DON'T CONFUSE US WITH THE FACTS?: THE RELEVANCE OF THE BUYER'S KNOWLEDGE OF A WRITTEN EXCLUSION OF AN IMPLIED WARRANTY WHICH IS INCONSPICUOUS AS A MATTER OF LAW (U.C.C. § 2-316(2))

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Sections 2-314 and 2-315 of the Uniform Commercial Code[1] pertain to the implication of warranties of merchantability[2] and fitness for a particular purpose[3] in certain sale of goods transactions[4] unless excluded or modified by the parties to the transaction. Subsection 2-316(2) provides for exclusion or modification of these implied warranties as follows:

> [T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be *conspicuous*, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and *conspicuous*.[5]

When I last taught Sales in 1979, it had been posed that a majority of courts were willing to consider evidence of a buyer's knowledge of an "inconspicuous" written disclaimer of an implied

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1 Hereinafter "U.C.C." or "Code."

2 Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

U.C.C. § 2-314(1) (hereinafter referred to as the "merchantability warranty").

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

U.C.C. § 2-315 (hereinafter referred to as the "fitness warranty").

4 By the terms of sections 2-314 and 2-315, these warranties are not implied in all sale of goods transactions.

5 U.C.C. § 2-316(2) (emphasis added).

warranty so as to overcome the conspicuousness requirement.[6] When teaching the course again in the Spring of 1990, I was disturbed to find that White and Summers had in the interim come to "view with apprehension the growing number of decisions making buyer knowledge relevant to a disclaimer's conspicuousness."[7] My curiosity was aroused: Why should a court be expected to choose to ignore "the bargain of the parties in fact" in favor of a form over substance approach to the issue of the effectiveness of an inconspicuous written disclaimer of an implied warranty?[8] After preliminary research I wanted to write an article urging amendment of section 2-

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[6] Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30 (1978). The Project states:

> In cases involving commercial transactions, where buyers are most commonly aware of the terms of the bargain, courts appear uneasy with an objective test of conspicuousness. The test seems especially troublesome when the seller offers to prove that a buyer actually knew of an inconspicuous disclaimer. Thus, a majority of courts consider buyer awareness to support or compel a finding that a disclaimer is effective.

Id. at 184.

[7] J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 502 (3d ed. 1988) (hereinafter "WHITE & SUMMERS"). Cases cited in WHITE & SUMMERS, as reason for apprehension were United States Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975); Imperial Stamp & Engraving Co. v. Bailey, 82 Ill. App. 3d 835, 403 N.E.2d 294 (1980); and Office Supply Co. Inc. v. Basic/Four Corp., 538 F. Supp. 776 (E.D. Wis. 1982).

[8] U.C.C. subsection 1-201(3) defines "Agreement" as:

> The bargain of the parties in fact as found in their language or by implication from other circumstances. . . . Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of Contracts (section 1-103) (Compare "Contract").

U.C.C. § 1-201(3). Section 1-103 states:

> Unless *displaced* by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to . . . *estoppel* . . . or other validating or invalidating cause shall supplement its provisions.

U.C.C. § 1-103 (emphasis added). Section 1-201(11) defines "Contract" as:

> the total *legal* obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law (compare "Agreement").

U.C.C. § 1-201 (11) (emphasis added). Analysis of the foregoing shows that the broad issue is whether U.C.C. section 2-316(2) has "displaced" estoppel as a nonetheless "validating cause" for an inconspicuous disclaimer of the implied warranty of merchantability, creating a "legal obligation" on the part of the buyer to abide by the disclaimer which was, after all, an admitted part of the parties' "agreement," their "bargain in fact." The estoppel would be of the nature of a "judicial estoppel," sometimes referred to as "estoppel by oath" or "estoppel by record." *See* note 41, *infra*.

316 to permit consideration of certain evidence of the buyer's knowledge of a disclaimer[9] notwithstanding the conspicuousness requirement.

In the course of further research, I found that the Permanent Editorial Board of the Uniform Commercial Code (PEB) and the American Law Institute (ALI), in conjunction with the National Conference of Commissioners on Uniform State Laws (NCCUSL), had approved in the Spring of 1988 a study to consider whether Article 2 should be revised and, if so, to report on what revisions might be required. The PEB appointed a Study Group, directed by Professor Richard E. Speidel, whose Preliminary Report was issued on March 1, 1990.[10] A majority of the Study Group advocated revising subsection 2-316(2) "to indicate that a disclaimer of which the buyer has knowledge . . . should be effective even though the definition of 'conspicuous' . . . was not satisfied."[11] Accordingly, one purpose of this article has become to respond to the Study Group's solicitation of written comments on its draft.

The Preliminary Report

The Preliminary Report summarizes the Study Group majority's thinking as to why a buyer's knowledge of an inconspicuous disclaimer should be relevant to the disclaimer's enforceability: "In this case substance (no surprise in fact) should control form ([furthering a policy to prevent] unfair surprise)."[12] It explains that the Study Group's minority view was "that form should be preserved, both to insure the consistent communication of essential information [to the buyer] and to avoid evidentiary conflicts over how much the buyer actually knew" at the time of sale.[13]

The Study Group's majority view is supported not only by several cases,[14] but also by Official Comment 1 to section 2-316

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[9] As will be seen, I do not advocate consideration of every type of evidence of buyer's knowledge to estop buyer from asserting a conspicuousness defense. *See infra* text accompanying notes 34-72.

[10] Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 2 Preliminary Report (ALI, March 1, 1990) (hereinafter "Preliminary Report").

[11] *Id.* at 106.

[12] *Id.*

[13] *Id.* at 106-07.

[14] *See, e.g.*, Imperial Stamp and Engraving Co. v. Bailey, 82 Ill. App. 3d 835, 403 N.E.2d 294 (1980) (conspicuousness requirement is not controlling when buyer

which states:

> This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.[15]

Considering that *knowledge* of a disclaimer would logically afford an individual buyer the greatest protection from unexpected, unbargained, surprising language, there seems to be little reason to resist a statutory change to recognize at least some types of knowledge as validating otherwise inconspicuous disclaimers.

