafter, under section 2-316(3) (b), the buyer can no longer assert any implied warranty with regard to a defect which an examination should or would have revealed. Section 2-316(3)(b) provides that, in addition to a specific disclaimer being effective,

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 him⁹³⁵

The obvious reason why a buyer should be bound by his examination of goods is that, if he reasonably could have discovered a defect, his expectation would have been diminished to that extent. Similarly, if he refuses to examine after the seller has requested that he do so, it is fair to say that he should take the goods

933. *Kalodis v. Mayo Motors, Inc.*, 1 U.C.C. REP. SERV. 96 (Pa. Ct. C.P. 1963).

934. *See, e.g.*, *Harison-Gulley Chevrolet, Inc. v. Carr*, 134 Ga. App. 449, 214 S.E.2d 712 (1975) (court states that examination of vehicle precludes warranties as to defects revealed and notes in passing that sale was "as is"); *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973) ("in its present condition" met requirements of Code, but no examination of statute); *Conran v. Yager*, 263 S.C. 417, 211 S.E.2d 228 (1975) (court briefly analogizes to section 2-316(2) (a) for purposes of giving effect to "as is" clause in contract for sale of house); *Lectro Management, Inc. v. Freeman, Everett & Co.*, 135 Vt. 213, 373 A.2d 544 (1977) (lease, called sale by court, contained "as is" clause; court skimmed over section 2-316(3)).

935. U.C.C. § 2-316(3)(b) [N.D. CENT. CODE § 41-02-33(3)(b) (Supp. 1979)].

subject to patent defects which he would have noticed. The fairness and reason embodied in the provision make the fact that a number of courts have struggled with it perplexing.

At the outset, the careful attorney will note that the Code here envisions a pre-contractual examination, so that what the buyer sees or fails to see once the contract has been entered into has no bearing whatsoever on the existence of the implied warranty. The focus of the statute is on examination by the buyer before he decides to deal. The comment further clarifies this point, and also differentiates the examination contemplated from either a casual inspection prior to sale or a more intense inspection after sale but prior to acceptance of the goods.⁹³⁶ Moreover, although the statute discusses the scope of the examination in terms of the buyer's desires, it is clear that scope is determined more appropriately with reference to all of the circumstances surrounding the transaction. The mere fact that the buyer "has examined the goods as fully as he desired" does not exclude warranties as to defects which even such a full examination would not "have . . . revealed to him in the circumstances." Thus, for example, if the buyer's full examination under the circumstances could not have included testing or chemical analysis, he should not be barred from asserting defects which only a chemical or other test would reveal.⁹³⁷

By the same token, if the defect is latent, so that in the course of an ordinary or usual examination it would not be apparent, the buyer's examination will not preclude allegation of the defect. The question of whether the defect was latent or patent, and thus whether it should or could have been discovered, is one of fact,⁹³⁸ and necessarily depends not only upon the character of the defect but upon the characteristics of the buyer. Comment 8 to the Code section states:

The particular buyer's skill and the normal methods of examining goods in the circumstances determine what defects are excluded A failure to notice defects which are obvious cannot excuse the buyer. . . . Nor can latent

936. See U.C.C. § 2-316, Comment 8.

937. U.C.C. § 2-316, Comment 8. See, e.g., *Murray v. Kleen Leen, Inc.*, 41 Ill. App. 3d 436, 354 N.E.2d 415 (1976) (dictum indicates that if testing is necessary, mere examination is insufficient); *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974) (express warranty as to freedom from disease diagnosable only by blood test); *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, 190 N.W.2d 275 (1971) (evidence suggested that only chemical analysis would reveal carbon content of steel, so examination performed was insufficient); *S-Creek Ranch, Inc. v. Monier & Co.*, 509 P.2d 777 (Wyo. 1973) (sheep infected with vibriosis, a disease not diagnosable absent laboratory culture tests).

938. See *Georgia Timberlands, Inc. v. Southern Airway Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972).

defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.⁹³⁹

Thus, it has been held that a lamp retailer who inspects lamps before purchase is bound by his inspection, since a professional should have discovered the defects which allegedly existed.⁹⁴⁰ However, the mere fact that a car buyer had some mechanical knowledge would not exclude the warranty of merchantability when a test drive revealed no defects.⁹⁴¹ Familiarity with the subject matter does not equate with professionalism, although it obviously should play a part.

It should be obvious that only patent defects which are discoverable or latent defects which are discovered upon a reasonable inspection will be excluded from subsequent warranty coverage. Surprisingly, there are few cases which have actively interpreted the section's coverage, and most of the reported decisions either refer to the issue of examination waiving patent defects only in passing, or merely affirm jury findings as to the waiver.⁹⁴²

Of the remaining cases, *Blockhead, Inc. v. Plastic Forming Co.*⁹⁴³ is probably the most appropriate example of a patent defect which should have been discovered. The buyer of wiglet cases, experienced in the area, had examined pre-production models and noted several defects. He did not indicate any problem with the handle-housings, which later proved to be defective, although he did examine the handle-housings at that time. The court ruled that if the handle-housings were defective it should have been

939. U.C.C. § 2-316, Comment 8.

940. *Richards Mfg. Co. v. Gamel*, 5 Wash. App. 549, 489 P.2d 366 (1971). The court probably went too far when it indicated in dicta that, given the opportunity to inspect, a professional buyer must take advantage of it. *Id.* at 550, 489 P.2d at 367. *See also* *Michael-Regan Co. v. Lindell*, 527 F.2d 653 (9th Cir. 1975); *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975).

941. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976).

942. *See, e.g.*, *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. 1978) (footnote indicating that examination waived warranties, as found by jury); *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971) (passing reference to effect of examination barring warranty); *Willis v. West Ky. Feeder Pig Co.*, 132 Ill. App. 2d 266, 265 N.E.2d 899 (1971) (same); *Michigan Mut. Liab. Ins. Co. v. Fruehauf Corp.*, 63 Mich. App. 109, 234 N.W.2d 424 (1975) (broad statement); *Forys v. Queensboro Motors Corp.*, 10 U.C.C. REP. SERV. 110 (N.Y. Sup. Ct. 1972) (per curiam affirmance, no facts available).

943. 402 F. Supp. 1017 (D. Conn. 1975).

discovered by the examination, since it was not so latent "as to have been undiscoverable."⁹⁴⁴ The point, of course, is that the defect was either patent or a latent defect which should have been discovered under the circumstances.

Michael-Regan Co. v. Lindell,⁹⁴⁵ again involving an experienced buyer, concerned table tops manufactured according to plaintiff's specifications. Plaintiff had inspected and examined samples, and had demanded that the table tops be "unsealed." When they subsequently warped, plaintiff refused to pay for them, asserting a latent defect which caused a breach of the warranty of merchantability. The court held that, as a professional, the plaintiff should have been aware of the propensity of unsealed wood to warp, and therefore he could not rely on the alleged defect.⁹⁴⁶ Again, although latent, the defect was one which the reasonable buyer in the plaintiff's position could have been aware of, and should thus be held to have been waived.

From the foregoing it is apparent that an examination of goods will exclude warranties as to patent defects or latent defects which either could have been discovered or which should have been anticipated. If the Code section did no more, the inquiry would end here. However, the section goes further, and also places the risk on the buyer who refuses to examine goods, at least as to those defects which the examination would probably have revealed.⁹⁴⁷ The theory behind the provision makes sense only if one remembers that refusal to examine is more than mere failure to do so:

[I]t is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" . . . is intended to make clear the necessity for such a demand.⁹⁴⁸

Obviously, the mere availability of goods for inspection does not create a duty to examine.⁹⁴⁹ The typical car sale provides a

944. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975).

945. 527 F.2d 653 (9th Cir. 1975).

946. *Michael-Regan Co. v. Lindell*, 527 F.2d 653, 661 (9th Cir. 1975).

947. U.C.C. § 2-316(3)(b) [N.D. CENT. CODE § 41-02-33(3)(b) (Supp. 1979)].

948. U.C.C. § 2-316, Comment 8.

949. *See, e.g., Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971); *Richards Mfg. v. Gamel*, 5 Wash. App. 549, 489 P.2d 366 (1971).

good example. The mere fact that a buyer sees the car on the lot and buys it without test driving it, absent a demand that he do so, would not operate to waive defects which a test drive would have revealed. The Code recognizes that a pre-contract agreement may permit examination, but the Code does not require pre-contractual examination.

Two cases which discuss the difference between failure to inspect and refusal to inspect are *Holm v. Hansen*⁹⁵⁰ and *Austin Lee Corp. v. Cascade Motel Inc.*⁹⁵¹ In *Holm*, the buyer purchased cattle from the defendant, but failed to have them tested for brucellosis. The trial court held that the failure to test reduced plaintiff's damages, apparently imposing a duty to examine.⁹⁵² The appellate court reversed, holding that since no demand had been made by the defendant there was no independent obligation to examine, and plaintiff's failure to do so, on the advice of a veterinarian, did not amount to a refusal to examine.⁹⁵³ In *Austin Lee*, the plaintiff had purchased 340 bedspreads from the defendant after inspecting and examining two samples. The seller had informed the buyer that the spreads were to be drycleaned only, and not washed. After the sale a wet rag was dropped on a spread, causing a permanent black waterspot. Other spreads also darkened when they came in contact with water, and the buyer finally returned all of the spreads and sued the seller. The seller defended on the ground that the buyer had either examined the spreads or refused to do so. The court, apparently believing water testing to be beyond the scope of an examination, held that since there had been no demand for examination there could be no refusal.⁹⁵⁴ In short, the refusal must be an actual refusal, after not only an opportunity to examine but also a request by the seller to do so.

Two other points deserve mention in connection with the statute. As a realistic matter, often while the buyer is making his examination the seller is simultaneously exhorting the quality of the goods. In such cases it would be unfair to limit the warranty as a result of the examination, at least to the extent that the seller assuaged the buyer's doubts. By the same token, if the buyer's own eyes reveal a defect he should not be able to ignore his observation and assert reliance on the seller's words. The comment suggests that under such circumstances there exists a question of fact

950. 248 N.W.2d 503 (Iowa 1976).

