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Exclusion and Modification of Warranty under the U.C.C. - How to Succeed in Business without Being Liable for Not Really Trying

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EXCLUSION AND MODIFICATION OF WARRANTY UNDER THE U.C.C.—HOW TO SUCCEED IN BUSINESS WITHOUT BEING LIABLE FOR NOT REALLY TRYING

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Recent decisions involving disclaimer of warranty have generated considerable confusion. These decisions are often irreconcilable or are based on nebulous notions of public policy. In this timely and well documented article, Mr. Moye examines the pertinent Code provisions in light of their applications, and discusses some of the policy considerations inherent in these decisions. Moreover, he distills the rules for an effective disclaimer as they have been developed and modified by judicial interpretation. Finally, he derives four principles which should guide the drafting of an effective disclaimer:(1) define the risk; (2) negotiate the disclaimer; (3) clarify the agreement; and (4) prepare the evidence.

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INTRODUCTION

AS ironic as it may seem, the *Uniform Commercial Code*, promulgated specifically "to simplify, clarify and modernize the law governing commercial transactions;"[1] has prompted a profusion of conflicting and often irreconcilable opinions regarding the

[1] UNIFORM COMMERCIAL CODE § 1-102(2)(a) (1962 version) [hereinafter cited as U.C.C.]

use of its warranty exclusion provisions.[2] The reason behind such diverse interpretations of a uniform code provision may be that warranty cases must be decided on their facts, and the facts are nearly always distinguishable. Each case then must balance the interests served by the disclaimer against the interests giving rise to the warranty being disclaimed,[3] and since those interests are as varied as the persons whom they affect, it is not difficult to understand why the cases are less than consistent. One student of the disclaimer, after studying its evolution over a period of thirty years, concluded that the underlying thesis behind the cases was a determination to preserve a fair remedy in contract.[4] This diagnosis, typical of the generality required in this area of law, is probably accurate but does little to define a method by which a seller may prevent warranty liability. Moreover, the modern vendor is subject to innumerable consumer pressures, not the least of which is strict tort liability — a legal hazard that is apparently immune to disclaimer of any kind.[5] Consequently, the ability to limit warranty liability may indeed be "The manufacturer's last stand . . . ."[6]

The classic case in the law of disclaimers is a good starting point because it involved a disclaimer that "had everything wrong with it."[7] In *Henningsen v. Bloomfield Motors, Inc.*,[8] the clause referring to the disclaimer was printed in type which was described by the court as "the least legible and most difficult to read in the instrument . . . ."[9] The disclaimer was printed in small type, on the back of the contract, among a series of clauses that covered 8½ inches of fine print. Moreover, this was a standard contract used by all automobile manufacturers and the buyer had no freedom of choice whatever. Futhermore, the manufacturer had provided Mr. and Mrs. Henningsen with an illusory, and

[2] The greatest confusion results from section 2-316, the major disclaimer provision. Warranty of title has its own disclaimer provisions in section 2-312(2), and some warranties may be disclaimed because they are cumulative and conflicting under section 2-317. *See* text, § III(A)(2) *infra.*

[3] *See* Note, *Disclaimers of Warranty in Consumer Sales,* 77 HARV. L. REV. 318, 325 (1963) [hereinafter cited as Note, *Disclaimers*].

[4] *See* Note, *Limitations on Freedom to Modify Contract Remedies,* 72 YALE L.J. 723, 729 (1963) [hereinafter cited as Note, *Limitations*].

[5] *See* Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipse, Pigeonholes and Communication Barriers,* 17 CASE W. RES. L. REV. 5, 40, 43 (1965). *See also,* Noel, *Products Liability of Retailers and Manufacturers in Tennessee,* 32 TENN. L. REV. 207, 251-52 (1965). Disclaimer is a contractual concept, and thus not really applicable in an action based on tort theory.

[6] *See* Duesenberg, *The Manufacturer's Last Stand: The Disclaimer,* 20 BUS. LAW. 159 (1964).

[7] *Id.* at 165.

[8] 32 N.J. 358, 161 A.2d 69 (1960).

[9] *Id.* at 365, 161 A.2d at 73.

thereby worthless, expressed warranty which was to the exclusion of all warranties.[10] Understandably, the court reacted strongly to the disclaimer, finally declaring it to be invalid, probably because it violated public policy.[11] In doing so, the court established a poorly defined standard which has encouraged courts to invalidate disclaimers on the basis of vague notions of public policy.[12] While the facts of the Henningsen case were highly unusual and hard cases can make bad law, the decision certainly indicates that each disclaimer must be evaluated within its individual context.

Warranty protection is a very important part of the consumer's legal arsenal.[13] The vendor generally occupies a far superior bargaining position, especially so in light of the fact that the seller usually prepares the contract. Warranties were developed to help correct this imbalance.[14] On the other hand, there are a number of unimpeachable reasons for a seller's attempting to either limit or exclude his warranty liability. The use of a disclaimer can aid in the accurate determination of the seller's costs by controlling the risk which he assumes.[15] Certainly the price of a product is dependent up on the potential liability involved in its sale. Where such liability is particularly difficult to estimate, it may be impractical for the seller to market the product without employing a disclaimer.[16] This is especially true where he is a

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[10] *See* Note, *Limitations, supra* note 4, at 736. *See also* the discussion in 36 NOTRE DAME LAW. 233 (1961).

> It is significant to note that shortly after the *Henningsen* opinion was published, all of the major automobile manufacturers increased the warranty period on their products. Beginning with the 1961 model year, the standard warranty will have a one year or 12,000 mile duration, instead of 90 days or 4,000 miles .... Under the old warranty the buyer received nothing. Under the new he receives three times nothing.

Id. at 236-37.

[11] *See* Note, *Limitations, supra* note 4, at 736. *See also* Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties,* 4 B.C. IND. & COM. L. REV. 285, 303-07 (1963); Prosser, *Strict Liability to the Consumer in California,* 18 HASTINGS L.J. 9, 47-48 (1966).

[12] *See* Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966). *But see* Marshall v. Murray Oldsmobile Co., 207 Vr. 972, 154 S.E.2d 140, 144-45 (1967).

[13] See the policy arguments set forth in Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases,* 18 STAN. L. REV. 974, 1008-12 (1966).

[14] *Compare* U.C.C. § 2-316, Comment 1 *with* U.C.C. § 2-302, Comment 1.

[15] *See* Duesenberg, *supra* note 6, at 162, where the author laments that disclaimers are occasionally used deceptively for risk elimination rather than forthrightly for risk control. *See also* Note, *Disclaimers, supra* note 3, at 326-27.

[16] *See* Blackburn, *Warranties Under the Uniform Commercial Code,* 22 ARB. J. (n.s.) 173 (1967). The author notes that implied warranties, and what is required under them, is not known, and therefore, the seller's potential liability is uncertain. Further, in the case of an implied warranty of fitness for a particular purpose, the seller cannot be sure, unless he has disclaimed the warranty altogether, just what warranties one of his salesmen might be held to have made. *Id.* at 180.

marginal entrepreneur who is unable to shoulder the expenses occasioned by strict liability.[17] Similarly, the price of a product reflects the cost of repair or replacement and if the seller is unable to rely on a disclaimer of this responsibility, he must necessarily raise his price. To do this may impair his ability to compete effectively and he could be forced out of business for lack of a reliable disclaimer.[18] A related reason for a seller's disclaiming responsibility is that he simply cannot estimate the quality of the product he is selling or the amount of risk involved.[19] Finally, the seller may be concerned by the expensive litigation costs involved in a products liability or warranty action and thus desires to escape responsibility for the product as easily as possible. Certainly, if a buyer is willing to accept the risks, what reason could exist for not allowing him to enter into an agreement of his choosing? However, for the buyer to enter into a contract he must be fairly appraised of his rights and responsibilities under that contract. Herein lies one of the elements of an effective disclaimer — *impress upon the buyer that the risk is his.*[20] Of course, the seller cannot afford to create anxieties in his buyers to a point where the product becomes unmarketable.[21] Accordingly, the object in the disclaimer game is to exclude warranty responsibility as softly, and as legally, as possible.

Unquestionably, sellers possess the capacity to limit warranty liability as to expressed and implied warranties, by sufficiently specific and clear language.[22] Under the *Uniform Commercial Code,*

[17] *See* Note, *Disclaimers, supra* note 3, at 327-28.

[18] This consideration does not apply solely to the seller who is marketing an inferior product. Any seller will admit that no matter how reliable his inspection system is, mistakes are made.

[19] *See* Prosser, *supra* note 11, at 46.

[20] Dean William D. Hawkland (of Buffalo School of Law) has developed the proposition by using the celebrated case of *Gardner v. Gray,* 171 Eng. Rep. 46, 47 (N.P. 1815). "The purchaser," thundered Lord Ellenborough, "cannot be supposed to buy goods to lay them on a dunghill." Dean Hawkland commented: "He might have added that the buyer has no cause to complain that the goods ultimately end up on the dunghill if the situation makes clear to him that the risk is his." Hawkland, *Limitation of Warranty Under the Uniform Commercial Code,* 11 How. L.J. 28, 30-31 (1965).

[21] *See* Boshkoff, *supra* note 11, at 307. In fact, it would be unreasonable to expect a seller to impress upon a buyer that a possibility existed that one of every thousand items sold would be harmful, and this particular one could be it. *Id.* The buyer need only know that the quality of the item is his risk, and that he should conduct himself accordingly.

[22] *See* Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548, 561 (D. Conn. 1967). This pre-code law still applies to the sections of the *U.C.C.* dealing with disclaimer. Freedom of the parties to make their own agreement is inherent in the *Code,* and is upheld by the courts. *See, e.g.,* Construction Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505 (7th Cir. 1968), *cert. denied,* 395 U.S. 921 (1969).

if the rules are followed *all* warranty liability may be excluded.[23] Similarly, the courts appear willing to uphold these disclaimers where it appears that the disclaimer was a product of mutual agreement and made in the absence of fraud.[24] However, as is indicated by the *Henningsen* decision, a successful disclaimer must be both bargained for and equitable. Moreover, the length of that opinion and the volume of litigation regarding disclaimers is indicative of the close judicial scrutiny such provisions must be able to withstand. Although, the *Uniform Commercial Code* provisions assist the draftsman in preparing an ostensibly bargained for and equitable disclaimer, judicial scrutiny remains as yet the most difficult hurdle. In order to successfully draft such a provision, one must understand not only the nature and purpose of its use, but also the technical requirements and contexts in which they may be used. These aspects will be examined in light of the applicable *Code* provisions and their treatment by the courts in order to gain insights into the drafting of such a disclaimer provision.

I. EXCLUSION OR MODIFICATION OF THE EXPRESS WARRANTY

The best way to avoid the liability imposed by an express warranty is not to create the warranty in the first place. It is a contradiction of the highest order for the seller to expressly assure the buyer that the product will perform while at the same time assure him that it may not. Certainly it would be a perversion of the law to let the seller get away with it. It is to this situation, where the seller gives an express warranty in one breath and takes it back in the next, that section 2-316(1) is directed.

The 1952 version of the *Uniform Commercial Code* adopted a strong position on disclaimer of express warranties, declaring: "If the agreement creates an express warranty, words disclaiming it are inoperative."[25] Commentators concluded from this provision that no matter how carefully the sales contract was drawn, express warranties could not be excluded.[26] In the current edition this section has for some reason emerged with what appears to be

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[23] U.C.C. § 2-316.

[24] *See, e.g.*, Sarwark Motor Sales, Inc. v. Husband, 5 Ariz. App. 304, 426 P.2d 404 (1967); Marshall v. Murray Oldsmobile Co., 207 Va. 972, 154 S.E.2d 140 (1967); Northwest Collectors, Inc. v. Gerritsen, 446 P.2d 197 (Wash. 1968).

[25] U.C.C. § 2-316 (1952 version).

[26] *See* Note, *The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law*, 49 KY. L.J. 240, 253 (1961). This article, referring to the early *Code* provision as the "old orthodox view," comments that such a strenuous position is contrary to "general contract principles." *Id.*

a considerably different rule.[27] Section 2-316(1) now provides:

> Words or conduct relevent to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Whereas the original rule provided some guidance in this subject, no matter how distastful it may have been to the merchant, the present position remands the issue to the courts, who are hard pressed to interpret the new language differently from the old.[28]

A. Exclusion or Modification Through Language Related to Express Warranty

The *Code* permits the creation of an express warranty in three ways: (1) any affirmation of fact or promise which relates to the goods; (2) any description of the goods; or (3) any sample or model.[29] When any of these situations occur and the representations become part of the "basis of the bargain" an express warranty is created.[30] Where this warranty is inconsistent with other language within the contract (*i.e.*, the disclaimer) it will be construed as an ambiguity of terms which is resolved by making one term yield to the other.[31] The purpose of the disclaimer provision relating to these express warranties is to "protect a buyer from unexpected and unbargained for language of disclaimer."[32] Therefore, language

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[27] Some of the legislative history of section 2-316 is contained in Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code,* 48 *Cornell L. Rev.* 1, 7 n.25 (1962). There is evidence, however, that some pressure was brought to bear on the draftsmen of the *Code* by persons who were interested in effectively disclaiming their warranties. *See* Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties,* 8 U.C.L.A.L. REV. 281, 310 (1961), where the author quotes Professor Grant Gilmore who stated that he was: "[i]nclined to cite the drafting history of 2-316 . . . as an illustration of the useful truth that when a law professor ventures out into the real world, as a draftsman of statutes . . . he will be well advised to take his brass knuckles along; he will need them before he gets through." *Id.* at 310, *quoting from,* Lectures by Professor G. Gilmore, No. 4, at 13 (unpublished lectures at Yale Law School, 1958).

[28] *See* Berk v. Gordon Johnson Co., 232 F. Supp. 682 (E.D. Mich. 1964). "Section 2-316 of the 1952 version of the Code stated simply, in subsection (1), 'If the agreement creates an express waranty, words disclaiming it are inoperative.' The Michigan version of this provision modifies the 1952 language, *but the spirit of the provision remains the same.*" *Id.* at 688 (emphasis added). *See generally* Note, *The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law,* 49 KY. L.J. 240, 253 (1961) [hereinafter cited as Note, *Consumer Protection*].

[29] U.C.C. § 2-313(1).

[30] "The basis of the bargain" test is a reliance factor used to weave the warranty "into the fabric of the agreement." U.C.C. § 2-313, Comment 3. It is easy to extend the "express" warranty concept beyond the specific rules outlined in section 2-313(1). *See* Shanker, *supra* note 5, at 40-41 n.124, and text accompanying notes 54-57, *infra.*

[31] *See* Hawkland, *supra* note 20, at 28-29.