The Preliminary Report makes reference to an article said to contain a discussion of cases contrary to the Study Group's majority view.[16] The fact is that only supportive cases are discussed in that article, though disapprovingly.[17] Indeed, my research produced no cases where a court refused to consider buyer knowledge of an inconspicuous disclaimer.[18] Even the Court in *Rehurek v. Chrysler Credit*

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admits he read and was aware of disclaimer); Office Supply v. Basic/Four Corp., 538 F. Supp. 776 (E.D. Wis. 1982) (warranty disclaimer will be enforced when deposition testimony clearly shows that buyer knew of the warranty limitations prior to signing the contract); Twin Disc, Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329 (7th Cir. 1985) (when a buyer has actual knowledge of the disclaimer, there is no need to determine if the disclaimer is conspicuous).

[15] U.C.C. § 2-316, comment 1.

[16] Preliminary Report *supra* note 10, at 106 n.38 (citing Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1270-71 (1987) [hereinafter "*Update*]).

[17] The cases discussed in *Update* are Twin Disc, Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329 (7th Cir. 1985); Imperial Stamp & Engraving Co. v. Bailey, 82 Ill. App. 3d 835, 403 N.E.2d 294 (1980); and Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776 (E.D. Wis. 1982). *Update*, *supra* note 16, at 1270-71 nn.648-49. The Study Group may have been thrown off by a negative implication arising from language in the *Update* article as follows: "Since 1978, however, only a few courts have found effective disclaimers compelled by evidence of buyer awareness." *Id.* at 1270. The implication that most courts were not so compelled caused me to look in vain for discussion of such cases in that article.

[18] The closest a court has come to disregarding buyer awareness was in Bodine Sewer v. Eastern Illinois Precast, 143 Ill. App. 3d 920 493 N.E.2d 705 (Ill. App. 1986). The court said: "The purchaser's knowledge of the *probable* existence of . . . disclaimers or what the purchaser should have read is irrelevant if the purported disclaimer does not pass the muster of subsection 2-316(2)." *Id.* at 925, 493 N.E.2d at 709 (emphasis added). The disclaimers were printed on the reverse side of seller's "quotation form" and were determined by the trial court to be inconspicu-

Corp.,[19] cited in some secondary authorities[20] as holding an inconspicuous disclaimer ineffective although the buyer admitted reading it, does not in fact hold that buyer knowledge is irrelevant to the issue.[21] What then supports the minority perspective?

Evidentiary Conflicts

The Study Group minority's view, at least its "evidentiary conflicts" concern, receives unequivocal support from White and Summers. White and Summers state "[w]e think the drafters [of the Uniform Commercial Code] intended a rigid adherence to the conspicuousess requirement in order to avoid arguments concerning what the parties said about warranties at the time of

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ous. In support of its position that the disclaimers should be deemed effective, the seller relied on two things: (1) testimony of one of buyer's employees involved in the purchase that he knew from past experience that standard conditions of sale are normally on the reverse side of quotation forms, and (2) case law saying that a reasonable business person is expected to have read the entire document creating an obligation. *Id.*

19 262 So. 2d 452 (Fla. Dist. Ct. App. 1972).

20 WHITE & SUMMERS *supra* note 7, at 502 n.34. *See also* Special Project, *supra* note 66, at 184 n.644.

21 It is true that the court in *Rehurek* found the "disclaimer" at issue inconspicuous. 262 So. 2d at 454. It is also true that the court rejected seller's argument that section 2-316(2) was not violated because buyer stated on deposition that he had read the contract, including the alleged disclaimer clause. *Id.* at 455. But the key to *Rehurek* is that the court was not persuaded by seller's "he read the contract" argument because the court did not consider the language used in the contract adequate to constitute a disclaimer in the first instance.

Rehurek involved the purchase by ordinary consumers of an automobile from a dealership. The alleged disclaimer clause appeared in small print in paragraph six on the back page of the contract as follows:

> No warranties, express or implied, and no representations, promises or statements have been made by Seller unless endorsed herein in writing. No modification of any of the terms and conditions hereof shall be valid in any event and Buyer expressly waives the right to rely thereon unless made in writing duly executed by the Seller. If the property covered by this contract is a new motor vehicle, Seller hereby confirms its written warranty against defective materials or workmanship, where such warranty has been made by the Seller.

Id. at 454. The Court stated, "we do not believe this contract would inform an average purchaser that he was waiving his right to insist that his new automobile perform properly." *Id.* at 455. Accordingly, the *Rehurek* court never reached the issue of whether the buyer's actual knowledge of an otherwise valid but inconspicuous disclaimer would be relevant to the court's decision as to whether to enforce the disclaimer.

sale."[22] This view of the drafter's intent is difficult to substantiate[23] considering that subsection 2-316(2) has never required a disclaimer of the merchantability warranty to be in writing at all. This allows considerable argument over what was said at the time of sale.[24] Additionally, subsection 2-316(3)(a), as written, arguably allows both the merchantability and fitness warranties to be excluded by certain *inconspicuous* written expressions and the fitness warranty to be disclaimed *orally* as well as in writing when those same expressions are utilized.[25] Further, there is nothing

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22 WHITE AND SUMMERS, *supra* note 7, at 502.

23 *See id.* White and Summers cite no authority for their position.

24 The statutory language is: "*and in the case of a writing* [the disclaimer] must be conspicuous." U.C.C. § 2-316(2) (emphasis added). Of course an oral disclaimer incident to a totally integrated written contract would be unenforceable as violative of the parol evidence rule. *See* U.C.C. § 2-202.