951. 123 Ga. App. 642, 182 S.E.2d 173 (1971).

952. *Holm v. Hansen*, 248 N.W.2d 503, 510 (Iowa 1976).

953. *Id.*

954. *Austin Lee Corp. v. Cascade Motel, Inc.*, 123 Ga. App. 642, _____, 182 S.E.2d 173, 174 (1971).

whether the seller's words became an express warranty which displaced the buyer's examination. The comment's assessment is acceptable, but only to the extent that the buyer's own observations do not contradict the seller's words. If, for example, the subject of the sale is a car, and the buyer during his pre-sale examination discovers four bald tires, he could not later assert that the seller told him the tires had full tread. His own observations established the contrary.⁹⁵⁵ On the other hand, where the examination reveals no major defects and the seller is exhorting the fact that there are none, the examination should not be held to waive major defects discovered later.⁹⁵⁶

The final point to be raised regarding the exclusion by examination concerns the timing of the buyer's examination. It has been noted that for section 2-316 to be applicable any examination must be made before the contract is entered into. The practitioner must keep in mind that for this examination to effectively exclude warranties it must be such as would reveal the defects later complained of. Thus, the buyer of a mobile home who inspected and examined the home on the seller's lot has been held entitled to recover for breach of warranty when defects became apparent only upon later delivery.⁹⁵⁷ The point is that a pre-sale examination does not have the effect of avoiding warranty responsibility entirely. If, after the contract is entered into, the buyer discovers defects not earlier discoverable, he can still recover for breach of the warranty by giving notice to the seller.

c. Disclaimer by Usage, Dealing, and Performance

The final means to disclaim, exclude, or modify implied warranties is through the operation of course of performance, course of dealing, or usage of trade. The area has been thoroughly discussed earlier,⁹⁵⁸ and it would add little to reiterate what was said previously. To the extent that all of these factors are to be considered in interpreting the parties' agreement, it only makes sense to ask whether, under any of them, the buyer's and seller's expectations excluded warranties. If the parties have in the past

955. See U.C.C. § 2-316, Comment 8. See also *Davis v. Pumpco, Inc.*, 519 P.2d 557 (Okla. Ct. App. 1974). *Davis* was a post-sale case in which, before the buyer used glue supplied by the seller, his contractor discovered that it would not bond. After checking the labels and finding that the glue was labeled to be the correct glue for the job, the buyer continued to use it. When the pipe was laid underground it developed leaks because the glue was in fact the wrong kind. The court ruled that plaintiff, in light of his own observations, should not have used the glue after discovering its defects. *Id.* at 560.

956. See *Cagney v. Cohn*, 13 U.C.C. REP. SERV. 998 (D.C. Super. Ct. 1973).

957. See, e.g., *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972); *Davis v. Vintage Enterprises, Inc.*, 23 N.C. App. 581, 209 S.E.2d 824 (1974).

958. See *supra* notes 355-69 and accompanying text.

acted as though no warranties existed, or if in the trade no warranties would be deemed to exist, there is no reason to impose warranty responsibility.

The major problems will be problems of proof, for it is incumbent upon the party asserting the trade usage, dealing, or performance to demonstrate its existence to the factfinder.⁹⁵⁹ In this regard, the cases indicate that the burden of proof is usually not an extreme one,⁹⁶⁰ and on appeal the findings of fact will probably be subject to reversal only if clearly erroneous.

The remainder of the cases in this area have been discussed earlier. It is appropriate to remind the practitioner here that, even where the implied warranties have not been disclaimed in some other permissible manner, usage, dealing, and performance may have this effect. For obvious tactical reasons, any attorney representing a seller would want to urge an applicable usage, course of performance, or course of dealing, even when there are better alternative arguments to be made. The effect of raising the issue is to preserve it, giving it at least residual effect, rather than run the risk of waiving it.⁹⁶¹

d. Disclaimers: Farm Machinery in North Dakota

No discussion of warranty disclaimers in North Dakota would be complete without an analysis of an extraordinary provision of the Century Code, section 51-07-07,⁹⁶² which in essence provides that the warranty of merchantability as it pertains to certain farm equipment cannot be disclaimed. The statute, by its terms, requires at a minimum that the buyer of covered machinery have a

959. See U.C.C. § 1-205 [N.D. CENT. CODE § 41-01-15 (1968)].

960. See, e.g., *Torstenson v. Melcher*, 195 Neb. 764, 241 N.W.2d 103 (1976) (evidence of usage sufficient to go to jury solely on the basis of plaintiff saying that he expected no more than warranty given in the trade); cf. *Georgia Timberlands, Inc. v. Southern Airway Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972) (burden of showing usage not met).

961. A case in point is *Torstenson v. Melcher*, 195 Neb. 764, 241 N.W.2d 103 (1976), in which the plaintiff argued that the defendant had not pleaded or proved a trade usage. The court ruled that passing reference made to trade usage in the pleadings was sufficient to preserve it, so that a mere scintilla of evidence as to it, offered by the plaintiff, created a jury question. *Id.* at 768-69, 241 N.W.2d at 106.