[32] U.C.C. § 2-316, Comment 1. *See* First National Bank v. Husted, 57 Ill. App. 2d 227, 205 N.E.2d 780, 784 (1965).

which creates an inconsistency, leaving both the buyer and seller unable to appraise their respective risks, or language which is unclear and gives rise to an ambiguity, is ineffectual in disclaiming an express warranty. It is easy to deduce that since the warranty is both expressed and disclaimed by certain language, in most cases that language will be inconsistent.[33]

In such cases, a reconciliation process is employed, or, if reconciliation is impossible, some theory is adopted which declares a consistent construction of the terms to be "unreasonable," thereby allowing section 2-316(1) to sever the disclaimer from the contract as "inoperative."[34] Several theories have been proposed for justifying this result when it appears that reconciliation of the terms is impossible. Suppose that a buyer and a seller agree on a contract which states that the product being sold is guaranteed to perform trouble-free for two years. The contract also provides that "there are no warranties, express or implied." First, it may be said that the express warranty is created by *specific* terms, whereas the disclaimer is couched in *general* terms. Since, by a familiar rule of construction, specific terms prevail over the general, the express warranty will prevail.[35] Secondly, the law is settled that ambiguities in a contract of sale will be construed against the party who created them[36] and, since the seller provided these conflicting contract terms, he should be held to his warranty.[37] Thirdly, the contract should be examined to determine if its language, read as a whole, fairly apprises the parties of their respective risks. If it does not, the matter must be resolved arbitrarily.[38] Finally, since an express warranty is created only when the enumerated factors become "part of the basis of the bargain,"[39] a disclaimer of one of those factors is a disclaimer of part of the bargain itself. The disclaimer is ignored, then, because it reaches to the "essence" of the contract and to uphold it would be to destroy the bargain.[40] The numerous theories for defeating a disclaimer leads one to

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[33] *See generally* Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 919-20 (1964).

[34] "[T]he critical determination turns on whether the apparently conflicting language of the warranty and disclaimer clauses can be reconciled. If it can, the disclaimer will be given at least the limited effect of illuminating the whole contract and thereby modifying the protective thrust of the warranty. If it cannot, the disclaimer will be completely rejected."

Hawkland, *supra* note 20, at 28-29.

[35] *See* Note, *Consumer Protection*, *supra* note 28, at 253.

[36] *See* 3 A. CORBIN, CONTRACTS § 559, at 262 (1960).

[37] *See* Note, *Strict Products Liability*, *supra* note 33, at 919.

[38] *See* Hawkland, *supra* note 20, at 29.

[39] U.C.C. § 2-313(1).

[40] *See* Note, *Limitations*, *supra* note 4, at 738-39.

wonder whether a disclaimer can *ever* be reasonably construed to be consistent with the express warranty.

1. Warranty by Affirmation of Fact or Promise.

The type of express warranty which a seller would most like to disclaim with impunity is the warranty by affirmation of fact. This legal millstone has long plagued the art of salesmanship,[41] and the drafters of the *Code* recognized that some statements made by sellers just can not, in common experience, be considered to be part of the bargain.[42] While the seller cannot consistently affirm a fact about a product and then subsequently disaffirm it, he may make his pitch and then retreat a bit. For example, suppose the contract is for the sale of "one copper brewing vat with a two-ton capacity." The seller may disclose to the buyer that this item will not corrode or decay for a period of years, and a warranty to that effect has been made. However, the seller could add that in order to prevent corrosion and decay, the purchaser must undertake a regular maintenance program, and if such a program is not successfully performed, the guarantee will not apply. Dean Hawkland points out that often the parties do not intend the warranty clause to be given its plain meaning. In such a case, a disclaimer may be employed to *modify,* but not to *negate,* the warranty.[43] There are two key issues in his analysis (1) the modification (not negation) of the warranty, and (2) the intention of the parties.[44] The negation of the warranty is flatly prohibited by section 2-316(1). If the warranty is stated, and then negated, no reasonable construction of such terms as consistent with each other is possible. On the other hand, when the warranty is modified, the words of disclaimer tend to explain the words of warranty, rather than contradict them.

The intent of the parties is important because section 2-316 was drafted in order to protect the buyer from unbargained language of disclaimer.[45] How could a buyer really intend to enter into an agreement if he wasn't aware of significant terms of the contract?

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[41] The intention of the seller at the time the statements are made is irrelevant to the determination of a warranty. *See* U.C.C. § 2-313, Comment 3. *See also* Charles F. Curry & Co. v. Hedrick, 378 S.W.2d 522, 536 (Mo. 1964); Turner v. Central Hardware Co., 353 Mo. 1182, 186 S.W.2d 603, 608 (1945); Compton v. M. O'Neil Co., 101 Ohio App. 378, 381, 139 N.E.2d 635, 638 (1955).

[42] U.C.C. § 2-313(2) states that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." But whether or not the statements made constituted warranty still remains for the court to determine. *See* Dailey v. Holiday Distrib. Corp., 260 Iowa 859, 151 N.W.2d 477 (1967).

[43] Hawkland, *supra* note 20, at 29.

[44] The seller's intention in creating the express warranty is, of course, irrelevant. It is the intention of both parties that it be modified that is important here.

[45] U.C.C. § 2-316, Comment 1.

Consequently, if the seller impresses upon the buyer that the risk is his, and the buyer persists in his purchase after being so appraised, then the seller should be relieved from responsibility for that risk.[46] Whether or not the buyer has been adequately apprised of his responsibilities is a question of fact, and the effectiveness of the disclaimer is dependent on that determination.[47] The problem is clearly one of draftmanship, since the written contract may be drafted in such a way as to completely determine all liability resulting from the express warranty.[48] One authority has recommended that the language of disclaimer should immediately follow the language of warranty.[49] Another has concluded that the disclaimer and warranty language must at least be on the same page of the contract.[50] In short, it must be apparent that the buyer clearly understood which risks are his and which risks remain the seller's responsibility. Where it appears from the entire agreement that a reasonable buyer would expect the seller to assume certain risks even though the seller had no intention of doing so, a court will overlook any language of disclaimer and will require the seller to perform.[51]

It should be apparent that affirmations of fact should be made sparingly, and only when the seller is willing and able to keep them. If any affirmation of fact is not absolutely true, or if a promise will be honored only in selective situations, the seller must say so immediately. For example, the seller cannot claim the product is "rustproof" and later say that this is applicable only where the product is used indoors. Neither can he promise to replace parts for two years, and afterwards interpose that the guarantee is conditional on the seller's approval of the buyer's maintenance program. Words which disclaim part of the effect of a warranty, and follow immediately thereafter may be construed as modifying the warranty, rather than negating it. Moreover, since value judgments are allowed by the *Code,* the seller should coach his salesmen to preface

[46] A court has recognized that the parties have the right to fix warranties by mutual agreement. *See* Marshall v. Murray Oldsmobile Co., 207 Va. 972, 154 S.E.2d 140, 144 (1967) (and case cited therein).

[47] The court may make several different determinations if it finds that the buyer has not been made aware of his risks. *See* text, § V, *infra.*

[48] *See* text, § I (c) *infra.*

[49] Hogan, *supra* note 27, at 7.

[50] Blackburn, *supra* note 16, at 178.

[51] Once an affirmation of fact is made, a warranty is created, whether or not the seller ever intended such an effect. "[A]ny fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof." U.C.C. § 2-313, Comment 3. Thus, the seller would have to affirmatively show that no reasonable buyer could have relied on the affirmation of fact before the disclaimer could be effective.

their comments with the words "in my opinion," in order to ensure that they are taken as such and not as affirmations of fact.

2. Warranty by Description

Where the express warranty has been created by a description of the goods, that description must be complied with, and cannot be disclaimed by any language. This conclusion is based on the fundamental contract principle that a vendor cannot sell apples and send oranges. In the example where "one copper brewing vat with two-ton capacity" is the subject matter of a contract which also contains a clause disclaiming all warranties, it cannot be concluded by any reasonable construction that the seller could deliver a tin brewing vat, or a copper vat with one-ton capacity, or a copper mixing vat, without suffering warranty liability.[52] If the seller has stated a description, he must conform to it.[53]

Because the description warranty is immune to disclaimer, courts and commentators are anxious to fit as many transactions as possible into this category. One author contends that a contract to deliver a "truck" may be construed as describing a "workable truck," and an express warranty to that effect is thereby created.[54] A recent case considered a contract for cotton seed which described the product as follows: "60, 50# bags Hi-Vigor Stoneville 213 Demonsan treatment." At the same time the contract contained a disclaimer of all warranty "as to description, productiveness, or any other matter of any seed that we sell. . . ,"[55] and it further disclaimed responsibility for the crop. The state regulations required that the percentage of germination of the seeds be stated on a tag and attached to each bag.[56] In this case, each tag showed the germination to be 80 percent but a test of some of the seed, after unsuccessful attempts at production showed a germination of only 27.75 percent. The plaintiff sued for breach of warranty and the defendant interposed the disclaimer. The court refused to uphold the disclaimer, claiming that the germination guarantee was part of the *description* of the product. However, was this really any more than an affirmation of fact? The official comments to section 2-313

[52] Of course, the seller probably could describe the product, and then immediately modify it. For example, "one copper brewing vat with two-ton capacity, but without normal valve fittings which are needed to operate a brewing vat." But these modifications are part of a new description, and do not constitute a disclaimer.

[53] *See* Hawkland, *supra* note 20, at 28-30; Weeks, *The Illinois Uniform Commercial Code: Article 2 — Sales,* 50 ILL. B.J. 494, 515 (1962).

[54] Shanker, *supra* note 5, at 40-41 n.124.

[55] Walcott & Steele, Inc. v. Carpenter, 246 Ark. 93, 436 S.W.2d 820, 822, 6 U.C.C. Rep. 89, 91 (1969).

[56] *Id.* An interesting point to note here is that a governmental regulation, by requiring a description, creates a warranty which is immune to disclaimer.

recognize that a "description" may include technical specifications, blueprints, and possibly even the quality of the goods previously delivered by the seller.[57] Therefore, the types of statements which may be treated as a description and which as such are immune to a disclaimer, are quite numerous.

To the extent that a warranty of description arises from the course of dealings, a seller may find himself in a precarious position. For example, if the seller had contracted to deliver onion seed to the buyer, and he delivered "Grade A onion seed" he has created a warranty of description and the buyer can expect the next delivery to conform therewith. Because warranties of description cannot be disclaimed or totally avoided in a continuous performance contract, a seller would be well advised to periodically re-evaluate his conduct to insure that he is able to perform to the expectations that the buyer has assumed.

Since parties to a contract always describe the subject matter of the contract, a description warranty is made in every case. As a practical matter, the seller should couch the description in general terms and should be certain that the product described can be delivered. If he is not certain whether he can deliver "one copper brewing vat with two-ton capacity" he should delete that part of the description about which he is uncertain. If the buyer insists on each element of the description the seller might consider foregoing the transaction. At least he should be aware of the fact that he cannot rely on disclaiming language in the contract to save him from the struggle with a description once it has been made.

3. Warranty by Sample or Model

The circumstances and statements of the seller surrounding the displaying of a sample or model play an important part in deciding whether or not a disclaimer is effective. The official comments describe certain presumptions with which the seller must contend. A presumption exists that any sample or model is intended to become part of the basis of the bargain, but the presumption is not as strong when the model represents merchandise not on hand.[58] Thus, when showing a product, the seller has an opportunity to impress upon the buyer that the sample or model is intended only to "suggest," rather than to "be," the character of the subject matter of the contract.[59] However, the seller must do so in a clear and

[57] U.C.C. § 2-313, Comment 5.

[58] U.C.C. § 2-313, Comment 6.

[59] *Id. See* Baltimore Machine & Equip., Inc. v. Holtite Mfg. Co., 241 Md. 36, 215 A.2d 458 (1965).

convincing manner because he must overcome the presumption that the displayed item is part of the basis of the bargain,[60] and he will have to convince a jury that the buyer understood the reason for displaying the item.[61] The exclusion of the warranty created by the displaying of a sample or model must be contemporaneous with the display, since the facts and circumstances surrounding that incident are determinative of the effect of that warranty.[62] The contract, which would ordinarily contain the written disclaimer where one is to be used, is usually executed after the sample or model has been shown. Thus, it seems that written disclaimers which are not contemporaneous with the displaying of a sample would be as ineffective against the sample as they are against an express warranty of description. This is so because, once the sample has been deemed to be representative of the product, the sample really becomes the description,[63] and the policy surrounding disclaimer of a warranty by description would be equally applicable here.[64] Therefore, when showing a sample or model, the seller should impress upon the buyer that the item displayed is only intended to "suggest" the character of the finished product. The seller can do so by having words printed on the item or on a conspicuous tag attached thereto stating: "This samplet is intended to suggest the characted of our product. Manufacturing processes may produce variations in the finished product which are not evident from this sample." The seller could even request that the buyer sign a statement of understanding to that effect when the sample is displayed. If the buyer insists on the exact specifications of the sample, the seller may safely assure him that every effort will be made to duplicate it, but can not specifically promise duplication without incurring liability were he later to be unable to comply.

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[60] The distinction between "suggesting" and "being" is drawn in the official comment. U.C.C. § 2-313, Comment 6. It would seem that the seller, by pointing out that the displayed item is intended only to "suggest" the product, is really never *creating* any warranty, rather than disclaiming one. In fact, a district court in *Beech Aircraft Corp. v. Flexible Tubing Corp.*, 270 F. Supp. 548, 562 (D. Conn. 1967), held that the mere exhibition of a sample does not mean that the sale is by sample. *Id.* at 562. There is no indication that this pre-*Code* law is not equally applicable to section 2-313. *See also* American Canning Co. v. Flat Top Grocery Co., 68 W. Va. 698, 703-04, 70 S.E. 756, 759 (1911). However, in view of the fact that the *Code* speaks of a presumption that a warranty arises when a sample or model is displayed, it is better to assume that what is being done is disclaiming a warranty that has been created. *See* U.C.C. § 2-316, Comment 6.

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

[62] *See* U.C.C. § 2-313, Comment 6.

[63] *See, e.g.*, Baltimore Machine & Equip., Inc. v. Holtite Mfg. Co., 241 Md. 36, 41, 215 A.2d 458, 460-61 (1965).

[64] *See* text, § I(A)(2) *supra,* and Note, *Limitations, supra* note 4 at 738-39. *See also,* Weeks, *supra* note 53, at 515.

To rely only on language of disclaimer in order to avoid the effect of an express warranty is a hazardous endeavor. As was stated, the best way to avoid express warranty liability is to avoid creating the warranty in the first place. Language of disclaimer alone will have no effect on a warranty of description. On the other hand, such language can be effective to disclaim a warranty by sample or model, but *only* if it is contemporaneous with the display, in such a way as to overcome the presumption that such sample or model was a part of the basis of the bargain, and in a manner sufficiently clear to convince a jury that the buyer understood the limited nature of that display. Similarily, language of disclaimer alone may be effective as to warranties arising by affirmation of fact but *only* where the following criteria are met: (1) the buyer was fairly apprised of his rights and liabilities under the contract, and (2) both parties intended the effect of the disclaimer. Moreover, an express warranty may never be completely negated by a disclaimer and where the exculpatory language is to have any effect at all, it may only modify the express warranty.