25 U.C.C. Section 2-316(3)(a) states:

> Notwithstanding subsection (2) . . . Unless the circumstances indicate otherwise, *all implied warranties* are excluded by *expressions* like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

U.C.C. § 2-316(3)(a) (emphasis added). *But see* Bevard v. Ajax Mfg. Co., 473 F. Supp. 35, 38 (E.D. Mich. 1979) ("as is" or "with all faults" disclaimers must be in writing and conspicuous). The court came to an interesting conclusion in *Bevard* notwithstanding that the "as is" term of the sale was not in writing. The court found that the "as is" nature of the transaction conclusively established that there was no reliance by the buyer upon the skill or judgment of the seller and therefore no fitness warranty, enforceable or unenforceable, arose in the first instance. *Id.* at 38. This is a significant idea because it is important to know whether an exclusionary term actually agreed to by the parties but unenforceable under the Code because not written or not conspicuous is admissible for a purpose other than establishing a disclaimer. Is the term a nullity or merely unenforceable? *See also* A&M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, n.6, 186 Cal. Rep. 114, 120 n.6, (Cal. Ct. App. 1982) ("assuming unconscionability of the disclaimer, its value toward proving the factual proposition that no warranty was created is slight, and substantially outweighed by the disclaimer's tendancy to unfairly prejudice and mislead the jury"). Analogy may be made to contracts not meeting Statute of Frauds requirements. Official Comment 4 to section 2-201 (Statute of Frauds) states:

> Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated, is not a trespasser. Nor would the Statute of Frauds provisions of this section be a defense to a third person who wrongfully induces a party to request to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

U.C.C. § 2-201, comment 4.

in the Code's history which indicates a reason for rigid adherence to the conspicuousness requirement.[26]

Consistent Communication of Essential Information

Enforcing the subsection 2-316(2) conspicuousness requirement irrespective of buyer knowledge of a disclaimer is seen by the Study Group minority as calculated "to insure the consistent communication of essential information"[27] to buyers. Thus, the minority advances a general policy reason for its position rather than a transactional justification. The conspicuousness requirement alone cannot insure consistency of communication to buyers as a class. The Study Group's additional proposal to require written merchantability disclaimers,[28] not just written fitness disclaimers,[29] goes further toward achieving the minority's consistency of communication goal than a policy of ignoring buyers'

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26 An excellent summary of the legislative history of the Uniform Commercial Code appears in the Study Group's Preliminary Report, *supra* note 10, at 1-6. *See also* Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958). In 1984, the American Law Institute and the National Conference of Commissioners on Uniform State Laws issued the multi-volumed UNIFORM COMMERCIAL CODE DRAFTS, Elizabeth S. Kelly, compiler (hereinafter "KELLY"). This set reprints the non-confidential drafts of the U.C.C. issued through 1962. Drafts and comments relative to what became sections 2-314, 2-315 and 2-316 appear in KELLY as follows (section numbers indicated where different from final version): First Draft of Revised Uniform Sales Act (1940), 1 KELLY 174, 195-97 (§ 25) (text and comments); Report and Second Draft of Revised Uniform Sales Act (1941), I KELLY 269, 389-97 (§ 15) (text and comments); Uniform Revised Sales Act (Sales Chapter of Proposed Commercial Code) (1944), II KELLY 1, 31-2 (§§ 38, 39, 41) (text), 154-63 (comment on section 37 on express warranties, including some discussion of implied warranties); First Draft of Uniform Commercial Code (1949), VI KELLY 1, 107-17 (text and comments); Uniform Commercial Code, Proposed Final Draft (1950), X KELLY 1, 144-54 (text and comments); Uniform Commercial Code, Proposed Final Draft No. 2 (Spring 1951), XII KELLY 1, 61-63 (text only); Uniform Commercial Code, Final Text Edition (Nov. 1951), XII KELLY 375, 435-37 (text only); Uniform Commercial Code, Official Draft, XIV KELLY 1, 136-47 (text and comments); Uniform Commercial Code, Official Draft (with changes through 1953, XVI KELLY 1, 136-47 (text and comments); 1956 Recommendations of the Editorial Board for the Uniform Commercial Code, XVIII KELLY 1, 62-4 (text and revision explanation); Uniform Commercial Code, 1957 Official Text with Comments, XIX KELLY 1, 122-30 (text and comments); Uniform Commercial Code, 1958 Official Text with Comments, XX KELLY 265, 386-94 (text and comments). The present section 2-316 first appeared in the 1956 Recommendations.

27 Preliminary Report, *supra* note 10, at 106-07.

28 The present section 2-316(2) provision requires fitness disclaimers to be in writing. *See* U.C.C. § 2-316(2).

29 Preliminary Report, *supra* note 10, at 105.

knowledge of inconspicuous disclaimers. Unfortunately, the gains to be achieved by a uniform writing requirement[30] will be considerably diluted by the Study Group consensus that:

> [S]ection 2-316(2) should *not* be revised to require the seller to communicate additional information to the buyer. The buyer is expected to understand from a conspicuous written disclaimer using the word "merchantability" that it assumes the risk that the goods will not be fit for ordinary purposes.[31]

Unless the Study Group advocates further change,[32] it appears that actual communication will fail in the Code's exclusion of implied

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[30] It is uncertain that the writing requirement will be completely uniform as to all section 2-316 disclaimers. The Study Group recommended that subsection 2-316(3)(a) "be revised to require that the language of the exclusion treated there, *if put in writing*, must be conspicuous." *Id.* at 108 (emphasis added). The Study Group's explanation of its recommendation is as follows:

> As now drafted, section 2-316(3)(a) does not clearly require that language of disclaimer, such as "as is," which is actually contained in a writing be conspicuous. In this case, we recommend that parity with section 2-316(2) be achieved. On the other hand, we are less clear that such language must be in writing, especially if that language is actually communicated to the buyer. Under those circumstances, the current draft of section 2-316(3)(a) appears to provide sufficient protection.

Id.