962. Section 51-07-07 of the North Dakota Century Code provides:

Any person purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machine, for his own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased, the purchaser may rescind the sale by giving notice, within a reasonable time after delivery, to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such personal property, or his successor, and by placing the same at the disposal of the seller. Any provision in any written order or contract of sale, or other contract, which is contrary to any of the provisions of this section, hereby is declared to be against public policy and void.

reasonable time within which to determine if the machinery is "reasonably fit," and, if it is not, to rescind the sale. The statute is apparently the only one of its kind in the United States. Because of this, the statute, its historical underpinnings, its reception in the courts, and its future deserve special consideration.

Section 51-07-07 is, at the outset, an extraordinarily broad statute. By its terms it applies not only to farmers, but to "[a]ny person purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery, for his own use."⁹⁶³ The cases which have interpreted the provision, however, have almost all involved farmers, and the constitutionality of the statute has been upheld by the United States Supreme Court,⁹⁶⁴ largely on the basis that the state legislature could reasonably protect farmers.⁹⁶⁵

The justification for applying the statute as supplementary to the Code, as articulated by the North Dakota Supreme Court,⁹⁶⁶ is that the Code does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."⁹⁶⁷ It should be noted that the one case which involved a non-farmer buyer held the statute inapplicable, although it was not made entirely clear whether it was because of the non-farmer status or because the buyer had entered into the purchase with actual knowledge of the equipment's defects, having leased the equipment earlier.⁹⁶⁸ However, the first North Dakota case to consider the constitutionality of the statute⁹⁶⁹ sustained its validity precisely because the classification made by the statute, all persons who purchase the listed machinery, was not an unreasonable classification.⁹⁷⁰ It might thus be argued that the statute is not limited strictly to farmers but applies to all purchasers of the enumerated equipment. Such a reading does not endanger the statute's continued viability under the Code, since it still fits comfortably within section 2-102, in that it is a "statute regulating sales to . . . [a] specified class of buyers."⁹⁷¹ Additionally, such a

963. *Id.*

964. *Jackson v. Advance-Rumely Thresher Co.*, 62 N.D. 143, 241 N.W. 722, *aff'd*, 287 U.S. 283, 289-90 (1932).

965. *Id.*

966. *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976).

967. *Id.* at 355, *quoting* U.C.C. § 2-102 [N.D. CENT. CODE § 41-02-02 (1968)].

968. *Northwestern Equip. v. Tentis*, 74 N.W.2d 832 (N.D. 1956). The case appears primarily directed at the fact that the purchaser had knowledge, but the court's broad language of non-applicability might well be based on the non-farmer status. It appeared that the machinery had been purchased for construction rather than farm activity. *Id.* at 837-38.

969. *Bratberg v. Advance-Rumely Thresher Co.*, 61 N.D. 452, 238 N.W. 552 (1931).

970. *Id.* at 473, 238 N.W. at 561.

971. U.C.C. § 2-102 [N.D. CENT. CODE § 41-02-02 (1968)].

reading would undoubtedly retain constitutional validity in light of the developing notions of federal constitutional jurisprudence.⁹⁷² Even a broad reading of the statute to include "any person" buying the type of machinery listed would be a relatively narrow classification, since few buyers other than farmers purchase gas or oil burning tractors, gas or steam engines, or harvesting or threshing equipment. In any event, the issue has not been squarely presented to the Supreme Court of North Dakota, and the practitioner might well consider the statute's probable applicability to such items purchased for construction use, consumer use, or other business purposes.⁹⁷³

The next question presented by the statute is whether it creates a warranty or merely prevents the exclusion of one. The cases indicate the latter, so that those warranties otherwise excluded remain a part of the contract.⁹⁷⁴ The distinction may be an unimportant one, for if the warranty cannot be disclaimed it exists by virtue of the Code. However, the distinction may be critical in one situation which apparently has not yet arisen. The statute by its terms applies to any seller, and is not restricted to merchant sellers.⁹⁷⁵ As noted previously, under the Code only merchant sellers will be deemed to make the implied warranty of merchantability. If the statute is read as merely incorporating the implied warranties of the Code, the coverage of section 51-07-07 will be severely restricted, for it would be of no effect in the casual sale. Such a reading seriously narrows the statute.

An illustration might be helpful. Suppose that Farmer X has a tractor which he wishes to sell. He advertises it for sale, and Farmer Y purchases it. Y uses it for one day and it breaks down. He notifies X that he is rescinding the contract under section 51-07-07, since the tractor was not reasonably fit for which he purchased it. X defends by asserting that, even though the tractor was unfit, no warranty was made and none should be implied, thereby precluding rescission. If section 51-07-07 incorporates only the warranty of merchantability or fitness, X must prevail. The author would argue that, contrary to the indications of the cases, section

972. The appropriate test today would be whether the legislation bears a rational relationship to a legitimate state interest. *See* *Morey v. Doud*, 354 U.S. 457 (1957).