B. Exclusion or Modification of the Express Warranty Through Recognized "Disclaimer" Language

General language of disclaimer such as "the seller makes no warranty, express or implied," or other words and phrases of a similar meaning, were the specific targets of section 2-316.[65] Words of art such as "with all faults" and "as is," although specifically allowed to have a disclaiming effect under the *Code*, are directed *only* toward exclusion of *implied* warranty.[66] Of course, such language, when considered with regard to an express warranty, would be construed wherever reasonable as consistent with the language creating the warranty.[67] Nonetheless it is difficult to imagine a case where the terms "as is" or "with all faults" could be construed to be any less than an attempt to completely negate the warranty. Even so, the import of section 2-316 remains subject to judicial interpretation[68] and courts have recently intimated that perhaps gen-

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[65] U.C.C. § 2-316, Comment 1.

[66] U.C.C. § 2-316(3)(a). This section states:

> (3) Notwithstanding subsection (2) of this section:
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> (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 .... (emphasis added).

Id.

[67] This is the test prescribed by the *Code*. *See* U.C.C. § 2-316(1).

[68] *See* Ezer, *supra* note 27, at 311.

eral language may disclaim express warranties after all.[69] However, it is significant to note that the courts which have so intimated have, with one exception,[70] not been governed by the *Uniform Commercial Code*, although the decisions were handed down after the *Code* became effective. The confusing feature of these cases is simply that they are included in annotations which interpret section 2-316 of the *Code*,[71] and that section intended no such interpretation. Recognized "disclaimer" language that is aimed at the exclusion of a warranty, can be every bit as inconsistent as any other type of language could be. In fact, to declare these clauses inoperative is easily justified because they are directed toward the elimination of all warranty liability. Similarily, these terms are general in nature and as such will be ignored where inconsistent language is more specific.[72] In conclusion, then, the courts have a number of theories by which they could hold such disclaimers ineffective as to the express warranty.

C. Exclusion of Express Warranties by use of the Parol Evidence Rule

Although disclaimer language directed to the express warranty carries questionable legal weight, it is possible, through careful draftsmanship, to do indirectly that which cannot be done directly. The parol evidence provision of the *Code*[73] has been made applicable to the express warranty provisions in order to protect the seller against "false allegations of oral warranties" and "unauthorized representations."[74] It does more than that. It gives the seller a second chance if he concludes that the oral warranties or authorized representations were improprietious.[75] According to the *Code's* parol evidence rule,

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[69] *See* Intrastate Credit Service, Inc. v. Pervo Paint Co., 236 Cal. App. 2d 547, 552, 46 Cal. Rptr. 182, 185 (Dist. Ct. App. 1965) ("A provision that the buyer takes the article in the condition in which it is, or 'as is,' prevents representations of the seller, although relied upon by the buyer, from constituting express or implied warranties." *Quoting from* Roberts Distributing Co. v. Kaye-Halbert Corp., 126 Cal. App. 2d 664, 669, 272 P.2d 886, 889 (1954)); Claxton v. Pullman, Inc., 116 Ga. App. 416, 418, 157 S.E.2d 642, 644 (1967) ("It is well settled that selling 'as is' and with specific disclaimer of warranty is sufficient to negate all warranties, express or implied."); James Talcott, Inc. v. Finley, 389 P.2d 988, 993 (Okla. 1964) ("[L]egal corollary that such a condition ["as is"] negatives both express and implied warranties and precludes the defense of failure of consideration.")

[70] A Pennsylvania lower court case, *Garner v. Tomcavage*, 34 Pa. Northumb. L.J. 18 (1962), said that a provision stating that the goods were sold "as is" excluded any warranty express or implied under section 2-316. This seems to be the only case which has implied that result under the *Code*, and insofar as that is what the court intended, does not appear to be good law.

[71] *See* 1 UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE § 1-101 to § 2-725, at 242-43 (West Publishing Co. 1968).

[72] *See* text accompanying note 35 *supra*, and Note, *Consumer Protection*, *supra* note 28, at 253.

[73] U.C.C. § 2-202.

[74] U.C.C. § 2-316, Comment 2.

[75] *See* Hogan, *supra* note 27, at 8; Duesenberg, *supra* note 6, at 163; Note *Consumer Protection*, *supra* note 28, at 252.

terms which are set forth in a writing intended by the parties as a final expression of their agreement, cannot be contradicted by a prior agreement or by a contemporaneous oral agreement although, they may be explained or supplemented.[76] Therefore the language in the contract constitutes the complete agreement and other terms can be included only if they do not contradict — that is, are consistent — with the language written in the contract. Thus, if the language in the agreement is disclaimer language, and the seller had created an express oral warranty prior to the signing of the contract, the warranty, to be enforced, must be consistent with the terms of disclaimer. In such situations the buyer has the burden of proving that the terms are consistent and an express oral warranty is ineffective wherever inconsistent with the disclaimer.

Accordingly, if the requirements of section 2-202 are met and the contract contains language of disclaimer, the parties have reversed the effect of section 2-316(1).

In *Green Chevrolet Co. v. Kemp*,[77] the buyer attempted to assert express warranty for all mechanical parts for one year. However, he had signed a conditional sales contract which provided that all conditions and agreements were covered by that contract. The court ruled that testimony regarding the seller's representations was improperly admitted because it was contradictory and inconsistent with the terms of the sales contract.[78] Nonetheless, consistent with the narrow construction generally afforded rules which adversely affect consumers,[79] courts will examine the contract carefully and apply section 2-202 only when absolutely necessary. Of course, if the contract contains an ambiguity on its face, parol evidence may be introduced to resolve it.[80] Such was the case in *Leveridge v. Notaras*,[81] where the contract stated that the buyer accepted the automobile "in its present condition," and that "there are no warranties or representations, expressed or implied, not specified herein." On the same contract the salesman had written the words, "30 day warranty" in his handwriting in a blank portion of the form. Despite an "integration" or "merger" clause in the contract, the court allowed introduction of parol evidence to solve the ambiguity thereby created.

One difficult hurdle is proving to the court that the writing was *intended by the parties* as the final expression of the agreement.

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[76] U.C.C. § 2-202.

[77] 241 Ark. 62, 406 S.W.2d 142, 143, 3 U.C.C. Rep. 805, 806 (1966).

[78] *Id.* at 143, 3 U.C.C. Rep. at 807. *See also* Appeals of Reeves Soundcraft Corp., ASBCA Nos. 9030 and 9130, 2 U.C.C. Rep. 210, 219 (1964).

[79] *See* text, § IV *infra*.

[80] U.C.C. § 2-202.

[81] 433 P.2d 935, 937, 4 U.C.C. Rep. 691, 692 (Okla. 1967).

[82] *Id.* at 941, 4 U.C.C. Rep. at 697.

In *Hull-Dobbs, Inc. v. Mallicoat*[83] the agreement stated that it was the entire contract between the parties, but it also stated that the warranties were not binding on any assignee of the seller. The court concluded that this language indicated that warranties were to be treated separate from the agreement itself, and therefore the agreement was not the final expression of the agreement of the parties.[84] Generally where it can be shown that the buyer agreed to the contract as the final expression of the agreement, any warranties given prior to or contemporaneous with the signing of the contract are inadmissable and therefore ineffective.

II. EXCLUSION OF THE WARRANTY OF TITLE

Exclusion of the warranty of title is provided for in a separate section of the *Code*. Section 2-312 provides:

> (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.[85]

The significant element in such exclusion is that the specific language or circumstances "give the buyer reason to know" of some unusual factor in the title.[86] Some situations which indicate a disclaimer as to title are mentioned in the comments. They include sales by "sheriffs, executors, foreclosing lienors, and persons similarly situated . . . ."[87] The latter group should include any seller who is clearly selling the property on behalf of a third person as evidenced by the circumstances surrounding the transaction.

The *Code* and comments do not define what is meant by "specific language" and there is a paucity of case material on the subject. However, the courts will likely require that the language be conspicuous, exacting and clear in light of the pre-*Code* attitude toward this warranty.[88] In *Wilson v. Manhasset Ford, Inc.*,[89] the court held that to allow an automobile dealer to evade his responsibility to furnish good title by the use of a disclaimer would be

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[83] 3 U.C.C. Rep. 1032 (Tenn. Ct. App. 1966).

[84] U.C.C. § 2-312(2). *See also* Stern & Co. v. State Loan & Finance Corp., 238 F. Supp. 901 (D. Del. 1965) analogizing section 2-202 to a contract for the sale of securities.

[85] U.C.C. § 2-312(2).

[86] *Id.*

[87] U.C.C. § 2-312, Comment 5.

[88] *See* N.Y.U.C.C. § 2-312, Comment 2 (McKinney 1964). *Cf.* Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 593 (1964).

[89] 27 Misc. 2d 154, 156-57, 209 N.Y.S.2d 210, 212 (Dist. Ct. Nassau County 1960).

subversive of public policy. At least, it has been held, reasonable notice of the disclaimer must be given to the buyer.[90]

Warranty of title is not considered to be an implied warranty and thus the general notion of disclaimer under section 2-316 is not applicable.[91] As a result, disclaimers approved under section 2-316, such as "as is" and "with all faults," and other disclaimers which satisfy the requirements stated,[92] are ineffective as to the warranty of title.[93] While such language may well call the buyer's attention to the risks of quality and performance, it cannot be presumed that they would put him on notice of a defect in title. The buyer may not be aware that he is assuming all of the risks inherent in the item when he purchases it, but at the least he thinks he owns it. Therefore, a practical and effective disclaimer of this warranty will require a clear statement that it is the warranty of title that is being disclaimed, and that the seller does not actually own the property being sold. This disclaimer may be oral or written, though written notice is preferable. For example, a sign attached to the product which states that the seller does not claim title in himself, but is selling for a third person, would probably be sufficient.[94]

III. EXCLUSION OR MODIFICATION OF THE IMPLIED WARRANTIES OF QUALITY AND PERFORMANCE

An implied warranty is exactly what it says it is — a warranty implied in law from the very fact that the transaction has taken place. The obligation imposed by an implied warranty results from implication of law, not from the conduct of the parties.[95] Since it arises by operation of law, it will exist whether or not the parties address themselves to it in the course of the transaction.[96] One court

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[90] Moore v. Schlossmon's, Inc., 5 Misc. 2d 693, 696, 161 N.Y.S.2d 213, 216 (City Ct. of N.Y. 1957).

[91] U.C.C. § 2-312, Comment 6. It had been considered an "implied" warranty under the Sales Act. UNIFORM SALES ACT § 13, and for some time after the *Code* had been promulgated. *See* Hawkland, *In Re Articles 1, 2 and 6,* 28 TEMPLE L.Q. 512, 515-16 (1955).

[92] The language must be such as to call the buyer's attention to the exclusion of warranty and to make it plain that there is no implied warranty. U.C.C. § 2-316(3)(a). *See* text, § III(A)(1) *infra.*

[93] *See generally* Note, *Consumer Protection, supra* note 28 at 257-58.

[94] This is suggested as a method to ward off a security interest from attaching to goods which have been consigned. U.C.C. § 2-326(3)(a).

[95] *See* Note, *Warranty Disclaimers and Limitation of Remedy for Breach of Warranty Under the Uniform Commercial Code,* 43 BOSTON U.L. REV. 396, 400 (1963) [hereinafter cited as Note, *Warranty Disclaimers*].

[96] In a sense, some of the implied warranties are very much like strict tort liability. One court recognized that the purpose behind the implied warranty sections of the *Code* is to hold the seller responsible when inferior goods are passed along to the unsuspecting buyer. Vlases v. Montgomery Ward & Co., Inc., 377 F.2d 846, 850, 4 U.C.C. Rep. 164, 168 (3d Cir. 1967). But, unlike strict tort liability, the implied warranties may be disclaimed. *See* Shanker, *supra* note 5, at 40.

stated that the implied warranty is properly a matter of public policy,[97] and the considerations surrounding its disclaimer indicate the implied warranty may indeed occupy that status.

Generally, the implied warranty may be excluded when there exists words and conduct tending to show that this was the intention of the parties. These warranties may be disclaimed by express unequivocal language where there is no problem of contradiction of terms because some are not expressed in the contract.[98] In fact, the language used must be "so clear, definite and specific so as to leave no doubt as to the intent of the contracting parties."[99] Once again it becomes a question of allocating the risk. On one hand is the fact that the *Code* does not intend to burden the seller with the same responsibility as is imposed by the law of product liability.[100] Freedom of contract is one of the basic propositions embodied in the *Code*.[101] However, section 2-316 intends to protect the buyer from surprise,[102] and will not permit the "expectations of the parties to be disappointed through uncommunicative contractual provisions."[103]

The recommended method of disclaiming implied warranties of quality and performance is prescribed by section 2-316 as follows:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in case of a writing must be conspicious, 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."

In addition, certain words or conduct will automatically exclude these implied warranties of they are present in the transaction. Section 2-316 continues:

> (3) Notwithstanding subsection (2) of this section:
>
> (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

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[97] Greene v. Clark Equipment Co., 237 F. Supp. 427, 431 (N.D. Ind. 1965). *See generally* Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

[98] *See* Hawkland, *supra* note 20, at 30.

[99] Boeing Airplane Co. v. O'Malley, 329 F.2d 585, 593 (8th Cir. 1964). This decision was concerned with an earlier and more demanding section regarding disclaimer of implied warranties. However, its directive is still good advice today.

[100] The *Code* allows the disclaimer of all liability for failure to manufacture or sell a safe, workable product. *See* U.C.C. § 2-316. That is a far cry from strict liability for such malfunctions. *See generally* Shanker, *supra* note 5, at 40, 43.

[101] *See* U.C.C. § 1-102(3).

[102] U.C.C. § 2-316, Comment 1.

[103] Hawkland, *supra* note 20, at 31.

warranties and makes plain that there is no implied warranty; and

(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; and

(c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

These provisions seem reasonably clear on their face, but they are subject to interpretation and are certainly not immune from the confusion that pervades this section of the *Code*. The following may best be described as an attempt to unscramble the egg.

A. Exclusive by Language of Disclaimer

The primary consideration in evaluating the words of exclusion for implied warranties is whether or not both parties understand the words and their legal implication.

1. Recognized "Disclaimer" Language Which Excludes All Implied Warranties

The *Code* indicates that certain words of art, and words which import the same meaning — namely, that there is no implied warranty — will have the effect of excluding all implied warranties. These words are "as is" and "with all faults,"[104] and, an official comment adds, "as they stand."[105] It has been recognized that an apparent inconsistency results by applying these words of art to both implied warranties of quality and performance.[106] Subsection (2) to section 2-316 indicates that the implied warranty of merchantability is to be treated differently than the implied warranty of fitness for a particular purpose, since the former requires specific mention of the word "merchantability." However, subsection (3) makes inapplicable the technical requirements of subsection (2)[107] and apparently the words of art are intended to have the same effect as stating "merchantability." In fact, to the ordinary buyer, the words "as is" means much more than the word "merchantability." Whatever inconsistency may exist in treating the two warranties together is

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[104] U.C.C. § 2-316.