[31] *Id.* at 106 (emphasis added). The sufficiency of the use of the word "merchantability" to communicate the true nature of the disclaimer being made has been questioned for some time:

> In disclaiming the implied warranty of merchantability under section 2-316(2), the question naturally arises whether it is sufficient, especially when dealing with consumer buyers, to use the word "merchantability" without explaining that what is being disclaimed is any promise that the goods "are fit for the ordinary purposes for which such goods are used." As Professor Honnold pointed out in his statement to the New York Law Revision Commission during its study of the U.C.C. "[t]he problem is a serious one since to an ordinary buyer 'merchantability' may suggest resaleability other than soundness of quality." When dealing with nonmerchant buyers, the provisions of section 2-316(2) should be regarded as minimum, but not necessarily sufficient, requirements for disclaiming the implied warranty of merchantability. This assertion is particularly true considering the obligation of good faith that pervades the Code.

Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty under the U.C.C.*, 53 TEX. L. REV. 60, 65-6 (1974)(footnotes ommitted).

[32] "Some members of the Study Group disagreed [that there should be no revision to require communication of additional explanatory information to the buyer], especially where consumer buyers are involved. Perhaps some reconsideration of the statutory [sic] approved words would help this issue. Compare section 2A-214(2) on 'fitness.'" Preliminary Report, *supra* note 10, at 106.

warranties scheme in terms of the understandability of exclusionary language.[33]

Regardless of any further movement to require more simplified expression of the merchantability concept in disclaimers of the implied warranty of merchantability, the Study Group's recommendations to revise subsection 2-316(2) to require written merchantability disclaimers, and to effectuate inconspicuous merchantability and fitness disclaimers of which the buyer has knowledge, should be retained in the final report and implemented. Attention must be given, however, to these questions: (1) what would constitute buyer "knowledge" and how should such knowledge to be established; and (2) should buyer knowledge obviate the writing requirement for disclaimers where such knowledge is established?

Buyer Knowledge of an Inconspicuous Written Disclaimer

The present subsection 2-316(2) conspicuousness requirement in essence establishes a constructive knowledge test for implied warranty disclaimers. That is, if a court determines as a matter of law that an otherwise valid disclaimer is conspicuous,[34] the buyer is charged with knowledge of the disclaimer even if he

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[33] The notion quoted from the Preliminary Report in note 30, *supra*, that there should perhaps be reconsideration of the statutorily approved words for disclaiming the *merchantability* warranty is not apparently intended to extend to Article 2 sales *fitness* warranty exclusions even though the thought for revision of the merchantability language was to compare the Article 2A lease *fitness* exclusion. The Article 2A provision on exclusion of fitness warranties differs from the Article 2 provision on fitness warranty exclusions as follows: *Article 2 provision* (§ 2-316(2)):

> Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2). Article 2A provision (§ 2A-214(2)):

> Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "there is no warranty that the goods will be fit for a particular purpose."

U.C.C. § 2A-214(2). If understandability is a goal of revision, it seems appropriate to encourage more clarity for not only the merchantability disclaimer (*see supra* note 30) but also the Article 2 fitness disclaimer.

[34] U.C.C. section 1-201(10) defines "conspicuous" as follows:

> 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 (example: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of *a form* is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated

did not actually see it. If subsection 2-316(2) is revised, as sug-

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> term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

U.C.C. § 1-201(10) (emphasis added). The emphasized language has been used by courts and commentators alike to place considerable discretion in the hands of judges determining "conspicuous" issues. In AMF, Inc. v. Computer Automation, Inc., 573 F. Supp. 924 (S.D. Ohio 1983), plaintiff AMF sued Computer Automation, Inc. (CAI) for, *inter alia*, breach of implied warranties in connection with its purchase in 1977 of computer equipment. The court noted that AMF had "not seriously disputed CAI's contention that both parties are commercially sophisticated businesses, *who had dealt with each other extensively before the 1977 contract*," *id.* at 930 (emphasis added). The court then rejected AMF's conspicuousness defense saying, "[i]t strains credulity to hold that a business like AMF was not, *or should not have been*, aware of the language disclaiming implied warranties (or any other provisions of the 1977 contract)." *Id.* The court came to its conclusion based upon the following analysis:

> There is no dispute that the contractual language in this case is not in "larger or other contrasting type or color." But as CAI emphasizes, this is *not* dispositive, particularly in *non*-form contracts (as herein), since the first sentence of 1-201(10) sets up a broader "reasonable person" standard. The modern trend, followed both in California and elsewhere, is to determine if the bargaining strength and commercial sophistication of the parties made it reasonable [to believe?] that the limiting language was brought to the attention of the parties.

Id. at 929 (emphasis in original)(citing WHITE & SUMMERS *supra* note 7 and Special Project, *supra* note 6, other citations ommitted). Thus the court may have mixed its discussion of conspicuousness with a discussion of what in essence is a "course of dealing" analysis ("dealt with each other extensively before the 1977 contract"). Without referring to "course of dealing," the *Update* article cites *AMF* as an example of the use of the "modified objective test" to determine the conspicuousness of a disclaimer. *Update, supra* note 16, at 1272. This test focuses on the phrase "reasonable person *against whom it is to operate*" found in the section 1-201(10) definition of "conspicuous:"

> It allows courts to concentrate "not only on the writing, but on the commercial buyer's experience and size as well. Where parties of relatively equal bargaining power negotiated the contract terms, a court could appropriately find that the buyer 'ought to have noticed' a disclaimer despite its inconspicuous print. The modified objective test [enables] courts to distinguish between commercial and consumer buyers without compromising the drafters' goal of avoiding inquiry into the parties' negotiations. Since courts would probably expect the reasonable *consumer* to notice only objectively conspicuous language, this approach would continue to promote disclaimer visibility."