973. A related question which has yet to be determined is whether the definition given to the enumerated equipment will be broad or narrow. For example, a consumer purchasing a small garden tractor might well fit within the section coverage, as might a business purchasing a gas engine for emergency energy use. One might also question whether a replacement engine purchased by an automobile owner might not also fit within the statute's coverage.

974. *See Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976); *Dwinnell v. Boehmer*, 60 N.D. 302, 234 N.W. 655 (1931).

975. N.D. CENT. CODE § 51-07-07 (1974).

51-07-07 does in fact create a warranty of reasonable fitness, which may be akin to that of merchantability but which is not dependent thereon. Therefore, Farmer Y, a purchaser from a non-merchant, should be able to rescind; to read the statute otherwise is to make it meaningless in all non-commercial transactions.

The statutory language allows for testing to determine whether the machinery is "reasonably fit for the purpose for which it was purchased." This might easily be construed to create a warranty of fitness for particular purpose. It has not been so construed, but has rather been equated with merchantability.⁹⁷⁶ The most recent cases to construe the section, however, have construed section 51-07-07 to void the disclaimer first, and thereafter imply the statutory warranties.⁹⁷⁷ Thus, while the temptation exists to say that the warranty of fitness for particular purpose can be disclaimed, in reality such a disclaimer might not be possible.

If the buyer discovers that the goods are not reasonably fit for the purpose for which they were purchased, he must notify the seller or the seller's agent of his desire to rescind, and thereafter make the equipment available to the seller. The notice of rescission may be oral or written,⁹⁷⁸ but it must be given within a reasonable time after delivery.⁹⁷⁹ Whether the buyer acts within a reasonable time is a question of fact,⁹⁸⁰ as is the question of whether the machinery is reasonably fit.⁹⁸¹ It has been held, however, that the buyer who unsuccessfully attempts to get the machinery repaired by the seller is not prejudiced by that fact, so that his subsequent demand for rescission is still deemed to have occurred within a reasonable time.⁹⁸²

Although section 51-07-07 speaks of rescission as the only available remedy, the statute has been interpreted to allow the buyer to alternatively seek damages.⁹⁸³ Such an interpretation is justified only if one first voids the disclaimer contained in the contract and then applies the Code as if the warranty had never

976. See *Gimbel v. Kuntz*, 286 N.W.2d 501 (N.D. 1979); *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976).

977. *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976).

978. See *Gimbel v. Kuntz*, 286 N.W.2d 501 (N.D. 1979); *International Harvester Co. v. Olson*, 62 N.D. 256, 243 N.W. 258 (1932); *Jespersion v. Advance-Rumely Thresher Co.*, 61 N.D. 494, 240 N.W. 876 (1932).

979. N.D. CENT. CODE § 51-07-07 (1974).

980. See *Gimbel v. Kuntz*, 286 N.W.2d 501 (N.D. 1979); *Jespersion v. Advance-Rumely Thresher Co.*, 61 N.D. 494, 240 N.W. 876 (1932); *Hamman v. Advance-Rumely Thresher Co.*, 61 N.D. 505, 238 N.W. 700 (1931).

981. *Gimbel v. Kuntz*, 286 N.W.2d 501 (N.D. 1979).

982. See *Gimbel v. Kuntz*, 286 N.W.2d 501 (N.D. 1979); *Northwestern Equip. v. Tentis*, 74 N.W.2d 832 (N.D. 1956).

983. See *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976); *Kramer v. K.O. Lee & Son*, 61 N.D. 28, 237 N.W. 166 (1931).

been disclaimed. As indicated earlier, this is apparently how the North Dakota Supreme Court has proceeded. The court, however, has also recognized that the seller, although he cannot disclaim warranties because of section 51-07-07, can nevertheless limit the remedy of his buyer to that provided in the statute.⁹⁸⁴ Such a reading would appear to comport well with the Code.⁹⁸⁵

Section 51-07-07 is a fascinating example of North Dakota's extraordinary independence. The statute's legislative history is less than revealing, and the North Dakota Supreme Court has noted that it was probably rooted in the political history of the state.⁹⁸⁶ The court has suggested that the Nonpartisan League passed the statute in an attempt to lessen exploitation of farmers.⁹⁸⁷ However, that explanation does not answer the questions of where the idea for such a statute came from or what precipitated its adoption. Research indicates that the statute was borrowed from similar provisions in two Canadian provinces.⁹⁸⁸ It is suggested that the underlying reason for the passage of the statute was not the perception that sellers were taking advantage of farmers per se, but rather because the North Dakota courts were giving full rein to freedom of contract, thereby strictly enforcing contractual provisions to the detriment of North Dakota farmers. It thus appears that a series of North Dakota Supreme Court decisions at the turn of the century which strictly construed contractual provisions to the disadvantage of farmers⁹⁸⁹ is what actually prompted the passage of section 51-07-07. It was only because the courts failed to police bargains that the legislature entered the arena. Therefore, the statute was as much designed to curtail the exercise of the courts' power as to curtail the exercise of sellers' power.