[105] *Id.*, Comment 7. Although the comments are not part of the statute, the term "as they stand" would, in the proper context, be properly included as "language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain there is no implied warranty . . . ." U.C.C. § 2-316(3).

[106] Donovan, *Recent Development in Product Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 ME. L. REV. 181, 213 (1967).

[107] U.C.C. § 2-316.

probably resolved in the policy of section 2-316 which states that the object is to "protect the buyer from surprise."[108] That object is accomplished just as well by the language in subsection (3) as by mentioning "merchantability."

Arguably, none of these words or phrases adequately apprises the buyer of the risks he is assuming. One authority commented that such language probably suggests only that the goods are not top quality, but does not indicate that the goods could be useless and might be harmful.[109] But it must be assumed that the draftsmen of the *Code* considered these problems and concluded that it was more desirable to allow words of "strict disclaimer" than to attempt to grapple with and develop a rule around each potential fact situation. The latter job belongs to the courts, and they have refined these rules.

The bench was not shocked at the thought of a "strict disclaimer" by use of the words "as is," since pre-*Code* law generally recognized this term as negating implied warranties.[110] Cases which have interpreted section 2-316 accept the effect of this language on implied warranties. In *Chamberlain v. Bob Matick Chevrolet, Inc.*[111] the buyer sued for breach of warranty in the sale of an automobile. The salesman had explained to the buyer that the car, if sold at a particular price, would be sold "as is," and with no guarantee. The sales agreement stated: "this car not guaranteed." The circuit court of appeals agreed with the lower court that there were no implied warranties, and cited section 2-316 in support of this position.[112] Similarly, special words of disclaimer were given an absolute effect in *First National Bank of Elgin v. Husted*,[113] which held that words similar to "as is" and "with all faults" have the effect of excluding implied warranties. The *Code* does leave an escape, however, in case a court decides that to enforce this language would be unjust. Subsection (3)(a) begins by equivocating "unless the circumstances indicate otherwise . . . ." No court has yet based a decision on that language, but there are some indication to that effect in an Illinois case. The court in *Crown Cork & Seal Co. Inc. v. Hires Bottling Co. of Chicago*[114] was confronted by a sale of bottling equipment under

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[108] U.C.C. § 2-316, Comment 1.

[109] Shanker, *supra* note 5, at 42.

[110] *See, e.g.*, Lindberg v. Coutches, 167 Cal. App. 2d 828, 334 P.2d 701 (App. Dep't, Super. Ct. Alameda County 1959); Yanish v. Fernandez, 156 Colo. 225, 397 P.2d 881 (1965); Belvison, Inc. v. General Electric Co., 46 Misc. 2d 952, 260 N.Y.S.2d 579 (Sup. Ct. 1965); James Talcott, Inc. v. Finley, 389 P.2d 988 (Okla. 1964); cases collected in Annot., 24 A.L.R.3d 465, 472-75 (1969).

[111] 4 Conn. Cir. 685, 239 A.2d 42, 44 (1967).

[112] *Id.* at 46. The court also used the examination subsection, section 2-316(3)(b), in support of its conclusion that no implied warranty arose.

[113] 57 Ill. App. 2d 227, 235, 205 N.E.2d 780, 784 (1965).

[114] 254 F. Supp. 424 (N.D. Ill. 1966), *rev'd on other grounds*, 371 F.2d 256 (7th Cir. 1967).

an agreement providing that the property was sold "as is, where is." The court held that this was a valid disclaimer of implied warranties, but not until it had reviewed all of the circumstances surrounding the case.[115] This leaves open the interesting possibility that if a court is not satisfied with the "smell" of the transaction, it could void the language of disclaimer by relying on the circumstances surrounding the transaction.[116] Further, what is to prevent a court from holding, as one pre-*Code* case did,[117] that certain implied-law terms exist in every sales contract which may not be waived or defeated by the parties? This case, *Mulder v. Casho*, considered a contract with a conspicuous "as is" provision, but held, despite this language, that the seller has a statutory duty to put the brakes of an automobile in "good condition and good working order" before he delivers the vehicle.[118] For the present, however, the seller is secure if he interprets the *Code* provisions to mean what they say. "As is" or "with all faults," and other similar phrases, will exclude implied warranties unless the circumstances surrounding the transaction raise a question about the intention of the parties.

Most vendors who have consulted with counsel regarding their sales contracts have apparently been advised to use the extact language of the *Code*. There have been some other phrases used, however, which have been intended to call the buyer's attention to the lack of implied warranty. The general pharase "no warranties, express or implied" is apparently not sufficient to exclude all implied warranties since the official comments to section 2-316 have declared this particular phrase to be anathema.[119] Other authorities agree with this interpretation.[120] There is a conflict over the phrase "accepted in its present condition." *Hull-Dobbs, Inc. v. Mallicoat*,[121] held that such language referred to acceptance, and is *not* synonomous with "as is," which refers to representations which have induced acceptance. However, in *First National Bank of Elgin v. Husted*,[122] the court stated that the words "in its present condition" are similar to the words "as is," and have the effect of excluding all

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[115] 254 F. Supp. 424, 427. The court examined depositions on file and the contract itself, and noted that the equipment was purchased used.

[116] Compare the courts' use of the unconscionable doctrine in U.C.C. § 2-302, discussed in text, § IV(B) *infra*.

[117] Mulder v. Casho, 61 Cal. App. 2d 633, 394 P.2d 545, 39 Cal. Rptr. 705 (1964).

[118] *Id.* at 637, 394 P.2d at 547, 39 Cal. Rptr. at 707. Compare discussion in Shanker, *supra* note 5, at 40-41 n.124, where the author argues that a sale of a "truck" means a "workable truck" and calls it part of the description.

[119] U.C.C. § 2-316, Comment 1.

[120] *See generally* Donovan, *supra* note 106, at 213; 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 77 n.59 (1964). *See also* L & N Sales Co. v. Little Brown Jug, Inc., 12 Pa. D. & C.2d 469 (1957).

[121] 57 Tenn. App. 100, 105, 415 S.W.2d 344, 345-46, 3 U.C.C. Rep. 1032, 1034 (1966).

[122] 57 Ill. App. 2d 227, 236, 205 N.E.2d 780, 784 (1965).

implied warranties.[123] There is no clear reconciliation point between the two cases, except that the *Husted* court also discussed the buyer's examination of the goods as having some bearing on the exclusion of warranties.

The fact that the parties use the word "guarantee" instead of "warranty" will have no effect on the effectiveness of the disclaimer as long as the intention of the parties is clear from the facts surrounding the transaction.[124] An interesting point was noted in an early discussion of the warranty disclaimer provisions:[125] Section 2-316(2) states, "language to exclude all implied warranties of fitness is sufficient if it states, for example, 'there are no warranties which extend beyond the description on the face hereof.' " The question is whether this language, if used, would exclude part of an implied warranty of merchantability, since "all implied warranties of fitness . . . ." would seem to include fitness for ordinary purposes, and that is an aspect of the warranty of merchantability.[126] The language of section 2-316(2) should not be so construed, since it is obvious from the organization of that section that the draftsmen intended to treat the warranty of merchantability and the warranty of fitness for a particular purpose separately.[127] The recommended language is intended to be illustrative of a proper disclaimer for the latter warranty only,[128] and the words "fitness for a particular purpose" should be read into this portion of section 2-316(2) for clarity.

When the seller uses this special language, there is some confusion regarding whether it must be stated conspicuously.[129] Section 2-316 requires conspicuous terms to exclude implied warranties when it discusses them in subsection (3). Professor William Hogan has concluded that such terms need not be conspicuously stated because subsection (3) provisions are operative "notwithstanding subsection (2)," and subsection (3) says nothing about conspicuous terms.[130] The cases would seem to support him. In *First National Bank of*

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[123] *Id. See also* Tibbitts v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967).

[124] *Compare* Chamberlain v. Bob Matick Chevrolet, Inc., 4 Conn. Cir. 685, 239 A.2d 42, 4 U.C.C. Rep. 936 (1967), *with* Ryan v. Ald, Inc., 149 Mont. 358, 427 P.2d 53 (1967).

[125] Note, *Consumer Protection, supra* note 28, at 255.

[126] U.C.C. § 2-314 provides in part:

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

. . . .

(c) are fit for the ordinary purposes for which such goods are used . . . .

[127] *See also* U.C.C. § 2-316(2), Comment 4.

[128] "Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous." U.C.C. § 2-316, Comment 4. Therefore, the language recommended by the *Code* is general language. *See also* U.C.C. § 2-316(2).

[129] What the courts have held to be conspicuous is discussed in text, § III(A)(3)(a) *infra*.

[130] *Compare* Hogan, *supra* note 27, at 7 n.29 *with* J. HONNOLD, LAW OF SALES AND SALES FINANCING 96 (3d ed. 1968).

Elgin v. Husted,[131] the disclaiming language was printed in the same size type as the rest of the contract, and the provision "accepted in its present condition" was held to be a valid exclusion.[132] Cases decided under pre-*Code* law likewise support this position. In *Claxton v. Pullman, Inc.*[133] the "as is" provision was held to be a part of the agreement although it was stated on the reverse side of the contract. On the other hand, the principle of internal consistency in statutory construction would indicate that the requirement for conspicuous terms of subsection (2) should be carried over to subsection (3).[134] In addition, since the purpose of section 2-316 is to call the buyer's attention to the exclusion of warranty, and since the courts consider all the circumstances surrounding the transaction, it seems logical to conclude that phrases under subsection (3) should be conspicuous.[135] At least that is the surest way to use the language effectively.

Finally, there is the question of whether the special language may be oral or must be in writing. Again, subsection (3) says nothing, while subsection (2) requires a writing to disclaim a warranty of fitness for a particular purpose.[136] The same arguments just presented regarding the requirement of conspicuousness apply here. No court has ever decided the issue. The safest rule is to include such language in a writing, and to do so is preferable for evidentiary purposes.[137]

2. Exclusion of All Implied Warranties by Stating Express Warranties — Exclusion and Integration Clauses

Sellers have long attempted to limit recovery in warranty by stating one express warranty to the exclusion of all other warranties. A typical example is stating that the product is guaranteed against defects in workmanship for one year, and that this warranty is in lieu of all other warranties express and implied. These "exclusion" clauses merely amount to disclaimers couched in the form of a limited and exclusive express warranty.[138] In fact, it has been intimated that sellers are anxious to provide some kind of limited warranty only for the purpose of excluding implied warranties which could otherwise return to haunt them.[139] Prior to the

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[131] 57 Ill. App. 2d 227, 236, 205 N.E.2d 780, 784 (1965).

[132] *Id. See also* Baselice v. 341 Reid Avenue Corp., 5 U.C.C. Rep. 493 (Sup. Ct. N.Y. 1968) (upholding an "as is" provision hidden in paragraph 10 of a lengthy contract).

[133] 116 Ga. App. 416, 157 S.E.2d 642 (1967).

[134] *See* Donovan, *supra* note 106, at 213, 215-16 n.164.

[135] *See* Hawkland, *supra* note 20, at 32.

[136] The warranty of merchantability may be excluded orally. U.C.C. § 2-316(2).

[137] *See* Hogan, *supra* note 27 at 8. *See also* section VI(D) *infra.*

[138] *See* Note, *Disclaimers, supra* note 3, at 329; Duesenberg, *supra* note 6, at 163.

[139] Blackburn, *supra* note 16, at 173.

promulgation of the *Uniform Commercial Code*, it was generally held that a clause which provided a limited express warranty, and stated it to be in lieu of all other warranties express and implied, was an effective disclaimer.[140] However, this theory was eroded on two fronts. First, the case of *Henningsen v. Bloomfield Motors, Inc.* [141] prompted courts to look carefully at any language directed at the consumer and to attempt to detect a violation of public policy. Accordingly, some courts have declared that clauses containing express warranties to the exclusion of all others did not exclude implied warranties as being against public policy to do so.[142] Secondly, some courts concluded that there was no reason to exclude the implied warranties which were not inconsistent with the express warranty.[143] The *Uniform Sales Act* adopted this position in section 15(6). If no inconsistency was found, therefore, the implied warranties remained effective. The *Code* provisions which apply to this problem are not specifically directed toward solving it. Section 2-316 indicates that implied warranties may be excluded if the parties agree to the exclusion. However, section 2-317 states certain rules to be followed if warranties are conflicting. The pertinent language of this section is as follows:

> Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:
>
> . . .
>
> (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Further, section 2-719 states that the parties may agree upon a remedy, to the exclusion of all others, which will restrict the cause of action for breach of warranty.[144]

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[140] *See, e.g.,* Shafer v. Reo Motors Inc., 205 F.2d 685 (3d Cir. 1953); Guhy v. Nichols & Sheperd Co., 33 Ky. L. Rep. 257, 109 S.W. 1190 (1908); Hargrove v. Lewis, 313 S.W.2d 594 (Mo. App. 1958); Lumbrazo v. Woodruff, 256 N.Y. 92, 175 N.E. 525, *modified as to counterclaim,* 256 N.Y. 640, 177 N.E. 174 (1931). *See also.* Mattson v. General Motors Corp., 9 Mich. App. 473, 157 N.W.2d 486 (1968); Klimate-Pruf Paint & Varnish Co. v. Klein Corp., 1 N.C. App. 431, 161 S.E.2d 747 (1968). For brief discussions of pre-*code* law see Layer, *Sales Warranties Under the Uniform Commercial Code,* 30 MO. L. REV. 259, 284-85 (1965); Note, *Consumer Protection, supra* note 28, at 258 n.120; Note, *Warranty Disclaimers, supra* note 95, at 399.

[141] 32 N.J. 358, 161 A.2d 69 (1960). *See* text accompanying notes 8-12 *supra.*

[142] *See* Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966). Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966). *See also* Manheim v. Ford Motor Co., 201 So.2d 440 (Fla. 1967); Crown v. Cecil Holland Ford, Inc., 207 So.2d 67 (Fla. App. 1968).

[143] *See* Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363 (5th Cir. 1964); Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548 (D. Conn. 1967); Tucson Utility Supplies, Inc. v. Gallagher, 102 Ariz. 499, 433 P.2d 629 (1967).

[144] *See* text, § V(B)(2) *infra.*

It is possible to interpret a clause which states an express warranty to the exclusion of all others as falling within either section. Under section 2-316 the clause may effectively disclaim implied warranties away in favor of the express warranty. And under section 2-719, if the remedy prescribed by the parties is intended to be exclusive, it will be considered the sole remedy in case of breach. Under section 2-317 the clause may have no effect because the express warranty, standing alone, is not inconsistent with the implied warranties. Courts which have upheld such provisions as effective disclaimers have generally done so on a freedom of contract theory,[145] accepting the express warranty in lieu of the implied warranties. Several cases further note that the enforcement of these clauses in no way offends public policy.[146] One case reasoned that the legislature was aware of public policy when it considered the *Code,* and, if it would offend public policy to exclude implied warranties in this manner, the legislature would have obviated the possibility when the *Code* was adopted.[147] It is plausible that these exclusion clauses do qualify under section 2-316 to exclude implied warranties of fitness for a particular purpose. They are always in writing, and, if conspicuous, all of the requirements to exclude those implied warranties have been met.[148] But it is difficult to understand how courts conclude that the language of these clauses would exclude an implied warranty of merchantability. Section 2-316(2) requires that the language, unless it falls within subsection (3)(a), must mention "merchantability." Yet a district court in *Arrow Transportation Co. v. Fruehauf Corp.*,[149] was faced with a breach of a warranty of merchantability where the seller had expressed a warranty to the exclusion of all others. The opinion states that the *Uniform Commercial Code*, "in essence, provides that the parties are free to contract away any warranties which may be implied by law, the only requirement being that the disclaimer be clearly stated and

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[145] *See* Construction Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505, 510 (7th Cir. 1968), *cert. denied,* 395 U.S. 921 (1969); Cox Motor Car Co. v. Castle, 402 S.W.2d 429, 3 U.C.C. Rep. 397 (Ky. App. 1966).