Id. at 1272 (quoting Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 186 (1978)). The "modified objective test" places too much discretion in the hands of a trial judge deciding the conspicuousness issue as a matter of law. *See infra* text accompanying notes 52-62, as to the exclusion of implied warranties by course of dealing, course of performance and usage of trade, and the constructive knowledge of the sophisticated businessman of objectively inconspicuous disclaimers.

gested by the PEB Study Group, to give vitality to an inconspicuous written disclaimer of which the buyer has knowledge, knowledge could be defined as either actual or constructive or both, and could be adduced in the form of several types of evidence. First, an admission by the buyer that he read and understood the disclaimer. Second, an admission by the buyer that he read the contract, including the disclaimer, but did not appreciate the significance of the disclaimer. Third, testimony of the seller or others that the buyer's attention was called to the terms of the disclaimer at the time of contract; fourth, evidence of "knowledge" gleaned by the buyer from course of dealing, course of performance or usage of trade. Finally, evidence showing the buyer's business sophistication such that he "ought" to have been aware of the disclaimer. Should all these types of evidence be admitted to give efficacy to an inconspicuous disclaimer?

Admissions by Buyer

The clearest argument for consideration of buyer knowledge of disclaimers of implied warranties is made by reference to those cases where courts have upheld inconspicuous disclaimers when buyers *admitted* having knowledge.[35] Though such decisions have been criticized as being contrary to the intent of the drafters of the Code,[36] the general policy of the Code is to consider the bargain of the parties in fact[37] and to impose good faith obligations upon parties to a contract.[38] These policy considerations demand that courts not turn a deaf ear to an admission by a party that he knew of and understood[39] the inconspicuous disclaimer. Analogy to a policy embodied in Article Two's Statute of Frauds is also appropriate. Section 2-201(3) provides:

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35 *See supra* note 14.

36 *See, e.g.*, WHITE & SUMMERS, *supra* note 7, at 502.

37 U.C.C. subsection 1-201(3) defines "agreement" as "the bargain of the parties in fact." U.C.C. § 1-201(3).

38 U.C.C. section 1-203 provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203. Good faith is defined as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19).

39 As to buyers who claim they read but did not appreciate the significance of a disclaimer, *see infra* text accompanying notes 44-46.

> A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
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> (b) if the party against whom enforcement is sought admits in his pleadings, testimony, or otherwise in court that a contract for sale was made.

What distinction can be drawn between enforcing one inconspicuous written term of a contract due to the buyer's admission of his knowledge of the term, and enforcing an oral contract admitted to by a party to be charged?[40]

It should be noted that courts might consider buyers' admissions of knowledge not just as the basis of an estoppel[41] to assert the conspicuousness requirement, but also in determining the issue of conspicuousness in the first instance. As previously indicated,[42] the subsection 1-201(10) definition of "conspicuous" is that "[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." Though

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40 For further discussion, *see infra* text accompanying notes 63-67. The Preliminary Report, indicates that the Study Group has recommended that section 2-201 (Statute of Frauds) be revised to "[c]larify in which settings and by what methods after a lawsuit is filed an 'admission' under section 2-201(3)(b) is effective to admit the existence of a contract." Preliminary Report, *supra* note 10, at 56. This is because there has been some doubt as to whether the provision as written includes admissions made in authorized pre-trial discovery proceedings. Procedurally, it would be desirable if buyers' admissions made during discovery, in deposition or otherwise, as to knowledge of disclaimers of implied warranties were considered as effective for the purpose of establishing buyer's knowledge so as to facilitate summary judgment in appropriate cases. Thus, it would not be necessary to wait until the time of trial to adduce buyer's testimonial admission or impeach him upon his discovery.

41 The estoppel contemplated here is "judicial estoppel" sometimes called "estoppel by oath" or "estoppel by record." Judicial estoppel arises against a party who in his pleadings, deposition, affidavit, trial testimony, etc., states a fact or makes an admission which he later wishes to deny or avoid without explanation. *See, e.g.*, Aetna Life Ins. Co. v. Wells, 557 S.W.2d 144, 147 (Tex. Civ. App. 1977) (judicial estoppel "arises from sworn statements made in a judicial proceeding by the person against whom the estoppel is sought to be invoked"); Van Deusen v. Connecticut Gen. Life Ins. Co., 514 S.W.2d 951 (Tex. Civ. App. 1974) (the sworn statement giving rise to judicial estoppel can occur in a sworn pleading, a deposition, an oral testimony, or an affidavit that states that the parties agreed to a judgment); Layhew v. Dixon, 527 S.W.2d 739 (Tenn. 1975) (judicial estoppels are not favored and do not arise from unsworn pleadings); URSA Farmers Cooperative Co. v. Trent, 58 Ill. App. 3d 930 374 N.E.2d 1123 (Ill. App. Ct. 1978) (a discovery deposition is considered an in-court admission).

42 *See supra* note 34.

the person against whom the disclaimer is to operate arguably *ought not* have noticed it (due to its inconspicuousness), if he *did*,[43] the disclaimer could be considered conspicuous as a matter of law.

Somewhat more problematic might be an admission by a buyer that he read the contract, including the disclaimer, but that he did not understand the disclaimer to mean that he was giving up the rights he now wishes to assert. Assuming language objectively sufficient to put a buyer on notice of the warranties being disclaimed, should buyer's claimed lack of understanding of the significance of the disclaimer nevertheless prevent an estoppel against him, an estoppel based on the fact that he read the inconspicuous words constituting the disclaimer? The general rule is that one having been afforded the opportunity to read a contract is charged with both knowledge and understanding of its terms.[44] In this context, however, an argument might be made that had the disclaimer been conspicuous, the buyer's attention would have been drawn to it, and he may have inquired about it, either obtaining clarification from the seller or seeking legal advice.

The Official Comment to 1-201 vaguely supports this argument by stating that "the test is whether *attention* can reasonably be expected to be called it to."[45] To the extent that the word "notice," as used in the subsection 1-201(10) definition of conspicuous,[46] and the word "attention," as used in the Official Comment, represent qualitatively different levels of conscious awareness, the Official Comment may have introduced a bit of a twist into the definition of "conspicuous." This argument notwithstanding, I believe the better view is to consider all admissions by buyers of knowledge of dis-

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[43] This discussion pertains to those instances where buyer "discovered" the inconspicuous disclaimer for himself at the time of sale and admits it. As to those instances when seller insists that he called buyer's attention to or discussed with him the inconspicuous written disclaimer, *see infra* text accompanying notes 47-51.