Having traced the historical development of the statute, only two tasks remain: first, to consider the two most recent cases construing the statute, and second, to assess the interplay between section 51-07-07 and the Code. The two most recent cases discussing section 51-07-07 are *Hoffman Motors, Inc. v. Enockson*⁹⁹⁰

984. See *Palahiuk v. Allis-Chalmers Mfg. Co.*, 57 N.D. 199, 220 N.W. 638 (1928).

985. See U.C.C. § 2-719 [N.D. CENT. CODE § 41-02-98 (1968)].

986. *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353, 355 (N.D. 1976).

987. *Id.*

988. See 15 ALTA. REV. STAT. §§ 1-6 (1913); 13 ALTA. REV. STAT. § 13 (1918); 2 SASK. REV. STAT. ch. 56 (1917) (originally enacted in 1915). See also MAN. REV. STAT. ch. 83 (1919).

989. See *Hanson v. Lindstrom*, 15 N.D. 584, 108 N.W. 798 (1906); *Dowagiac Mfg. Co. v. Mahon*, 13 N.D. 516, 101 N.W. 903 (1904); *J.I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N.D. 466, 92 N.W. 826 (1902); *Fahey v. Esterley Harvesting Mach. Co.*, 3 N.D. 220, 55 N.W. 580 (1893).

990. 240 N.W.2d 353 (N.D. 1976).

and *Gimbel v. Kuntz*.⁹⁹¹ In *Hoffman*, the seller sued to recover the balance due from the defendant for the purchase of a tractor, and for the cost of repairing the tractor after it had broken down. The trial court awarded plaintiff the balance due on the purchase price, but refused to award recovery based on the repair cost because of section 51-07-07.⁹⁹² The North Dakota Supreme Court affirmed the trial court's ruling, but remanded the case to allow the seller interest on the balance of the purchase price.⁹⁹³

The tractor which was the subject of the contract was a used model, and the contract contained a clause providing that used equipment was sold "as is with no warranty of any character." When the tractor was first delivered it broke down, and the defendant returned it to plaintiff, who made the necessary repairs. After the tractor was returned to the buyer it broke down again, and plaintiff repaired it and returned it to defendant, billing him approximately \$950. When the tractor still did not work the defendant had it repaired elsewhere, but refused to pay the \$950 and the balance of the purchase price. The plaintiff sued, seeking to recover the total sum allegedly due.

The court, after reciting the facts and setting forth the statute, considered whether the defendant could retain possession of the tractor and still void the disclaimer, and thus whether rescission was the only remedy available under section 51-07-07. Citing an earlier decision which discussed section 51-07-07,⁹⁹⁴ the court held that the defendant was entitled to avoid payment for repairs, since he could resort to the provisions of the Code. The court's reasoning was deceptively simple.⁹⁹⁵ Since the "as is" clause is void as a result of section 51-07-07, all of the implied warranties of the Code apply, including the warranty of merchantability. The trial court found that the tractor was unfit for farm work, and thus not fit for an ordinary purpose.⁹⁹⁶ Therefore the warranty of merchantability was breached, and the defendant was not liable for the repair costs.⁹⁹⁷

There are two problems with the court's analysis, one which it addressed and one which it ignored. The first is that the statute

991. 286 N.W.2d 501 (N.D. 1979).

992. *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353, 354 (N.D. 1976).

993. *Id.* at 356.

994. *Kramer v. K.O. Lee & Son*, 61 N.D. 28, 237 N.W. 166 (1931). The statute has had an interesting history in the courts, with the vast majority of the cases decided under circumstances where depressed agricultural prices surely contributed to the results. Eleven of the sixteen cases under the statute were decided between 1926 and 1933, and nine were decided in the years 1931-1933.

995. 240 N.W.2d at 355-56.

996. *Id.* at 355.

997. *Id.* at 356.

does not by its terms void all disclaimers of warranty. Rather, it makes "any provision in any . . . contract of sale . . . which is contrary to any of the provisions of this section . . . against public policy and void."⁹⁹⁸ The provisions of "this section" referred to are that the buyer shall have a reasonable time to inspect, and that he may thereafter rescind if the tractor is unfit. Here, the provision in the contract, that the sale was "as is," was void only insofar as it would disallow rescission. However, since the defendant did not seek to rescind, the "as is" provision was never at issue. The court addressed this question by holding that, since "the public policy . . . which makes disclaimers void was enacted separately from the provision authorizing purchasers to rescind, . . . the provision . . . relating to voiding a disclaimer . . . can be relied upon by one who does not demand rescission."⁹⁹⁹ The problem, of course, is that even though the second sentence of section 51-07-07, voiding certain contractual provisions, was originally a separate section, it still referred exclusively to the first section of the statute, and not to any and all disclaimers. Thus, the public policy statement refers only to provisions which preclude inspection and rescission. The "as is" clause merely disclaims any implied warranty, since it cannot, because of section 51-07-07, preclude inspection and rescission. Therefore, as long as the buyer does not exercise his statutory right to inspect and rescind, section 51-07-07 should not come into play.