[146] *See* Desandolo v. F & C Tractor & Equip. Co., 211 So.2d 576, 580 (Fla. App. 1968); Thorman v. Polytemp, Inc., 2 U.C.C. Rep. 772, 774 (Westchester County Ct., N.Y. 1965). *But see* Hall v. Everett Motors, Inc., 340 Mass. 430, 165 N.E.2d 107 (1960). In *Hall,* Justice Wilkins enforced a clause creating an express warranty to the exclusion of implied warranties, and then lamented: "This is not the kind of an agreement which commends itself to the sense of justice of the court . . . . We hope that should a similar case arise under the Uniform Commercial Code we shall not be bound by precedent." *Id.* at 432, 165 N.E.2d at 109.

[147] Marshall v. Murray Oldsmobile Co., 207 Va. 972, 978, 154 S.E.2d 140, 144-45 (1967).

[148] U.C.C. § 2-316(2).

[149] 289 F. Supp. 170 (D. Ore. 1968).

be conspicuous."[150] This is overstating freedom of contract at the expense of the clear requirements of section 2-316. The language used in exclusion clauses may not be fairly considered within the provisions of subsection (3)(a),[151] and therefore must contain the word "merchantability" to exclude that warranty under subsection (2). The better rule seems to be that the warranty of merchantability survives a clause which states that an express warranty is given in lieu of all other warranties.[152] In one case the clause stated that the express warranty was in lieu of "any implied warranty of merchantability." Nevertheless, the court held in this case, *Walsh v. Ford Motor Co.*,[153] that absent a clear showing of commercial reasonableness, the exclusion would be stricken as a matter of law.

Other courts have held that exclusion clauses will not have the effect of disclaiming implied warranties of fitness for a particular purpose because those implied warranties are not inconsistent with the express warranty, and are therefore saved by section 2-317.[154] This, too, is a preferable rule. Although warranties of fitness for a particular purpose may be disclaimed by general language of this type under section 2-316, they should be retained in almost every case under section 2-317.[155] Where the seller has led the buyer to believe that all warranties can be performed while inserting an exclusion clause into the contract, the seller is estopped from raising the exclusion clause as a defense.[156] However, if the seller has stated an express warranty to the exclusion of all implied warranties, and has done so in good faith not realizing an inconsistency with a warranty of fitness, then section 2-317(c) will retain

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[150] *Id.* at 172-73. *See also* Cox Motor Car Co. v. Castle, 402 S.W.2d 429, 3 U.C.C. Rep. 397 (Ky. App. 1966); Marshall v. Murray Oldsmobile Co., 207 Va. 972, 154 S.E.2d 140 (1967). In *Marshall,* the court expresses no opinion on whether the language would be sufficient to exclude implied warranties under the *Code. Id.* at 978, 154 S.E.2d at 145.

[151] *See* text accompanying notes 119-20 *supra* for a discussion of the words "all warranties, express or implied, are excluded."

[152] *See* Neville Chemical Co. v. Union Carbide Corp., 249 F. Supp. 649, 5 U.C.C. Rep. 1219 (W.D. Pa. 1968); Marion Power Shovel Co. v. Huntsman, 246 Ark. 149, 437 S.W.2d 784 (1968); Willman v. American Motor Sales Co., 44 Erie Co. L.J. 51, 1 U.C.C. Rep. 100 (1961). *See also* Boeing Airplane Co. v. O'Malley, 329 F.2d 585, 593 (8th Cir. 1964) (decided under the 1952 Code); Mutual Services of Highland Park, Inc. v. S.O.S. Plumbing & Sewerage Co., 93 Ill. App. 257, 235 N.E.2d 265 (1968).

[153] 59 Misc. 2d 241, 298 N.Y.S.2d 538, 540 (Sup. Ct. 1969), *citing* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[154] *See* Sutter v. St. Clair Motors, Inc., 44 Ill. App. 2d 318, 323, 194 N.E.2d 674, 677 (1963) (court applies reasoning of section 2-317 but refers to section 2-316); L. & N. Sales Co. v. Stuski, 188 Pa. Super, 117, 146 A.2d 154, 157 (1958).

[155] U.C.C. § 2-317, Comment 2 states that where the seller has in good faith caused an inconsistency, the "intention" rules of section 2-317 apply, and they presume the intention of the parties to be the retention of the implied warranty of fitness.

[156] U.C.C. § 2-317, Comment 2.

the implied warranty of fitness.[157] According to the *Code* provisions, therefore, the typical exclusion clause may exclude the implied warranty of fitness if the evidence is clear that such a result was the exact intention of the parties, so as to overcome the presumed intention of the parties stated in section 2-317(c).[158] Absent a clear showing that the intention of both parties has been adopted by an exclusion clause, it should have no effect whatsoever. Where the exclusion clause states a limited remedy, and provides that this remedy is intended as the exclusive remedy in case of breach of contract, the effect may be to exclude any action alleging breach of implied warranties. This type of clause and its effect are considered in detail later.[159]

A related problem is the use of the "integration" or "merger" clause, stating that the written contract contains all of the agreements between the parties and is intended by the parties as the final expression of the agreement. The parol evidence rule has a profound effect on express warranties,[160] but, alone, it has no effect at all on implied warranties. Since implied warranties are generally viewed as arising by operation of law, rather than by conduct of the parties, the parol evidence rule is irrelevant to implied warranties.[161] Moreover, the parol evidence rule is specifically incorporated into the *Code* provisions dealing with disclaimer of express warranties, while the provisions relating to disclaimer of implied warranties do not refer to the rule.[162] The parol evidence rule, then, will not operate as an unbargained-for disclaimer of implied warranties — it never has. Cases decided prior to the adoption of the *Code* have generally held that a provision in a contract that the writing contains all of the agreements between the parties does not affect implied warranties.[163] Courts interpreting the *Code* provisions have reached the conclusion that the warranty exists despite the "integration" clause, unless specifically excluded.[164] The integration clause may be used, however, to help prove the intentions of the parties when an exclusion clause

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[157] *Id.*

[158] *See* U.C.C. § 2-317, Comment 3.

[159] *See* text, § V(B)(1) *infra.*

[160] *See* text, § I (C) *supra.*

[161] *See* Note, *Warranty Disclaimers, supra* note 95, at 400.

[162] *Compare* U.C.C. § 2-316(1) *with* U.C.C. § 2-316(2) *and* U.C.C. § 2-316(3). *See also* Hogan, *supra* note 27, at 8-9.

[163] *See* Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959); Frigidinners, Inc. v. Branchtown Gun Club, 176 Pa. Super. 643, 109 A.2d 202 (1955); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 189 A. 580 (1937); White Co. v. Francis, 95 Pa. Super. 315 (1929). *But cf.* S.F. Bowser & Co. v. Birmingham, 276 Mass. 289, 177 N.E. 268 (1931).

[164] *See* Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962); *rev'd in part on other grounds,* 320 F.2d 130 (3d Cir. 1963).

is present, and together they may have the effect of excluding the implied warranties. The fact that the buyer has signed an agreement which states that it represents the entire contract between the parties tends to show that he is willing to waive all of the prior negotiations.[165]

3. Technical Requirements to Exclude Each Separate Implied Warranty

The use of recognized "disclaimer" language, such as "with all faults" or "as is," has the effect of excluding all implied warranties of quality and performance. The *Code* treats each warranty separately and prescribes special rules to follow in order to disclaim each warranty.[166] One troublesome factor is common to language disclaiming the warranty of merchantability and the warranty of fitness for a particular purpose — in either case, such language must be conspicuous.[167]

a. Conspicuousness

The drafters of the *Code* apparently felt that some guidance was necessary to help determine when language was conspicuous enough to be effective. Accordingly, they drafted section 1-201(10):

> "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 conspicious. 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.

This guidance generally followed pre-*Code* law which required that a disclaimer clause must be called to the buyer's attention to be valid.[168] Section 1-201(10) prescribes the manner in which a disclaimer clause should be written to be effective. Onto this the courts have engrafted some tests regarding the location of such a clause.

A New York court in *Minikes v. Admiral Corp.*,[169] had no trouble in striking a disclaimer which had been written in print smaller than the print in the rest of the contract.[170] Similarly, a

[165] *See* Thorman v. Polytemp, Inc., 2 U.C.C. Rep. 772 (Westchester County Ct., N.Y. 1965).

[166] The seller may have a valid reason for wishing to disclaim one but not the other. One reason could be the courts' propensity to declare contracts which disclaim all warranties to be unconscionable. *See* text, § IV(B) *infra*.

[167] U.C.C. § 2-316(2).

[168] *See, e.g.*, Smith v. Regina Mfg. Corp., 396 F.2d 826 (4th Cir. 1968); Mosesian v. Bagdasarian, 260 Cal. App. 2d 361, 67 Cal. Rptr. 369 (Ct. App. 1968); Ryan v. Ald, Inc., 149 Mont. 384, 427 P.2d 53 (1967).

[169] 48 Misc. 2d 1012, 266 N.Y.S.2d 461 (Dist. Ct. Nassau County 1966).

[170] *See also* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. 30 (1968).

number of courts have refused to uphold a disclaimer printed in the same color and same size type as the rest of the contract.[171] In some cases, the heading to the section of the contract which contained the warranty was printed in unusual type, but this was not enough,[172] even where the language in the heading might have hinted that a disclaimer was contained in that section.[173]

The practice of hiding the disclaimer language in the body of the contract has been critized.[174] Similarly, placing the disclaimer clause on the back of the contract is undesirable,[175] especially if no reference is made on the front of the contract to the language on the back.[176] In *Hunt v. Perkins Machinery Co.*,[177] a disclaimer clause was printed in capital letters on the back of the contract, under the heading "TERMS AND CONDITIONS." On the face of the contract in bold-face capital letters was the statement "BOTH THIS ORDER AND ITS ACCEPTANCE ARE SUBJECT TO THE 'TERMS AND CONDITIONS' STATED IN THIS ORDER." The court held that the reference on the front of the contract was not sufficient to direct attention to the otherwise conspicuous disclaimer language on the back, and the disclaimer was ineffective.

To satisfy the requirement of conspicuousness, therefore, the seller should state his disclaimer in a manner prescribed by section 1-201(10), on the face of the contract, and in a separate paragraph.

b. Language to Exclude the Implied Warranty of Merchantability

Language disclaiming the implied warranty of merchantability may be stated orally or in writing.[178] If it is in writing, it must be

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[171] Boeing Airplane Co. v. O'Malley, 329 F.2d 585, 593 (8th Cir. 1964); Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co., 246 Ark. 99, 437 S.W.2d 459, 463, 6 U.C.C. Rep. 93, 98 (1969); Marion Power Shovel Co. v. Huntsman, 246 Ark. 149, 437 S.W.2d 784, 6 U.C.C. Rep. 100 (1969); Massey-Ferguson, Inc. v. Utley, 439 S.W.2d 57, 59 (Ky. App. 1969); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 6 U.C.C. Rep. 132, 137 (N.Y. Civil Ct. 1969). S.F.C. Acceptance Corp. v. Ferree, 39 Pa D. & C.2d 225, 229, 3 U.C.C. Rep. 808, 810 (1966). *See also* Blackburn, *supra* note 16, at 179.

[172] *See* Massey-Ferguson, Inc. v. Utley, 439 S.W.2d 57, 59 (Ky. App. 1969).

[173] *See* Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co., 246 Ark. 99, 437 S.W.2d 459, 463, 6 U.C.C. Rep. 93, 98 (1969). The warranty section was titled with the words "Vehicle Warranty." Then followed a section titled "Supplement to Mack Standard Warranty Applicable to Mack Diesel Engines," in which the disclaimer was stated. *Id.*

[174] *See* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. 30 (1968); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 6 U.C.C. Rep. 132, 137 (N.Y. Civil Ct. 1969); S.F.C. Acceptance Corp. v. Ferree, 39 Pa. D. & C.2d 225, 3 U.C.C. Rep. 808 (1966).

[175] Massey-Ferguson, Inc. v. Utley, 439 S.W.2d 57, 59 (Ky. App. 1969).

[176] *See* Dailey v. Holiday Distrib. Corp., 260 Iowa 859, 151 N.W.2d 477 (1967).

[177] 352 Mass. 535, 536, 226 N.E.2d 228, 229 (1967).

[178] U.C.C. § 2-316(2). *See* Note, *Consumer Protection*, *supra* note 28, at 255; Hogan, *supra* note 27, at 7.

conspicuous, and if it is oral it must specifically alert the buyer to the fact that the warranty has been excluded.[179] The substance of the clause purporting to disclaim this warranty is suggested by the *Code*. Section 2-316(2) states that the language must mention "merchantability," and, of course, a draftsman will be well advised to follow this directive. But section 2-316(2) does not say that the disclaimer will be effective by the mere mention of the word "merchantability." On the contrary, the purpose behind this section would seem to indicate that any "legalese" which is not clearly understood by the buyer will be ineffective.[180] The rule, then, if taken on its face, is probably unrealistic,[181] since it will not warn anyone but the most sophisticated buyer of the risk it transfers. The 1952 version of the *Code* proposed that this warranty could only be excluded by "specific language,"[182] and a more realistic approach would insist that this requirement be read into the present section 2-316.

Further, there is an argument, despite the specific language of the statute, that the word "merchantability" may be omitted and the disclaimer will still be effective.[183] This is based on the fact that subsection (2) of section 2-316 is made subject to the general provisions of subsection (3), and the latter does not specifically require the use of the word to disclaim the warranty. To omit the word "merchantability" is a hazardous practice that only provides the courts with a handle on which to rely while declaring the disclaimer inoperative. This was the holding in *Neville Chemical Co. v. Union Carbide Co.*,[184] where the disclaimer was stricken for failure to specifically recite the word "merchantability."

Therefore, based on the underlying policy that the seller should adequately apprise the buyer of his risk, an effective disclaimer

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[179] Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc. 68 Ill. App. 2d 297, 306, 216 N.E.2d 282, 286, 3 U.C.C. Rep. 531, 533 (1966). The *Admiral* case involved an oral contract which was executed before the *Code* was effective in Illinois. The court interpreted section 2-316, however, to be consistent with its proposition that a buyer would not be bound by the oral disclaimer unless he had been specifically made aware that such a disclaimer existed. *Id.*

[180] The exclusion of implied warranties is supposedly permitted only when the buyer is not surprised. *See* U.C.C. § 2-316, Comment 1.