[44] *See, e.g.*, Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1292 (7th Cir. 1989) (basic contract law establishes a duty to read the contract); Grieve v. Grieve, 15 Wyo. 358, 89 P. 569 (Wyo. 1907) (when a party to a contract does not read the contract prior to signing, a court of equity will not reform the contract because the mistake could have been avoided in the exercise of due diligence); *cf.* Ackerlind v. United States, 240 U.S. 531 (1917) (failure to read an agreement is not a complete defense); *see also* J. CALAMARI & J. PERILLO, CONTRACTS, §§ 9-42, 9-44 (3d ed. 1987).

[45] U.C.C § 1-201, comment 10.

[46] The subsection 1-201(10) definition of "conspicuous" is set forth in note 34, *supra*.

claimers on equal footing. Allowing a buyer who admits having read the disclaimer to equivocate will encourage such equivocation by buyers who will consider themselves honest by having admitted awareness of the disclaimer while being vague about what they understood. If, as a matter of law, an alleged disclaimer is inadequate to the task of informing the buyer of the nature of the rights being lost, the "disclaimer" will not be enforced, not because it was inconspicuous, but because it did not adequately disclaim.

Seller's Witnesses as to Buyer's Awareness at the Time of Contract

As clear as it seems that a buyer's admission of knowledge of an inconspicuous disclaimer should estop him from asserting the conspicuousness requirement, it is equally clear that a seller's self-serving testimony that a buyer was aware of the inconspicuous disclaimer at the time of contract should be disregarded. While a "convincing liar"[47] may be the evil against which the "conspicuous" requirement is intended to guard, a policy which treats honest and dishonest sellers alike cannot be avoided if the reasonable warranty expectations of buyers are to be effectively protected. This is all the more appropriate considering that section 2-316 establishes a formula of sorts for sellers who sincerely wish to put buyers on notice of the liability the sellers are disclaiming.[48]

It must be acknowledged that the foregoing does not take into account the position of the honest seller who does not know the law. His ignorance will be attributable to the fact that he did not have a lawyer review the forms he customarily uses in his business or a non-form contract he has drawn for a particular transaction.[49] Assuming an otherwise valid disclaimer, it may appear harsh to establish a rule which would not permit the honest but unadvised seller to present the testimony of the twenty bishops[50] who work for him that the inconspicuous disclaimer was

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47 WHITE & SUMMERS, *supra* note 7, at 502.

48 In addition to the conspicuousness requirement the "formula" is that merchantability disclaimers must mention merchantability and fitness disclaimers must be in writing. *See* U.C.C. § 2-316.

49 Hopefully, seller's ignorance will not be attributable to having received inadequate legal advice.

50 As a Contracts teacher I can never resist an opportunity to make reference to Judge Learned Hand's famous twenty bishops:

> If, however, it were proved by twenty bishops that either party, when he

pointed out to or discussed with the buyer at the time of sale. Sellers, especially those selling goods likely to be the subject of warranty disputes,[51] must consider the price of legal advice as a cost of doing business or assume the risk of faulty legal documents. In the case of high-priced, complex goods whose potential to be subject to costly defects or to cause substantial harm is considerable, the likelihood that a seller has had legal counsel in developing his sales documents is greatest. Less sophisticated businesses which are less likely to have sought legal counsel are probably less likely to litigate warranty disputes. This may be either because no warranty claim is made in the first place, or because buyer or seller or both see litigation as too costly, and therefore reach some adjustment without litigation. As to transactions falling between these two poles, the best policy is to continue to protect buyers from what they contend to be unexpected, unbargained, surprising terms.

Disclaimer by Course of Dealing, Course of Performance and Usage of Trade

Subsection 2-316(3)(c) provides that notwithstanding the disclaimer formula of subsection 2-316(2), "an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade." Each of these methods of exclusion depends on a buyer's implied or constructive knowledge.[52] But what role should that "knowledge" play in determining the existence of disclaimers of implied warranties under subsection 2-316(3)(c) and what role might such "knowledge" come to play in subsection 2-316(2) analysis if buyer knowledge becomes expressly relevant to the issue of conspicuousness? Specifically, does evidence of course of dealing, course of per-

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used the words, intended something else than the usual meaning which the law imposes on them, he would still be held.

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911).

51 My informal survey discloses that some of the goods which are currently most often the subject of warranty disputes are automobiles, mobile homes, computers, seeds and pesticides.

52 Course of dealing and course of performance knowledge is "implied" because the buyer presumably was aware of the facts of dealing or performance giving rise to the imposition of "knowledge" of a disclaimer. Usage of trade "knowledge" is essentially constructive knowledge because it will be imposed on the buyer if he is a member of the trade, whether or not he was actually aware of its existence.

formance and trade usage go only to the *interpretation* of the contract of the parties, or should *supplementation* of the contract with such evidence also be allowed?

That such evidence may be admitted as interpretive is indisputable. I suggest, however, that any engrafting of an implied warranty disclaimer upon a written contract of sale[53] by reference to course of dealing, course of performance or usage of trade should not be permitted, *nor should such evidence come to bear on the issue of conspicuousness*. This is so because the Code definition of "agreement" includes "course of dealing or usage of trade or course of performance" as part of the parties' bargain in fact, but "[w]hether that agreement has legal consequences is determined by the provisions of this Act."[54] Rather than enforcing such matter, the Code's parol evidence rule[55] arguably excludes it from consideration.

Under the Code's parol evidence rule, whether a writing is a partial integration or a total integration, it is clear that evidence of terms that are contradictory to the parties' statement of their agreement is inadmissible. Course of dealing, course of performance or usage of trade evidence which destroys warranties implied by law in the parties' contract[56] is nothing if not contra-

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53 This discussion assumes a written contract because the issue of conspicuousness does not arise in an oral contract.