An even more disturbing facet of *Hoffman* is the damage issue, which the court failed to address. The court merely affirmed the trial court's conclusion that the repair costs were not chargeable to the defendant. Certainly it would be true that the buyer would not be responsible for the repair costs where, as in *Hoffman*, the repairs were ineffective. However, the defendant buyer had also refused to pay the balance due on the purchase price. Once the "as is" disclaimer is voided and the warranty of merchantability attaches, the buyer, under the Code, would be entitled to recover damages for the breach, and not merely to avoid paying for ineffective repair attempts. At the very least, he should have recovered the difference in value between the goods as accepted and their value had they been merchantable.¹⁰⁰⁰ In the absence of proof of the respective values, the buyer may have been entitled to recover his cost in having the tractor repaired.¹⁰⁰¹ Furthermore, he should also have

998. N.D. CENT. CODE § 51-07-07 (1974).

999. 240 N.W.2d at 355.

1000. See U.C.C. § 2-714(2) [N.D. CENT. CODE § 41-02-93(2) (1968)].

1001. See *id.* (special circumstances).

been entitled to consequential damages, resulting, for example, from down time or loss of use.¹⁰⁰² Finally, and perhaps most problematical, the buyer may have been able to assert a right of revocation of acceptance under the Code akin to rescission, even though the time for exercising his right to rescind under section 51-07-07 had lapsed.¹⁰⁰³ The court's failure to even consider the damage issues suggests yet another reason why section 51-07-07 should not be interpreted to preclude warranty disclaimers, but should be interpreted solely to permit rescission. At the very least, the court should not have ruled as it did without exploring the remainder of the buyer's allegation that he was not required to pay the balance due.

If the *Hoffman* decision stretched section 51-07-07 to its outermost limits, *Gimbel v. Kuntz*¹⁰⁰⁴ does little to suggest that the elasticity is diminishing. On its surface, *Gimbel* fits within the statute as enacted, for it involved the sale of a new 1977 tractor by the defendant to the plaintiff, followed closely by a breakdown, repairs, and another breakdown. The plaintiff then demanded rescission.¹⁰⁰⁵ The defendant offered to repair the tractor a second time,¹⁰⁰⁶ and further offered to supply a replacement tractor of the same type while it was being repaired. The plaintiff refused both offers, and maintained his demand for rescission. Thereafter, the plaintiff made his rescission demand in writing and defendant refused. The plaintiff sued, seeking a return of his purchase price or, in the alternative, damages based upon the difference in value between a 1977 and 1978 model. The trial court found that the plaintiff had failed to prove any difference in value, and held that rescission was unavailable because the defendant had acted both

1002. See U.C.C. §§ 2-714(3), 2-715(2) [N.D. CENT. CODE §§ 41-02-93(3), -94(2) (1968)].

1003. This remedy is the most fascinating aspect of the interplay between the Code and section 51-07-07, as interpreted by the court. Under section 51-07-07, the buyer has a reasonable time to inspect and test, and if the goods are not fit he may, within a reasonable time after delivery, rescind. Under section 2-608 of the Code the buyer may revoke acceptance within a reasonable time after he discovers or should have discovered the ground for revocation. The ground for revocation may be any nonconformity which substantially impairs the value of the goods to the buyer which appears after acceptance, if the acceptance was made on the reasonable assumption that repairs would be made or where the nonconformity was not discovered because of difficulty in discovering it or because the seller assured the buyer of the conformity. Since the measuring times are different, it is possible that the buyer's right to rescind under section 51-07-07 would lapse if the unfitness did not appear within a reasonable time after delivery, and yet he would still be entitled to revoke his acceptance, based on, for example, a defect not readily discoverable or the seller's continuing but ineffective attempts to repair.

1004. 286 N.W.2d 501 (N.D. 1979).

1005. *Gimbel v. Kuntz*, 286 N.W.2d 501, 503 (N.D. 1979). The plaintiff had requested a new 1978 Model 285 Massey-Ferguson tractor, and instead received a new 1977 Model 285 tractor. He had traded in a 1977 Model 265 tractor. Although the proof indicated that the 1977 Model 285 was defective, at least a portion of the plaintiff's legitimate dissatisfaction was based on the fact that he had received a 1977 rather than a 1978 model. *Id.*

1006. *Id.* The repairs were extensive, and cost \$1,362.49. *Id.*

promptly and in commercial good faith.¹⁰⁰⁷ The court also found that the tractor was fit during the period when it was operational.¹⁰⁰⁸ The Supreme Court of North Dakota reversed.¹⁰⁰⁹

The court determined that the issue was whether the tractor was reasonably fit at the time the buyer gave notice of rescission.¹⁰¹⁰ Were that the question, however, the inquiry would have ended there, for clearly at the time the buyer initially sought to rescind the tractor was in need of extensive repairs, and was not only unfit but inoperable. In reality, the question was whether the buyer could exercise his right to rescind under section 51-07-07 when the tractor, although unfit, was capable of repair, and when the seller offered to make repairs, offered a replacement tractor, and in fact made the repairs. The court held that the right was available, indicating that the question was not how well the tractor operated during the period when it was operational, but how well it operated during the entire testing and inspection period under section 51-07-07.¹⁰¹¹ Since the tractor at issue was inoperable during much of that period, it was unfit for its purpose and the buyer could rescind.¹⁰¹²

The court was obviously uncomfortable with its ruling, both because of the seller's accommodating attitude and because of the holding's apparent breadth. As to the latter problem, the court attempted to narrow the applicability of the rule by indicating that not all defects would trigger application of section 51-07-07:

We believe that the term "reasonably fit for the purpose for which it was purchased" has to mean that the tractor is free of serious defects which would render it inoperable, and that, under ordinary and reasonable operating conditions, the tractor will perform as intended and expected.