[181] A conclusion also reached by Professor Morris G. Shanker, who argues that a more effective disclaimer would be: "These goods are *not* fit for the ordinary purposes for which they are normally used *and may actually cause you physical harm.*" Shanker, *supra* note 5, at 41, 42.

[182] Section 2-316 of the 1952 *Code* provided:

> (2) Exclusion or modification of the implied warranty of merchantability or of fitness for a particular purpose must be in specific language and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller . . . .

[183] *See* Donovan, *supra* note 106, at 213.

[184] 294 F. Supp. 649, 656, 5 U.C.C. Rep. 1219, 1225 (W.D. Pa. 1968). *See also* Marion Power Shovel Co. v. Huntsman, 246 Ark. 149, 437 S.W.2d 784, 6 U.C.C. Rep. 100 (1969).

of the warranty of merchantability should at least contain the following: "there is no warranty of merchantability, and the seller assumes no responsibility for the quality of the product or for damage that may be caused by a defect in the product."

c. Language to Exclude the Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose may not be disclaimed orally. To be effective, a disclaimer of this warranty must be in writing and conspicuous.[185] Although section 2-316 does not require any specificity of language to disclaim this warranty, it does suggest that a clause stating, "there are no warranties which extend beyond the description on the face hereof," will be sufficient.[186] This would seem to indicate that other language having the same general meaning would be equally effective. It should merely inform the buyer that the seller is accepting no responsibility for any reliance on his skill and judgment, and this may be done in general terms.[187] It would be unrealistic to require any more from the seller, since he is unable to adequately ascertain what he may have done to cause the buyer to rely on his skill and judgment, so as to specifically disclaim that effect for each instance. Nor does the buyer need additional protection. If the seller has affirmatively commented about the product in such a way as to encourage the buyer to purchase it for a particular purpose, the seller may well have made an express warranty by affirmation of fact. Whatever the buyer has *inferred* from the transaction should not be so strenuously protected as to require carefully drafted language of disclaimer.

B. Exclusion by Conduct

The reasonable expectations of the parties is the principle subject of protection in warranty law, just as in other contract law.[188] All of the facts surrounding the transaction must be considered in determining the intention of the parties. Often these circumstances will include certain conduct of the parties which indicate an intention to transfer or to accept the risk of a defective product. If that intention is apparent from the conduct of the parties, all implied warranties may be excluded.

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[185] U.C.C. § 2-316(2).

[186] *See* notes 125-27 *supra*, and accompanying text, for a discussion of this language as it relates to all implied warranties.

[187] U.C.C. § 2-316, Comment 4. *See also* Donovan, *supra* note 106, at 212.

[188] *See* Hawkland, *supra* note 20, at 32.

1. Examination

The buyer may have an opportunity to examine the goods before he enters the contract. If he has examined the items "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 . . . ."[189] The policy behind this rule is simple. If the buyer notices the defect and waives it, or fails to notice it through his own fault after having ample opportunity to discover it, then the buyer should be estopped from asserting the defect as a breach of warranty when he is injured. However, it may be argued that a buyer would not assume that a professional seller will have no further responsibility for the goods merely because of his examination of the product.[190] But the buyer may have a duty to inquire into the extent of the seller's further responsibility regarding the defect, and, of course, if the seller gives assurances as to these matters, the buyer is protected by an express warranty.[191]

The requirement that a buyer "examine" the goods constitutes a modification of prior law, which merely required an "inspection."[192] The "examination" refers to the nature of the responsibility assumed at the time the contract is made, while "inspection" refers to activity before acceptance or any other time after the contract is made.[193] The buyer's observations which may be said to form part of the bargain constitute the operative disclaimer of implied warranties here.

However, the buyer may be estopped from asserting a breach of warranty where he has had an opportunity to examine the goods and refuses.[194] One court seems to have held that merely making the goods available to inspection will provide the opportunity necessary to exclude the warranties.[195] The comments to section 2-316 directly refute this proposition,[196] and the better rule is that

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[189] U.C.C. § 2-316(3)(b).

[190] Shanker, *supra* note 5, at 42. The author argues that the buyer should be held to a waiver only if he knows that the defective good will likely lead to the harm of which he complains. "For example, a buyer may be aware that a screw is missing on a machine. He may not have sufficient engineering sophistication to be aware that the machine will fly apart under operation just because of the missing screw. If so, the buyer ought not be denied all recovery for injuries caused him by the flying parts." *Id.*

[191] *See* Hawkland, *supra* note 20, at 32-33.

[192] *See* Donovan, *supra* note 106, at 216; Note, *Consumer Protection, supra* note 28, at 256-57; Ezer, *supra* note 27, at 317.

[193] U.C.C. § 2-316, Comment 8.

[194] U.C.C. § 2-316(3)(b). *See also* Hawkland, *supra* note 20, at 33.

[195] Refrigeration Discount Corp. v. Crouse, 79 York L.R. 31, 2 U.C.C. Rep. 986 (Pa. Ct. C.P. York County 1965).

[196] U.C.C. § 2-316, Comment 8.

the buyer's refusal is ineffective unless the seller has made a *demand* that the goods be examined[197] and unless the seller has so demanded, the buyer cannot be said to have refused.[198]

If the buyer has either examined, or refused to examine, there are no implied warranties as to defects which such examination would have revealed.[199] However, an implied warranty remains for latent defects.[200] The extent of the exclusion by examination will be a question of fact for a jury to determine,[201] and will depend upon the facts surrounding the examination, the means of examination which were available, the manner in which it was conducted, and the professional capacity of the person conducting the examination.[202] As a practical matter, if the buyer possesses the technical skill to detect a possible defect in the product, the seller should demand that he examine it. Of course, this may result in his declining to purchase the product, but it is preferable to lose a sale rather than expending large sums for consequential damages. There is also a possibility that the buyer will refuse the demand, or, having examined it, waive the defect.

2. Course of Dealing, Course of Performance, Usage of Trade

The conduct of the parties in performing previous transactions may have the effect of excluding an implied warranty.[203] If these prior dealings induce expectations that the buyer, rather than the seller, is to assume certain risks, then the seller is relieved from responsibility for those risks.[204] The *Code* has followed prior law on this subject. In *Asgrow Seed Co. v. Gulick*,[205] the court held that a valid custom concerning the subject matter of a contract, knowledge of which could be imputed to the parties, is incorporated into the contract by implication. Thus, the buyers of seed, who had purchased from the seller on prior occasions and should have known that the seller limited its liability in the invoice and on the container, could not assert a breach of warranty which contravened that limitation. Of course, the buyer must either have actual knowledge

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[197] *See* Hawkland, *supra* note 20, at 33; Note, *Consumer Protection, supra* note 28, at 256.

[198] David Pepper Co. v. Jack Keller Co., 6 U.C.C. Rep. 673 (Dep't of Agriculture 1969).

[199] *See* Appeals of Reeves Soundcraft Corp., 2 U.C.C. Rep. 210 (Armed Services Bd. of Contract Appeals 1964).

[200] *See* Leveridge v. Notaras, 433 P.2d 935, 4 U.C.C. Rep. 691 (Okla. 1967).

[201] Sylvia Coal Co. v. Mercury Coal & Coke Co., 151 W. Va. 818, 156 S.E.2d 1, 4 U.C.C. Rep. 650 (Va. App. 1967).

[202] U.C.C. § 2-316, Comment 8. *See* Note, *Consumer Protection, supra* note 28, at 256.

[203] U.C.C. § 2-316(3)(c). It may also have the effect of creating an express warranty. *See* text accompanying note 57 *supra.*

[204] *See* Hawkland, *supra* note 20, at 33-34.

[205] 420 S.W.2d 438 (Tex. Civ. App. 1967).

of the course of performance or dealing, or be able to be charged with such knowledge.[206]

IV. Judicial Construction and Limitations of Warranty Exclusion

A. Strict Construction

Disclaimers although a part of the contract are not constructive terms. Instead, they tend to infringe upon protective doctrines which have been established by the very same courts that must construe the disclaimer.[207] These courts are understandably hesitant to enforce a provision which contractually disrupts the protection they have developed over many years. Similarly, the aura surrounding the disclaimer is generally unpleasant. It is the rare case where the buyer has a superior bargaining position. Where the seller has the superior position, a standard contract is often used, and the sale may be on a take-it or leave-it basis. Even when the seller clearly informs the buyers of the intent to disclaim, the buyer's attention may be directed elsewhere by the excitement of purchase, and, if he notices the disclaimer, doesn't care — then. Though courts are loathe to abandon the doctrine of freedom of contract, they will, in most cases, try to obviate the seller's potential power of abuse by excluding the disclaimer on any one of a number of contract principles.[208] Moreover, the court may find a disclaimer so objectionable as to refuse to enforce it as a matter of "public policy,"[209] or "natural justice and good morals."[210]

Courts have a tendency to construe disclaimers strictly.[211] One court described this tendency as "the commendable judicial feeling that, whenever possible, a court should enable a buyer to obtain something for his money."[212] And that, whenever possible, is what the courts do. A disclaimer, as a contract term, should be viewed with an eye toward determining the intent of the parties. Yet, it has been noted that judicial interpretation of disclaimers often

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[206] *See* Layer, *supra* note 140, at 284.

[207] *See generally* Note, *Limitations, supra* note 4, at 727.

[208] *See* Prosser, *supra* note 11, at 46-47.

[209] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403-04, 161 A.2d 69, 95 (1960).

[210] Linn v. Radio Center Delicatessen, Inc., 169 Misc. 879, 880-81, 9 N.Y.S.2d 110, 112 (N.Y. Mun. Ct. 1939).

[211] *See generally* Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548, 561 (D. Conn. 1967); Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc., 68 Ill. App. 2d 297, 305, 216 N.E.2d 282, 286 (1965); Hogan, *supra* note 27, at 6, n.24.

[212] Berk v. Gordon Johnson Co., 232 F. Supp. 682, 688 (E.D. Mich. 1964), *quoting from* Note, *Warranties Disclaimers and the Parol Evidence Rule,* 53 Colum. L. Rev. 858, 868 (1953).

ignore this principle.[213] Some special rules of construction applied to disclaimers are worth noting: (1) If the disclaimer is "ambiguous," extrinsic evidence may not be supplied in order to explain it.[214] The courts will uphold the principle the disclaimer sought to exclude rather than to attempt to ascertain the parties' intent on the issue; (2) One construction employed to avoid the effect of a disclaimer is by calling a defect in quality a failure of consideration.[215] This, in effect, says that if the disclaimer is unimpeachable, the bargain is invalid; (3) Although form contracts invariably contain several paragraphs of fine print, the disclaimer provisions are the only ones that are not enforced;[216] (4) One court was quick to restrict the effect of the exclusionary language to some limited part of the liability and then allow recovery on another related theory. [217]

Usually, however, courts will exclude the disclaimer by extracting some defect in the course of bargaining, and explaining that this irregularity prevented the buyer from agreeing on the terms. The *Uniform Commercial Code* permits this analysis by authorizing the court to determine whether a contract is unconscionable.[218]

B. Unconscionable Disclaimers

Section 2-302 was drafted in the *Code* in order to reform outmoded concepts which had been developed by the common law to protect a buyer from an unbargained contract.[219] This section gave the courts sweeping power to deal with contract provisions which are unbargained-for. It is as follows:

> (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 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 effects to aid the court in making the determination.

The comments explained that the purpose of the unconscionability provision is to prevent oppression and unfair surprise.[220]

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[213] *See generally* Note, *Limitations, supra* note 4, at 726, Note, *Warranty Disclaimers, supra* note 95, at 401.

[214] *See* Note, *Disclaimers, supra* note 3, at 330, *citing* McPeak v. Boker, 236 Minn. 420, 53 N.W.2d 130 (1952).

[215] *See* Note, *Limitations, supra* note 4, at 732-33. *See also* Myers v. Land, 314 Ky. 514, 519, 235 S.W.2d 988, 991 (1950).

[216] Note, *Disclaimers, supra* note 3, at 330. *See also* Note, *Limitations, supra* note 4, at 727.

Unquestionably, the public interest and the determination to provide a fair remedy were considered by the drafters when this provision was drawn. Courts have continued to extract these vague policy considerations from section 2-302.

Deeply rooted in the concept of oppression is the contract of adhesion. The *Henningsen* decision[221] was based partly on the fact that the buyer had no choice of terms, since all automobile manufacturers were using the same contract. In order for a buyer to assume the risk of a defective product, as he is required to do by accepting a disclaimer provision, is it necessary that he have a choice of whether or not to accept the disclaimer? Theoretically, more is required than the choice between doing without the product, and accepting the contract as drafted.[222] Moreover, section 2-316 which prescribes requirements for an effective disclaimer, does not protect against a contract of adhesion. Therefore a disclaimer provision could easily satisfy the enumerated requirements, and still be unbargained-for because the product to which it applies is available from only one source.[223] Furthermore, even where the classic adhesion contract situation does not exist, consumers ordinarily do not negotiate terms of a contract.[224] Consequently, the court is presented with an opportunity to inquire into each of these situations to determine if — considering the commercial setting, purpose, and effect — the bargain was oppressive and thereby unconscionable. An automobile warranty disclaimer was recently declared inoperative in *Zabriskie Chevrolet, Inc. v. Smith*,[225] because it was not brought to the buyer's attention, and the court classified it a "contract of adhesion." However, the courts also have recognized that they must consider the commercial setting in which the agreement is made,[226] and in *Dow Corning*

[217] Water Works & Industrial Supply Co. v. Wilburn, 437 S.W.2d 951 (Ky. 1968).

[218] U.C.C. § 2-302. *See generally* Note, *Disclaimers, supra* note 3, at 330.

[219] *See generally* U.C.C. § 2-302, Comment 1; Note, *Warranty Disclaimers, supra* note 95, at 403-04.

[220] U.C.C. § 2-302, Comment 1.

[221] Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

[222] *Compare* Note, *Disclaimers, supra* note 3, at 331, *with* Boshkoff, *supra* note 11, at 304-05, where the author argues that freedom of choice may be defined in different ways. It has been argued that even ordinary contracts of sale are contracts of adhesion, since they are "presented to consumers under conditions of haste, ignorance, and compulsion." Note, *Disclaimers, supra* note 3, at 328.

[223] *See* Note, *Warranty Disclaimers, supra* note 95, at 399.

[224] Note, *Disclaimers, supra* note 3, at 329. The author notes that "[n]othing in the small voice of a disclaimer will provoke the consumer into his own program of insurance, testing, and caution after purchase." *Id.*

[225] 99 N.J. Super. 441, 240 A.2d 195 (1968).

[226] Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 297 N.Y.S.2d 108, 5 U.C.C. Rep. 1213 (1968). *See also* Donovan, *supra* note 106, at 217.

Corp. v. Capitol Aviation, Inc.,[227] a court found the commercial setting to be controlling in holding that a limitation of damages was not unconscionable.