54 U.C.C. § 1-201(3).

55 U.C.C. section 2-202 provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.C.C. § 2-202.

56 There may be a "chicken or the egg" dispute here. Section 2-314 provides: "Unless excluded or modified (section 2-316) . . . a warranty . . . is implied." U.C.C. § 2-314. Section 2-315 provides: "[T]here is unless excluded or modified under the next section an implied warranty." U.C.C. § 2-315. Arguably the Code means that a warranty never exists if there is a disclaimer, as opposed to its existence being extinguished by the disclaimer. White and Summers make the following observation:

dictory and inconsistent with those warranties. Rather than allowing these evidentiary tools to create disclaimers of implied warranties in written contracts, I believe the better practice is to consider these only as aids to interpretation of the parties' actual words. For example, if it was understood in their trade that "no warranty of any kind" means no warranty of merchantability or fitness for a particular purpose, then the intended result would occur.

This view appears to be heretical. I have found no case law to support it.[57] On the other hand, it appears that no court has considered the precise issue of whether, considering the parol evidence rule, course of dealing, course of performance or usage of trade should be confined to an interpretive function in section 2-316 litigation.

The Constructive Knowledge of the Sophisticated Businessman

In an earlier footnote[58] it was mentioned that some courts

> It is unclear under subsection 3(c) whether a course of performance waives existing implied warranties or demonstrates that the warranties never existed. Section 2-208(1) supports the latter view because it depicts course of performance as a tool for interpreting the parties' original agreement.

WHITE & SUMMERS, *supra* note 7, at 512 n.37. Of course, the implied warranty is not, strictly speaking, a part of the *writing* setting forth the *contract*. Thus, the *writing* is technically not contradicted by an exclusion of warranty arising from course of performance, course of dealing or usage of trade. But given a written agreement which does not expressly disclaim implied warranties, those warranties are, by law, given effect as if they were set forth in the writing. Assuming that the parties to a written agreement are more likely to expect that warranties will be implied rather than excluded, unexpected damage will be done to the integrity of the writing by virtue of its failure to protect the parties' assumptions.

57 Nordstrom, however, did cast his discussion of subsection 2-316(3) in terms of interpretation only:

> [The application of the concepts of course of dealing, course of performance, and usage of trade] to disclaimers rests on the notion that each of them aids in determining the meaning of the parties' agreement. The language that the parties used in expressing their agreement is apt to have been chosen in the background of any usage of the trade in which they are engaged or of any prior course of dealing between those parties. Further, a course of performance of this contract is evidence of how the parties intended the words to be used. To the extent that any one of these indicates that the parties intended to limit or exclude implied warranties, that intention will be given effect.

R. NORDSTROM, LAW OF SALES 271 (1970).

58 *See supra* note 34.

have expressly or tacitly adopted the "modified objective test" for determining the conspicuousness of disclaimers of implied warranties. Emphasizing the fact that subsection 1-201(10) defines a term or clause as being conspicuous "when it is so written that a reasonable person *against whom it is to operate* ought to have noticed," some courts have taken into account not just the objective appearance of the disclaimer in a written agreement,[59] but also, as to commercial buyers, the parties' experience, size and relative bargaining power in a given transaction.[60]

In my view, such an expansive approach to the issue of conspicuousness, which its originators acknowledge as "arguably not the intent of the drafters,"[61] allows courts to stray impermissibly beyond their appropriate field of inquiry in determining conspicuousness as a matter of law.[62] Examining the experience, size and relative bargaining power that a buyer brings to his negotia-

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59 U.C.C. section 1-201(10) provides that a printed heading in capitals is conspicuous, as well as matter in larger or contrasting type of color. U.C.C. § 1-201(10) (emphasis added).

60 Interestingly, the proponents of the modified objective test, while charging the buyer with knowledge he *should* have had, staunchly refuse to consider knowledge buyer admits to having. Special Project, *supra* note 6, at 184-87. Hence the hook in the title of this article: "Don't Confuse Us With the Facts?"

61 The "modified objective test" was first given that name in Special Project, *supra* note 6, at 186. The authors stated that "[a]lthough arguably not the intent of the drafters, section 1-201(10)'s words 'reasonable person *against whom it is to operate*' may permit a modified objective test." *Id.*

62 U.C.C. subsection 1-201(10) provides that "[w]hether a term or clause is conspicuous is for decision by the court." U.C.C. § 1-201(10). In contrast, whether questions of interpretation of a contract are questions of fact or of law is ably summarized by Calamari and Perillo as follows:

> Although the meaning of language is essentially a question of fact, it has been determined that this question should often be treated as a question of law. The general rule is that the interpretation of a writing is for the court. This approach again reflects the unwillingness of the judicial system to trust unsophisticated jurors and the desire of judges to increase the judicial scope of review.
>
> But where extrinsic evidence is introduced, to aid interpretation, the quest of its meaning should be left to the jury except where, after taking the extrinsic evidence into account, the meaning is so clear that reasonable men could reach only one reasonable conclusion, in which event, as pointed out above, the question is treated as one of law. Where extrinsic evidence is not introduced, as indicated above, the question is one of law. Even where the contract is oral, if the exact words used by the parties are not in dispute the court will deal with the matter in the same way as if the contract were written.

J. CALAMARI & J. PERILLO, CONTRACTS 174-75 (3d ed. 1987) (citations omitted). If

tion of a contract seems even more inappropriately subjective than considering course of dealing, course of performance, and usage of trade. Analogizing to the prior analysis as to the appropriate use of course of dealing, course of performance and trade usage in disclaimer disputes, such "buyer sophistication" evidence arguably should go only to the *interpretation* of an alleged disclaimer. Thus, such evidence may go to the issue of certain buyer "knowledge" so as to defeat a buyer's assertion that a *conspicuous* "disclaimer" was nevertheless inadequate to inform him that a disclaimer was being made. But the consideration of such knowledge should go to the trier of fact on matters of interpretation, not to the court in determining whether the disclaimer is conspicuous as a matter of law.