Certainly, every mechanical failure in a new and complex machine does not render the machine unreasonably fit for the purpose for which it was purchased. . . . Mechanical failures in new machines are to be expected, and no buyer is absolutely entitled to a break-in period that is completely free of the need for service. So at the outset, it may be necessary to

1007. *Id.* at 504. The trial court did not use the term good faith, but the supreme court indicated that, in essence, the trial court had found for the defendant on the basis of its good faith efforts to accommodate the buyer. *Id.* at 507.

1008. *Id.* at 504.

1009. *Id.* at 509.

1010. *Id.* at 506.

1011. *Id.* at 508.

1012. *Id.* at 506-07.

distinguish between defects which merely require minor repair to correct, and significant defects which render the machine inoperable, and remain after the seller has been afforded a reasonable opportunity to correct.¹⁰¹³

The court's approach thus appears reasonable, in that only *serious* defects trigger the section, and even then only when they remain after the seller has a reasonable opportunity to repair. Thus, as long as the defect can be characterized as serious the seller may get one opportunity to correct it. If he fails to do so, without regard to the commercial reasonableness of his conduct, the buyer has a right to rescind.¹⁰¹⁴ Such a result may accord superficially with a literal reading of section 51-07-07, but seems incompatible with commercial notions of fairness, good faith, and reasonableness. It is suggested that a more reasonable, commercially justifiable result could have been obtained had the court sought guidance from the cases which have interpreted section 2-608.¹⁰¹⁵ Although it cannot be said with certainty that the outcome would have been different had the court employed section 2-608, the probability is that it would have been.

In summary, it is believed that the two most recent decisions discussing section 51-07-07 have the following effects. First, they may make it impossible to disclaim implied warranties in the sale of the farm machinery enumerated in the statute. Second, they permit the buyer to resort to remedies other than the statutory remedy of rescission. Third, they permit rescission (and presumably the other remedies) in spite of the reasonableness of the seller's actions, although the seller is to be given one opportunity to repair. Finally, although in order to trigger application of section 51-07-07 the defects must be characterizable as serious, seriousness is as likely to be measured by repair time as by, for example, cost involved.

Coupled with prior decisions regarding the statute, it is apparent that the court will continue to construe section 51-07-07 broadly, giving purchasers of the enumerated products extraordinary protection. Although the statute was clearly designed

1013. *Id.* at 507 (citation omitted).

1014. *Id.* at 508-09. Since the court's approach is to a large extent dependent upon the amount of time the tractor spent being repaired, *id.* at 508, it is likely that even a series of minor repairs will trigger the statutory right to rescind, in spite of the assertion previously set forth. See *supra* notes 1004-13 and accompanying text.

1015. U.C.C. § 2-608 [N.D. CENT. CODE § 41-02-71 (1968)]. Section 2-608, as indicated earlier, see *supra* note 991, is the Code's revocation (rescission) section. Under section 2-608, most cases have held that the seller has a reasonable, though not unlimited, opportunity to correct defects, and that if the defects are not corrected the buyer's right to revoke acceptance is not waived. See generally WHITE and SUMMERS, *supra* note 62, at 301-18. See also Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980).

to provide a measure of protection for the farmer, and such a measure of protection is surely necessary and appropriate, it is believed that the court has gone too far in interpreting the statute. While the statute affords protection, it need not be interpreted to confer complete insulation from contractual undertakings. Nor need it be interpreted to occasion commercially unreasonable results. This, however, is what has occurred, and it has occurred less as a result of legislative action than of judicial fiat.

IV. CONCLUSION

This article has attempted to study some of the more pressing and, it is hoped, interesting aspects of warranty law, and to consider them with particular reference to North Dakota. Although the article has touched on a number of warranty concerns, the reader should realize that much more could be written. Little has been said about applicable federal law, about the rapidly approaching merger between contract and tort in the area of strict liability, or about the ever-expanding scope of warranty encompassing the rights of disinterested third parties who may be affected by, although not in privity with, the seller. Daily, courts are confronted with warranty claims which a few years ago would have been summarily dismissed, and which may form the basis for future developments. While the underlying precepts of warranty have remained remarkably unchanged, the coverage afforded by warranty has expanded and continues to expand. As it expands, and perhaps eventually contracts, future generations will be called upon to deal with developing issues. Undoubtedly they will do so as past generations have done so, resulting in a reasoned body of warranty law. One can only hope that courts will pay heed to the developments and render their decisions with an eye toward accomodating the legitimate interests of all of the parties, and with an eye toward both the legislative commands and the underpinnings upon which those commands are based.