A court reviewing a disclaimer provision may find that its effect works an unfair surprise on the unsuspecting buyer. The requirement of conspicuousness is found in section 2-316 and is intended to mitigate against surprise. If the disclaimer was not conspicuously stated, the court may simply conclude that it does not satisfy the technical requirements for an effective disclaimer,[228] rather than ruling that it is unconscionable. An element of surprise is presented when a latent defect causes a product to be worthless, a situation the courts are not treating uniformly. Where the defect is latent, so that neither party could be charged with knowledge that injury may result, it is a question of fact as to whether or not the waiver of warranties was unconscionable.[229] *Vlases v. Montgomery Ward & Co., Inc.*,[230] states that where a latent defect exists that renders the goods worthless, a disclaimer of responsibility for that defect is manifestly unreasonable.[231] However, *Jackson v. Muhlenberg Hospital*,[232] stands for the proposition that an express disclaimer of warranty with respect to a latent defect in blood which could not be detected and prevented was reasonable and contractually valid.

The theory behind the unconscionability clause and the concern of public policy obviously have a number of fundamental elements in common. Accordingly, it's not surprising that the courts are less than precise when using these concepts. Arguments have been made that certain attempts to exclude the implied warranty of merchantability should be interpreted as prima facie unconscionable, since the seller is abdicating his professional responsibilities by so disclaiming them.[233] There is some merit to this proposition, especially since certain attempts to limit damages for personal injuries are accorded the status of "prima facie" unconscionability under section 2-719.[234] Presently, however, the warranty of merchantability remains a negotiable issue, at least theoretically, and its exclusion will be governed by normal rules of unconscionability as promulgated by the *Code*. Stated simply, the application of the

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[227] 411 F.2d 622, 6 U.C.C. Rep. 589 (7th Cir. 1969).

[228] *See, e.g.*, Minikes v. Admiral Corp., 48 Misc. 2d 1012, 266 N.Y.S.2d 461 (Dist. Ct. Nassau County 1966) and text, § III(A)(3)(a) *supra*.

[229] Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778, 782, 5 U.C.C. Rep. 312, 316 (1968).

[230] 377 F.2d 846, 4 U.C.C. Rep. 164 (3rd Cir. 1967).

[231] *Id.* at 850, 4 U.C.C. Rep. at 169.

[232] 96 N.J. Super. 314, 232 A.2d 897, 4 U.C.C. Rep. 561 (1967).

[233] Shanker, *supra* note 5, at 43-44.

[234] *See* text accompanying notes 268-70, *infra*.

unconscionability clause to disclaimers depends on the extent to which the negotiation of the contract and the effect of the disclaimer shocks the conscience of the courts. There is no formula for coping with the hoary problem of unconscionability. The seller may avoid the problem of unfair surprise by taking every prescribed precaution to call the buyer's attention to the disclaimer. However, the problem of oppression, and the extent of which the courts feel the disclaimer violates public policy, are intangibles which are incapable of reduction to a common denominator. For these reasons, the seller should avoid overbroad disclaimers that seek to exclude all potential liability. Further the seller must show that the bargain is not, in the commercial setting, oppressive to the buyer. A record of any negotiation of the disclaimer provisions will help to prove that the disclaimer was not oppressively obtained. As a general principle, the seller should attempt to conduct the transaction as he, if he were a judge, would like to see it conducted.

C. Disclaimers Not Contemporaneous With the Sale

In order to enforce a disclaimer, a court must be able to find that the parties have agreed to its effect. Generally, language of disclaimer is included in the written contract which is executed to consummate the transaction, and thus, if all other requirements are met, a court may infer that the parties have agreed to the stated terms. However, this inference will not be drawn where the disclaimer is proposed after the sale has been completed and thus, subsequent language of disclaimer will have *no effect* on the warranties, which become binding when the contract is signed.[235]

The *Code* itself covers this point specifically only in one case — when a security agreement is executed after the parties have agreed on the sale. Subsection 9-206(2) provides that the Sales article governs exclusion or modification of warranties when a security agreement is involved, and a comment to that section indicates that a buyer will not inadvertently abandon his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement.[236] Futhermore, pre-*Code* decisions recognized that an attempt to disclaim warranties on or after delivery by language on an invoice, receipt, or other notice, is ineffective.[237] For example, in *Tiger Motor Co.,*

[235] *See* Note, *Consumer Protection, supra* note 28, at 257.

[236] U.C.C. § 9-206, Comment 3. For a discussion of the earlier version of this section regarding this issue, see Donovan, *supra* note 106, at 213-14 n.158.

[237] *See* Trane Co. v. Gilbert, 73 Cal. Rptr. 279 (Ct. App. 1968); Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965) (implying that a similar result would be obtained under section 2-316).

Inc. v. McMurtry[238] the court held a disclaimer of warranties in an "Owner's Manual" ineffective to exclude express or implied warranties where the manual was given to the buyer when the automobile was delivered.[239] Of course, if the buyer has agreed to the disclaimer, and the later written disclaimer merely confirms the agreement between the parties, he should not be allowed to escape its effect by alleging it was delivered after the sale had been consummated.

V. MODIFICATION OR LIMITATION OF DAMAGES AND REMEDIES FOR BREACH OF WARRANTY

It may appear apparent from the foregoing that the chances for a seller successfully running the obstacle course of disclaimer are reasonably slim. If his disclaimer is impeccably drafted he runs the risk of being unable to market the product.[240] If he attempts to impose a disclaimer which raises only slight anxiety in the buyer, it may not be legally sufficient to apprise him of the risk.[241] A seller facing such a dilemma may well consider minimizing the effect of an ineffective disclaimer. This he is permitted to do, within limits, by sections 2-718 and 2-719 of the *Code*.[242]

A. Liquidated Damages

The parties to a sale may agree on an amount of damages which reasonably anticipates harm which may be caused by the breach. Section 2-718 provides:

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Of course, this provision is most applicable in a commercial setting.[243] It would be an unusual transaction for a sale to a con-

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[238] 224 So. 2d 638, 6 U.C.C. Rep. 608 (Ala. 1969).

[239] *See also* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. 30 (1968).

[240] *See* Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code,* 112 U. Pa. L. Rev. 564, at 594-95 (1964).

[241] *See* Hawkland, *supra* note 20, at 29.

[242] These sections are carefully intertwined with warranty disclaimers by reference to them in section 2-316(4). It is almost as if the draftsmen of section 2-316 were remarking with tongue-in-cheek that the disclaimer provisions which precede this reference were too confusing to be followed with consistent success.

[243] Murray, *The Consumer and the Code: A Cross-Sectional View,* 23 U. MIAMI L. REV. 11, 36 (1968).

sumer to contain a liquidated damage provision, and, even if such a provision were included, it would be doubtful that it was a product of agreement of the parties.[244]

"Reasonableness" of the agreed damages is the test of validity of this portion of the agreement, and apparently each of the three tests enunciated in subsection 2-718(1) must be met or the damages clause will be ineffective.[245] Therefore, no convenient or feasible alternative remedy can exist, and circumstances surrounding the transaction must indicate that it will be difficult to prove the amount of loss. These two elements of reasonableness really constitute the central purpose of a liquidated damages provision. Dean Hawkland argues that in the absence of these factors, the liquidated damages clause will be superseded by general remedies, because subsection 2-719(2) directs that result when a limited remedy fails of its essential purpose.[246] In addition to these elements, the estimated damages must reasonably approximate the actual harm expected by the breach. If unreasonably large liquidated damages are stated, the clause is void as a penalty.[247] It is doubtful that a seller who is seeking to minimize his liability for breach of warranty will agree to an unreasonably large liquidated damages provision. However, should he attempt to stipulate an unreasonably small amount, the clause could be considered to be unconscionable and stricken for that reason.[248] A circuit court of appeals in *Dow Corning Corp. v. Capitol Aviation, Inc.*,[249] held that an agreement which limited the purchaser's remedy for failure or delay in the delivery of a plane to the return of its deposit was not unconscionably small in light of the experimental product and flexible nature of the transaction. Apparently, a court will evaluate the damage provision in the context of its commercial setting to decide whether or not the clause is reasonable.

The seller may, and should, attempt to estimate potential damages which may follow from the sale of the product and the amount used in a liquidated damage provision should approximate that estimate. The fact that the estimate was made, and that the liquidated damage provision was based on the estimate, will assist the seller in proving the reasonableness of the provision.

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[244] In such a case, it may be stricken as unconscionable under section 2-302, since it is a provision in a contract of adhesion. *See* text, § IV(B) *supra*.

[245] *See* Hawkland, *supra* note 20, at 38, 39. *See also* U.C.C. § 2-718, Comment 1.

[246] Hawkland, *supra* note 20, at 39. *See also* Denkin v. Sterner, 10 Pa. D. & C.2d 230, 1 U.C.C. Rep. 173 (1956).

[247] U.C.C. § 2-718(1).

[248] U.C.C. § 2-718, Comment 1. *See also* Murray, *supra* note 243, at 36.

[249] 411 F.2d 622, 6 U.C.C. Rep. 589 (7th Cir. 1969).

B. Limitation of Remedy

The more frequent method used by a seller to minimize his responsibility for warranty problems is the contractual limitation or modification of remedies for the breach. Section 2-719 governs this manipulation:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
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> (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 exclusio nis 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.

1. Restricted Remedies

A majority of the clauses which are drafted in reliance on this section follow the illustration provided therein and limit the buyer's options to returning the goods for repair or replacement or to obtaining a refund of the purchase price.[250] Apparently, however, the parties are left free to shape any remedies they may agree upon, provided there are at least minimum adequate remedies available.[251] The latter phrase should signify to the perceptive reader that this provision, like all others which may affect the consumer, will be subjected to the most thorough judicial scrutiny. Courts have several options available by which they may disapprove of stipulated remedies: (1) the court may find that it was not intended to be an "exclusive" remedy; (2) even if intended as exclusive, it may "fail of its essential purpose;" and (3) it may be unconscionable.

The special remedies which the parties incorporate into their agreement exist merely as additions to normal contract remedies, unless it is expressly agreed that the stated remedies are exclusive.[252]

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[250] U.C.C. § 2-719(1)(a). *See* Blackburn, *supra* note 16, at 179; Note, *Warranty Disclaimers, supra* note 95, at 407.

[251] U.C.C. § 2-719, Comment 1.

[252] *See* U.C.C. § 2-719, Comment 2.

Thus, if the parties agree that the buyer may return the goods for free repair and replacement, that is only an option which the buyer may add to his arsenal of remedies, unless that remedy is stated to be exclusive of all others.[253] In an early case interpreting the *Code*,[254] the court held that the requirement of exclusivity had been satisfied when the seller provided free replacement of defective parts and stated that "this warranty is in lieu of any and all other warranties stated or inferred, and of all other obligations on the part of the manufacturer." In *Dow Corning Corp. v. Capitol Aviation, Inc.*,[255] the court determined that the remedy provided was intended to be the only recourse by surveying the circumstances surrounding the transaction, and the court noted that this result obtains despite the fact that the clause in the contract did not say the remedy contained therein is exclusive. Despite this decision, a seller would be well advised to clearly state that the remedy prescribed is intended to be exclusive.

Even if the parties have stated their intention to accept the stated remedy as "exclusive," a court may overlook that intention if the remedy fails "of its essential purpose."[256] In such a case, the right to pursue normal contract remedies is resorted to the buyer.[257] Basically, this provision gives the court opportunity to determine whether or not the remedy devised earlier is reasonable, in light of the circumstances surrounding the transaction at the time of the breach.[258] Therefore, even though the buyer may have agreed to the limited remedy and at that time it was reasonable, if the circumstances at the time of breach show that the buyer would not have a fair remedy, the court may declare that the remedy has failed of its essential purpose. A simple example is one in which the parties agree that the exclusive remedy will be to return the goods and the price will be refunded. If the goods are destroyed because of inherent defects, they obviously cannot be returned, and the remedy has failed of its essential purpose. In *Wilson Trading Corp. v. David Ferguson, Ltd.*,[259] the contract provided that no claims pertaining to defects in the yarn being sold would be

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[253] *Id. See generally* Note, *Contract Draftsmanship, supra* note 240 at 595; Murray, *supra* note 243 at 37; Note, *Warranty Disclaimers, supra* note 95, at 407. "The seller's liability shall be limited to repair and replacement of goods or parts defective in materials or workmanship. This shall be the buyer's sole and exclusive remedy whether in contract, tort or otherwise." *Id.* Can the buyer's right to a remedy in tort be restricted in this manner? *See* Shanker, *supra* note 5 at 40, 43.

[254] Evans Mfg. Corp. v. Wolosin, 47 Pa. Luz. Leg. Reg. 238, 1 U.C.C. Rep. 193 (Pa. Ct. C.P. Luzerne County 1957).

[255] 411 F.2d 622, 6 U.C.C. Rep. 589 (7th Cir. 1969).

[256] U.C.C. § 2-719(2).

[257] *Id.*

[258] *See* Hawkland, *supra* note 20, at 42.

[259] 23 N.Y.2d 398, 297 N.Y.S.2d 108, 5 U.C.C. Rep. 1213 (1968).

allowed if made after weaving, knitting, or processing, or more than 10 days after receipt of shipment. The defect in the yarn could not be discovered until after the yarn had been processed and the finished product had been washed. The court held that the prescribed limitation failed of its essential purpose because it prevented all remedies.[260] This result might be avoided by providing two exclusive remedies at the outset, one to operate as an alternative should the other fail. This makes it considerably more difficult for a court to declare that the prescribed remedies are unreasonable.[261] In the *Wilson* case, then, besides the time limitation, the contract should have provided that "if the defect is latent and cannot be discovered within the prescribed time, the buyer's sole and exclusive remedy shall be return of the purchase price."

Finally, although the remedy is exclusive, and may still be performed as provided, it could be unconscionable. In such a case, a court may strike it and proceed as though it never existed.[262] According to a New York supreme court, speaking in *Walsh v. Ford Motor Co.*,[263] the test of whether the prescribed remedy must be stricken as a matter of law, is the absence of factual evidence that the limitation was commercially reasonable and fair, rather than oppressive and surprising to a purchaser.[264] In this case, the purchaser had been injured when his new automobile went out of control due to defects in the throttle linkage, and the seller had limited its responsibility to repair and replacement of defective parts.[265] On the other hand, *Dow Corning Corp. v. Capitol Aviation, Inc.*[266] found that there was nothing unreasonable in restricting the buyer's rights to cancellation of the contract and return of the deposit considering the circumstances surrounding the transaction.[267] A limited remedy must provide adequate redress in the context of the transaction, and must not surprise the pur-

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[260] *Id.*, at 404, 297 N.Y.S.2d at 112-13, 5 U.C.C. Rep. at 1217. *See also* Neville Chemical Co. v. Union Carbide Corp., 249 F. Supp. 649, 5 U.C.C. Rep. 1219 (W.D. Pa. 1968).

[261] *See generally* Note, *Contract Draftsmanship, supra* note 240, at 596.