Buyer Knowledge of an Oral Disclaimer

The discussion of buyer knowledge has, thus far, centered on the question of the effect of that knowledge on the conspicuousness requirement of subsection 2-316(2), that is, upon a written but inconspicuous disclaimer. Because the Study Group's Preliminary Report suggests not only that buyer knowledge should overcome the conspicuousness requirement, but also that all subsection 2-316(2) disclaimers be in writing,[63] one further issue arises: Should buyer knowledge obviate the writing requirement for disclaimers in a case in which such knowledge is established?

As noted previously, the PEB Study Group's minority viewpoint is that a goal of subsection 2-316(2), especially with reference to the conspicuousness requirement, is to insure the consistent communication of essential information to buyers.[64] It was noted that a *uniform* writing requirement (applying to merchantability as well as fitness disclaimers) retaining the conspicuousness rule *more reasonably* accomplishes this objective than foreclosing admission of evidence of buyer knowledge of inconspicuous disclaimers.[65] The consumer interest is protected by requiring a conspicuous writing, but the integrity of the judicial

its course of dealing, course of performance, and usage of trade are clearly evidence extrinsic to the written contract, such evidence is for the jury.

63 Preliminary Report, *supra* note 10, at 105.

64 *See supra* text accompanying note 27.

65 *See supra* text accompanying notes 28-29.

system is also protected by avoiding absurd results where the buyer admits he was aware of a technically inconspicuous disclaimer.

Is it also absurd to deny enforcement of an *oral* disclaimer of which a buyer admits knowledge? I think the answer is no. This answer depends upon my view that the conspicuousness requirement is more an unusual technicality than a writing requirement. Laymen generally tend to understand the necessity of "getting it in writing," but they are probably less likely to expect that it makes a difference where certain provisions in a writing are located (public antipathy against "fine print" notwithstanding). Further, the writing requirement does indeed assist in avoiding "arguments concerning what the parties said about warranties at the time of sale,"[66] whereas the conspicuousness requirement does not necessarily provide additional certainty.

Analogy to the Statute of Frauds admissions exception on this question would, of course, result in enforcing an admitted oral disclaimer. Superficial symmetry would be achieved by such an analogy in this writing requirement analysis since that analogy was made earlier in the conspicuousness context.[67] But the policy served by the admissions exception to the Statute of Frauds proper, and the policy served by analogy to it in the conspicuousness context, are not served by a requirement that disclaimers of implied warranties be in writing without regard to buyers' admissions.

The admissions exception to the Statute of Frauds promotes a policy of enforcing legitimate contracts which would otherwise go unenforced on any terms. Analogy to the admissions exception of the Statute of Frauds as to the conspicuousness issue promotes a policy of requiring individuals who, by virtue of having discharged their duty to read or otherwise becoming knowledgeable of the terms of the contracts they have entered into, have accepted the risk as to the merchantability and/or fitness of goods. Refusing to analogize to the Statute of Frauds admissions exception as to the disclaimer writing requirement would not do violence to either of these policies: (1) a contract will be en-

66 WHITE & SUMMERS, *supra* note 7, at 502.

67 *See supra* note 40, for analogy to the Statute of Frauds admissions exception vis-a-vis buyer admission of knowledge of a written but inconspicuous disclaimer.

forced, but on the terms required by the Code in the first instance (with implied warranties); and (2) buyer will not be relieved of a risk assumed by discharging his duty to read in that there was nothing for him to read, the disclaimer having been oral. Instead, analogy to the Statute of Frauds admissions exception would impose an otherwise unrecognized duty on a buyer (i.e., assumption of the risk of defective goods) in the face of seller's violation of the duty to put disclaimers in writing. Put more simply, a buyer will have neither refused a risk assigned to him by the Code nor breached the general contract principle of a duty to read. The seller will have violated the writing requirement and thus, on balance, should not benefit from the buyer's admission.

Conclusion

The Article Two Study Group majority view should prevail on the Study Group's final report recommending revision of section 2-316 to indicate, as stated in the Preliminary Report, "that a disclaimer of which the buyer has knowledge . . . should be effective even though the definition of 'conspicuous' . . . was not satisfied."[68] Further, the Study Group's preliminary recommendation that merchantability disclaimers be in writing[69] should stand.

Accordingly, I respectfully suggest that the present subsection 2-316(2) be revised to add a writing requirement for merchantability disclaimers and be designated as subsection 2-316(2)(a), and that the following language be introduced as subsection 2-316(2)(b):

> If a buyer admits, in his verified pleadings,[70] authorized and sworn pre-trial discovery proceedings,[71] affidavit, or in-court testimony that he was aware at the time of sale of the presence in the contract[72] of an otherwise valid but facially inconspicu-

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68 Preliminary Report, *supra* note 10, at 106.

69 *Id.* at 105.

70 An unsworn pleading would be ineffective to create a judicial estoppel. *See supra* note 41 for a discussion of judicial estoppel.

71 As to the desirability of the inclusion of authorized pre-trial discovery proceedings, *see* note 40, *supra*.

72 The language "was aware at the time of sale of the presence in the contract" is specifically chosen to overcome the argument set forth in the text *supra* accompanying notes 44-46.

> ous disclaimer or modification of an implied warranty, the disclaimer or modification shall be deemed conspicuous as a matter of law and enforceable. A disclaimer or modification so admitted which does not satisfy the writing requirement of subsection (2)(a) is unenforceable.

An Official Comment should also be added for section 2-316 to overrule cases referring to a buyer's experience, size, relative bargaining power and the like as factors to be taken into account in determining whether a disclaimer is conspicuous by the admission requirement of subsection (2)(b). Also, such evidence of buyer "sophistication" is properly to be considered only as a source of interpretive evidence as to implied warranty exclusions.

It is also suggested, equally respectfully but much less hopefully, that subsection 2-316(3)(c) be deleted in its entirety to rule out exclusion or modification of an implied warranty by course of dealing, course of performance or usage of trade. If subsection 2-316(3)(c) were deleted, the Official Comment suggested above should indicate that such evidence should be treated as interpretive only.