[262] U.C.C. § 2-719, Comment 1.

[263] 59 Misc. 2d 241, 298 N.Y.S.2d 538, 5 U.C.C. Rep. 56 (Sup. Ct. 1969).

[264] *Id.* 298 N.Y.S.2d at 539-40.

[265] *See also* Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966) (pre-*Code* law). *But see* Cox Motor Car Co. v. Castle, 402 S.W.2d 429, 3 U.C.C. Rep. 397 (Ky. 1966); Bassman v. Manhattan Dodge Sales, 5 U.C.C. Rep. 128 (Sup. Ct. 1968).

[266] 411 F.2d 622, 6 U.C.C. Rep. 589 (7th Cir. 1969).

[267] *See also* Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 297 N.Y.S.2d 108, 5 U.C.C. Rep. 1213 (1968). "Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract's commerical setting, purpose, and effect.... *Id.* at 403-04, 297 N.Y.S.2d at 112, 5 U.C.C. Rep. at 1216.

chaser. If the remedy fails to meet either criteria, it may be considered unconscionable.

2. Limitation of Damages

Besides prescribing the type of remedy that the buyer may pursue in case of breach, the seller may seek to limit his responsibility for consequential damages arising from the breach. This is permitted in subsection 2-719(3), except insofar as the limitation is unconscionable. That section goes on to provide that a limitation on consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. This provision is necessarily interrelated with the restriction of remedies, since the purpose of the latter is to minimize all damages, including consequential damages for personal injury.[268] Arguably, the fact that such a limitation is "prima facie" unconscionable is not intended to mean that the limitation is always invalid without exception.[269] "Prima facie" should mean no more than "presumptively," and if the seller could show that the limitation is neither surprising nor oppressive, the limitation should be enforced. Construed in this manner, the provision merely accomplishes a transfer of the burden of proof. However, if this issue will be raised when a consumer has suffered personal injury from a defective product, it will be extremely difficult to prove that the limitation is fair. One commentator concludes that, as a practical matter, sellers attempt to limit their damages, but realistically recognize consequential damage liability as a possibility.[270]

Since limitation of consequential damages is permitted in a commercial setting, subject only to normal rules of unconscionability,[271] it is important to distinguish between consumer goods and those used in a commercial setting. Subsection 2-719(3) provides that effect in the case of "consumer goods," which are defined as goods which are "used or bought for use primarily for personal, family or household purposes. . . ."[272] The question which this provision leaves unanswered is: Does the language refer (1) only to goods which are being used as consumer goods when the injury occurs or (2) to goods destined for use as consumer goods? There

[268] *See* Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538, 6 U.C.C. Rep. 56 (Sup. Ct. 1969). Defendant, answering a claim of breach of warranty, pleaded a clause in the contract which excluded all implied warranties and limited liability to replacement or repair of defective or damaged parts. The court said, "[i]f the pleaded defense is intended to exclude plaintiff from recovering damages for his personal injury, such limitation is prima facie unconscionable . . . ." *Id.*, 298 N.Y.S.2d at 539, 6 U.C.C. Rep. at 57.

[269] *See* Note, *Contract Draftsmanship, supra* note 240 at 598-99.

[270] *Id.* at 599.

[271] *See* U.C.C. §§ 2-302, 2-719(3). *See* text, § IV(B) *supra.*

[272] U.C.C. § 9-109(1).

is a strong argument that the language refers to goods destined to become consumer goods, because that would place the responsibility for the defect where it belongs — on the manufacturer.[273] If that is the case, a manufacturer could not create a limitation of consequential damages for personal injuries as to a dealer or intermediary who had been injured himself or had suffered a liability as a result of a consumer's injury. A court considered this issue in *Ford Motor Co. v. Tritt*,[274] though it did not define "consumer goods" so as to resolve this point. The court did, however, hold that the manufacturer's limitation was unconscionable, even in a commercial setting, because of the same policy reasons advanced above. Certainly, however, a reasonable construction requires that the goods are being used as consumer goods when the injury occurs. Otherwise, there would have been no reason to specifically designate "consumer goods" in this section. Thus, an employee of an intermediate seller who is injured by a product may be the victim of one of these limitations since the goods are "inventory" at the time the injury occurred.[275] Similarly, a truck driver who is injured while making deliveries for his employer will be affected by a limitation of damages clause since the truck is "equipment" in this case.[276] However, a court may determine that the limitation is unconscionable even in a commercial setting,[277] and whether or not such a limitation is unconscionable is a question of fact.[278] One court, having difficulty establishing unconscionability, decided that the seller's intention to limit his liability for consequential damages was not clearly stated, and therefore allowed these damages.[279] In *Water Works & Industrial Supply Co. v. Wilburn*[280] the court said that the limitation of consequential damages ("no claim for labor or damages will be allowed")[281] applied only to damages relating to the express warranty, and that it had no effect on damages resulting from a breach of an implied warranty. It does not appear, therefore, that courts are anxious to give the limitation

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[273] *See generally* Note, *Contract Draftsmanship, supra* note 240, at 598. *But see* Note, *Warranty Disclaimers, supra* note 95, at 406.

[274] 244 Ark. 883, 430 S.W.2d 778, 5 U.C.C. Rep. 312 (1968).

[275] *See* Note, *Warranty Disclaimers, supra note* 95, at 405. "Inventory" and "consumer foods" are mutually exclusive. *Compare* U.C.C. 9-109(1) *with* U.C.C. § 9-109(4).

[276] *See* U.C.C. § 9-109(2).

[277] *See* Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778, 782, 5 U.C.C. Rep. 312, 316 (1968).

[278] Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 29 App. Div. 2d 303, 287 N.Y.S.2d 765, 5 U.C.C. Rep. 98 (App. Div. 1968).

[279] Henry v. W.S. Reichenbach & Son, Inc., 45 Pa. D. & C.2d 17, 5 U.C.C. Rep. 985 (1968).

[280] 437 S.W.2d 951 (Ky. 1968).

[281] *Id.* at 955.

of damage clauses their full effect, even where personal injury to consumer is not involved.

Despite this indication, and even though the *Code* specifically refuses to enforce limitations on personal injury damages in the case of consumer goods, there is enough confusion surrounding this point that the seller should include such a limitation in his contract. Such a clause should state that the seller is not responsible for consequential damages resulting from a defect in the product "on any theory whatsoever."

VI. General Rules of Draftsmanship

A draftsman faced with the problem of preparing an effective disclaimer has the difficult task of playing the roles of the diplomat and field general simultaneously. The challenge is to prepare a disclaimer which will clearly state the seller's position while not destroying the marketability of the product by creating damaging anxiety in potential buyers. Also, this language must measure up to a court's criteria of "fair remedy," "reasonableness," and "conscionability."

A. Define the Risk

It is important from the outset to define the subject matter of the disclaimer. The seller should exhaust all possibilities for determining the quality of the product, the probability of a defect, and the adequacy of safety precautions which may be employed before the product is ever marketed.[282] Certain risks cannot be eliminated from the transaction, but if the seller exhausts available methods of risk determination, the risk which he assumes may be more accurately estimated. Similarily, the seller should research the potential damages which may result if a defect is not discovered or if the disclaimer is held ineffective. As expected, risk will very from product to product. For instance, raw materials carry the potential for damages for a loss of profit, should they be defective, whereas a finished product carries with it the potential high damages associated with personal injury.[283] A disclaimer should be directed to that risk which cannot economically or feasibly be prevented. The seller should consider the possibility of improving his quality control system, or of obtaining insurance to cover proximate damages, rather than relying on a disclaimer to eliminate these risks. The important point here is that the disclaimer should be directed *only to the unavoidable risk,* and should not be ex-

[282] *See generally* Blackburn, *supra* note 16, at 181.

[283] *See generally* Duesenberg, *supra* note 6, at 164.

tended to include other risks which may be eliminated by other means. If the disclaimer attempts to cover all risks inherent in the product, it runs the risk of being unconscionable by being overbroad. A carefully-worded specific disclaimer which defines a limited risk and excludes responsibility for that risk alone will certainly receive more favorable judicial response.

B. Negotiate the Disclaimer

A seller should spend some time with the buyer discussing the warranties and the manner in which the seller would like to limit them. At this time, the seller should be prepared to make concessions, if necessary, to get the buyer to agree to the terms. This is normally done as a matter of course between a commercial buyer and seller, and often overriding agreements are drafted for repeat customers which defines the warranty liability applicable to each individual transaction.[284] However, in most consumer transactions it is rarely accomplished in any meaningful sense.

No longer can a seller simply rely upon his "form" for automatic protection,[285] and the negotiations surrounding the transaction are becoming increasingly important. In one case, involving the sale of an automobile, the salesman discussed the disclaimer with the buyer, and clearly pointed out that the car would be sold without warranty at the price the buyer requested. The court discussed these negotiations as support for upholding the disclaimer.[286] Price negotiations surrounding disclaimer of warranty liability are extremely effective. A buyer will remember that he thought the price was too high at first, and that he was pleased when the seller reduced it. This will help the seller show that the reason for the reduction was a restriction on warranty liability, and, without the warranty responsibility, the seller could offer the product at a lower price. In turn, this will aid the court in defining the *quid pro quo* for the waiver of warranty protection. Therefore, the seller should, whenever possible, negotiate the price with reference to the warranty liability, and impress upon the buyer the reason for the price reduction.[287]

C. Clarify the Agreement

The agreement between the parties will be carefully analyzed by a court if a question as to warranty liability arises, and it is to

[284] *See* Resnick, *Conflicting Boiler Plate — Effect of the Uniform Commerical Code,* 18 BUS. LAW. 401, at 406 (1963).

[285] Blackburn, *supra* note 16, at 181.

[286] Chamberlain v. Bob Matick Chevrolet, Inc., 4 Conn. Cir. 685, 239 A.2d 42 (1967).

[287] *See* Blackburn, *supra* note 16, at 181.

the seller's advantage to have the contract terms clearly stated. Ambiquities in a contract are construed against their author, and this is especially true when the ambiguous phrase is meant to disclaim warranties.[288] It should be apparent from the entire agreement precisely what limitations were placed on the warranties. The seller should pay particular attention to the language used, especially as to what terms actually constitute the contract and where and how they are placed within the contract.

The language used in such clauses should have a plain meaning and that is the meaning which should be intended. Then the seller may at least argue that if the buyer saw the clause he knew what it meant. Arguably, this becomes a matter of semantics, but it may mean the difference between a valid and an ineffective disclaimer.

For express warranties, where modification is possible, the modifying language should be succinctly stated, and should make the buyer's responsibilities obvious. Thus, it is preferable to say that the copper brewing vat will not corrode if it is "washed daily" than to say that it will not corrode "provided an adequate maintenance program is adopted." In addition, the language of modification should immediately follow the warranty language, so that no confusion exists as to whether or not the disclaiming language is meant to alter the warranty.[289] To disclaim implied warranties the seller would be well advised to use the exact language specified in the *Code* — "as is," or "with all faults." Variations on this language should be discouraged. For example, the words "no warranties express or implied" will probably not have a disclaiming effect, and the phrase "in its present condition" has questionable validity. To further clarify the agreement the seller may wish to use other specific language indicating that no warranties exist in addition to the explicit language suggested by the *Code*. This is desirable as long as the additional language does not serve to hide the *Code* words, and thereby reduce their effectiveness in notifying the buyer of the lack of warranty protection.

In all cases of written disclaimers, particular care should be taken to make the language conspicuous. This requires stating the words in a certain manner and locating the phrase in a certain place. As to manner, the direction provided by section 1-201(10) has been approved by the courts. Therefore, print the words of disclaimer in capital letters, and wherever possible, in a different color. Then locate this clause on the face of the contract in a separate paragraph as it may not be safely placed on the back.

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[288] *See* Note, *Strict Products Liability, supre* note 33, at 919-20.

[289] *See* Hogan, *supra* note 27, at 7.

Related to conspicuousness is the concept of severability of clauses. Any language of disclaimer should be physically separated from language limiting remedies, or restricting the agreement to the written contract, or other similar terms. The purpose for this is that the invalidity of one clause will not affect the others. If a court finds the disclaimer provision unacceptable, it will not declare the other language limiting warranty liability inoperative simply because the terms were placed together in the same paragraph. Similarily, if the clauses are physically separated, a court does not have to make a determination that they are separable.

Finally, the seller should attempt to define the limits of the agreement wherever possible. If the contract clearly states that what is contained therein is intended to be the complete and final agreement between the parties, a court is less likely to look beyond the agreement to extend the limits of negotiation. Thus, the "integration" or "merger" clause should be used whenever possible so that the interpretation of the agreement is, as much as possible, restricted to the four corners of the contract. Moreover, such a clause may have an indirect disclaiming effect for express warranties by excluding those warranties made prior to the signing of the contract. As to implied warranties, one of these clauses will help to prove the buyer's intent to waive everything but the rights explicitly stated in the contract.

D. Prepare the Evidence

Since a major concern surrounding warranty disclaimers is whether they are bargained-for or surprising to the purchaser, the seller should anticipate the possibility of a warranty dispute and accumulate evidence which would support his disclaimer, and show that the purchaser was fully aware of its inclusion at the time of the transaction. One way in which this may be accomplished is for the seller to request that the buyer sign his name under the paragraph disclaiming warranties, in addition to subscribing the contract in the normal fashion.[290] He could even request that the buyer write on the contract in "his own handwriting": "I understand that there are no warranties with this product." Or he may require the buyer's signature on a separate piece of paper which identifies the product and states the disclaimer. Furthermore, the seller could take a picture of the used car with the words "AS IS" painted conspicuously on the windshield. Why not even have the buyer stand next to the car when the picture is taken? Another possibility is having two salesmen present when warranty provisions are dis-

[290] *See* Griffin v. H.L. Peterson Co., 427 S.W.2d 140 (Tex. Civ. App. 1968).

cussed. Similarily, in transactions where the buyer is able to competently evaluate the character and quality of the goods, a checklist could be prepared on which the buyer acknowledges examination of parts of the product by signing his initials. In short, be prepared to prove that the buyer was, or should have been, aware of the limitations on his protection. Once a court is convinced that the buyer assented to the terms of a disclaimer, a major obstacle has been hurdled.

CONCLUSION

By way of disclaimer, the conclusions which have been reached herein are not intended to be the last word regarding the exclusion or modification of warranties. In fact, if anything is certain from an analysis of the law of disclaimers, it is that the judicial scrutiny remains the most difficult hurdle. It should be apparent, however, that the *Uniform Commercial Code* permits the seller some degree of control over the hazards he risks in running his disclaimer by the bench. A carefully drafted provision which meets all the technical requirements, and which is called to the buyer's attention and understood by him, will successfully exclude or modify warranty liability. The seller's dilemma is reaching the delicate balance of adequately apprising the buyer of his risks while still persuading him to purchase the product. This burden is not insurmountable, but it does force the seller to carefully plan the negotiations to tailor an agreement to fit the transaction — following the technical requirements of the *Code* — and to forthrightly define the limits of his responsibility so that the buyer understands the limits of his protection.

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